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CASE NUMBER: 23CV03140
PII COMPLIANT

Court:	Johnson County District Court
Case Number:	23CV03140
Case Title:	HODES & NAUSER MDS PA, et al vs. KRIS KOBACH, et al
Type:	ORD: Order (Generic)

SO ORDERED,

/s/ Honorable Krishnan Jayaram, District Court Judge

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

HODES & NAUSER MDS, P.A.
TRACI LYNN NAUSER MD
COMPREHENSIVE HEALTH OF
PLANNED PARENTHOOD GREAT
PLAINS,

Plaintiffs,

Vs

Case No. 23CV03140
Division 12

KRIS KOBACH
STEPHEN M HOWE
MARC BENNETT
SUSAN GILE
RONALD M VARNER
MARK A DUPREE SR
JANET STANEK,

Defendants.

JOURNAL ENTRY ON STATE DEFENDANTS' MOTION TO NARROW OR VACATE INJUNCTION AND TO DISMISS

This matter comes before the Court, in chambers, for review of the Defendants Kris Kobach, Stephen Howe, Marc Bennett, and Mark Dupree's (hereinafter collectively "State Defendants") Motion to Narrow Or Vacate Injunction And To Dismiss [Index No. 499-500, 501-502] ("Motion").[1] Plaintiff Comprehensive Health of Planned Parenthood Great Plains ("CHPP-GP") has submitted its Memorandum in Opposition, along with supporting materials [Index No.

[1] Despite this characterization as a "motion to dismiss," the Court notes that the State Defendants actually appear to seek Judgment on the Pleadings, by reference to KSA 60-212(c)—not dismissal. Further, they appear to also simultaneously ask the Court, in actuality, to consider their request a summary judgment motion, pursuant to KSA 60-212(d) and 60-256.

533]. The State Defendants have further submitted their Reply memorandum [Index No. 558, 559].

The Court has considered the papers submitted, and it concludes that oral argument will not materially aid the Court in addressing the issues before the Court, and thus, it rules herein, in accordance with Kansas Supreme Court Rule 133. Being duly advised, the State Defendants' Motion is hereby **DENIED**.

I. Introduction and Procedural Posture

The State Defendants now seek to vacate the Court's prior temporary injunction and dismiss the case, in its entirety, pursuant to KSA 60-212(c). The State Defendants submit this renewed challenge to plaintiffs' legal standing to assert claims on behalf of their patients, following the prior denial of their previously-filed Motion to Dismiss. See Index No. 133-134 [State Defendants' Original Motion to Dismiss] and 192 [Journal Entry denying State Defendants' Motion]. It also follows the State Defendants' filing of an Answer to the Plaintiffs' Second Amended Petition. [Index No. 220] In their original motion, the State Defendants sought dismissal, in accordance with KSA 60-212 based, in part, upon lack of standing by the physician providers to assert the rights of their patients in this case. See Original Motion to Dismiss, pg. 1. However, the issue of plaintiffs' patients being "required" parties is a new and novel argument that was not raised or argued in that original motion to dismiss. See Index 133-134, which omit any argument or issue regarding "required parties." Nor was the issue raised in their Answer to the SAP. See Index No. 220.

Apparently dissatisfied with the Court's prior rulings, the State Defendants effectively seek reconsideration of the Court's prior Journal Entries entering a Temporary Injunction and denying their prior Motion to Dismiss, as it relates to plaintiffs' legal standing to pursue their

claims. They raise the same standing arguments as before, but as discussed above, now also add a new contention that all of plaintiffs' patients (or at least some inchoate subset thereof) are "required parties". They argue that because plaintiffs' past, present, and future patients are not named parties but are "required parties," the matter must be dismissed in accordance with KSA 60-212(b)(7) and (c) (and the temporary injunction vacated) because joinder of these necessary/required parties is infeasible and because equity and good conscience require dismissal in their absence. See Brief in Support, pg. 20-25. In so moving, the State Defendants further submit myriad materials that are outside of the operative pleadings (Second Amended Petition, "SAP") and suggest that this Court is obligated to treat the matter as one for "summary judgment" in accordance with Rules 60-256 and Supreme Court Rule 141.

However, the Court has already addressed the issue of legal standing at the motion-to-dismiss stage. Instead, the State Defendants' instant Motion for Judgment on the Pleadings/Dismissal/Summary Judgment appears to be a combined Motion to Reconsider the Temporary Injunction and the JE denying dismissal in a way that circumvents proper Summary Judgment procedures in Kansas. As such, it merits no relief, given the record. Further, dismissal based upon the absence of "required parties" was raised, for the first time, in the instant serial "motion to dismiss," almost two years after the initial Petition was filed; approximately nine months after the filing of the Second Amended Petition (SAP); and approximately eight months after the State Defendants' original motion to dismiss. While the Court concludes that plaintiffs' patients ***are not*** "required parties," as contemplated in KSA 60-219(a), that are indispensable, the Court nonetheless notes that equity and good conscience would not require dismissal, even if they were. Accordingly, for the reasons set forth below, the State Defendants' request in their subsequent motion for dismissal is **DENIED**.

