UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

THE NATIONAL FEDERATION OF THE BLIND, INC., Plaintiff, v. EPIC SYSTEMS CORPORATION, Defendant.	CIVIL ACTION NO. 1:18-cv-12630-RWZ

DEFENDANT EPIC SYSTEMS CORPORATION'S MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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This lawsuit brought by the National Federation of the Blind ("NFB") against Defendant Epic Systems Corporation ("Epic") is an attempt to turn Mass. G.L. c. 151B — an employment discrimination law designed to prohibit discrimination by employers against employees — into a mandate that software manufacturers that are not a part of any relevant employment relationship must make all of the products they provide to Massachusetts businesses accessible to the blind. As set forth below, the Court should dismiss this lawsuit under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) because the NFB lacks standing to bring it, and because the NFB's novel theory has no merit. In fact, the NFB's misuse of this statute contradicts a number of judicial decisions interpreting Mass. G.L. c. 151B.

With respect to its standing to sue, an organizational plaintiff such as the NFB can establish standing in one of two ways: (1) as a representative of at least one of its members (*i.e.* associational standing), or (2) on its own behalf as a party that has been injured by Epic's conduct. The NFB cannot establish standing under either theory. First, the NFB does not have associational standing because the Complaint fails to identify a single member who has suffered a concrete and particularized injury as a result of Epic's allegedly inaccessible software. Additionally, the NFB does not have standing to sue based on its own injury because the law is clear that an advocacy organization's voluntary expenditure of resources on litigation is not an injury that establishes standing to sue.

Moreover, even if the NFB could demonstrate standing, the Complaint fails to state a claim for which relief can be granted for at least two reasons. First, the Massachusetts Supreme Judicial Court has held that only persons alleging injuries arising from their own employment are "persons aggrieved" with standing to bring a civil action under Chapter 151B. Wherever the outer boundaries of aggrieved person status may lie under the statute, the relationship between

the parties in this case does not come close. The NFB is not an employee; it is an advocacy organization. Nor does the NFB allege that Epic employed any member of the NFB. Rather, the Complaint seeks to hold Epic liable for violating the rights of unidentified persons in employment for the sole reason that Epic manufactures software used by employers in Massachusetts. Epic is not aware of a single case in which any court in any jurisdiction in the United States has held a third party vendor or supplier liable for employment discrimination by virtue of its sale, in the ordinary course of business, of a product that is used by employers. Permitting such a claim to proceed would stretch statutory standing under Massachusetts's employment discrimination laws beyond recognition.[1]

Second, the only claim the NFB asserts is one for interference with rights in employment under G.L. c. 151B, § 4(4A). An interference claim may not be brought as a stand-alone cause of action, but must be based on an underlying claim of employment discrimination. Because the NFB does not even assert a claim for, much less plausibly allege, any underlying act of employment discrimination, the NFB's claim for interference fails as a matter of law.

For the foregoing reasons, and those set forth in more detail below, Epic respectfully requests that this Court enter an order dismissing the Complaint in its entirety.

[1] Under the NFB's interpretation of Mass. G.L. c. 151B, car manufacturers could be liable under the statute for interference in an employment relationship for selling cars to employers that cannot be driven by employees who use wheelchairs. Likewise, manufacturers of tools or equipment would be liable for such interference for selling tools or equipment that cannot be used by people who are blind or have limited mobility. While mandating the creation of accessible software, cars, or tools and equipment may be a legitimate societal objective, it may be accomplished through the legislative process, not through the distortion of a law that was written to prohibit discrimination within the employer-employee relationship.

FACTUAL BACKGROUND[2]

On or about December 4, 2018, the NFB filed this lawsuit in the Massachusetts Superior Court for Suffolk County. *See* ECF No. 1 (Def. Not. of Removal), p. 1, ¶ 1. Epic was served with the summons and complaint on or about December 11, 2018, and filed a notice of removal of the action pursuant to this Court's diversity jurisdiction. *Id.*, p. 1, ¶ 2.

