

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0194

QLARANT INTEGRITY SOLUTIONS, LLC,

Petitioner/Appellee,

v.

NICHOLAS GUTHNECK,

Respondent/Appellant.

APPENDIX TO APPELLEE'S ANSWER BRIEF

On Appeal from the First Judicial District Court, Lewis and Clark County
Cause No. ADV-2023-483
The Honorable Mike Menahan, Presiding

APPEARANCES:

AMY CHRISTENSEN
VICKI BIGNELL
Christensen & Prezeau, PLLP
The Montana Club Building
24 W. 6th Ave., Suite 501
Helena, MT 59601
(406) 442-3690
amy@cplawmt.com
vicki@cplawmt.com

TORRANCE L. COBURN
Tipp Coburn Lockwood, PC
2200 Brooks Street
P.O. Box 3778
Missoula, MT 59806-3778
(406) 549-5186
torrance@tippcoburn.com

Attorney for Respondent/Appellant

Attorneys for Petitioner/Appellee

TABLE OF CONTENTS

Appendix A. *Cabela's Wholesale, LLC v. Chavez*, CV 23-41-M-DLC-KLD, Findings and Recommendations (5/29/24)

Appendix B. Qlarant Office of Administrative Hearings Reply Brief In Support of Motion to Dismiss (2/9/23)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CABELA’S WHOLESale, LLC,

Plaintiff,

vs.

ISAAC CHAVEZ,

Defendant.

CV 23-41-M-DLC-KLD

FINDINGS AND
RECOMMENDATION

Plaintiff Cabela’s Wholesale, LLC brings this action seeking judicial review of a decision by the Montana Human Rights Commission (“MHRC”) on Defendant Isaac Chavez’s claim of discrimination based on vaccination status. Chavez is proceeding pro se, and represented himself throughout the administrative proceedings. Cabela’s moves for summary judgment on the ground that Montana’s statute prohibiting discrimination related to vaccination status, Mont. Code Ann. § 49-2-312, was preempted during the relevant period by an emergency temporary standard issued by the Occupational Safety and Health Administration (“OSHA”) in response to the COVID-19 pandemic. For the reasons discussed below, Cabela’s motion should be granted.

I. Background

The Montana legislature passed House Bill 702, codified at Mont. Code Ann. § 49-2-312, during the 2021 legislative session. The law, which took effect on May 7, 2021, makes it an unlawful discriminatory practice for “an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person’s vaccination status or whether the person has an immunity passport.” Mont. Code Ann. § 49-2-312(1)(b). An “immunity passport” is a “document, digital record, or software application indicating that a person is immune to a disease, either through vaccination or infection and recovery.” Mont. Code Ann. § 49-2-312(5)(a). The statute defines “vaccination status” as “an indication of whether a person has received one or more doses of a vaccine.” Mont. Code Ann. § 49-2-312(5)(b).

On November 5, 2021, OSHA issued an emergency temporary standard (“the ETS”) to protect unvaccinated employees of large employers by strongly encouraging vaccination. 86 Fed. Reg. 61402 (Nov. 5, 2021). The ETS required all employers with at least 100 employees to “develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.” 86 Fed. Reg. 61402. Unvaccinated employees who did not comply

with the ETS's requirements were to be "removed from the workplace." 86 Fed. Reg. 61532. Covered employers were required to comply with most provisions of the ETS by January 10, 2022. *Emergency Temporary Standard, Fact Sheet: COVID-19 Vaccination and Testing ETS*, U. S. Department of Labor, OSHA, <https://www.osha.gov/sites/default/files/publications/OSHA4161.pdf> (last visited May 15, 2024) ("OSHA Fact Sheet").

The ETS was quickly challenged in the courts, and on November 6, 2021, the Fifth Circuit Court of Appeals issued a stay barring OSHA from enforcing the ETS. *BST Holdings, L.L.C. v. Occupational Safety and Health Admin., U.S. Dept. of Labor*, 17 F.4th 604 (5th Cir. 2021). All cases challenging the ETS were then consolidated in the Sixth Circuit Court of Appeals, which dissolved the stay on December 17, 2021. *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021). The ETS remained in effect until January 13, 2022, when the United States Supreme Court stayed the ETS pending completion of judicial review. *National Federation of Independent Business v. Dept. of Labor, Occupational Safety and Health Admin.*, 595 U.S. 109 (2022).

In accordance with the ETS, Cabela's implemented a COVID-19 Vaccination, Testing, and Face Covering Policy ("the Temporary Policy") in January 2022.¹ (Doc. 18 at ¶ 19; Doc. 5-2 at 3). The Temporary Policy required all

¹ Chavez did not file a Statement of Disputed Facts in opposition to Cabela's

Cabela's employees to disclose their vaccination status, and if an employee refused to do so, or disclosed that they were unvaccinated, the employee was required to wear a face mask in the workplace and test for COVID-19 weekly. (Doc. 18 at ¶ 19; Doc. 5-2 at 3).

Chavez applied for and received an offer of employment as a part-time Firearms Specialist at Cabela's Kalispell, Montana store. (Doc. 18 at ¶ 20; Doc. 5-2 at 4). On or about January 10, 2022, Chavez reported to Cabela's Kalispell, Montana store for his new employee orientation.² (Doc. 18 at ¶ 21; Doc. 5-2 at 3). During the orientation, a Cabela's representative explained to Chavez that Cabela's had a Temporary Policy in place requiring all employees to either provide proof of a COVID-19 vaccination or wear a mask and submit to regular COVID-19 testing. (Doc. 18 at ¶ 19; Doc. 5-6 at 38). Chavez refused to disclose his vaccination status, and stated that he would not wear a mask at work or submit to COVID-19 testing. (Doc. 18 at ¶¶ 22-23; Doc. 5-1 at 2; Doc. 5-2 at 4; Doc. 5-6 at 38). Cabela's

motion for summary judgment. Under Local Rule 56.1(d), “[f]ailure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute.” The facts taken from Cabela's Statement of Undisputed Facts (Doc. 18) are deemed undisputed to the extent they are not contradicted by other parts of the record.