II. Authorities and Analysis

A. Standards governing Motions to Dismiss or for Judgment on the Pleadings.

Motions to Dismiss are largely governed in Kansas by KSA 60-212. It provides, in part:

60-212. Defenses and objections; presentations, when and how; certain motions; waiver.

***

(b) *How to present defenses.* Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. ***But a party may assert the following defenses by motion***:
(1) Lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under K.S.A. 60-219, and amendments thereto.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.
(c) Motion for judgment on the pleadings. After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings.
(d) *Result of presenting matters outside the pleadings.* If, on a motion under subsection (b)(6) or (c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under K.S.A. 60-256, and amendments thereto. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.
***
(g) *Joining motions.* (1) *Right to join.* A motion under this section may be joined with any other motions allowed under this section.
(2) *Limitation on further motions.* Except as provided in subsection (h)(2) or (3), a party that makes a motion under this section must not make another motion under this section raising a defense or objection that was available to the party, but omitted from its earlier motion.
(h) *Waiving and preserving certain defenses.* (1) *When some are waived.* A party waives any defense listed in subsections (b)(2) through (5) by:
(A) Omitting it from a motion in the circumstances described in subsection (g)(2); or

(B) failing to either:
(i) Make it by motion under this section; or
(ii) include it in a responsive pleading, or in an amendment allowed by subsection (a)(1) of K.S.A. 60-215, and amendments thereto, as a matter of course.
(2) When to raise others. Failure to state a claim upon which relief can be granted, to join a person required by subsection (b) of K.S.A. 60-219, and amendments thereto, or to state a legal defense to a claim may be raised:
(A) In any pleading allowed or ordered under subsection (a) of K.S.A. 60-207, and amendments thereto;
(B) by a motion under subsection (c); or
(C) at trial.
(3) *Lack of subject-matter jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
(i) *Hearing before trial.* If a party so moves, any defense listed in subsections (b)(1) through (7), whether made in a pleading or by a motion, and a motion under subsection (c), must be heard and decided before trial unless the court orders a deferral until trial.

KSA 60-212 (2025)(emphasis added).

As this is a motion based, in part, upon 60-212(b)(7) and (c), the standards governing Motions to Dismiss are appropriate to review and consider once again. In Kansas, the traditional test for review of motions to dismiss is oft-stated and familiar:

> "When a defendant uses [K.S.A. 60-212(b)(6)] to challenge the legal sufficiency of a claim, the court must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition. Courts must resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. ***Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim***. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001) (citing *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 [(1996)], and *Bruggeman v. Schimke*, 239 Kan. 245, 247-48, 718 P.2d 635 [(1986)]). Likewise, appellate courts reviewing a district court's decision to grant a motion to dismiss will assume as true the well-pled facts and any inferences reasonably drawn from them. ***If those facts and inferences state any claim upon which relief can be granted, dismissal is improper***. *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013)."
Tolbert, 260 Kan. 491, 493, 921 P.2d 1210 [(1996)], and *Bruggeman v. Schimke*, 239 Kan. 245, 247-48, 718 P.2d 635 [(1986)]). Likewise, appellate courts reviewing a district court's decision to grant a motion to dismiss will assume as true the well-pled facts and any inferences reasonably drawn from them. ***If those facts and inferences state any claim upon which relief can be granted, dismissal is improper***. *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013)."

Kucharski-Berger v. Hill's Pet Nutrition, Inc., 60 Kan.App.2d 510, 514-15 (2021) (citing also *Steckline Communications, Inc. v. Journal Broadcast Group of KS, Inc.*, 305 Kan. 761, 767-68, 388 P.3d 84 (2017)(emphasis added)). But while a trial court must accept a plaintiff's description of what has occurred factually, it need not accept the plaintiff's conclusions about the legal meaning of those facts. See *312 Educ. Ass'n v U.S.D. No.* 312, 273 Kan. 875, 881, 47 P.3d 383, 388 (2002); *Weil & Associates v. Urban Renewal Agency*, 206 Kan. 405, 413-14, 479 P.2d 875 (1971).