According to the Complaint, the NFB is a "non-profit corporation duly organized under the laws of the District of Columbia" and maintains a principal place of business in Baltimore, Maryland. *See* ECF No. 5-2 (Complaint), p. 1, ¶ 2. The Complaint describes the NFB as "the oldest and largest national organization of blind persons[.]" *Id.* The NFB asserts that it is "a collective and representative voice on behalf of blind Americans[,]" with an organizational purpose of "promot[ing] the general welfare of the blind … ." *Id.*, p. 4, ¶ 8. The Complaint alleges that the NFB is "actively involved in promoting accessible technology in and out of the workplace so that blind persons can live and work independently in today's technology-dependent world." *Id.* Moreover, the NFB alleges that "[a]s part of its mission and to achieve these goals, [it] actively pursues litigation and engagement in public policy discussions to ensure that the blind receive equal access to employment opportunities, including those that require the use of technology." *Id.*

The Complaint asserts that Epic, a corporation organized under Wisconsin law, is "one of the largest providers of health care software in the United States" *Id.*, p. 2, ¶ 3; p. 3, ¶ 6. The NFB avers that "[b]lind persons access computer software using screen reading technology[,]"

[2] Insofar as Epic refers to factual allegations contained in the NFB's Complaint, those allegations are assumed to be true only for the purposes of this motion. In so doing, Epic does not purport to express its agreement with the veracity of the Complaint's allegations, and Epic expressly reserves the right to further respond to those allegations in the event this Court declines to dismiss the action at the pleading stage.

and that such technology "involves the use of software that converts visual screen components to spoken information or braille [sic] and allows screen navigation using keyboard commands." *Id.*, p. 3, ¶ 4. The NFB alleges that Epic has "taken steps to make patient-facing portions of its electronic health record software accessible with screen reading software so that blind patients are able to access their health information[,]" but that Epic has "not made the clinical or administration-facing portions of its software accessible to blind healthcare workers." *Id.*, p. 3, ¶ 6. The Complaint further alleges that Epic, "despite knowing that its software is inaccessible to blind healthcare workers," "sells and licenses its software to healthcare providers in the Commonwealth." *Id.*, p. 3, ¶ 7. The NFB claims that Epic's software is "used by numerous hospitals and other healthcare providers in Massachusetts." *Id.*

The Complaint then asserts that, because certain hospitals and healthcare providers in the Commonwealth utilize Epic's software, blind persons "are effectively barred from employment at hospitals and facilities that use Epic's software." *Id.* The Complaint contains no specific factual allegations providing support for the assertion that blind persons are "effectively barred" from all employment at any hospital or facility that happens to use Epic's software.[3] It does not identify a single individual who has been barred from employment at any hospital or facility that uses Epic's software. *See id.*

The Complaint contains two paragraphs related to the NFB's standing to bring this suit. First, the NFB alleges:

[3] Likewise, in Paragraph 17 of the Complaint, the NFB repeats this conclusory assertion, stating that Epic's sale and licensing of its software to Massachusetts employers introduces "an artificial job requirement of sight[.]" ECF No. 5-2, p. 6, ¶ 17. Paragraph 17 similarly contains no other factual allegations supporting the conclusion that any healthcare employer in Massachusetts has ever made the non-existence of a vision impairment an "artificial job requirement."

> Many NFB members work and seek to work in the healthcare industry, and the NFB has at least one member residing in Massachusetts who would have standing to sue because he has (a) been discriminated against on the basis of his disability by facilities that have adopted Epic's inaccessible software, or (b) been dissuaded from applying for work in healthcare facilities that use Epic software because it is inaccessible.

Id., p. 5, ¶ 10. Second, the NFB alleges:

> [The NFB] also has standing to sue because [Epic's] conduct has forced [the NFB] to divert resources to litigating with Epic over its failure to make its products accessible to the blind when those resources could otherwise be devoted to other portions of [the NFB's] mission.

Id., p. 5, ¶ 11.

In the Complaint, the NFB seeks a permanent injunction "prohibiting [Epic] from continuing to sell, install, or contract to sell or install computer software to employers in the Commonwealth that is not independently accessible to blind persons." *Id.*, p. 6, Prayer for Relief Para. (b). It also seeks a permanent injunction "requiring [Epic] to immediately remediate any software used in the Commonwealth that is not independently accessible to blind persons[.]" *Id.*, p. 7, Prayer for Relief Para. (c). Finally, the NFB requests an award of its reasonable attorneys' fees and costs pursuant to G.L. c. 151B, § 9.