² Although Chavez alleged in his administrative complaint that the relevant events occurred on January 10, 2022 (Doc. 5-1 at 2), Cabela's submitted records reflecting that the events actually took place on January 11, 2022 (Doc. 5-6 at 35, 38). Because this discrepancy is not material to the analysis, the Court accepts the date identified by Chavez for purposes of this motion.

advised Chavez that if he refused to comply with the Temporary Policy he could not work at its store. (Doc. 18 at ¶ 24; Doc. 5-1 at 2; Doc. 5-2 at 4). Chavez left Cabela's and did not return. (Doc. 18 at ¶ 25). On January 13, 2022, Cabela's rescinded its Temporary Policy in light of the United States Supreme Court's decision in *National Federation* staying the ETS. (Doc. 18 at ¶ 26).

On January 14, 2022, Chavez filed a complaint of discrimination with the Montana Department of Labor and Industry, Human Rights Bureau ("MHRB"), alleging a single discrimination claim based on vaccination status under Mont. Code. Ann. § 49-2-312. (Doc. 18 at ¶ 27; Doc. 5-1). On February 15, 2022, Cabela's submitted a Statement of Position to the MHRB, arguing that at all times relevant to Chavez's complaint, the ETS preempted Mont. Code Ann. § 49-2-312. (Doc. 18 at ¶ 28; Doc. 5-6 at 34-54). On July 7, 2022, a MHRB investigator issued a Final Investigative Report finding reasonable cause to believe unlawful discrimination occurred as alleged in Chavez's complaint. (Doc. 18 at ¶ 19; Doc. 5-6 at 56-58). Chavez's case was then referred to the Office of Administrative Hearings, and Cabela's moved to dismiss the complaint pursuant to Montana Rule of Civil Procedure 12(b)(6) for failure to state a claim for relief. (Doc. 18 at ¶¶ 30-31; Doc. 5-6 at 60-72).

The Hearing Officer granted Cabela's motion, concluding that Chavez failed to state a claim for relief because Mont. Code Ann. § 49-2-312 was preempted by

the ETS at all times relevant to the complaint. (Doc. 18 at 8 ¶ 33; Doc. 5-2 at 11). The Hearing Officer first determined that the Montana statute was expressly preempted because the ETS, a Frequently Asked Questions section on the OSHA website,³ and the Federal Register included explicit language expressly preempting conflicting state laws. (Doc. 5-2 at 6-8). The Hearing Officer further concluded that the regulatory language of the ETS impliedly preempted Mont. Code. Ann. 49-2-312 because it would have been impossible for Cabela's to comply with both the ETS and Montana law. (Doc. 5-2 at 8-9).

Following the decision entered by the Hearing Officer, Chavez timely appealed to the Montana Human Rights Commission ("MHRC"). (Doc. 18 at ¶ 34; Doc. 5-4 at 1). On March 27, 2023, the MHRC issued a Remand Order remanding the case back to the Hearing Officer. (Doc. 18 at ¶ 36; Doc. 5-12). The MHRC determined that the Hearing Officer did not have the power to rule that a state law was preempted, reasoning that "[c]onstitutional questions, such as federal preemption of a state law, are properly decided by a judicial body, not an administrative official, under the constitutional principles of separation of powers." (Doc. 18 at ¶ 35; Doc. 5-12 at 2). The MHRC concluded that the Hearing Officer's conclusion that the ETS preempted Mont. Code Ann. § 49-2-312 was incorrect,

³ *Emergency Temporary Standard, Frequently Asked Questions*, U. S. Department of Labor, OSHA, <https://www.osha.gov/coronavirus/ets2/faqs> (last visited May 15, 2024) ("OSHA FAQs").

and remanded the case to the Office of Administrative Hearings (OAH) for further proceedings. (Doc. 18 at ¶ 36; Doc. 5-12 at 3).

On April 26, 2023, Cabela's filed its Complaint in this case, seeking judicial review of the MHRC's decision. (Doc. 1). Cabela's invokes the Court's diversity and federal question jurisdiction, and seeks judicial review pursuant to Mont. Code Ann. § 2-4-702. (Doc. 1 at ¶¶ 5, 9). Cabela's asks the Court to reverse the MHRC's decision and order a complete dismissal of Chavez's complaint. (Doc. 1 at 10-11).

Where the prerequisites for federal diversity jurisdiction are met, federal courts have subject matter jurisdiction over cases involving “on-the-record review of a Montana administrative agency decision.” *BNSF Ry. Co. v. O’Dea*, 572 F.3d 785, 791 (9th Cir. 2009). To establish diversity jurisdiction, there must be complete diversity of citizenship between the parties and the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332.

Cabela's identifies itself in the Complaint as “a foreign limited liability corporation with its registered agent in Lincoln, Nebraska,” and the record reflects that Chavez, who has a Montana address on file with the Court, is a Montana citizen. Cabela's asserts that “the amount in controversy exceeds \$75,000,” (Doc. 1 at ¶ 5) and the record reflects that Chavez asserted in the administrative proceedings that “he is owed \$100,000 in damages from Cabela's.” (Doc. 5-5 at 1).

Because the prerequisites for federal diversity jurisdiction are satisfied, this Court has subject matter jurisdiction.

II. Legal Standard

Under Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary judgment motions are “particularly appropriate where, as here, review is on the administrative record.” *State of Montana v. U.S. E.P.A.*, 941 F.Supp. 945, 956 (D. Mont. 1996) (citing *Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963)).

The district court reviews a final administrative decision to determine “whether the agency’s findings of fact are clearly erroneous and whether the agency’s interpretation and application of law are correct.” *Denke v. Shoemaker*, 198 P.3d 284, 294 (Mont. 2008).

“A factual finding is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made.” *Denke*, 198 P.3d at 295. The “standard of review for an administrative agency’s conclusions of law is whether its interpretation of the law was correct.” *Cambra Foods Ltd. v. Mont. Dep’t of Revenue*, 925 P.2d 855, 856

(Mont. 1996).