In other words, if the well-pleaded facts alleged in plaintiffs' petition, and the reasonable inferences arising from them, state a claim based on their theory "***or any other possible theory***," a motion to dismiss must be denied. See *Cohen*, 296 Kan. 542, Syl. ¶ 2, 293 P.3d 752, 545-46 (emphasis added). It is also important to remember that "[b]ecause Kansas is a notice-pleading state, the petition is not intended to govern the entire course of the case." *Berry v. National Medical Services, Inc.*, 292 Kan. 917, 918, 257 P.3d 287 (2011). "[T]he pretrial order is the ultimate determinant as to the legal issues and theories on which the case will be decided." *Unruh v. Purina Mills*, 289 Kan. 1185, 1191, 221 P.3d 1130 (2009). Because a party typically moves to dismiss early in a case when many facts have not yet been discovered and legal theories may be in flux, "[j]udicial skepticism" must be exercised." *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008); *Kucharski-Berger*, supra at 514-15.

The Kansas courts have recognized that 60-212(c) motions are limited to the factual allegations within the four-corners of the pleadings, holding that parties may not rely upon affidavits in a 60-212(c) motion, without conversion to a summary judgment motion. See *Karhoff v. National Mills, Inc.*, 18 Kan. App. 2d 302, 851 P.2d 1021 (1993); see also 4 Kan. Law & Prac., Code Of Civ. Proc. Anno. § 60-212 (5th ed.). Indeed, motions for judgment on the

pleadings, like motions to dismiss, are "limited to a review of the pleadings" themselves. *Doe H.B. v. M.J.*, 59 Kan. App. 2d 273, 282–83, 482 P.3d 596, 604 (2021), aff'd sub nom. *H.B. v. M.J.*, 315 Kan. 310, 508 P.3d 368 (2022)(citing *Keiswetter v. State*, 304 Kan. 362, 368, 373 P.3d 803 (2016)). Federal practice is in accord on this point. See *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357 (7th Cir. 1987); *Dragor Shipping Corp. v. Union Tank Car Co.*, 361 F.2d 43 (9th Cir. 1966).[2]

However, where the moving party inserts and includes materials beyond the "four corners" of the pleadings, and not excluded by the Court, then the Court must treat the matter as one for summary judgment, which is governed by KSA 60-256 and Rule 141. See KSA 60-212(d)(2025); see also *Doe H.B.,* supra at 282-83.

B. The State Defendants' Motion, which re-raises the Plaintiffs' legal standing to assert claims--not only on their own behalves but also on behalf of their patients, is without merit and does not comply with Supreme Court Rule 141.

The State Defendants' arguments regarding plaintiffs' legal standing to assert claims on behalf of their patients are, in reality, repackaged arguments that seek reconsideration of the Court's prior rulings on legal standing, given the pleadings. However, there is no such thing as a "motion to reconsider" under Kansas rules, and such motions are normally deemed motions to alter or amend the judgment (if it seeks to address a Judgment that is final for purposes of appeal), in accordance with KSA 60-259. See *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128 (Kan. 1992). Or they can constitute Motions for Relief from a Judgment or Order, in accordance with KSA 60-260, provided that the movant demonstrates the existence of certain grounds. See KSA 60-260(a), (b)(2025). In this case, the Court's Journal Entry granting a

[2] Because of the similarity between the Rule 12(c) and Rule 12(b) standards, courts typically will construe a premature Rule 12(c) motions as if it were brought under Rule 12(b), and a late Rule 12(b) motion, or a Rule 12(b) motion that implicates affirmative defenses, as if it were brought under Rule 12(c). See 5C Fed. Prac. & Proc. Civ. § 1368 (3d ed.)(2024).

Temporary Injunction and its Journal Entry denying the Original Motion to Dismiss are not final judgments—rather they are interlocutory orders. Thus, the Court will consider the issues in light of the standards under KSA 60-260.

While the Court has not located (or been provided) any specific state appellate decisions addressing what are effectively motions to "reconsider" interlocutory decisions (or post-trial Orders/Judgments), federal cases are instructive and persuasive to the Court on this point. *Matter of Marriage of Larson*, 257 Kan. 456, 462–63, 894 P.2d 809, 813 (1995)(noting that in the context of motions brought pursuant to KSA 60-260, which mirrors FRCP 60, "[w]e have repeatedly noted that federal cases interpreting rules identical to those existing in the Kansas Code of Civil Procedure are entitled to "persuasive weight."). A motion to alter or amend a court's findings is "not intended to allow the parties to relitigate old issues, to advance new theories, or to rehear the merits of a case." *Renfro v. City of Emporia*, Kan., 732 F. Supp. 1116, 1117 (D. Kan. 1990). "A court's rulings 'are not intended as first drafts, subject to revision or reconsideration at a litigant's pleasure." *United States v. Carr*, 2007 WL 1989427, at *1 (D. Kan. June 20, 2007) (quoting *Quaker Alloy Casting v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988)). Because of the strong public policy interest in finalizing litigation and conserving judicial resources, granting a motion to reconsider, alter or amend is an extraordinary remedy which is used sparingly. *Torre v. Federated Mut. Ins. Co.*, 906 F. Supp. 616, 619 (D. Kan. 1995). "A motion to reconsider is appropriate if the court has obviously misapprehended a party's position, the facts, or applicable law, or if the party produces new evidence that could not have been obtained through the exercise of due diligence." *U.S. v. Carr*, 2010 WL 1424362, *2 (D. Kan. April 5, 2010) (citing *Comeau v. Rupp*, 810 F. Supp. 1172, 1175 (D. Kan. 1992)).