ARGUMENT

I. Legal Standards

Although the instant motion seeks dismissal for lack of standing under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Rule 12(b)(6), the standard governing the Court's evaluation of each of these motions is the same. With respect to standing, "at the pleading stage, the NFB bears the burden of establishing sufficient factual matter to plausibly demonstrate [its] standing to bring the action." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016). To plead sufficient allegations demonstrating standing, "[n]either conclusory assertions nor unfounded speculation can supply the necessary [factual] heft." *Id.* (citations omitted).

Moreover, the NFB bears the burden of demonstrating its standing even though the Complaint was originally filed in state court and was removed by Epic. *See Culhane v. Aurora Loan Servs. of Nebraska*, 708 F.3d 282, 289 (1st Cir. 2013). "Once removal has been effected, the burden of going forward with the claim in federal court (including the burden of establishing standing) still rests with the plaintiff." *Id.* The court is confined to the factual allegations contained within the four corners of the Complaint related to the NFB's standing. *See Guckenberger v. Bos. Univ.*, 957 F. Supp. 306, 320 (D. Mass. 1997) (rejecting organization's attempt to raise new theory of standing for first time in opposition to motion to dismiss where "[n]o such allegation of injury appears within the four corners of the complaint").

Similarly, Epic's motion to dismiss for failure to state a claim is evaluated under the well-established plausibility standard. "To survive a motion to dismiss, [the] complaint 'must contain sufficient factual matter ... to state a claim to relief that is plausible on its face.'" *Saldivar v. Racine*, 818 F.3d 14, 18 (1st Cir. 2016) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)) (some internal quotation marks omitted). This inquiry involves a two-step analysis. *Id.* At the first step, the court must "distinguish the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." *Id.* (internal quotation marks and citation omitted). Then, the court "must 'determine whether the factual allegations are sufficient to support the reasonable inference that the defendant is liable.'" *Id.* (*quoting Cardigan Mtn. Sch. v. N.H. Ins. Co.*, 787 F.3d 82, 84 (1st Cir. 2015)). "[L]egal conclusions couched as fact" and "threadbare recitals of the elements of a cause of action" must be disregarded as conclusory in evaluating the sufficiency of a complaint. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (*quoting Iqbal* at 1949-50) (internal alterations and quotation marks omitted).

II. The NFB Lacks Standing

Article III of the United States Constitution "limits the judicial power of the federal courts to actual cases and controversies." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (*citing* U.S. Const. art. III, § 2, cl. 1). Such a case or controversy only exists when the plaintiff can demonstrate each element of this "familiar triad: injury, causation, and redressability." *Id.* (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The first element of the triad, injury in fact, is the invasion of a legally-protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* (*quoting Lujan*, 504 U.S. at 560). The second element, causation, requires "a sufficiently direct causal connection between the challenged action and the identified harm." *Id.* The third, redressability, requires a plaintiff to show that a favorable resolution of its claim would likely redress the alleged injury. *Id.* at 72. In addition, the Supreme Court has made clear that when a plaintiff is seeking a forward-looking injunction, there must be a showing of an imminent injury in the future. *Lujan*, 504 U.S. at 564 ("[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects") (internal quotation marks and citation omitted).

In addition to these three requirements, sometimes referred to as the "constitutional" requirements of standing, federal courts also adhere to certain "prudential" standing requirements. *Id.* These "prudential concerns ordinarily require a plaintiff to show that his claim is premised on his own legal rights (as opposed to those of a third party), that his claim is not merely a generalized grievance, and that it falls within the zone of interests protected by the law invoked." *Pagan v. Calderon*, 448 F.3d 16, 27 (1st Cir. 2006).[4]

[4] Both the constitutional and prudential limitations on federal courts' standing apply in cases, such as the instant action, in which the court would be exercising jurisdiction over state