In general, “pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.” *Morin v. Nielsen*, 2020 WL 6701423 (citing *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986)). In the summary judgment context, however, courts are to construe pro se documents liberally and give pro se litigants the benefit of any doubt. *Morin*, at 2 (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted)).

III. Discussion

The Court begins with an issue that is not raised by the parties, but is addressed in the analogous state court case that is the subject of a notice of supplemental authority by Cabela’s, *Qlarant Integrity Solutions, LLC v. Nicholas Guthneck*, Cause No. ADV-2023-483, issued by the Montana First Judicial District Court, Lewis and Clark County, on March 28, 2024. (Doc. 24). In *Qlarant*, the respondent Nicolas Guthneck filed a MHRB complaint against Qlarant alleging discrimination in employment based on vaccination status in violation of Mont. Code Ann. § 49-2-312. (Doc. 24-1 at 3). The federal regulation at issue in *Qlarant* was Executive Order 14042, which required employees of covered federal contractors, including Qlarant, to obtain Covid-19 vaccinations. (Doc. 24-1 at 2). Qlarant implemented a mandatory vaccination policy requiring its employees to

submit proof of vaccination, and discharged Guthneck after he would not disclose his vaccination status. (Doc. 24-1 at 3-4).

The MHRB transferred Guthneck's complaint to the OAH, and Qlarant moved to dismiss on the ground that EO 14042 preempted Mont. Code Ann. § 49-2-312. (Doc. 24-1 at 4). The hearing officer granted the motion, and Guthneck appealed to the MHRC. (Doc. 24-1 at 4). The MHRC remanded the case to the OAH, concluding that the hearing officer did not have the authority to determine whether EO 14042 preempted the Montana statute because the issue was "constitutional in nature and could only be decided by a judicial body." (Doc. 24-1 at 4).

Qlarant filed a petition for judicial review of the MHRC's remand order in the Montana First Judicial District Court, Lewis and Clark County. (Doc. 24-1 at 4). Before addressing the merits, the court found that although the MHRC's remand order was not a final agency decision, it was reviewable pursuant to Mont. Code Ann. § 2-4-701, which provides that a preliminary "or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." The court reasoned that remanding the preemption "issue to the hearing officer while specifically rejecting the hearing officer's authority" to resolve the issue would be futile. Because the preemption issue was determinative, and MHRC had determined that the issue was

unresolvable at the agency level, the court concluded it was appropriate to review the agency's "intermediate decision before requiring the parties to participate in further proceedings at the agency level." (Doc. 24-1 at 6).

The same is true here. The MHRC determined that the Hearing Officer did not have the authority to address whether Mont. Code Ann. § 49-2-312 was preempted by federal law. The MHRC characterized the preemption issue as a constitutional one, which could only be "decided by a judicial body, not an administrative official, under the constitutional principles of separation of powers." (Doc. 5-12 at 2). As in *Qlarant*, the preemption issue is dispositive and remanding this matter to the Hearing Officer to resolve an issue that the agency has said the Hearing Officer does not have the authority to address would be futile. The MHRC's remand order is thus reviewable under Mont. Code Ann. § 2-4-701.

Cabela's contends that the MHRC erred in concluding that the Hearing Officer did not have authority to address the preemption issue and in remanding this matter to the OAH on that basis. The Court agrees.

As in *Qlarant*, the MHRC in this case characterized the preemption issue as a constitutional one and relied on *Jarussi v. Board of Trustees*, 664 P.2d 316 (Mont. 1983) to conclude that the Hearing Officer did not have the authority to decide that the ETS preempted Mont. Code Ann. § 49-2-312. The MHRC cited *Jarussi* for the proposition that "[c]onstitutional questions, such as federal

preemption of a state law, are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers.” (Doc. 5-12 at 2). *Jarussi* is distinguishable, however, in that it discussed the constitutional right to observe a school board meeting and simply recognized that the doctrine requiring exhaustion of administrative remedies does not apply to constitutional issues, which are properly addressed by the courts. *Jarussi*, 664 P.2d at 318.

Here, as in *Qlarant*, the MHRC erred in framing Cabela’s preemption argument as a constitutional challenge to the validity of Mont. Code Ann. § 49-2-312. (Doc. 24-1 at 7). Cabela’s does not challenge the general validity of the statute, but rather argues the ETS preempted the statute as to employers in Cabela’s position. Concluding that the ETS “preempted the Montana statute under the facts of this matter would have no effect on the validity of” the statute, and the MHRC was not called on to determine the constitutionality of the statute or the ETS. (Doc. 24-1 at 7). Because the issue of whether the ETS preempted Mont. Code Ann. § 49-2-312 is a matter of statutory interpretation, the Hearing Officer had the authority to make that determination and the MHRC erred in holding otherwise.

Cabela’s argues, and the Court agrees, that the Hearing Officer correctly concluded that Chavez’s discrimination claim fails as a matter of law because the

ETS expressly and impliedly preempted Mont. Code Ann. § 49-2-312 during the relevant period.⁴

Federal law, including federal regulations,⁵ may preempt state law under the Supremacy Clause of the United States Constitution in three ways: “(1) express preemption; (2) field preemption (sometimes referred to as complete preemption); and (3) conflict preemption.” *Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). Field preemption and conflict preemption are both forms of implied preemption. *Ting*, 319 F.3d at 1135-36. Cabela’s argues that express and conflict preemption both apply here.

Express preemption applies when Congress has indicated “its intent to displace state law through express language.” *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010). Where Congress has enacted an express preemption provision, the court’s “task is to interpret the provision and ‘identify the domain expressly pre-empted by that language,’” using “the text of the provision, the surrounding statutory framework, and Congress’s state purposes in enacting the statute to determine the proper scope of an express preemption provision.” *Chae*, 593 F.3d at

⁴ As noted above, it is not clear whether the events giving rise to Chavez’s discrimination claim took place on January 11, 2022 or January 12, 2022. Because the ETS was in effect on both dates, the result here is the same regardless of which date is accurate.