In the instant case, the State Defendants' re-packaged standing arguments simply do not merit relief or reconsideration, given the record on a 60-212(c) motion. The issues, in light of the proper record and legal framework for such motions, are no different than they were before, and thus, the State Defendants simply are not entitled to the relief requested, based upon their position that the plaintiffs lack standing. The plaintiffs have demonstrated, based upon the pleadings, that they have standing to assert claims on behalf of their patients.

To the extent that the State Defendants seek to inject extrinsic materials from outside the pleadings and "convert" their request to one of "summary judgment," in accordance with KSA 60-256 and Rule 141, the Court declines the invitation to consider the merits of their arguments on these issues, as raised in their motion. First, the State Defendants have already (contemporaneous with the filing of this motion) filed a separate "omnibus" motion for summary judgment. Consequently, this uniquely re-packaged "motion to dismiss"/motion for judgment on the pleadings appears to the Court to be an effort to simply avoid compliance with Kansas rules regarding summary judgment procedure and to inject another motion for summary judgment under another name, when it simply does not comply with Kansas rules.

Supreme Court Rule 141 "govern the form and manner of presenting these outside matters [beyond pleadings]." *Sperry v. McKune*, 305 Kan. 469, Syl. ¶ 4, 384 P.3d 1003 (2016). Rule 141, which governs these procedural requirements for a motion for summary judgment, "is not just fluff—it means what it says and serves a necessary purpose." *Id.* at 490-92. Kansas courts have held that the failure to comply with Rule 141 is sufficient grounds for denying a motion for summary judgment. See *Sheldon v. Khanal*, 329 P.3d 557 *4-5 (Kan. App. 2014)(unreported); *Sperry v. McKune*, 305 Kan. 469, 491-92 (2016)(holding "[B]oth the district court and Court of Appeals committed reversible error in not enforcing the requirements of

Supreme Court Rule 141" after materials outside the pleadings were asserted in a motion to dismiss); *Frick v. City of Salina*, 290 Kan. 869, 879, 235 P .3d 1211 (2010) ("[A] failure to comply with Rule 141 may be fatal if nothing is cited to support a party's evidentiary allegations before the district court renders judgment."); see also *Roy v. Young*, 278 Kan. 244, 253, 93 P.3d 712 (2004) (the trial court "clearly could have denied the motion [for summary judgment] for [the movant's] failure to comply with Rule 141[a]").

In this case, the State Defendants' Motion to Dismiss falls woefully short of the requirements set forth in Rule 141. Its motion fails to:

> a. "state[] concisely, in separately numbered paragraphs, the uncontroverted contentions of fact on which the movant relies; and
> b. for each fact, contains precise references to pages, lines and/or paragraphs–or to a time frame if an electronic recording–of the portion of the record on which the movant relies;"

Kansas Supreme Court Rule 141(a) (2025). The State Defendants' Motion and Brief in Support are devoid of any statement of "uncontroverted facts" in separately numbered paragraphs; nor does it contain precise references to admissible evidence to support such a statement. See Motion and Brief, Index Nos. 499-500. This failure is not mere technicality, as it prevents the Court (and opposing parties) from fairly and reasonably evaluating the purported record through which the State Defendants purport to have an entitlement to a judgment as a matter of law.[3] Accordingly, the Court denies the State Defendants' Motion, based upon standing, and declines to consider this a Motion for Summary Judgment, given the complete lack of compliance with summary judgment rules.

[3] The Court is also skeptical that a "motion for summary judgment" is even an appropriate procedural vehicle for adjudicating issues such as "required" parties described by KSA 60-219. Indeed, the case law and legal commentators appear to largely agree that where a Court ultimately dismisses a case, for want of a "required" party, the dismissal is "without prejudice" and is not a decision on the merits. See 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 19 (2024); see also KSA 60-241(b)(2025). ***Summary Judgment*** seems inconsistent with such an outcome that is other than on the merits. Regardless, this Court need not resolve that point, given the State Defendants' failure to comply with Rule 141.