An organizational plaintiff such as the NFB may satisfy these federal standing requirements in one of two ways. First, the NFB can show that it has associational or representational standing by establishing that at least one of its members would have standing to sue. *See, e.g., Town of Norwood v. F.E.R.C.*, 202 F.3d 392, 405-06 (1st Cir. 2000). Alternatively, the NFB "can assert standing to protect against injury to its own organizational interests … ." *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 45 n.7 (1st Cir. 2012) (*quoting* 13A Wright & Miller, *Federal Practice and Procedure* § 3531.9.5 (3d ed. 2011)); *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). The asserted injury to the NFB's interests must constitute a "'concrete and demonstrable injury to [its] activities,' not 'simply a setback to the organization's abstract social interests …'" *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (Bader Ginsburg, J.) (*quoting Havens Realty Corp.*, 455 U.S. at 379).

a. The NFB Lacks Associational Standing

The U.S. Supreme Court has made clear that an organization seeking to proceed on a theory of representational standing must set forth specific factual allegations of concrete, individualized injury pertaining to at least one identified member. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S. Ct. 1142, 1152, 173 L. Ed. 2d 1 (2009) ("the Court has required plaintiffs claiming an organizational standing *to identify* members who have suffered the requisite harm") (emphasis added). Consistent with this precedent, the First Circuit has refused

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law claims pursuant to its diversity jurisdiction. *See Katz*, *supra* at 72 (discussing prudential standing requirements in diversity case implicating state common law and statutory claims); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir. 1994) (stating that, in diversity cases, the plaintiff must satisfy both the Article III and prudential standing requirements of federal law); *AHW Inv. P'ship v. Citigroup, Inc.*, 806 F.3d 695, 699 (2d Cir. 2015) (observing, in diversity case, that "[t]he lack of prudential standing would present an independent basis for dismissing the complaint").

to find associational standing when the organizational plaintiff fails to identify by name in the complaint at least one member with standing to sue. *See Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *United States v. AVX Corp.*, 962 F.2d 108, 117 (1st Cir. 1992).[5] In *Draper*, the First Circuit held that the organizational plaintiff had no associational standing, noting that "the Supreme Court has said that an affidavit provided by an association to establish standing is insufficient *unless it names an injured individual*." *Draper*, 827 F.3d at 3 (emphasis added). In *AVX*, the First Circuit found that the plaintiff organization's allegation that its members "have been and will continue to be harmed by [the defendant's conduct]" was not sufficient to establish associational standing. The court specifically noted that "the members are unidentified, their places of abode are not stated; the extent and frequency of any individual use

[5] Other federal circuit courts have reached the same conclusion. *See Georgia Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018) (organization lacked standing to sue on behalf of its members where it "failed to allege that a specific member" would be injured); *Tennessee Republican Party v. Sec. & Exch. Comm'n*, 863 F.3d 507, 520-21 (6th Cir. 2017) (organization lacked standing on behalf its members where it "fail[ed] to identify any members" who were affected by amendment to proposed securities regulation); *Ouachita Watch League v. United States Forest Serv.*, 858 F.3d 539, 542-43 (8th Cir. 2017) (where organization failed to identify specific member alleged to suffer injury, organization lacked standing to sue on behalf of its members); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (an organization seeking to proceed on theory of representational standing must identify a specific member of organization who allegedly suffered harm) (*quoting Summers*, 555 U.S. at 498); *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 203 (D.C. Cir. 2011) ("an organization bringing a claim based on associational standing must show that at least one *specifically-identified member* has suffered injury-in-fact") (emphasis added; internal quotation marks omitted) (*quoting Am. Chem. Council v. Department of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006)); *see also Small v. Gen. Nutrition Companies, Inc.*, 388 F. Supp. 2d 83, 98 (E.D.N.Y. 2005) (organization only has representational standing with respect to specific claims of injury suffered by member identified in the complaint); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 345 (D.N.J. 2003) (organization did not have standing to assert claims under Title III of the ADA insofar as it failed to identify specific members who allegedly suffered harm).

of the affected resource is left open to surmise." *AVX*, 962 F.2d at 117. The Complaint here suffers from the same fatal deficiencies present in *Draper* and *AVX*.[6]

