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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA GREEN PARTY, DANIELLE BRECK, CHERYL WOLFE, HARRY C. HOVING, DOUG CAMPBELL, STEVE KELLY, ANTONIO MORSETTE TAMARA R. THOMPSON, and ADRIEN OWEN WAGNER, Plaintiffs, v. COREY STAPLETON, in his official capacity as Secretary of State for the State of Montana, Defendant.	Cause No. 6:18-cv-00087 **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)**

The official capacity defendant (the State) submits this reply in support of its motion to dismiss.

ARGUMENT

A complaint should be dismissed for failing to state a claim either because it fails to present a cognizable legal theory or because it contains insufficient factual allegations to support a theory. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1008 (9th Cir. 2018). Further, when considering a motion to dismiss for failure to state a claim, a court's review is limited to the allegations contained in the complaint, not new allegations made in a brief opposing a motion to dismiss. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). As discussed in the State's opening brief, the Court should dismiss Plaintiffs' (collectively, MGP) complaint because it fails to state any cognizable legal theory, fails to include any counts for relief, and fails to include the factors of any constitutional claim. *See* Def. Opening Br. (Doc. 12) at 5-8. Given that a "formulaic recitation of the elements of a cause of action" is insufficient to state a claim, MGP's

failure to recite any elements, formulaic or otherwise, should clearly result in dismissal. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Rather than addressing the State's arguments, MGP spends much of its brief detailing the complaint's factual allegations related to the identity of the parties, its efforts to obtain signatures, and Montana's statutory provisions related to political party recognition. *See* Pls. Resp. Br. (Doc. 13) at 6-11. MGP's citation to these allegations is beside the point; the State's motion was not based on the inadequacy of the allegations relating to party identity and MGP's signature gathering but on MGP's failure to set forth allegations demonstrating any cognizable legal theory or plausible constitutional claim.

Moreover, these allegations do not state a claim that "is plausible on its face." *Iqbal*, 556 U.S. 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The facts that MGP highlights do not lead to a "reasonable inference" that MGP suffered harm from Montana statutes; on the contrary, if the complaint is correct that MGP collected more than double the signatures that Montana law requires, then it is more plausible that any of MGP's "harms" resulted from its method of signature gathering rather than from any statutory provisions.

Regardless, in a case involving constitutional claims pursuant to 42 U.S.C. § 1983, a plaintiff must plead the pertinent factors showing a constitutional violation. The Court made this clear in *Iqbal*, stating: "Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. Thus, as an example, if one of MGP's theories is that the State has invidiously discriminated against minor political parties, then *Iqbal* establishes the factors that MGP must plead. For MGP's other constitutional theories, it must plead those claims, whatever they may be, in its complaint. *See Iqbal*, 556 U.S. at 676. But MGP does not even adequately plead constitutional claims, much less the pertinent factors showing a constitutional violation.

The complaint's invocation of "due process" provides another example of the deficiency of MGP's complaint. The complaint states that Plaintiffs have been denied "due process," but MGP does not say whether it is asserting a substantive due process claim, a procedural due process claim, or whether it is even asserting a due process claim at all. MGP's failure to state a cognizable due process claim is cause for

dismissal. *See Ocasio v. Perez*, 735 Fed. Appx. 418, 419 (9th Cir. 2018) (district court properly dismissed due process claims because plaintiff failed to allege whether he had been deprived of a liberty interest or of procedural protections).

Notably, while MGP cites specific paragraphs in its complaint for factual allegations related to parties and the like, *see* Pls. Resp. Br. at 6, it does not cite to any paragraphs that set forth the factors or elements of any constitutional claims. The reason, of course, is that these are absent from the complaint, and MGP does not even attempt to argue that the complaint contains the factors of any constitutional cause of action or even any cause of action at all. While MGP is clear that it wants Montana's laws declared unconstitutional, *see* Pls. Resp. Br. at 11, it fails to show where in its complaint there is a cognizable legal theory that would plausibly support that outcome.

