

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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Standard Water Control Systems, Inc.,  
Association of Radon Professionals,

Case Type: Civil Other/Misc.  
Court File No. 62-CV-18-4356  
Judge: Richard H. Kyle, Jr.

Plaintiffs,

vs.

**ORDER**

Jan Malcom, in her official capacity as  
the Commissioner of the Minnesota  
Department of Health, Lori Swanson, in  
her official capacity as Minnesota  
Attorney General,

Defendants.

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On October 29, 2018, the parties in the above-captioned matter appeared for a hearing before the undersigned upon Defendants' Motion to Dismiss. Curtis D. Smith appeared on behalf of Plaintiffs Standard Water Control Systems, Inc. and Minnesota Association of Radon Professionals (collectively, "Plaintiffs"). Megan J. McKenzie, Assistant Attorney General, appeared on behalf of Defendants Jan Malcolm, in her official capacity as Commissioner of The Minnesota Department of Health, and Lori Swanson, in her official capacity as Minnesota Attorney General (collectively, "Defendants"). Defendants requested that the Court dismiss all claims against them under

Minn. R. Civ. P. 12(e), arguing that Plaintiffs failed to state a claim upon which relief can be granted.<sup>1</sup>

Based upon the evidence received at the hearing, the arguments of counsel, and all of the files and proceedings herein, the Court makes the following:

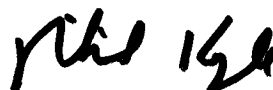
**ORDER**

1. Defendants' motion to dismiss the claims against them is **DENIED**.
2. The attached Memorandum is incorporated herein.

Dated:

1/3/19

BY THE COURT:



Richard H. Kyle, Jr.  
Ramsey County District Judge

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<sup>1</sup> Plaintiffs have since voluntarily dismissed Defendant Swanson, in her official capacity as Minnesota Attorney General, without prejudice, from this matter. *See* Notice of Dismissal, filed December 31, 2018. Notwithstanding the recent dismissal of Attorney General Swanson, the Court will continue to refer to "Defendants" in this Order and Memorandum.

## MEMORANDUM

### Factual Background

The Complaint sets forth the following allegations, which the Court accepts as true for purposes of the instant motion:

Plaintiff Standard Water Control Systems, Inc. (“Standard Water”) is a Minnesota Corporation, engaged in business, and certified by the National Environmental Health Association as a radon mitigation professional. Standard Water is also licensed by the Minnesota Department of Labor and Industry (“DLI”) as a residential building contractor under Minn. Stat. § 326B.801, *et seq.* Complaint at 1.

Plaintiff Minnesota Association of Radon Professionals (“MARP”) is a Minnesota nonprofit corporation whose mission is advocate and educate radon mitigators, testers, and other related industry professionals in Minnesota. Complaint at 2.

The Minnesota Radon Licensing Act, Minn. Stat. § 144.4961 (the “Act”), was enacted by the Minnesota Legislature in 2015. Since enactment, the effective date of the Act has been pushed back on two occasions, with a current effective date of January 1, 2019. Complaint at 7.

Defendant Jan Malcolm (“Malcolm”) is the Commissioner of the Minnesota Department of Health (“MDH”). Malcolm and MDH are legally obligated to ensure that provisions of the Act are enforced, and authorized to promulgate rules establishing licensure requirements and work standards relating to indoor radon in dwellings and other buildings, with the exception of newly constructed Minnesota residences. Complaint at 3 and 8.

The Act requires, among other things, that every person, firm, or corporation that performs a service for compensation to detect the presence of radon in the indoor atmosphere, performs laboratory analysis, or performs a service to mitigate radon in the indoor atmosphere obtain a license from MDH unless otherwise exempt. Complaint at 9.