The Complaint does not identify a single member of the NFB who would have standing to bring this lawsuit. *See* ECF No. 5-2, p. 5, ¶ 10. The Complaint simply asserts, in vague and conclusory fashion, that "many" of the NFB's members "work and seek to work in the healthcare industry" and that "NFB has at least one member residing in Massachusetts who would have standing to sue because he has (a) been discriminated against on the basis of his disability by facilities that have adopted Epic's inaccessible software, or (b) been dissuaded from applying for work in healthcare facilities that use Epic software because it is inaccessible." ECF No. 5-2, p. 5, ¶ 10. First and foremost, the NFB has failed to identify the member by name. Second, the NFB has alleged no facts to establish that the unnamed member has actually suffered a concrete and particularized injury that would give him or her standing to sue. The Complaint contains no allegations about (1) the type of job the unnamed member holds or seeks to hold, (2) the employer for which the unnamed member works or would like to work, (3) the type of Epic software that this unnamed member has to use or would have to use, (4) how this unidentified software is or would be inaccessible to the unnamed member, (5) what accommodations have been provided or would be provided by the unidentified employer relating to the unidentified software, or (6) the adverse consequences that the unnamed member will suffer in the future as a result of the alleged inaccessibility of the unspecified software used by the unidentified employer. In fact, the Complaint appears deliberately vague, alleging that the unidentified

[6] In *Draper*, the First Circuit also rejected an advocacy organization's claim that it should be entitled to discovery before its claim was dismissed for lack of associational standing. *Id.* ("why the advocacy group would have needed formal discovery to identify which of its own members may have been injured by the regulation is a mystery the group leaves unsolved").

member was either "discriminated" against at a facility that used allegedly inaccessible software *or* was "dissuaded" from applying.[7] *See* ECF No. 5-2, p. 5, ¶ 10. As the First Circuit stated in *AVX*, "[g]auzy generalities of this sort, unsubstantiated by any sort of factual foundation, cannot survive a motion to dismiss" for lack of standing. *See AVX*, 962 F.2d at 117.

b. The NFB Lacks Organizational Standing

Apart from its claim of associational standing, the Complaint also contains a single sentence alleging that the NFB has standing in its own right. As set forth *supra*, the only injury the NFB alleges to have suffered are the resources expended to litigate this lawsuit. *See* ECF No. 5-2, p. 5, ¶ 11. In conclusory fashion, the Complaint alleges that the resources expended in filing this lawsuit could "otherwise be devoted" to unspecified "other portions" of the NFB's "mission." *Id.* Conspicuously absent from the Complaint is any concrete allegation that there has been any perceptible impairment to any of the NFB's programs or activities, or that the NFB has suffered any other injury related to Epic's sale and licensing of its software independent of the filing of this lawsuit. The Complaint's lone, threadbare allegation that the NFB has been injured by the expenses of this litigation does not establish organizational standing.

Although the First Circuit does not appear to have directly addressed the question, other federal circuit courts have held that an organization must demonstrate an injury independent of the expenses associated with the litigation itself to establish organizational standing. *See Spann*, 899 F.2d at 27 ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real

[7] Epic is not aware of any authority supporting the proposition that an individual's unilateral decision not to apply for a job, based only upon that individual's subjective belief that he or she will not be deemed qualified for the position, states an actionable claim under state or federal anti-discrimination laws.

limitation."); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) ("standing must be established independent of the lawsuit filed by the plaintiff") (internal quotation marks and citations omitted); *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (plaintiff organization's expenditure of funds to pursue litigation against the defendant was a "self-inflicted" injury and not one that is traceable to the defendant's allegedly unlawful conduct); *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 80 (3d Cir. 1998) ("We hold … that the pursuit of litigation alone cannot constitute an injury sufficient to establish standing under Article III."); *Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, a Div. of Gannett Co.*, 943 F.2d 644, 646 (6th Cir. 1991) (stating that organization can establish standing by alleging a concrete injury that "increases the resources the group must devote to programs *independent of its suit challenging the action*") (internal quotation marks omitted and emphasis added; *quoting Spann* at 27); *Maryland Minority Contractors Ass'n v. Lynch*, 203 F.3d 821 (4th Cir. 2000) (Unpublished) (organization cannot manufacture standing to bring suit via expenses of that very suit) (*quoting Spann* at 27).