⁵ See *Hillsborough Cnty. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (federal regulations may preempt state law).

942 (citations omitted). “Conflict preemption occurs where (1) it is impossible to comply with both federal and state law, or (2) where the state law stands an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016).

Cabela’s first contends that the ETS expressly preempted Mont. Code Ann. § 49-2-312 as evidenced by the plain text of the regulatory language, OSHA publications, and statements of intent in the Federal Register. Cabela’s is correct.

The ETS contained a clear statement of OSHA’s intent to preempt contrary state laws.⁶ The ETS stated that it was:

intended to establish minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace, and to preempt inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers’ authority to require vaccination, face covering, or testing, regardless of the number of employees.

29 C.F.R. § 1910.501(a). Consistent with the regulatory language, the OSHA FAQs explained, in part, that the “ETS preempts States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings, and

⁶ A federal agency, like OSHA, that is “acting within the scope of its congressionally delegated authority may preempt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.” *City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988) (internal citations omitted).

testing for COVID-19, except under authority of a Federally-approved State Plan...” *Emergency Temporary Standard, Frequently Asked Questions*, U.S. Department of Labor, OSHA, <https://www.osha.gov/coronavirus/ets2/faqs> at 1A (last visited May 14, 2024). As expressed in the Federal Register, OSHA intended for the ETS to preempt conflicting state laws and specifically mentioned Montana HB 702, which created Mont. Code. § 49-2-312. 86 Fed. Reg. at 61507-08. OSHA explained that “state restrictions of this kind are clearly preempted whether they take the form of direct workplace regulation or are part of a law of general applicability because they relate to the issues addressed by this standard and conflict with it.” 86 Fed. Reg. at 61508. *See also National Federation Independent Business*, 595 U.S. 109, 113 (2022) (recognizing that the ETS “requires that covered workers receive a COVID-19 vaccine, and it pre-empts contrary state laws.”). As argued by Cabela’s, the Hearing Officer correctly concluded based on clear expressions of OSHA’s intent that the ETS expressly preempted Mont. Code Ann. § 49-2-312.

The Hearing Officer was also correct in concluding that the ETS implicitly preempted Mont. Code Ann. § 49-2-312 because Cabela’s was unable to comply with both the federal regulation and the Montana statute. The ETS required large employers to gather information about their employees’ vaccination status. 86 Fed. Reg. at 61552. The ETS required covered employers to remove any employees

who were unvaccinated or refused to disclose their vaccination status from the workplace, or require those employees to wear a mask and submit to weekly Covid-19 testing. 86 Fed. Reg. at 61532.

The Hearing Officer correctly reasoned that the ETS's requirements directly conflicted with Mont. Code Ann. § 49-2-312, which makes it an unlawful discriminatory practice to determine a condition of employment based on vaccination status, thereby prohibiting an employer from requiring its employees to disclose their vaccination status and from requiring employees to wear masks if they refused to do so. (Doc. 5-2 at 8).

Because the Hearing Officer correctly concluded that Chavez's discrimination claim was preempted by the ETS, and the MHRC erred in concluding that the Hearing Officer did not have authority to address the preemption issue, Cabela's motion for summary judgment should be granted.

IV. Conclusion

For the reasons set forth above,

IT IS RECOMMENDED that Cabela's Motion for Summary Judgment (Doc. 16) be GRANTED and this case be remanded to the MHRC with instructions to dismiss Chavez's claim.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge upon the

parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after entry hereof, or objection is waived.

DATED this 29th day of May, 2024.



Kathleen L. DeSoto
United States Magistrate Judge

AMY D. CHRISTENSEN
VICKI BIGNELL
CHRISTENSEN & PREZEAU, PLLP
THE MONTANA CLUB BUILDING
24 W. 6TH AVENUE, FIFTH FLOOR
HELENA, MT 59601
(406) 442-3690 (PHONE)
(406) 603-4008 (FAX)
amy@cplawmt.com
vicki@cplawmt.com

ATTORNEYS FOR RESPONDENT
QLARANT INTEGRITY SOLUTIONS, LLC

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS**

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1736-2022

NICHOLAS GUTHNECK)
)
 Charging Party,)
)
 vs.)
)
QLARANT INTEGRITY)
SOLUTIONS, LLC.)
)
 Respondent.)

**REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS**

Respondent Qlarant Integrity Solutions, LLC, hereby submits its Reply Brief in Support of its Motion to Dismiss. Qlarant’s motion should be granted because Charging Party Nicholas Guthneck’s Montana-specific vaccination discrimination claim is preempted by Executive Order 14042, which was in effect at the time of his termination from employment.

BACKGROUND

Qlarant first announced its COVID-19 Vaccination Policy (“Policy”) on October 6, 2021, explaining that employees needed to submit proof of COVID-19 vaccination by November 24, 2021. (Complaint, ¶ 2.) Qlarant’s communication came almost one month after the President announced Executive Order 14042 (“EO 14042”), which required federal contractors to implement COVID-19 safety protocols consistent with applicable Safer Federal Workforce Task Force Guidance (“Task Force Guidance”). 86 Fed. Reg. 50985-88. The Task Force Guidance, issued first on September 24, 2021, and later updated, required covered federal contractors to ensure all covered contractor employees were fully vaccinated for COVID-19, unless an employee was legally entitled to an accommodation. *Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, p. 5, issued Sept. 24, 2021,¹ updated Nov. 10, 2021² (“September 24 Task Force Guidance” and “November 10 Task Force Guidance”). Compliance with EO 14042 was not optional; all federal contracts subject to EO 14042 had to implement the safety protocols, and failure to do so could have resulted in breach of contract remedies such as contract termination, suspension, and debarment. *See* 86 Fed. Reg. 50985-88; Federal Acquisition Regulation (FAR) 52.223-99; *September 24 Task Force Guidance*.

