VICTORIA L. FRANCIS
Assistant U.S. Attorney
U.S. Attorney's Office
James F. Battin U.S. Courthouse
2601 Second Ave. North, Suite 3200
Billings, MT 59101
Phone: (406) 247-4633
FAX: (406) 657-6058
E-mail: victoria.francis@usdoj.gov

ATTORNEY FOR DEFENDANT
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JERRY O'NEIL, individually and as President of Montanans for Multiple Use, on behalf of himself, and the Members of MONTANANS FOR MULTIPLE USE, and CHERYL LITTLE DOG, **Plaintiff,** **vs.** **TYLER P. GILMAN, Clerk of the U.S. DISTRICT COURT FOR THE DISTRICT OF MONTANA, in his official capacity, and the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, in its administrative capacity,** **Defendants.**	**CV 16-84-GF-BMM-JTJ** **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

A. Standard of Review Under Rule 12(b)(6) Motion to Dismiss

On a motion to dismiss under Rule 12(b)(6), "all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). "The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id*. *See also Ove*, 264 F.3d at 821 ("conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss"). Dismissal can be based on the lack of a cognizable legal theory. *Balistreri v. Pacifica Police Dept*., 901 F.2d 696, 699 (9th Cir. 1990).

Thus, O'Neil's allegations regarding Montanans for Multiple Use, an artificial entity, are generally not statements of fact but fall into conclusory allegations of law about rights to petition for redress of grievances. As noted below and in the opening brief, nothing prevents the free speech of Montanans for Multiple Use. However, an artificial entity, such as a corporation, does not have authority to utilize a lay person to represent it in Federal District Court. Individual persons may represent themselves, and O'Neil may act pro se under the Administrative Procedure Act to contest agency action, but O'Neil cannot

represent other parties under 28 U.S.C. § 1654 and Local Rule 83.1. For similar reasons, Plaintiff Little Dog is not entitled to representation by an unlicensed lay person in her criminal trial.

B. As a Matter of Law the Plaintiffs Complaint Fails to State a Claim Upon Which Relief May Be Granted.

Plaintiff O'Neil filed a response brief. The arguments O'Neil seeks to assert have been repeatedly rejected. In *Turner v. American Bar Association et al*, 407 F.Supp. 451 (N.D. Tx. 1975), the Chief Justice of the United States Supreme Court, Warren E. Burger and the Chief Judge of the Fifth Circuit, designated the District Court Judge, to sit in seven similar cases and three related cases filed in the United States District Courts in the States of Texas, Pennsylvania, Indiana, Minnesota, Alabama and Wisconsin. A central figure in many of the cases was a disbarred Minnesota attorney. The plaintiffs' principal contention in the suits was that they had a constitutional right to have unlicensed lay counsel assist them in Court proceedings. *Turner*, 407 F.Supp. at 456-57. The plaintiffs included both corporations and individuals. The Court in *Turner* found that "[i]n the fabric of this nationwide litigation, there is but one thread that is woven and rewoven into the whole with sufficient clarity to delineate a claim: the denial by State and Federal Courts of the plaintiffs' alleged right, springing from the First, Sixth and Fourteenth Amendments, to have spokesmen of their own choice represent them in

criminal and civil proceedings in Court." *Turner*, at 472.

In its analysis, the court in *Turner* noted that the historical English forerunner to the American lawyer was a counsel who had been "invited" to practice before the Court only after the Court had satisfied itself that the person was fit to practice before the Court by virtue of his or her training and character. *Id* at 474. As discussed in the opening brief, the Federal Courts generally adopt the admission requirements of the State in which the Federal Court is located for this determination of fitness and character. *See* Dkt. 9, p. 10-12; *Turner*, 407 F. Supp. 475, n. 19. Such incorporation by the Local Rules is rational and assures the Federal District Court that counsel is qualified and of fit character to represent third parties in the complex arena of the Federal District Court. *See Giannini v. Real*, 911 F.2d 354, 360 (9th Cir. 1990).

Plaintiff O'Neil appears to assert themes of antitrust in his response brief. The Supreme Court, however, has long recognized that the States have a compelling interest in the practice of professions and that as part of their power to protect the public, have a valid interest and broad power to establish standards for licensing practitioners and regulating professional practice. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the

courts.'" *Goldfarb*, at 475, citing to *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 383 (1963). Though a State bar association may not enforce minimum prices for legal services or generally prevent advertising, the Supreme Court has not prevented the States from setting rigorous requirements for practicing the profession of law before the Court. Local Rule 83.1 does not in any fashion address minimum prices or interfere with free speech.

Plaintiff O'Neil argues that the First Amendment rights of Montanans for Multiple Use and Little Dog are contravened by the Local Rule which requires membership in the bar. He cites to *NAACP v. Button*, 371 U.S. 1 (1963). Dkt. 14, p. 4. However, as noted in the opening brief, *NAACP v. Button* does not involve the question of securing redress of grievances in Court by unlicensed counsel. *Button* rather holds that collective activity undertaken outside of Court, to obtain meaningful access to the Courts is a fundamental right within the protection of the First Amendment, and a State cannot through regulation of solicitation of legal business, prohibit such activity. *Turner*, 407 F.Supp. at 478. The court in *Turner* stated:

> This Court is not today holding that the Plaintiffs must disband their organization or cease to espouse their cause in the Appellate Courts. Nor is this Court holding that these Plaintiffs may not represent themselves individually in Court. What this Court is holding is that the Constitution of the United States, in particular the First and Sixth Amendments, does not grant to the Plaintiffs the right to have an unlicensed layman represent them in Court proceedings. The corollary of this holding is that unlicensed

> laymen cannot under the Constitution demand the right to represent other litigants.