C. Standards governing Motions to Join "Required" parties, pursuant to KSA 60-219.

KSA 60-219 provides, in part:

> **60-219. Required joinder of parties; feasibility.** (a) *Persons required to be joined if feasible.* (1) *Required party***. A person who is subject to service of process must be joined as a party if:**
> **(A) In that person's absence, the court cannot accord complete relief among existing parties; or**
> **(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:**
> **(i) As a practical matter, impair or impede the person's ability to protect the interest; or**
> **(ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.**
> ***
> (b) *When joinder is not feasible.* **<u>If a person who is required to be joined if feasible cannot be joined</u>, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:**
> **(1) The extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;**
> **(2) the extent to which any prejudice could be lessened or avoided by:**
> **(A) Protective provisions in the judgment;**
> **(B) shaping the relief; or**
> **(C) other measures;**
> **(3) whether a judgment rendered in the person's absence would be adequate; and**
> **(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. . . "**

KSA 60-219 (2025)(emphasis added).

Since the 2007 stylistic changes to the Federal Rule (Rule 19), which were codified in Kansas in 2010, the state appellate decisions that the Court has located provide little guidance and fail to specifically address or detail the analysis for "required parties" under the Rule, but given the similarities between the state and federal rules, the Court considers the far more abundant federal case law persuasive and helpful.

The standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied "in a practical and pragmatic but equitable manner." *Francis Oil & Gas, Inc. v.*

Exxon Corp., 661 F.2d 873, 878 (10th Cir.1981). See also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106–07, 88 S.Ct. 733, 736–37, 19 L.Ed.2d 936 (1968). The burden is on the party moving under Rule 12(b)(7) to show the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* 17 F.3d 1292, 1293 (10th Cir., 1994), appeal after remand C.A.10th, 1998, 142 F.3d 1325; *WhatsApp Inc. v. NSO Group Technologies Limited*, 472 F. Supp. 3d 649, 663 (N.D. Cal. 2020) (”When considering a motion to dismiss under Rule 12(b)(7), the court accepts as true the allegations in the plaintiff’s complaint and draws all reasonable inferences in the plaintiff’s favor. But the court may consider evidence outside of the pleadings. ‘The moving party has the burden of persuasion in arguing for dismissal’ for failure to join.”) (citation omitted).

As set out in the text of the rule, the analysis is threefold. First, the Court determines if the absent party is a “required party” under Rule 19(a) (and correspondingly, KSA 60-219). Fed.R.Civ.P. 19(b); KSA 60-219(b). Second, the Court ascertains whether joinder of the required party “is feasible.” Fed.R.Civ.P. 19(b); KSA 60-219(b). Third, if joinder is not feasible, the Court undertakes an equitable balancing of certain factors to “determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.” Fed.R.Civ.P. 19(b); KSA 60-219(b). Succinctly stated, Rule 19:

> provides for the joinder of such “necessary” parties when feasible. It then provides for the dismissal of suits when the court determines that the joinder of the “necessary” [“required”] parties is not feasible, but that they are, nonetheless, so “indispensable” that the suit must not be litigated without them.

Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir.2008) (quoting former Rule 19 prior to 2007 amendment).

In reviewing a Rule 12(b)(7) motion,[4] a Court must accept all factual allegations in the complaint as true and draw inferences in favor of the non-moving party. 5C Fed. Prac. & Proc. Civ. (Wright & Miller) § 1359 at 2 (3d ed.)(2024). However, the trial court is not necessarily limited to a review of the pleadings. *Eaton v. XPO Logistics Worldwide, Inc*., 2020 WL 2847863, *2 (M.D. Pa. 2020) ("The court may consider 'evidence outside of the pleadings' when ruling on a Rule 12(b)(7) motion. This does not, however, open the door for parties to submit any documents they would like. Instead, the court may only consider documents that are 'integral to or explicitly relied upon in the complaint' or any 'undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.'")(citations omitted), citing Wright & Miller, supra.

Further, while "indispensable party" motions, pursuant to KSA 60-219/Rule 19, should be made "early in the proceedings," the express language of Rule 12 and KSA 60-212 do not contemplate an express waiver of the issue by the moving party with undue delay. *Dore Energy Corp. v. Prospective Inv. & Trading Co., Ltd.*, 2008 WL 152119 *1 (W.D. La 2008)(citing *Ilan-Gat Engineers v. Antigua Int. Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981)). Nonetheless, when delayed and not included in either a pre-Answer motion or an Answer, the Court should consider the delay and timing of the motion, as part of its analysis of whether "equity and good conscience" requires dismissal. *Id.*

Courts are reluctant to grant motions of this type. 5C Fed. Prac. & Proc. Civ. § 1359 at 2 (3d ed.)(2024). Thus, a Rule 12(b)(7) motion will not be granted because of a vague possibility that persons who are not parties may have an interest in the action. *Id.* In general, dismissal is warranted only when the defect is serious and cannot be cured. *Id.*

[4] Or a corresponding 12(c) motion.

