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IN THE MONTANA FOURTH JUDICIAL DISTRICT
MISSOULA COUNTY

BRANDON HUBER, Plaintiff, vs. NATIONAL ASSOCIATION OF REALTORS, INC.; MISSOULA ORGANIZATION OF REALTORS, INC., Defendants.	DV-2021-1371 **DEFENDANT MISSOULA ORGANIZATION OF REALTORS, INC.'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiff Brandon Huber ("Huber") claims to be a victim of Defendants' unlawful discrimination. And yet, taking all of Huber's factual allegations as true, Defendants have not taken any adverse action against him. Rather, a third party filed an ethics complaint against Huber with Defendant Missoula Organization of

REALTORS®, Inc. ("MOR"). Before MOR had an opportunity to hold a hearing, much less issue a decision, Huber filed this lawsuit, inviting the Court to render a pre-emptive advisory opinion on how MOR should interpret the Code of Ethics. The Court should decline the invitation.

"The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 365, 833 P.2d 1019, 1021 (1992). Huber's claims violate fundamental doctrines of justiciability and must be dismissed. Additionally, Huber's declaratory relief claim based on contract fails for the additional reason that, even taking his allegations as true, it fails to state a claim upon which relief can be granted. As a matter of law, the ethical rule at issue is not a contract provision, much less one that is "void for lack of certainty." MOR's Motion to Dismiss should be granted.

BACKGROUND

According to Huber's complaint, he has been a real estate agent for several years. (Doc. 3 at ¶¶ 49-54.) He is a member of both MOR and Defendant the National Association of REALTORS®, Inc. ("NAR"). (Doc. 3 at ¶¶ 4, 49-54.) As such, he is subject to NAR's Code of Ethics. (Doc. 3 at ¶¶ 27-32.) MOR, as an NAR local association, is charged with enforcing the Code of Ethics in accordance with NAR's due process procedures as outlined in NAR's Code of Ethics and Arbitration Manual. (Doc. 3, ¶¶ 3, 32, 47.)

The complaint alleges a "resident of Clinton" filed an ethics complaint against Huber with MOR on July 29, 2021. (Doc. 3 at ¶ 68.) There are no allegations the complainant was a member or agent of MOR. (See generally Doc. 3.) The ethics complaint states that Huber violated Article 10 of the NAR Code of Ethics, as interpreted by Standard of Practice 10-5, which was promulgated by NAR in November 2020. (Doc. 3 at ¶¶ 33, 70.) That standard prohibits, in pertinent part, "hate speech," a term that is further defined by NAR in an appendix to the Code of Ethics. (Doc. 3 at ¶¶ 33, 34.)

MOR's Grievance Committee found that the complaint's allegations, if taken as true on their face, were sufficient to potentially constitute unethical conduct and referred the matter to MOR's Professional Standards Committee. (Doc. 3 at ¶¶ 10, 79.) As Huber's own complaint in this mater attests, this was not a decision by MOR that Huber committed a violation. (Doc. 3 at ¶¶ 10, 79.) Huber's allegations demonstrate MOR has yet to render a decision on his alleged ethical transgression and, accordingly, has taken no adverse action against him. (Doc. 3 at ¶¶ 10, 79.)

As set forth in NAR's Code of Ethics and Arbitration Manual, the Grievance Committee "does not decide whether members have violated the Code of Ethics":

The function of the Grievance Committee is clearly distinguishable from the function of the Professional Standards Committee. The Professional Standards Committee makes decisions on matters involving ethics or arbitration. *(Revised 05/15)*

The Grievance Committee receives ethics complaints and arbitration requests to determine if, taken as true on their face, a hearing is to be warranted. The Grievance Committee makes only such preliminary evaluation as is necessary to make these decisions. While the Grievance Committee has meetings, it does not hold hearings, does not decide whether members have violated the Code of Ethics, and does not dismiss ethics complaints because of lack of evidence. Complainants are not required to prove their case upon submission of their ethics complaint or arbitration request. The Grievance Committee does not mediate or arbitrate business disputes. The Grievance Committee will hold regularly-scheduled meetings and/or review complaints not later than forty-five (45) days after receipt of the complaint. *(Revised 05/15)*