Turner at 478.

Local Rule 83.1 for the Federal Courts in the District of Montana does not prevent Plaintiffs from organizing, making speeches or writing articles about their views. As noted by the concurring opinion in *Thomas v. Collins*, 323 U.S. 516 (1944), "[a] State may forbid one without a license to practice a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man, or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views." *Thomas v. Collins*, 323 U.S at 544.

O'Neil also focuses on the non-profit status of the named plaintiff, Montanans for Multiple Use, a public benefit corporation, asserting that he as an officer should be allowed to represent this corporation. However, the Supreme Court in *Rowland v. California Men's Colony*, 506 U.S. 194 (1993), stated as follows:

> It has been the law for the better part of two centuries, for example, that a corporation may appear in the federal courts only through licensed counsel. *Osborn v. President of Bank of United States*, 9 Wheat. 738, 829, 6 L.Ed. 204 (1824); *see Turner v. American Bar Ass.*, 407 F.Supp. 451, 476 (ND Tex. 1975) (citing the "long line of cases" from 1824 to the present holding that a corporation may only be represented by licensed counsel), affirmance order *sub nom. Taylor v. Montgomery*, 539 F.2d 715 (Table) (CA7 1976), and aff'd *sub nom. Pilla v. American Bar Assn.*, 542 F.2d 56 (CA8 1976).

> As the courts have recognized, the rationale for that rule applies equally to all artificial entities. Thus, save in a few aberrant cases, the lower courts have uniformly held that 28 U.S.C.§ 1654, providing that "parties may plead and conduct their own cases personally or by counsel," does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney. See, *e.g., Eagle Associates v. Bank of Montreal*, 926 F.2d 1305 (CA2 1991) (partnership); *Taylor v. Knapp*, 871 F.2d 803 (CA9) (nonprofit corporation formed by prison inmates), cert. denied, 493 U.S. 868 (1989) . . . .

Rowland, 506 U.S. at 201-202 (some citations omitted).

The Ninth Circuit has stated that "[u]nincorporated associations, like corporations, must appear through an attorney; except in extraordinary circumstances, they cannot be represented by laypersons." *Church of the New Testament v. United States*, 783 F.2d 771, 773-774 (1986) citing to *In re Highley*, 459 F.2d 554, 555 (9th Cir. 1972) (corporations); *Strong Delivery Ministry Association v. Board of Appeals of Cook County*, 543 F.2d 32, 33-34 (7th Cir. 1976) (per curiam) (not-for-profit corporation); *Move Organization v. U.S. Dept. of Justice*, 555 F.Supp. 684, 693 (E.D.Pa. 1983), and other cases cited therein.

Also as noted in the opening brief in support of the motion to dismiss, the Equal Access to Justice Act sets forth provisions that require a court to award the prevailing party attorney fees when entities contest agency action and other expenses, excluding tort claims, unless the court finds the United States was substantially justified or that special circumstances exist to make an award unjust. 28 U.S.C. § 2412 (d)(1)(A).

Regarding Plaintiff Little Dog, because she was charged with a felony, under the Sixth Amendment she was entitled to Court appointed counsel to represent her, not an unlicensed lay person. She did indeed obtain such court appointed counsel, Anthony Gallagher of the Federal Defenders. Ms. Little Dog's plea of guilty was withdrawn and she was able to participate in a jury trial as shown by the Court docket. *See docket in United States v. Little Dog*, 16-CR-00009-BMM-1. The Sixth Amendment guarantee of representation by counsel, means representation by an attorney who is licensed to practice law. *United States v. Hoffman*, 733 F.2d 596, 599 (9th Cir. 1984).

CONCLUSION

As a matter of law Plaintiff O'Neil cannot represent other individuals, corporations or associations in the United States District Court for the District of Montana. This violates Local Rule 83.1 and 28 U.S.C. § 1654. As a matter of law O'Neil does not meet the requirements for practice in the United States District Courts for the District of Montana as set forth under Local Rule 83.1. Therefore, the Complaint for Declaratory Judgment and Injunctive Relief should be dismissed. There is no legal basis to order the Clerk of the United States District Court for the District of Montana to approve O'Neil's petition for admission.

DATED this 19th day of December, 2016.

MICHAEL W. COTTER
United States Attorney

/s/ VICTORIA. L. FRANCIS
Assistant U. S. Attorney
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 1770 words, excluding the caption and certificates of service and compliance.

DATED this 19th day of December, 2016.

MICHAEL W. COTTER
United States Attorney

/s/ VICTORIA L. FRANCIS
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2016, a copy of the foregoing document was served on the following person by the following means.

1-2	CM/ECF
	Hand Delivery
3	U.S. Mail
	Overnight Delivery Service
	Fax
	E-Mail

1.
Clerk of Court

2.
Jerry O'Neil
985 Walsh Road
Columbia Falls, MT 59912
Email: oneil@centurytel.net
(406) 892-7602 – phone
(406) 250-2503 – cell phone
(406) 892-7603 – fax
Pro Se Plaintiff

3.
Cheryl Little Dog
211 Marie Street
P.O. Box 278
East Glacier Park, MT 59434
Pro Se Plaintiff

/s/ VICTORIA L. FRANCIS
Assistant U.S. Attorney
Attorney for Defendant