More still, this federal district court rejected the argument that the expenditure of resources on litigation itself is sufficient to confer standing in *Guckenberger*. In that case, three plaintiff advocacy organizations argued that their expenditure of resources to challenge a university's disability accommodations policy was an organizational injury that gave them standing to sue. The court disagreed, stating that such a claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *See Guckenberger* at 320 (Saris, J.)

(internal quotation marks omitted; *quoting Warth v. Seldin*, 422 U.S. 490, 509, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

The Complaint contains no allegation — other than those relating to litigation expenses — that the NFB has had to expend additional resources as a result of Epic's alleged conduct. The Complaint also fails to identify a single program, service, or activity that has been curtailed or impaired as a result of Epic's alleged conduct. The NFB's only allegation is that it would have devoted its resources to other unspecified programs had it not had to expend them on this lawsuit. Epic is aware of no case holding that such an allegation is sufficient to establish organizational standing. In fact, at least one Court of Appeals has specifically rejected this argument. *See N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 239 (5th Cir. 2010) (the NAACP did not establish standing by "conjectur[ing] that the resources that [it] had devoted [to opposing challenged city ordinances] … could have been spent on other unspecified … activities").

Accordingly, the NFB lacks organizational standing to pursue this lawsuit, and the Complaint should be dismissed.[8]

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[8] The foregoing standing principles apply with equal force in Massachusetts courts, and the NFB would lack standing either in a representational capacity or in its own right under Massachusetts law. In Massachusetts, as in federal courts, "[w]here a nonprofit organization asserts associational standing on behalf of its members, it must establish that its members would independently have standing to pursue the claim." *Statewide Towing Ass'n, Inc. v. City of Lowell*, 865 N.E.2d 804, 807 (Mass. App. Ct. 2007) (*citing Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd.*, 624 N.E.2d 556, 559 n.4 (Mass. 1993)). Thus, where a complaint fails to identify any of the organization's members or provide any concrete, specific allegations showing that any of them suffered a legal injury, the organization lacks standing in a representational capacity. *Id.* The Supreme Judicial Court has also rejected the notion that expenses incurred in bringing a lawsuit to challenge alleged unlawful conduct confer standing to sue under a remedial statute. *See Enos v. Sec'y of Envtl. Affairs*, 731 N.E.2d 525, 530 n.5 (Mass. 2000) (litigation expenses to challenge project did not confer standing to bring suit under Massachusetts Environmental Protection Act); *cf. Siegel v. Berkshire Life Ins. Co.*, 835 N.E.2d 288, 292 (Mass. App. Ct. 2005) (to demonstrate requisite loss of money or property under the Massachusetts Consumer Protection Act, the plaintiff must show that he or she incurred legal fees and expenses *independent* of those incurred in vindicating rights under the statute).

c. The NFB Lacks Standing to Seek an Injunction

A party seeking prospective injunctive relief (as the NFB does in this case) must also show that it has standing to seek an injunction. To establish standing to seek such relief, the NFB faces "a significantly more rigorous burden" than that confronted by parties seeking redress for past injuries. *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015). The NFB must show that it faces "an imminent future injury." *Id.* The "past injury suffered" by a plaintiff "is an insufficient predicate for equitable relief." *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992) (*citing Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 1670, 75 L.Ed.2d 675 (1983)). The Complaint's allegations pertaining both to the NFB's associational standing and its organizational standing fail to plausibly allege that the NFB has standing to seek the prospective injunctive and declaratory relief sought in the Complaint.

With respect to the NFB's claim of associational standing, the Complaint does not allege any facts plausibly suggesting that any of the unidentified members of the NFB face a likelihood of injury in the future, as required to obtain standing to seek an injunction. Rather, the Complaint alleges that some unidentified member or members of the NFB would have standing

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Additionally, in Massachusetts, an organization generally lacks standing to vindicate the rights of third parties unless it is "difficult or impossible for the actual rightholders to assert their claims." *Slama v. Attorney Gen.*, 428 N.E.2d 134, 137 (Mass. 1981). The NFB has not alleged (nor could it) that it would be "difficult or impossible" for individual members who claim to have suffered from employment discrimination to vindicate their rights by bringing their own discrimination claims.