D. Plaintiffs' patients are not "required" parties for whom joinder is infeasible?

Simply stated, the plaintiffs' patients are not, as contemplated by KSA 60-219, "required" parties whose joinder is infeasible and whose absence demands dismissal, in light of equity and good conscience.

1. Plaintiffs' patients are not "required" parties, as contemplated by KSA 60-219.

The statute's plain language dictates who is a "required" party under the Rule. Specifically, a "required" party is someone that:

> (A) In that person's absence*, the court cannot accord complete relief among existing parties*; **or**
> (B) *that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:*
> *(i) As a practical matter, impair or impede the person's ability to protect the interest*; **or**
> (ii) *leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest*.

KSA 60-219 (2025)(emphasis added).

The State Defendants argue that the plaintiffs' patients (an "inchoate" group of plaintiffs' patients seeking abortion—past, present, and future) are "required" because the patients' rights/interests would be impaired or impeded, if the Court were to allow the matter to proceed without their presence as parties to the case (presumably as plaintiffs) and because the State Defendants might be subjected to inconsistent obligations, if the matter proceeds through Judgment and appeal. They argue that hypothetical patient plaintiffs might commence a future case against them to enforce the subject laws. Brief in Support, pg. 20-25. In doing so, they appear to seek relief that would either effectively "out" plaintiffs' patients and specifically identify and include them as part of the proceedings or, alternatively, preclude any action by the existing plaintiffs to challenge the laws at issue. However, the State Defendants' arguments are

unconvincing to the Court, and they fail to meet their burden to demonstrate that the plaintiffs' patients, past present, and future, are "required" as parties.

a. Plaintiffs' patients are not "required" because the Court can award complete relief between the existing parties on the claims at issue.

Notably, the State Defendants do **not** argue in their motion that the Court cannot afford complete relief amongst the existing parties. Indeed, reasonable people would be hard pressed to argue or conclude otherwise.

This first criteria contained within KSA 60-219 looks only to the existing parties; the effect on any relief from or to the absent person is immaterial. 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 19 (2024). In most cases, the courts appear to focus on whether they can order "meaningful" relief, generally defined as relief that would achieve the objective of the lawsuit. *Id.*

In the case at bar, the Court finds that the Court can enter complete relief between the existing parties on the claims asserted—even in the absence of any patients. This is an action for Declaratory Relief, Injunction, and the assertion of various constitutional challenges to the WRTKA, the promulgated H.B. 2264 ("Reversal" Amendment) and H.B. 2749 ("Most Important Reason" provisions)), collectively the "subject laws". In their action, the plaintiff health-care providers seek to enjoin the State of Kansas (through its various agents and agencies) from enforcing and/or mandating the provisions of the subject laws. The subject laws will either be upheld or invalidated (in whole or in part) by this Court, based upon the record that the parties submit at trial or by dispositive motion. The Court's ultimate ruling is likely to amount to complete relief, as requested by both sides. In short, the plaintiffs' patients are not "required" based upon this criterion.

b. Plaintiffs' patients are not "required" because any academic interest that an abortion patient may have is unlikely to be impaired or impeded by this case, given the existing parties.

Similarly, the Court finds that the State Defendants have failed to demonstrate and meet their burden that the plaintiffs' patients possess some interest that will likely be impaired or impeded by this case and its outcome, given the existing parties. Indeed, the Court is skeptical of how the State Defendants have cast these "interests" of the plaintiffs' patients and questions whether their position truly reflects a granted "right" that would be impaired, as contemplated by the Rule. Regardless, the State Defendants ultimately fail to convince the Court that any such interest is not adequately addressed and represented, with any academic risks mitigated, through the existing parties' own positions and motivations.

The State Defendants argue that plaintiffs' patients have been afforded statutory rights under the subject laws, and without their participation and presence, those "rights' are impaired, without any recourse to the patients, including an alleged prohibition on medical negligence cases for "informed consent," if the provider plaintiffs are successful. See Brief, pg. 21-23. They point specifically to statutory rights, such as "the right to an ultrasound, to hear their child's heartbeat, to not be pushed into an abortion in less than 24 hours, to have at least 30 minutes after consultation to decide, and to receive certain medical information." Brief, pg. 22. Without all of plaintiffs' patients (or the inchoate group to which they refer), those individuals' rights to due process are violated, according to the State Defendants, and these patients' "rights" under the subject laws, are "foreclosed" without their involvement. *Id.* The Court does not agree with the State Defendants' proposition or conclusion, given the record.