Each of those persons, firms, or corporations must also pay an annual licensing fee pursuant to a fee schedule: those who perform tests to determine the presence and concentration of radon in a building the person does not own (a “measurement professional”) must pay a yearly \$150 licensing fee; any individual who installs or designs a radon mitigation system in a building the person does not own or lease, or provides on-site supervision of persons who do so (a “mitigation professional”), must pay a \$250 yearly licensing fee; any business or government entity that performs or authorizes employees to perform mitigation which employs more than one licensed mitigation professional (a “mitigation company”) must obtain a company license with a yearly licensing fee of \$100; any business or government entity that analyzes passive radon detection devices to determine the presence and concentration of radon in those devices (a “radon analysis laboratory”) must obtain a company license with a yearly licensing fee of \$500, unless the laboratory is a government entity and only distributes test kits for general public use in Minnesota; and all non-exempt radon mitigation systems installed in Minnesota are required to have a radon mitigation tag attached by the installing radon mitigation professional at a cost of \$75 per tag. Complaint at 9.

The Act further requires that radon measurement professionals and radon mitigation professionals complete specific training and education as a requirement to

obtain their license, and to annually maintain that license. The measurement and mitigation professionals must also maintain detailed records relating to the calibration of radon testing devices. Complaint at 10-12. Each radon mitigation tag must be attached to a radon mitigation system upon the completion of its installation by a mitigation professional. Complaint at 13.

The Act specifically exempts employees of a firm or corporation that installs radon control systems in newly constructed Minnesota homes, prior to issuance of a certificate of occupancy, from the above licensing, education, and other requirements. Complaint at 14. The license required to install a radon control system in a new residential home prior to the issuance of a certificate of occupancy is a residential building contractor license pursuant to Minn. Stat. § 326B.801 et seq. Complaint at 15.

Standard Water and other members of MARP who perform radon mitigation and testing services on existing homes will be required to obtain a mitigation company license, measurement professional licenses, and mitigation professional licenses if the Act is enforced despite their status as a licensed residential contractor. Complaint at 19. As a result Standard Water and the other members of MARP will incur costs in the form of yearly licensing fees and certification of training that will not be incurred by companies who perform radon control work on new construction. Complaint at 20.

Plaintiffs seek declaratory judgment that the Act is unconstitutional based on its violation of the equal protection and due process clauses of the Minnesota Constitution. Plaintiffs further seek injunctive relief in the form of a temporary injunction enjoining

enforcement of the Act as unconstitutional until this matter is decided on the merits with all appeals exhausted, and a permanent injunction enjoining enforcement of the Act.

### Legal Analysis

#### I. Rule 12 Standard of Review.

Under Rule 12.02(e) of the Minnesota Rules of Procedure, a party may move to dismiss a claim in lieu of filing a formal answer to test the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Consequently, only documents embraced by the pleadings may be considered. *In re Hennepin Co. Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are central to the parties' claims and referenced in the complaint or counterclaim are embraced by the pleadings. *Id.* at 497 (“[t]he court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged.”).

When considering a motion to dismiss, the court must accept as true the factual allegations contained in the pleading, construing all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). However, the court is not bound by any legal conclusions asserted in the pleading. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A sufficient complaint “requires more than labels and conclusions.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Id.* (quoting *Anspach v. City of Phila.*, 503 F.3d 256, 260 (3d Cir. 2007) (internal quotation omitted)).

Rule 8 of the Minnesota Rules of Civil Procedure requires every complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.” Minn. R. Civ. P. 8.01. Applying the Rule 8 standard, the Supreme Court stated in *First National Bank of Henning v. Olson*: “[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.” 246 Minn. 28, 38, 74 N.W.2d 123, 129 (1955) (quoting *Dennis v. Vill. of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)). In other words, a motion to dismiss should be denied “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Northern States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963) (citations omitted); see *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if the complaint fails to state a claim upon which relief may be granted, a dismissal with prejudice is appropriate).