Instead, MGP briefs an equal protection argument on the merits. *See* Pls. Resp. Br. at 13-15. Not only is a merits-based argument premature, but it is irrelevant to a motion to dismiss for failure to state a claim. Ninth Circuit law is clear that allegations in an opposition brief have no bearing on a 12(b)(6) motion and that a court

should not consider them. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("'new' allegations contained in the [opposing party's] opposition motion, however, are irrelevant for Rule 12(b)(6) purposes. In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (emphasis in original). MGP's merits-based arguments cannot save its deficient complaint.

MGP ignores its burden under *Iqbal* and *Twombly*, and it tries to minimize the significance of these cases. For example, MGP relies on cases that predate *Iqbal* and *Twombly* to suggest that a more lenient standard should apply. *See* Pls. Resp. Br. at 3. MGP also writes that "Justice Souter suggested" that previous case law "should be retired," Pls. Resp. Br. at 4, implying that Justice Souter was writing a concurrence or dissent rather than a seven-justice majority opinion of the United States Supreme Court in *Twombly*. The *Iqbal* standard is the law, and MGP's complaint falls short. Moreover, MGP's complaint is deficient under any standard. The purpose of Rule 8(a)(2)'s "short and plain" statement is to "give the defendant fair notice of what the

plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), which MGP's complaint fails to do.

MGP unpersuasively asserts that the cases cited in the State's opening brief "are not factually and materially on point." Pls. Resp. Br. at 15. But MGP offers nothing to support this conclusory statement. Moreover, MGP is wrong. The cases the State cited set forth what is required under Fed. R. Civ. P. 8. There is no question that the civil procedure requirements of Rule 8 apply to cases alleging violations under 42 U.S.C. § 1983. After all, *Iqbal* itself involved a *Bivens* action, which is the federal equivalent to a § 1983 action. *Iqbal*, 556 U.S. at 675.

To be clear, the State is not seeking a return to hypertechnical notice pleading. But it is entitled to know what MGP's claims are and what they are based on. *See Twombly*, 550 U.S. at 555. A complaint must do more than set out "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"; rather, the rules require a "'showing,' rather than a blanket assertion, of entitlement to relief." *Id.*; *id.* n.3. MGP's complaint does not do this. Instead it contains factual and legal allegations that are nothing more than conclusory,

bare assertions like those rejected in *Iqbal*. Because MGP has failed to state a claim for relief, this Court should dismiss the complaint.

Finally, MGP takes issue with the State's argument that Plaintiffs cannot seek relief under § 1983 for a denial of rights under "the laws of the State of Montana . . . ." *See* Def. Opening Br. at 8; Pls. Resp. Br. at 16. MGP accuses the State of presenting a "somewhat questionable" argument because, according to MGP, the State's ellipses omitted that MGP was also seeking relief under the laws of the United States of America and gave the "incorrect impression" of Plaintiffs' complaint. Pls. Resp. Br. at 16. MGP protests too much. Contrary to MGP's implication, the State agrees that § 1983 provides a mechanism for vindicating federal law violations, provided a plaintiff alleges a federal constitutional claim. But the fact remains that MGP's complaint appears to seek redress for alleged violations of rights contained in the Montana Constitution. *See* Doc. 1 at 11, ¶ IX (A). This relief is not available under § 1983. *See Galen v. County of Los Angeles*, 447 F.3d 652, 662 (9th Cir. 2007); Def. Opening Br. at 8.

CONCLUSION

MGP's complaint fails to adequately set out a plausible constitutional claim, and it fails to give the State notice of the claims and grounds for relief. For the reasons set forth in the opening brief and above, this Court should grant the State's motion to dismiss.

Respectfully submitted this 29th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the clerk of the court for the United States District Court for the District of Montana, using the cm/ecf system. Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: November 29, 2018

/s/ Matthew T. Cochenour
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule Local Rule 7.1(d)(2), I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,521 words, excluding certificate of service and certificate of compliance.

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