First, the Court notes that some of these "rights," such as the right "not to be pushed into an abortion," (State Defendants' Brief, pg. 22) in that respect, likely already independently exist

and are addressed by existing "informed consent" requirements under Kansas law.[5] The State Defendants have failed, at this juncture, to convince the Court that patients even need a specific statute to prescribe when they may proceed with health care that they have chosen, as the State Defendants fail to persuasively demonstrate that existing informed consent law does not adequately address such concerns. Indeed, truly voluntary health-care decisions cut to the very nature and essence of informed consent and personal bodily autonomy, and existing common law principles relating to informed consent protect and ensure this, independently. Consequently, the Court is skeptical that the State Defendants' proposition with respect to inchoate patients' "rights" even rises to an "interest," as contemplated by 60-219, that would be impaired, absent the patients' presence as parties of record.

Further, the outcome of this litigation does nothing to impact or impair any woman's right to commence litigation against a provider, if she believes she has not received proper informed consent. Indeed, regardless of the existence or validity of specific provisions of the subject laws, if the hypothetical patient(s) posited by the State Defendants were able to adequately demonstrate and proffer admissible evidence to support a claim for lack of informed consent (relating to some or all of the subject laws' provisions) and to convince a finder of fact regarding the same, the outcome of this case is of no import. Nothing in any Judgment entered herein would preclude such a separate action by any patients against any provider or hinder the vindication of such "rights," if proven. In short, the State Defendants simply fail to adequately

[5] The Court is dubious of the State Defendants' efforts to characterize mandatory waiting periods and other requirements within the subject laws as, in fact, *grants* of rights—as commonly understood. As plaintiffs aptly point out, a waiting period before one would be allowed to vote would likely not equate to a "right" to be free from casting a ballot too soon. See Opposition, pg. 11. Would the State Defendants similarly argue that a 30-day mandatory waiting period before purchasing a firearm was a "right" to be firearm free until "ready" to purchase? This Court is not convinced of either the legitimacy or the persuasiveness of the State Defendants' assertions in that respect, and it concludes that such logic would potentially turn the very concept of a "right," including a fundamental and natural Constitutional right to bodily autonomy, on its head.

satisfy their burden to demonstrate that the plaintiffs' patients have an interest that would be impaired or impeded vis-à-vis informed consent.

Additionally, the Court further concludes that any such academic and hypothetical "interest" maintained by any of plaintiffs' past, present, or future patients is adequately protected by the existing parties to this matter. As mentioned above, the party asserting a Rule 19/KSA 60-219 motion bears the burden of proof to establish that the parties are "required"/indispensable, and that includes the burden to demonstrate that the absent parties are unable to protect their own interests. See Section II.C., supra; see also *Ferrofluidics Corp. v. Advanced Vacuum Components*, 789 F.Supp. 1201, 1208 (D.N.H.1992); see also *Am. Gen. Life & Acc. Ins. Co. v. Woo*d, 429 F.3d 83, 92 (4th Cir.2005) ("The burden of proof rests on the party raising the defense ... to 'show that the person who was not joined is needed for a just adjudication.' ") (quoting 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure § 1609* (3d ed.2001)). Any perceived or potential prejudice to a relevant absent party's interest "may be minimized if the absent party is adequately represented in the suit." *Hedge Lane Shawnee, LLC v. CTW Transportation Services, Inc.*, 2024 WL 4751392 *9 (D. Kan. 2024)(citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr*., 94 F.3d 1407, 1411 (10th Cir. 1996)). "If, as a practical matter, the interests of the absent part[y] will be adequately represented, their interests will not be impaired ...." *Hedge Lane Shawnee, LLC v. CTW Transportation Services, Inc.*, supra; *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr*., supra.

In this case, the State Defendants vehemently contend that patients seeking abortions in Kansas are being deprived of their due process rights through this litigation because the unspecified group of patients is not currently in a legal position ***to advocate in support of the provisions of the subject laws***, and patients' ability to avail themselves of those provisions will

be impaired, if they are not joined as parties (or if this case is not dismissed entirely). However, to the extent that some hypothetical patient contemplating an abortion had such a belief and/or interest, the State Defendants wholly fail to explain how their own advocacy for those very points is somehow inadequate to protect the interest they identify. This Court has no doubt that the State Defendants will vigorously and actively seek to uphold the validity of the subject laws, and as a result, the State Defendants simply fail to establish that there is an "impairment" to a non-party's interests, such that they constitute a "required" party under KSA 60-219.

c. Plaintiffs' patients are not "required" because the State Defendants have not demonstrated that they are likely to be subjected to inconsistent obligations because of the plaintiffs' patients' purported interests.