In *Walsh v. U.S. Bank, N.A.*, the Minnesota Supreme Court reaffirmed the interpretation of Rule 8 expressed in *Olson* and *Franklin* and rejected the “plausibility” standard applicable to federal cases:

In our view, the plain language of Rule 8.01, its purpose and history, and its procedural context make clear that the rule means today what it meant at the time *Olson* and *Franklin* were decided. A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.

851 N.W.2d 598, 603 (Minn. 2014).

A Rule 12.02 motion to dismiss should be treated as a motion for summary judgment once matters outside the pleadings are presented to and not excluded by the court. Minn. R. Civ. P. 12.02. “Rule 12.02 provides that such a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded.” *Northern States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).

#### **A. Public Records**

The parties dispute what factual record may be presented to the Court without converting Defendants’ motion to dismiss to one for summary judgment. Defendants contend that a Court may take judicial notice of matters that are part of the public record when considering a motion to dismiss. To that end, Defendants submit the following public records concerning MDH’s rulemaking process for the Court’s consideration:

- MDH’s Statement of Need and Reasonableness Relating to Proposed Rules on Radon Licensing, SONAR-4353;
- MDH’s Rebuttal Comment to Standard Water Control Systems and Minnesota Association of Radon Professionals related to the rules on radon licensing dated August 13, 2018;
- Report of the Chief Administrative Law Judge and Report of the Administrative Law Judge in *In the Matter of Proposed Permanent Rules Relating to Radon Licensing*, Office of Administrative Hearings, Docket No. 80-9000-35263-R-4353;
- Information published by the U.S. Environmental Protection Agency entitled, *Health Risk of Radon*, [www.epa.gov/radon/health-risk-radon](http://www.epa.gov/radon/health-risk-radon);
- Journal article abstract entitled, *Residential radon and risk of lung cancer: a combined analysis of 7 North American case-control studies*,



EPIDEMIOLOGY; 2005 Mar; 16(2):137-45, available online at [www.ncbi.nlm.nih.gov/pubmed/15703527](http://www.ncbi.nlm.nih.gov/pubmed/15703527); and

- A copy of information published by the US Environmental Protection Agency, *Building a New Home, Have You Considered Radon?*, [www.epa.gov/radon/building-new-home-have-you-considered-radon](http://www.epa.gov/radon/building-new-home-have-you-considered-radon).

See Affidavit of Megan J. McKenzie in Support of Defendants' Motion to Dismiss, Exs. A-F. Defendants argue that "the public records submitted by Defendants address the Legislature's intent, including why the Legislature chose to enact the exception [for newly constructed Minnesota homes from the licensing requirements set forth in the Act and draft rules proposed by MDH]." Defendants' Reply Memorandum at 5.

Plaintiffs take issue with the public records Defendants submitted in conjunction with their Motion and dispute the conclusion of those records. Plaintiffs contend that while public records are a notable exception to the general prohibition against considering outside matters on a motion to dismiss, Defendants "drastically misconstrue the scope and impact of this rule by asking the Court to find that the allegations in the Complaint are untrue because Defendants have created 'public records' in which they attempt to refute Plaintiffs' claims." Plaintiffs' Memorandum at 5. As an example, Plaintiffs point to Defendants' Memorandum which cites to MDH comments submitted during the rulemaking process as evidence that there are real and substantial differences between radon mitigation techniques in new construction as opposed to existing homes. Plaintiffs contend that while it would be proper for the Court to take judicial notice of the public records cited by Defendants as evidence that the MDH made these comments, it is not proper to use these comments to contradict the factual allegations of the Complaint,

which the Court is required to presume to be true and viewed in the light most favorable to Plaintiffs.

Documents that are a matter of public record may be considered by the district court on a Rule 12.02 motion to dismiss. *Mutua v. Deutsche Bank Nat. Trust Co.*, 2013 WL 6839723 at \*1 (Dec. 30, 2013) (citing to *State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000) (refusing to strike documents---statistical reports---which were matters of public record and finding that court was free to refer to them in the course of its own research)). *See also Feltl v. Greenblatt*, 2005 WL 221872 (Minn. App. Feb. 1, 2005) (court records can properly be submitted as a supplemental record on appeal).