¹https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last accessed Feb. 9, 2023).

²https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf (last accessed Feb. 9, 2023).

In response to Qlarant’s Policy, Guthneck, a remote employee residing in Montana, emailed Qlarant regarding Montana’s law prohibiting discrimination based on vaccination status, explaining his opinion that Qlarant’s Policy violated Montana law. (Compl., ¶¶ 1, 3.) Qlarant responded that since it performed services on federally funded contracts, Montana law was inapplicable, and he remained subject to the Policy. (Compl., ¶ 4.)

Guthneck eventually notified Qlarant on November 4, 2021, that he was not comfortable releasing his vaccination status. (Compl., ¶ 6.) Guthneck was terminated from his employment with Qlarant that day, but he received pay and benefits through November 24, 2021 – the last day in which to comply with the Policy. (*Id.*) A few weeks later, on December 7, 2021, a federal district court enjoined enforcement of the federal contractor vaccination mandate nationwide. *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1343 (S.D. Ga. 2021), *vacated in part, affirmed in part by Georgia v. Biden*, 46 F.4th 1283 (11th Cir. 2022).

LEGAL STANDARD

A claim is subject to dismissal under Rule 12(b)(6) if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692. A claim is subject to dismissal “if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” *Id.*

//

ARGUMENT

Guthneck has failed to state a claim upon which relief can be granted because his claim is preempted by federal law. Qlarant was required to comply with EO 14042 and corresponding Task Force Guidance at all times relevant to Guthneck's allegation, notwithstanding subsequent court rulings or changes to compliance dates. Further, the allegations contained in Guthneck's Complaint support Qlarant's motion to dismiss on preemption grounds, but if the Office of Administrative Hearings decides it requires additional information, Qlarant has provided such information herein.

I. Qlarant was required to comply with EO 14042 and corresponding Task Force Guidance when it terminated Guthneck's employment on November 4, 2021.

EO 14042 and the corresponding September 24 Task Force Guidance was the law of the United States that was in effect when Qlarant terminated Guthneck's employment on November 4, 2021. *See* 86 Fed. Reg. 50985-88; *September 24 Task Force Guidance*. Guthneck argues, based on the timing of the Executive Order, changes to the Task Force Guidance, and subsequent court rulings, that EO 14042 never preempted Montana law and that Qlarant was not at any time required to choose between ensuring that Guthneck was vaccinated or risk violating EO 14042. (Charging Party's Brief in Response to Respondent's Motion to Dismiss, pp. 1-6, 8-10, Jan. 30, 2023 ("Resp. Br.")). Guthneck's arguments ignore the fact that EO 14042 was the applicable law when Qlarant terminated Guthneck's employment.

//

//

a. EO 14042 and the corresponding Task Force Guidance preempted Montana law when the federal law was in effect, despite later court rulings.

Montana's law prohibiting discrimination based on vaccination status was preempted by EO 14042 at all times the federal law was in effect, notwithstanding later court rulings. Guthneck argues that EO 14042 did not preempt Montana state law during the relevant time period because courts have *subsequently* held that EO 14042 exceeded or likely exceed the President's grant of authority under the Procurement Act, 40 U.S.C. § 101 *et seq.* (Resp. Br., pp. 8-10.) This argument is contrary to state and federal law.

Under Montana law, a "claim or cause of action accrues when all elements of the claim or cause exist or have occurred." Section 27-2-102(1)(a), MCA. The Montana Supreme Court has clarified that a claim is governed by the substantive law in effect at the time the claim accrues. *Anderson v. Werner Enters., Inc.*, 1998 MT 333, ¶ 28, 292 Mont. 284, 972 P.2d 806 (citing *Cadwell v. Bechtel Power Corp.*, 225 Mont 423, 732 P.2d 1352 (1987)). The United States Supreme Court has similarly approved the "timeless and universal appeal" of the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf v. Usi Film Prods.*, 511 U.S. 224, 265, 114 S. Ct. 1483, 1497 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990)).

The Office of Administrative Hearings has already considered and rejected arguments similar to Guthneck's related to the Occupational Safety and Health Administration's ("OSHA") Emergency Temporary Standard ("ETS"), which required employers with 100 or more employees to comply with certain COVID-19 vaccination

requirements. *McPhee and Burden v. Torrent Technologies, Inc.*, OAH Case Nos. 30-2023 & 31-2023, Order on Respondent's Motion to Dismiss, pp. 11-12, dated Oct. 27, 2022; *Chavez v. Cabela's Wholesale, LLC*, OAH Case No. 102-2023, Amended Order on Respondent's Motion to Dismiss, pp. 9-10, dated Oct. 13, 2022. The United States Supreme Court stayed the OSHA ETS on January 13, 2022, after determining that OSHA likely lacked the authority to impose the ETS. *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 664-65 (2022). The Supreme Court's finding that OSHA likely lacked the authority to impose the ETS was immaterial to the Office of Administrative Hearings' conclusion that the ETS preempted Montana law when the ETS was in effect. *McPhee*, pp. 11-12; *Chavez* pp. 9-10. The Office of Administrative Hearings specifically concluded that the Supremacy Clause requires compliance with federal law over state law when it is impossible to comply with both, even if the federal law is later struck down by a court. *McPhee*, p. 12; *Chavez* pp. 9-10.

Likewise, the Supremacy Clause required compliance with EO 14042 over contrary state law when EO 14042 was in effect, even if courts later found that the President exceeded or likely exceeded his authority. When the President announced EO 14042, its preemptive effect was repeatedly emphasized. EO 14042 itself explained that it set the requirements for federal contractor COVID-19 safety standards, with states and localities free to establish only more protective protocols. 86 Fed. Reg. 50985, 50986. The FAQs issued in conjunction with the September 24 Task Force Guidance further explained that federal contractors must comply with the workplace safety protocols, notwithstanding contrary state law: "These requirements are promulgated pursuant to

Federal law and supersede any contrary State or local law or ordinance.” *September 24 Task Force Guidance, Frequently Asked Questions, No. 19*. Relying on that information, Qlarant initiated compliance with federal law, contrary Montana law notwithstanding. (Compl., ¶¶ 3-6.)