Lastly, the State Defendants suggest that the "inchoate group" of plaintiffs' patients are "required" because if the matter at bar proceeds through trial and appeal, in the absence of this amorphous group, the State Defendants could be subjected to conflicting litigation efforts that may result in inconsistent obligations. See Brief, pg. 22-24. Again, the State Defendants' arguments are unpersuasive.

While KSA 60-219 (and its federal counterpart) generally find parties are "required," if the interests held present a substantial risk of inconsistent obligations to an existing party, but this risk must be more than conjectural. 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 19 (2024). A remote risk based on an unlikely hypothetical is insufficient. *Id.;* see also *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259, 49 Fed. R. Serv. 3d 697 (10th Cir. 2001) (rejecting assertion that party faced multiple or inconsistent obligations because "nothing in the record indicates the possibility of additional lawsuits involving the same subject matter").

In the instant case, the State Defendants offer nothing more than vague and passing arguments regarding this perceived risk of other litigation, which is insufficient to carry their burden. Indeed, they cite to no other cases that have been filed by any patient, past or present, that seeks to ensure the viability of the subject laws, despite this litigation having been pending for almost two years. Nor is the Court convinced that if a patient contemplating an abortion commenced such a case at some point in the future, the Kansas judicial system could not ensure that the issues, in all matters, were fully and fairly litigated in a procedural manner that avoids the possibility of an "inconsistent obligation" imposed on the State Defendants. This type of remote and speculative risk raised by the State Defendants simply is insufficient to justify the relief sought.

d. Additionally and alternatively, even if there were some patients that the State Defendants had demonstrated were "required" parties, the Court does not believe that the considerations of equity and good conscience weigh in favor of dismissal.

Even if the State Defendants had met their burden to demonstrate that plaintiffs' patients were "required" parties (they have not), this Court would nonetheless conclude that dismissal is not appropriate, given considerations of equity and good conscience. Both the timing and the practical implications of their request weigh against dismissal under KSA 60-219.

Both the federal advisory committee on the civil rules, as well as federal case law reflect that timeliness of required/necessary party motions should be considered when ruling. See Fed.R.Civ.P. 19, Committee Notes; see also *Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 895 (9th Cir. 1996)("The Committee Notes to Rule 19, the Federal Rule on which a 12(b)(7) motion rests, indicate that the district court has discretion to consider the timeliness of such a motion if it appears that the defendant is interposing that motion for its own defensive purposes, rather than to protect the absent party's interests."); *Provident*

Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 at 110 n.4 (citing the Committee Note, which states "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person ... and is not seeking vicariously to protect the absent person against a prejudicial judgment ... his undue delay in making the motion can be properly counted against him as a reason for denying the motion."); *Molinos Valle del Cibao, C. por A. v. Lama*, 2009 WL 10669271 *3 (S.D. FL. 2009).

In the instant case, the State Defendants failed to even raise the issue of the "necessity" of joining plaintiffs' patients until the dispositive motion deadline, almost 2 years after the action was originally commenced. They did not raise it through its Original Motion to Dismiss; nor did they assert that point as an affirmative defense in their Answer to the SAP. See Index No. 220. The Court is concerned, given the timing of the State Defendants' request and the glaring admission that they do not seek ***actual joinder*** of what they characterize as "required" parties (which they admit is impossible as to the unknowable group of patients—apparently both of plaintiffs and of "any other abortion provider in Kansas", Brief, pg.23). Rather, they seek outright dismissal of ALL claims, including those directly asserted by the providers in their own right. This appears more likely related to the State Defendants' desires to protect the State's own interests in preserving the subject laws than it does in vindicating any particular patient's rights or in affording that patient the right to join the litigation. Additionally, if the Court were to accept the State Defendants' position, no abortion provider could ever proceed with a challenge to legislative enactments seeking to regulate or limit the procedure, without first ensuring that every potentially-implicated patient was also joined as a named party. When considering the

combination of these two inescapable conclusions, equity and good conscience, in the Court's view, demand that the Court conclude otherwise and DENY their motion.

IT IS SO ORDERED.

Dated: This 30th day of April, 2025.

K. Christopher Jayaram

Honorable K. Christopher Jayaram
Judge of the District Court
Division 12

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing order of the Court have been delivered via electronic transmission through the Centralized Case Management System (CCMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file certificate of service for any additional service made.

Further, a copy of the foregoing was also served upon:

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