District courts may also consider legislative history in making a Rule 12.02 determination “because the information is not evidence outside the record.” *Kruger v. Pawlenty*, 2005 WL 221929 at \*1 (proper for district court to consider testimony presented before the Senate Health and Family Security Committee of the 2003 Legislative Session and the testimony of a forensic psychiatrist and former clinical director of the Minnesota Security State Hospital on Rule 12.02(e) motion) (citing to *Central Lakes Educ. Ass’n v. Indep. Sch. Dist. No. 743*, 411 N.W.2d 875, 881 (Minn. App. 1987) (holding legislative history was relevant and responsive to assertions in respondent’s brief, and was not “evidence” outside of the record), *review denied* (Minn. Nov. 13, 1987)).

Here, the Court is not asked to consider statistical reports, court records, or even legislative history. Rather Defendants ask the Court to consider evidence presented

during the Act's rulemaking process.<sup>2</sup> The first document is MDH's "Statement of Need and Reasonableness (SONAR 4353)" relating to proposed rules on radon licensing, dated May 2018. *See* McKenzie Affidavit (Exhibit A). The Act directs MDH to "adopt rules establishing licensure requirements and work standards relating to indoor radon in dwellings and other buildings, with the exception of new constructed Minnesota homes according to section 326B.106, subdivision 6." Minn. Stat. § 144.4961, subd. 3. An agency adopting rules must address eight factors in its SONAR. Minn. Stat. § 14.131. SONAR-4353 addresses the eight factors required by statute, including the cost of complying with the MDH's proposed rules and a description of any alternative methods for achieving the purpose of the proposed rule.

The second document is MDH's "Response to Standard Water Control Systems, Inc. and Minnesota Association of Radon Professionals," dated August 31, 2018. *See* McKenzie Affidavit (Exhibit B). The document is MDH's point by point rebuttal to Plaintiffs' objections to the SONAR. Defendants did not include a copy of Plaintiffs' written objections to MDH's SONAR as part of their Motion.

The third document is the Report of the Chief Administrative Law Judge and Report of the Administrative Law Judge in *In the Matter of the Proposed Permanent Rules Governing Licensing of Radon Professionals*, Minn. R., 4620.7000-4620.7950,

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<sup>2</sup> Defendants also ask the Court to consider a journal article abstract published by the National Center for Biotechnology Information and two articles published by the U.S. Environmental Protection Agency concerning the health risks of radon. *See* McKenzie Affidavit (Exhibits D-F). The Court finds the articles not particularly relevant to Defendants' Rule 12.02(e) motion.

4717.7000, dated September 13, 2018 (“Report”), approving MDH’s proposed rules with a few minor modifications. *See* McKenzie Affidavit (Exhibit C).

The Report indicates that a rulemaking hearing was held on July 17, 2018, to permit MDH representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and any changes that might be appropriate. *Id.* At the hearing any interested persons who wished to provide public comment were allowed to do so. At the close of the hearing, the rulemaking record remained open for another 20 days to permit interested persons and MDH to submit written comments. Following the initial comment period, the hearing record was open for an additional five business days to permit interested persons and MDH an opportunity to reply to earlier-submitted comments. MDH submitted five rebuttal comments on August 13, 2018, the close of the rebuttal comment period. *Id.*

The Report addresses each of the eight SONAR factors and ultimately adopted the proposed amended rules. *Id.* None of the dozen exhibits referenced in the Report are contained in Defendants’ written submission. As such, the public rulemaking record before this Court is far from complete.