Qlarant was not at liberty to prejudge EO 14042 and guess how it would be analyzed by the courts. Instead, Qlarant appropriately complied with the law as it existed at the time. Like the OSHA ETS, EO 14042 preempted contrary state law when it was in effect, even though courts later determined that the President exceeded or likely exceeded his power under the Procurement Act. *See McPhee*, p. 12; *Chavez* p. 9-10.

b. In seeking compliance with EO 14042 and the September 24 Task Force Guidance, Qlarant was free to set its own internal compliance deadlines.

Qlarant cannot be faulted for setting its own internal compliance deadlines consistent with EO 14042 and the September 24 Task Force Guidance. Guthneck argues that Qlarant was not at any time required to choose between ensuring that Guthneck was vaccinated or risk violating EO 14042. (Charging Party’s Brief in Response to Respondent’s Motion to Dismiss, pp. 1-6, Jan. 30, 2023 (“Resp. Br.”).) Again, Guthneck’s argument ignores the fact that EO 14042 was the applicable law when Qlarant terminated Guthneck’s employment.

The Office of Administrative Hearings has already determined that the OSHA ETS preempted Montana state law *at all times it was in effect*, regardless of future compliance deadlines. *Chavez*, pp. 10-12. For example, in *Chavez*, the employer’s COVID-19 policy went into effect on November 8, 2021. *Id.* at 4. The policy provided that unvaccinated

employees were not allowed to use common breakrooms, had to enter the building through the back door, had to remain in the basement of the building, and could only use a specific restroom marked for their specific use. Unvaccinated employees also had to undergo weekly COVID-19 testing and wear a face covering at work, as required by the ETS. *Id.* at 5. Chavez and other employees filed vaccination discrimination complaints against the employer with the Human Rights Bureau on December 20, 2021. *Id.*

In analyzing *Chavez*, the Office of Administrative hearings noted that the employees' claims accrued no later than November 8, 2021, when they were treated differently in a term or condition of employment based on their vaccination status. *Id.* at 10. The Office of Administrative Hearings reviewed the ETS's effective dates, noting that the ETS went into effect on November 5, 2021. *Id.* at 11. A court stayed enforcement of the ETS on November 6, 2021, but the stay was later dissolved on December 17, 2021. *Id.* (citations omitted). The ETS remained in effect until it was stayed by the United States Supreme Court on January 13, 2022. *Id.* The Office of Administrative Hearings ultimately concluded that the employees' state law claims were preempted by the ETS at all times the ETS was in effect after December 17, 2021. *Id.* at 12. This was true even though employers were not required to comply with some ETS requirements until January 10, 2022, and were not required to comply with other ETS requirements until February 9, 2022. *United States Department of Labor, Occupational Safety and Health Administration, Emergency Temporary Standard, Answer to Frequently Asked Question 12.A*³.

³ <https://www.osha.gov/coronavirus/ets2/faqs#accordion-81527-header1> (last accessed Feb. 9, 2023).

The same is true in this case. Qlarant was free to set its own internal timeline to reach compliance with EO 14042, notwithstanding future compliance dates or subsequent changes to the deadlines. Guthneck's claim of vaccination discrimination under Montana law accrued on November 4, 2021, when Qlarant terminated his employment. (Compl., ¶ 6); § 27-2-102(1)(a), MCA. Guthneck signed and filed his complaint of discrimination with the Human Rights Bureau that same day. (Compl., p. 1.) As Guthneck acknowledges, on November 4, 2021, EO 14042 and the September 24 Task Force Guidance required covered contractors to ensure that their covered contractor employees were fully vaccinated by December 8, 2021. (Resp. Br., p. 4 (citing *September 24 Task Force Guidance*)).

As the federal law in effect at the time, Qlarant was bound by EO 14042 and the September 24 Task Force Guidance. Even though the law did not require federal contractors to ensure full vaccination until December 8, 2021, Qlarant, in seeking compliance with controlling federal law, was free to set its own internal compliance timelines. *September 24 Task Force Guidance*, p. 5 (stating that covered contractor employees "must be fully vaccinated *no later than* December 8, 2021"). Again, it was not up to Qlarant to prejudge EO 14042 or guess whether the Task Force Guidance would later change compliance dates.

Guthneck also criticizes Qlarant for the timing of his termination. He relies on Task Force Guidance language cautioning against "immediate termination of 'non-compliant' employees," and directing that removal should only occur after continued noncompliance. (Resp. Br., p. 5.) The Complaint demonstrates that Qlarant did not

terminate Guthneck's employment "immediately." Qlarant announced its Policy on October 6, 2021, and Guthneck initiated a conversation with Human Resources about the Policy on October 22, 2021. (Compl., ¶¶ 2-3.) After weeks of back-and-forth between Guthneck and Qlarant regarding Qlarant's Policy and Guthneck's concerns, Guthneck definitively told Qlarant that he was "not comfortable releasing his vaccination status to them" on November 4, 2021. (Compl., ¶¶ 3-6.) Based on Guthneck's announcement that he would not comply with Qlarant's Policy, or even provide it with information necessary for Qlarant to determine its own compliance, Qlarant terminated his employment. (*Id.*, ¶ 6.) Qlarant was well within the parameters of EO 14042 and the September 24 Task Force Guidance when it terminated Guthneck's employment after Guthneck confirmed that he would not comply with the federally mandated Policy.

EO 14042 and the September 24 Task Force Guidance was the law in effect when Guthneck's employment was terminated on November 4, 2021, and it is therefore the law that applies to this matter. At all times relevant to Guthneck's complaint, federal law preempted § 49-2-312, MCA, as explained in Qlarant's Brief in Support of its Motion to Dismiss, and the state law was therefore unenforceable against Qlarant.