The lack of standing under state law also requires dismissal of the Complaint. *See Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 173 (2d Cir. 2005) (Sotomayor, J.) ("Where, as here, jurisdiction is predicated on diversity of citizenship, a plaintiff must have standing under both Article III of the Constitution and applicable state law in order to maintain a cause of action"); *Metro. Exp. Servs., Inc. v. City of Kansas City, Mo.*, 23 F.3d 1367, 1369 (8th Cir. 1994) ("In a diversity case, a court will not address the plaintiff's claims unless the plaintiff has standing to sue under state law").

because they have suffered unspecified instances of employment discrimination or "dissuasion" in the past. *See* ECF No. 5-2, p. 5, ¶ 10. The fact of past injury, however, would not be sufficient to give these hypothetical persons standing to obtain injunctive relief in their individual cases, let alone the Commonwealth-wide injunction sought in this case. Nor do the Complaint's allegations concerning Epic's general practice of selling and licensing its software to employers in the Commonwealth suffice to show that any individual member confronts an immediate threat of future harm. *Am. Postal Workers Union* at 1376 (*quoting Lyons* at 105).[9]

As for the NFB's organizational standing, the only injury to the organization alleged in the Complaint, *i.e.*, incurring of expenses to litigate this dispute, "at best demonstrate[s] *past* injury." *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015) (emphasis in original). An organization's incurring of expenses to oppose alleged wrongful conduct "is not an injury that can be redressed through the prospective declaratory and injunctive relief sought in this action." *Id.* (*citing Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Thus, even assuming that the NFB's conclusory allegation of organizational injury were sufficient to show that it suffered an injury in fact for standing purposes, such injury would not provide the NFB with standing to obtain the equitable relief sought in this litigation.

III. The Complaint Fails to State a Claim for Which Relief Can Be Granted

Even if the NFB did have standing to bring this case, its claim under G.L. c. 151B must be dismissed on the merits for at least two reasons. First, the NFB lacks statutory standing under G.L. c. 151B, § 9, which affords a cause of action only to "person[]s … aggrieved" by alleged unlawful *employment* discrimination, and the NFB has not suffered any employment

[9] These principles also apply to the NFB's request for declaratory relief. *See* ECF No. 5-2, p. 6, Prayer for Relief, Para. (a); *see Am. Postal Workers Union* at 1377 n.4.

discrimination by Epic. Second, the Complaint neither asserts an underlying employment discrimination claim, nor alleges facts plausibly demonstrating that any blind person was subject to employment discrimination by any employer. Absent an underlying claim of employment discrimination, the NFB's claim of interference fails as a matter of law.

a. The NFB Lacks Statutory Standing Under c. 151B Because it is Not a "Person Aggrieved" Under the Statute

Standing[10] to bring a civil action for employment discrimination under G.L. c. 151B is limited to "person[s] … aggrieved by a practice made unlawful" under the statute. G.L. c. 151B, § 9. "To qualify as a 'person aggrieved,' a person must allege substantial injury as the *direct result of* the action complained of." *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 N.E.2d 1192, 1203–04 (Mass. 1978) (labor union lacked standing to pursue pregnancy discrimination claims on behalf of members) (emphasis added). The Supreme Judicial Court has held that "an individual has to be within the employment relationship and has to have suffered injury as a result of a prohibited practice in order to have a cause of action under § 9." *Harvard Law Sch. Coal. for Civil Rights v. President & Fellows of Harvard Coll.*, 595 N.E.2d 316, 318 (Mass. 1992).

Where the plaintiff is not a "'person[]' within the employment relationship[,]" he or she is not a "'person … aggrieved'" under the statute and has no standing to sue thereunder. *Id.* at 319 (*quoting* G.L. c. 151B). In *Harvard*, a civil rights coalition (along with individual law students) asserted claims under Chapter 151B alleging that Harvard Law School was engaging in discriminatory faculty hiring policies, thereby depriving the law students of the "perspectives,"

[10] Unlike the issues of Article III standing and standing for purposes of subject matter jurisdiction under state law, statutory standing goes to the merits of the NFB's claim. *See Katz*, 672 F.3d at 75 (explaining that Article III standing is jurisdictional, whereas statutory standing under G.L. c. 93A and 93H went to merits of claims).