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Before MOR's Professional Standards Committee was able to hold a hearing to decide whether Huber violated Standard of Practice 10-5, Huber filed this lawsuit, resulting MOR staying its administrative process. (Doc. 3 at ¶¶ 10, 79.) In this action, Huber brings two causes of action:

(1) "Declaratory Relief Based Upon Montana Contract Law," and

(2) "Declaratory Relief Based Upon the Montana Human Rights Act."

(Doc. 3 at 13-14.) As set forth below, these claims must be dismissed.

[1] Although Huber's own allegations provide sufficient grounds to dismiss—including his acknowledgement that no "final" decision has been issued (Doc. 3 at ¶¶ 10, 79) —the Court may also consider NAR's Code of Ethics and Arbitration Manual. Huber's Complaint specifically references and quotes NAR's Code of Ethics and procedures. (Doc. 3 at ¶¶ 27-36.) It is well established a court may consider items incorporated into the complaint under Rule 12(b)(6). *E.g., City of Cut Bank v. Tom Patrick Construction, Inc.*, 1998 MT 219, 290 Mont. 470, 963 P.2d 1283.

MOTION TO DISMISS STANDARD

"The distinct focus of a Rule 12(b)(6) motion to dismiss is whether an asserted claim for relief is facially sufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled." *Gottlob v. DesRosier*, 2020 MT 210, ¶¶ 7-11, 401 Mont. 50, 470 P.3d 188 (internal quotations omitted). Whether a complaint states a cognizable claim for relief is a question of substantive law on the merits. *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. "A cognizable claim for relief generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Id*. (citing, *e.g., Dillon v. Great N. Ry. Co.*, 38 Mont. 485, 496, 100 P. 960, 963 (1909)). In Montana, threshold questions of justiciability are generally considered as part of a Rule 12(b)(6) challenge, rather than a challenge to the Court's subject matter jurisdiction. *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶¶14-16, 340 Mont. 56, 172 P.3d 1232.

ANALYSIS

I. HUBER'S CLAIMS DO NOT PRESENT A JUSTICIABLE CONTROVERSY.

"The judicial power of Montana's courts, like the federal courts, is limited to 'justiciable controversies.'" *Plan Helena,* ¶ 6 (citing cases); Mont. Const., Art. VII, § 4(1). "A justiciable controversy is one upon which a court's judgment will

effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical or academic conclusion." *Clark v. Roosevelt County*, 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48 (citing *Seubert v. Seubert,* 2000 MT 241 ¶ 20, 301 Mont. 382, 13 P.3d 365). Though not determinative of the existence or extent of a court's subject matter jurisdiction, justiciability is a mandatory prerequisite to the initial and continued exercise of that jurisdiction. *See Ballas*, ¶¶ 14-16.

"The central concepts of justiciability have been elaborated into more specific categories or doctrines—namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions—each of which is governed by its own set of substantive rules." *Plan Helena*, ¶ 10 (citing *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881). Two related doctrines—advisory opinions and ripeness—are dispositive here.

Montana courts may not render advisory opinions because a "controversy, in the constitutional sense . . . is a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." *Id*. (internal quotations omitted). Similarly, the basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance

of premature adjudication, from entangling themselves in abstract disagreements[.]" *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 16-27, 333 Mont. 331, 142 P.3d 864.

The Montana Supreme Court has specifically held the prohibition against advisory opinions applies when underlying administrative proceedings remain pending. In *Brisendine*, 253 Mont. at 362-63, 833 P.2d at 1019-20, for example, a denturist sought a judicial declaration that he was not prohibited from entering into a professional relationship with a dentist while the issue was still pending before the Board of Dentistry. The Court determined that no justiciable controversy existed because the plaintiff had not exhausted his administrative remedies:

> As we have stated previously, no final decision has been issued from the Board. Appellant's legal rights and status have not been adversely affected. We hold that the District Court is correct that no justiciable controversy exists at this time in the proceedings.