II. Qlarant and Guthneck were subject to EO 14042's vaccination policy requirements during the relevant time period.

Qlarant filed a Motion to Dismiss based on the legal argument that Guthneck's state law discrimination claim is preempted by the federal law that was in effect during the relevant time period. (Br. Supp. Mot. Dismiss, pp. 8-16.) In an effort to defeat Qlarant's Motion to Dismiss, Guthneck argues that his Complaint does not establish Qlarant's

status as a covered contractor subject to EO 14042 or Guthneck's status as a covered contractor employee subject to EO 14042. (Resp. Br., pp. 6-8.) To the contrary, the allegations contained in the Complaint set forth facts that are sufficient to support Qlarant's Motion to Dismiss on preemption grounds. However, if more information is needed to support Qlarant's argument, Qlarant has provided the necessary information.

a. Guthneck's Complaint alleges information sufficient to support Qlarant's preemption arguments.

Guthneck's Complaint is centered around his allegation that Qlarant terminated his employment because he refused to comply with Qlarant's Policy, which Qlarant had to implement because it performs services on federally funded contracts. (Compl., ¶¶ 2-7.) Guthneck asserts that Qlarant cannot prevail on its Motion to Dismiss because he never specifically alleged that he was a "covered contractor employee," that Qlarant was a "covered contractor," or that he or Qlarant were subject to EO 14042 and its vaccine mandate. (Resp. Br., p. 8.) Those specific allegations are not necessary to dismiss Guthneck's state law claim on preemption grounds.

On a motion to dismiss for failure to state a claim, all well-pleaded factual allegations in the complaint are taken as true. *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6. The Complaint alleges that Qlarant informed Guthneck "that because Qlarant performed services on federally funded contracts, Montana law was not valid, and [he] was still subject to Qlarant's mandatory COVID vaccination policy." (Compl., ¶ 4.) That fact, taken as true, establishes that Qlarant had to comply with federal law and

that Guthneck was subject to that law. As such, the allegations of Guthneck's Complaint are sufficient to support Qlarant's preemption argument.

b. Alternatively, if the Office of Administrative Hearings determines that additional information is needed to support Qlarant's preemption argument, Qlarant provides such information.

If the Office of Administrative Hearings finds it necessary to substantiate that Qlarant was a "covered contractor" and that Guthneck was a "covered contractor employee" under EO 14042, Qlarant can easily provide that information. On a Rule 12(b)(6) motion, if matters outside of the pleadings are presented and not excluded, the motion must be treated as one for summary judgment under Rule 56. Mont. R. Civ. P. 12(d).⁴ Under Rule 56(c), summary judgment should be "rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c).

The September 24 Task Force Guidance, issued pursuant to EO 14042, required covered contractors to "ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation." *September 24 Task Force Guidance*, p. 5. A covered contractor "means a prime contractor or subcontractor at any tier who is a party to a covered contract." *September 24 Task Force Guidance*, p. 3. A covered contract "means any contract or contract-like instrument that includes the clause described in Section 2(a) of [EO 14042]." The requirements apply to

⁴ Mont. R. Civ. P. 12(d) further provides that in such instance, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

procurement contracts or contract-like instruments for services. 86 FR 50985, 50986 (§ 5(a)(1)). A covered contractor employee means “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract” *September 24 Task Force Guidance*, pp. 3-4.

Qlarant qualifies as a covered contractor under the September 24 Task Force Guidance. Qlarant has a contract with the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, to work as a Unified Program Integrity Contractor (UPIC) to detect, prevent, and proactively deter fraud, waste, and abuse in Medicare and Medicaid Programs in the western part of the United States (“UPIC West Contract”). (Affidavit of Deirdre Stokes, ¶ 6, Feb. 9, 2023, attached as **Exhibit 1**.) After the President issued EO 14042, Qlarant was required to execute a Modification to the UPIC West Contract, which implemented EO 14042 and required Qlarant to comply with the Executive Order and all guidance, including guidance conveyed through Frequently Asked Questions. (Ex. 1, Stokes Aff., ¶¶ 7-10.) Further, Guthneck qualifies as a covered contractor employee under the September 24 Task Force Guidance. He was a full-time employee who worked on or in connection with the UPIC West Contract. (Ex. 1, Stokes Aff., ¶ 11.)

Given this information, it is undisputed that Qlarant was required to comply with EO 14042 and corresponding Task Force Guidance. Qlarant was a covered contractor and Guthneck was a covered contractor employee. If the Office of Administrative Hearings considers this information, it will treat Qlarant’s motion as one for summary judgment. *See* Mont. R. Civ. P. 12(d). In that instance, Qlarant has demonstrated that there is no

genuine issue as to any material fact regarding Qlarant's obligations to comply with EO 14042 and Guthneck's status as a covered contractor employee. Accordingly, Qlarant is entitled to judgment as a matter of law because Guthneck's state law claim was preempted by EO 14042 during the relevant time period. *See* Mont. R. Civ. P. 56(c).

CONCLUSION

During the time period relevant to Guthneck's state law claim, EO 14042 preempted § 49-2-312, MCA. Accordingly, Qlarant's actions during the relevant time period are protected by preemption principles, and Guthneck has failed to state a claim upon which relief may be granted. Alternatively, if the Office of Administrative Hearings considers the attached Affidavit, the Motion will be treated as one for summary judgment. In that instance, Qlarant is entitled to summary judgment because there is no genuine issue as to any material fact and Qlarant is entitled to judgment as a matter of law because Guthneck's state law claim was preempted by EO 14042 during the relevant time period. Either way, Qlarant respectfully requests that the Office of Administrative Hearings enters judgment in its favor.

Dated this 9th day of February, 2023.