The public records concerning the Act’s rulemaking process proposed by Defendants do lay bare a key factual dispute in this lawsuit: whether there is a rational distinction between the knowledge and skill needed to install a radon control system in new residential construction (pre-certificate of occupancy) and the knowledge and skill needed to install a radon mitigation system in an existing residence (post-certificate of occupancy). To the extent Defendants are asking the Court to make factual findings

regarding matters that are in dispute in this Rule 12(e) motion to dismiss, the Court declines the invitation. The Court is not allowed to make such factual findings on a motion to dismiss, but must accept the facts alleged in the Complaint as true. *See Bodah*, 663 N.W.2d at 553. As such, the Court notes the public documents concerning MDH's rulemaking process, but declines to use these documents to contradict the factual allegations of the Complaint.

### **B. Constitutional Claims**

The parties also dispute whether a motion to dismiss a pleading that alleges constitutional violations is subject to a higher standard than a typical Rule 12.02(e) motion. Plaintiffs argue that given the constitutional challenges alleged in the Complaint Defendants must show the "complete frivolity" of the Complaint to justify dismissal. Defendants contend that Plaintiffs' argument lacks merit because the language of Rule 12.02 itself does not require frivolity, and such a standard would be inconstant with the plain language of the Rule.

The Minnesota Supreme Court has long held where a complaint alleges constitutional violations, a Rule 12 motion is subject to increased scrutiny to protect the public from "possible government overreaching." *Elzie v. Commissioner of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980), *review denied* (Jan. 30, 1992). Thus, when the plaintiff alleges a constitutional error, a Rule 12 dismissal is proper only when the defendant "demonstrate[s] the *complete* frivolity of the complaint." *Id.* at 33 (emphasis in original). *See also 614 Co. v. Minneapolis Community Development Agency*, 547 N.W.2d 400, 405 (1996) (landowner filed action against city and city community development agency for

temporary taking and other claims arising from city's pre-condemnation actions relating to shopping center development projects); *Schocker v. State Dept. of Human Rights*, 477 N.W.2d 767, 769 (1991) (job applicant brought suit against Minnesota Department of Human Rights alleging violation of his right to equal protection and due process). As such, the Court agrees with Plaintiffs that Defendants must demonstrate the complete frivolity of Plaintiffs' Complaint to succeed on their Rule 12 motion.

## **II. Plaintiffs' Case States A Claim Upon Which Relief Can Be Granted.**

Plaintiffs' Complaint claims the Act violates the Equal Protection and Due Clauses of the Minnesota Constitution. Plaintiffs alleges the Act "treats similarly situated individuals---specifically individuals performing radon testing and control work on new construction prior to issuance of a certificate of occupancy---and all other individuals performing radon testing and control work---differently, without a rational basis." In addition, Plaintiffs contend "there is no genuine or substantial distinction between these two groups of radon testing and control professionals that justifies exemption of professionals working on newly constructed residences from the requirements of the Act" and "no evident connection between the purpose of the Act and the difference in treatment of radon testing and control professionals working on new residential construction and those professionals that are made subject to the Act." Complaint at 23-25, 30-32.

For the reasons set forth below, the Court concludes that Plaintiffs Complaint states a claim for which relief can be granted.

### A. Equal Protection

The Equal Protection clause of the Minnesota Constitution provides: “No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” Minn. Const. art. I § 2. A facial equal-protection challenge alleges that the statute “creates at least two classes of individuals, which are treated differently under the statute, and that this difference in treatment cannot be justified.” *Matter of Griepentrog*, 888 N.W.2d 478, 491 (Minn. Ct. App. 2016). In arguing that the Act does not violate Equal Protection, Defendants contend that radon prevention in new construction is different from radon mitigation in existing structures, and, therefore, the Act does not treat similarly situated individuals differently. Defendants rely on MDH’s SONAR and rebuttal comments from the public rule making process that the “two types of work are not analogous.”

Plaintiffs object to the Court’s consideration of public rulemaking records on a Rule 12(e) motion to dismiss. Plaintiffs then argue that if the Court does consider these materials, they are refuted by the Declaration of Michael Hogenson, which was submitted by Plaintiffs in support of their motion for temporary injunction. The Court will not consider affidavits that were not referenced in or a part of the Complaint that is the subject of this motion to dismiss; to do otherwise would require that the Court treat this motion as a motion for summary judgment. *Northern States Power Co.*, 684 N.W.2d at 491.