Id., 253 Mont. at 365, 833 P.2d at 1021 (emphasis added). *See also, e.g., Northfield Ins. Co. v. Mont. Ass'n of Cntys.*, 2000 MT 256, ¶ 13, 301 Mont. 472, 10 P.3d 813 (holding insurer's request for declaratory judgment while the underlying case was pending sought an impermissible advisory opinion); *Havre Daily News*, ¶ 27 (finding newspaper's claim was unripe because "[t]he mere absence of a policy governing dissemination of documents does not ripen into a violation of the constitutional right to know unless and until an identifiable person is actually denied access to a particular document or a specific deliberation").

Here too, Huber is asking this Court to speculate about a contingency "which has not yet arisen and which may, in fact, never arise." *Northfield*, ¶ 18. No decision has been rendered by MOR, or anyone else, that Huber violated Standard of Practice 10-5. At the moment, the only party potentially having a legally adverse interest to Huber is the unidentified "resident of Clinton" who is not named as a defendant. Under these circumstances, the Court should decline to render an advisory opinion on an issue that is, at best, unripe. The Court should allow MOR to conclude its administrative process and interpret its own ethical rules in deciding the complaint before it. Only then will it be known if the parties are legally adverse and have a justiciable dispute. Both of Huber's claims must be dismissed for lack of a justiciable controversy.

II. THE DECLARATORY RELIEF CLAIM BASED ON CONTRACT MUST BE DISMISSED FOR THE ADDITIONAL REASON THAT IT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In this lawsuit, Huber has attempted to state a peculiar kind of contract claim. He alleges he has a "contractual relationship" with MOR and goes on to attack certain standards in NAR's Code of Ethics as "inherently vague and ambiguous." (Doc. 3 at ¶¶ 84-86.) Because of this claimed ambiguity, he argues, the Court should declare the provisions "void for lack of certainty." (Doc. 3 at ¶ 86.) As set forth above, the claim fails because it is unripe and impermissibly

seeks an advisory opinion. Even if the claim was justiciable, however, it fails to state a claim upon which relief can be granted.

First and foremost, the ethical rules at issue are not contract provisions. They are, rather, self-imposed regulations by NAR's membership (including Huber) that govern the conduct and practice of REALTORS®. According to Huber's complaint, the ethical rule at issue in this case—Standard of Practice 10-5—was promulgated many years after he became a member of NAR and MOR. (Doc. 3 at ¶¶ 33, 49-54, 70.) As such, it was not part of any contract he entered upon becoming a member. Nor has Huber identified any contract with MOR, or any contract provision, that NAR's promulgation of the rule, or MOR's review of a third-party complaint for compliance, is said to have violated.

Just as a lawyer cannot sue the Montana Bar Association for breach of contract over the promulgation or enforcement of a rule of professional conduct, Huber has no contract claim against MOR. Ethical rules governing a trade are designed to protect the rights of third parties (i.e., clients) and the profession in general—not to establish contractual obligations between the professional and a trade organization. *See, e.g., Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶¶ 36-39, 303 Mont. 274, 16 P.3d 1002 (noncompliance with the Rules of Professional Conduct is evidence, though non-conclusive evidence, that a lawyer may not have fulfilled tort duties to his clients). For this reason, although MOR has enforcement

procedures in place, it would have no contract remedy against Huber for the violation of an ethical rule.

This concept is perhaps best illustrated by Huber's suggestion that the "contract" at issue lacked "consent of the parties." (Doc. 3 at ¶¶ 82, 83.) It is true, of course, that MOR did not negotiate with Huber or seek his consent regarding Standard of Practice 10-5, but this only underscores why Huber's contractual analysis is inapt. Huber may have agreed to abide by NAR's ethical rules in order to become a member of NAR and MOR, but this certainly does not mean that every new rule or enforcement action is subject to negotiation or Huber's "consent." If that were the case, every REALTOR® could simply pick and choose which ethical rules apply to him/her.