CHRISTENSEN & PREZEAU, PLLP

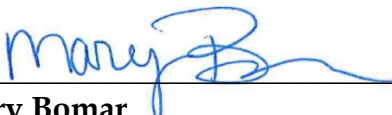
By: 
Vicki Bignell
The Montana Club Building
24 W. 6th Avenue, Fifth Floor
Helena, MT 59601

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** was served upon the following by emailing a true and correct copy thereof on this 9th day of February, 2023, addressed as follows:

Torrance Coburn
Tipp Coburn & Associates, PC
2200 Brooks St.
Missoula, MT 59801
torrance@tcsattorneys.com



Mary Bomar

EXHIBIT 1

AMY D. CHRISTENSEN
VICKI BIGNELL
CHRISTENSEN & PREZEAU, PLLP
THE MONTANA CLUB BUILDING
24 W. 6TH AVENUE, FIFTH FLOOR
HELENA, MT 59601
(406) 442-3690 (PHONE)
(406) 603-4008 (FAX)
amy@cplawmt.com
vicki@cplawmt.com

ATTORNEYS FOR RESPONDENT
QLARANT INTEGRITY SOLUTIONS, LLC

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 1736-2022

NICHOLAS GUTHNECK)
)
Charging Party,)
)
vs.)
)
QLARANT INTEGRITY)
SOLUTIONS, LLC.)
)
Respondent.)

AFFIDAVIT OF DEIRDRE STOKES

Deirdre Stokes, being first duly sworn upon oath, deposes and says:

1. My name is Deirdre Stokes.
2. I serve as the Corporate Contracts and Compliance Officer for Qlarant Integrity Solutions, LLC ("Qlarant").
3. My job title is Corporate Contracts and Compliance Officer.

4. I have worked at Qlarant for 11 years, with 3 of those years in my current role as Corporate Contracts and Compliance Officer.

5. In my role as Corporate Contracts and Compliance Officer, I am familiar with Qlarant's contracts and employees' job duties.

6. Qlarant has a contract with the Department of Health and Human Services, Centers for Medicare & Medicaid Services ("CMS"), to work as a Unified Program Integrity Contractor ("UPIC") to detect, prevent, and proactively deter fraud, waste, and abuse in Medicare and Medicaid Programs in the western part of the United States ("UPIC West Contract").

7. After the President issued Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, CMS issued a Modification to the UPIC WEST Contract which Qlarant was required execute.

8. In accordance with EO 14042, the Modification incorporated FAR 52.223-99 - Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors into the UPIC West Contract. (Modification of Contract, dated October 20, 2021, attached as **Exhibit A**.)

9. The incorporation of FAR 52.223-99 into the UPIC West Contract implemented Executive Order 14042. (Ex. A, p. 2.)

10. Qlarant was required to comply with Executive Order 14042 and all guidance, including guidance conveyed through Frequently Asked Questions. (Ex. A, p. 2.)

EXHIBIT A

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT ID CODE	PAGE OF PAGES 1 2
2. AMENDMENT/MODIFICATION NO. P00014	3. EFFECTIVE DATE See Block 16C	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
6. ISSUED BY CMS, OAGM, ASG, DPIFMC 7500 SECURITY BLVD., MS: B3-30-03 BALTIMORE MD 21244-1850	CODE ASG - DPIFMC	7. ADMINISTERED BY (If other than Item 6) Charlene Barnes Contract Specialist (410) 786-8827	CODE AGG/CB1
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code) QLARANT INTEGRITY SOLUTIONS, LLC Attn: Sandy Love 28464 Marlboro Avenue Easton MD 21601-2732		(x)	9A. AMENDMENT OF SOLICITATION NO.
CODE 190146923			9B. DATED (SEE ITEM 11)
FACILITY CODE		x	10A. MODIFICATION OF CONTRACT/ORDER NO. HHSM-500-2016-00080I
			10B. DATED (SEE ITEM 13) 05/17/2016

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers is extended. is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or electronic communication which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by letter or electronic communication, provided each letter or electronic communication makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

NO CHANGE IN OBLIGATION AMOUNT

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
X	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: FAR 43.103(a)(3), EO 14042 & FAR Clause 52.223-99
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor is not is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Tax ID Number: 20-3796994

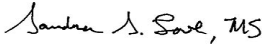
DUNS Number: 190146923

In accordance with Executive Order (E.O.) 14042 signed by the President on September 9, 2021, and published in the Federal Register at 86 FR 50985, the contract is hereby modified to incorporate FAR 52.223-99 - Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors.

All orders under this contract are subject to the FAR Clause 52.223-99. In the event of conflict between an order and this contract, the contract shall control. This applies to all current and future orders.

Period of Performance: 05/10/2016 to 05/09/2022

Except as provided herein, all terms and conditions of the document referenced in Item 9 A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print) Sandra S. Love, President		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print) Michael Connors	
15B. CONTRACTOR/OFFEROR  (Signature of person authorized to sign)	15C. DATE SIGNED 10/20/2021	16B. UNITED STATES OF AMERICA (Signature of Contracting Officer)	16C. DATE SIGNED

Previous edition unusable

Contract Number: HHSM-500-2016-00080I

Modification Number P00014

UPIC – Qlarant Integrity Solutions, LLC

SECTION I – CONTRACT CLAUSES, is hereby modified to incorporate FAR Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Oct 2021) (Deviation) as follows:

I.12 ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) Definition. As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

All other terms and conditions remain unchanged.

END OF MODIFICATION

EXHIBIT B

Dashboard Employees Q Nicholas Robert Guthneck

Audit Trail

Name : Nicholas Robert Guthneck
HRISID : guthneckn
Login ID : guthneckn
Status : Inactive



Job Info

Rehire

Status : Inactive
Organization : UPIC W
Location : MT Home Based C
Job Profile : Investigator
Job Title : Investigator
Business Card Title :
Reports To : Ryan Alexander Dorsey
Secondary Job Code :
Benefit Group :
PTO Policy :
GL Code : 1.04.02.01

Work Schedule : Full Time
Scheduled Hours Per Week : 40.00
Class : Regular
Payroll Group :
Worker Type : Employee
Pay Type : Salary
Pay Frequency : Bi-Weekly
Pay Rate : 68,259.00
Pay Currency : US Dollar
Other Comp Group :