As set forth above, a key factual dispute in this lawsuit is whether there is a rational distinction between the knowledge and skill needed to install a radon control

system in new residential construction and the knowledge and skill needed to install a radon mitigation system in an existing residence. The Court notes the arguments made by MDH during the public rulemaking process that the two types of work are “not analogous.” However, for purposes of this Motion, the Complaint’s allegation that radon mitigation professionals who perform work on new and existing homes are similarly situated is presumed to be true and all factual inferences must be decided in favor of the non-moving parties.

### **B. Due Process**

The Due Process clause of the Minnesota Constitution, which provides, in relevant part, that “[n]o person shall be . . . deprived of life, liberty or property without due process of law.” Minn. Const. art. I, sec. 7. Substantive due process requires that “unless a fundamental right is limited or a classification is based on a suspect class, minimal judicial scrutiny of legislation is appropriate.” *Doll v. Barnell*, 693 N.W.2d 455, 463 (Minn. Ct. App. 2005) (quoting *Lukkason v. 1993 Chevrolet Extended Cab Pickup*, 590 N.W.2d 803, 806 (Minn. Ct. App. 1999)) (internal quotation marks omitted). “Absent cause for special scrutiny, legislation is constitutional if it is not unreasonable, arbitrary, or capricious and bears a rational relation to the public purpose it seeks to promote.” *Id.*

Defendants argue that the Act does not violate substantive due process. They point to the purpose of the Act, which is to protect Minnesotans from the health risks associated with radon and the harm from improper radon testing and mitigation systems. In response, Plaintiffs ask the Court to not make fact findings on this Motion to dismiss. Rather Plaintiffs refer the Court to the allegations in the Complaint and incorporate by



reference arguments made in Plaintiffs' Memorandum in Support of Motion for Temporary Injunction. In that Memorandum, Plaintiffs argued that "[t]he same facts which indicate that the [Act] and the MDH Rules create a manifestly arbitrary distinction between tradespeople who install radon mitigation systems in new construction as opposed to existing homes discussed in the equal protection analysis above support Plaintiffs' argument that these laws are [an] unreasonable, arbitrary, and capricious interference with their employment and otherwise violate their substantive due process rights." Memorandum in Support of Plaintiff's Motion for Temporary Injunction" at 16-17. The Legislature's decision to "create a carve-out exempting new home construction without any rational justification related to the goal of the legislation mandates that the [Act] and MDH Rules be struck down as violations of Plaintiffs' substantive due process rights." *Id.*

For the reasons set forth in its previous Order granting Plaintiffs' motion for temporary injunction, the Court finds that the Complaint sufficiently alleges a violation of the due process clause of the Minnesota Constitution. Plaintiffs' constitutional claim faces challenges with respect to burden of proof and the presumption that the statute is valid. However, the facts as alleged in the Complaint are sufficient to withstand Defendants' challenge to Plaintiffs' due process claim. Unlike the *Dahlberg* analysis undertaken in response to Plaintiffs' motion for injunctive relief, the Court on Defendants' motion to dismiss must presume as true the Complaint's allegation that radon mitigation professionals who perform work on new and existing homes are

similarly situated and that there is no evident connection between the purpose of the Act and the difference in treatment of these mitigation professionals.

### **Conclusion**

For the reasons set forth above, the Court denies Defendants' motion to dismiss. On a Rule 12.02(e) motion, the Court must accept as true the factual allegations contained in the Complaint and can take judicial notice of matters that are part of the public record such as evidence concerning MDH's rulemaking process. When that evidence is viewed in the light most favorable to the non-moving party, the Court can only conclude that Plaintiffs have stated constitutional claims upon which relief can be granted.

RHK