Similarly, Huber's assertion that a professional rule is void unless sufficiently precise in definition ignores the nature and purpose of ethical rules. Ethical rules are by necessity broader than statutes, laws, or contract provisions. "Ethical rules must necessarily be broad and flexible so as to have some application in various ethical dilemmas." *Clinard v. Blackwood*, 46 S.W.3d 177, 186-87 (Tenn. 2001) (interpreting attorney rules of professional conduct and finding "the appearance of impropriety standard can work well when more specific rules may be ineffective"); *Blau v. Wolnitzek (In re Winter)*, 482 S.W.3d 768, 772-73 (Ky. 2016) (finding the code of judicial conduct "of necessity consists of broad

statements" because it consists of "rules or reason" that must be applied "in the context of all relevant circumstances").

Indeed, under Huber's reasoning, a great many ethical rules would be "void" for lack of specificity. For example, NAR's Code of Ethics requires that REALTORS® "competently manage" client property, "conform to the standards of practice and competence which are reasonably expected," refrain from "misleading statements" and "be honest and truthful in their real estate communications." NAR Code of Ethics, Standards of Practice 1-10, 1-11, 3-1, 10-1, 11-1, 15-2. All of these standards are by necessity broad, and require interpretation in light of the specific facts and circumstances of each case.[2]

Finally, even if Standard of Practice 10-5 was a contract provision, it is sufficiently "certain" as a matter of Montana contract law. As set forth in Huber's complaint, NAR included specific definitions for, inter alia, "harassment" and "hate speech" in the Appendix to the Code of Ethics:

> "Harassment" includes inappropriate conduct, comment, display, action, or gesture based upon another's sex, color, race, religion, national origin, age, disability, sexual orientation, gender identity, and any other protected characteristic.

[2] For largely these same reasons, in contrast to contract provisions, courts generally defer to an administrative body's interpretation of its own ambiguous rules. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019); *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 24, 397 Mont. 161, 451 P.3d 493.

> Hate speech: speech that is intended to insult, offend, or intimidate a person because of some trait (as race, religion, sexual orientation, national origin, or disability).

(Doc. 3 at ¶ 34.)

A contract is sufficiently certain if the parties agree to "essential terms," which have been defined by the Montana Supreme Court as "'critical issues' as opposed to 'mere details.'" *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶¶ 16-22, 364 Mont. 425, 276 P.3d 854. The concept of "certainty" generally arises in cases where the parties have left some issues for negotiation at a later date. *See id*.; *see also Covenant Invs., Inc. v. First Sec. Bank*, 2014 MT 14, ¶ 14, 373 Mont. 353, 317 P.3d 197. For example, in *Hurly*, the defendant argued no valid contract existed because the parties never agreed to the specific real estate improvements to be constructed or a purchase price. *Id.*, ¶ 16. The Montana Supreme Court disagreed. Although "an agreement that requires the parties to agree to material terms in the future is not an enforceable agreement," the court determined the parties' real estate improvement contract was sufficiently certain to be enforceable, even absent certain details the parties agreed to iron out later. *Id*., ¶ 22.

Here too, no material "missing term" is identified. Huber makes no allegation that the defined term(s) at issue should or could have been made more specific—he simply disagrees with their hypothetical future application to him in this particular case. This has nothing to do with the validity of any contractual

provision. Huber's declaratory relief claim based on contract fails as a matter of law.

CONCLUSION

The Court should refuse to pre-empt MOR's administrative procedures by issuing an advisory opinion on hypothetical facts. MOR has yet to issue an adverse decision against Huber, or impose any sanction or consequence, and may never do so. There is no justiciable controversy between the parties. Additionally, his contract claim fails to state a claim upon which relief can be granted. For these reasons, MOR's Motion to Dismiss should be granted.

DATED: January 28, 2022

BOONE KARLBERG P.C.

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CERTIFICATE OF SERVICE

I, Thomas J. Leonard, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 01-28-2022:

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