"life experiences," and "access to … role models" that would flow from a more diverse faculty. *Id.* In concluding that these plaintiffs were not "persons aggrieved" with standing to sue under Chapter 151B, the Supreme Judicial Court observed that the plaintiffs were neither employees nor applicants for employment at the law school, nor did they claim that the law school discriminated against them in compensation or the terms and conditions of their employment. *Id.* Because the plaintiffs were not within any employment relationship and their alleged injuries (*viz.*, denial of the benefits of a diverse faculty) were not "within the area of concern of the statute[,]" they were not "persons aggrieved" and lacked standing to pursue claims under Chapter 151B. *Id. See also Lecrenski Bros. Inc. v. Johnson*, 312 F. Supp. 2d 117, 123 (D. Mass. 2004) ("According to the SJC, the 'central focus' of section 4 of chapter 151B, which is included within the statutes governing labor and industries, is to protect *employees* from *employers'* discriminatory employment practices" (emphases in original) (*quoting Harvard* at 318). In *Lecrenski*, this federal district court concluded that an employer lacked standing under Chapter 151B to pursue claims of interference and aiding and abetting discrimination under c. 151B, § 4(4A) and (5) against a third party, a member of the Massachusetts state police, for allegedly taking action against the employer motivated by animus due to the employer's employment of persons of Russian heritage. *Lecrenski* at 119. The court found "no evidence that [Chapter 151B] was intended to provide standing" to an employer, rather than an employee, against a third party. *Id.* at 124.

These authorities foreclose the NFB's effort to bring this suit under G.L. c. 151B. The NFB is not an employee, nor is Epic alleged to have been the employer of any of the NFB's members. Rather, Epic is alleged to sell and license software to employers. And while a person aggrieved may bring a claim of interference under G.L. c. 151B, § 4(4A) against a non-employer

third party, the plaintiff in those suits still must suffer injuries in the context of his or her employment. *See, e.g., Lopez v. Com.*, 978 N.E.2d 67, 71, 77 (Mass. 2012) (the plaintiffs were minority police officers employed by municipalities throughout the Commonwealth); *Thomas O'Connor Constructors, Inc. v. Massachusetts Comm'n Against Discrimination*, 893 N.E.2d 80, 86 (Mass. App. Ct. 2008) (affirming finding of liability for interference against non-employer; the plaintiff was employee of defendant's subcontractor). Epic is aware of no case in which a complete stranger to any employment relationship has been found to be a "person aggrieved" with standing to prosecute a civil action under Chapter 151B. *See Lecrenski, supra* (observing that, although a non-employer may be liable as a defendant for interference under § 4(4A), there is no evidence that the statute extends standing to non-employees to *bring* interference claims). 312 F.Supp. 2d at 124 & n.6.

The circumstances of this case well illustrate the perils of stretching the limits of aggrieved person status beyond the statute's "area of concern." *Harvard* at 319. The NFB is asking this Court to permanently enjoin a software company from providing products and services that are vital to the functioning of numerous hospitals and healthcare providers throughout the Commonwealth of Massachusetts, with all of the attendant potential disruptions to patient care that would result. It asks this Court to order this extraordinary relief in litigation that is completely divorced from any concrete factual context, without the participation of a single allegedly aggrieved employee, and without the participation of a single employer whose employment-related practices may be at issue. The absence of allegedly aggrieved persons from the litigation deprives the Court of the ability to issue narrowly-tailored and individualized remedies in favor of a grossly overbroad injunction — an injunction which, it bears noting,

would not obligate any employer to change its conduct or practices (since none are parties to this suit).

In sum, the NFB is not a "person aggrieved" under Chapter 151B and lacks standing under the statute. Thus, the NFB's claim for interference under c. 151B, § 4(4A) fails as a matter of law.

b. The NFB's Interference Claim Fails Because There is No Underlying Claim of Employment Discrimination.

The Massachusetts Appeals Court has held that there can be no claim for interference with rights to be free from unlawful discrimination under c. 151B, § 4(4A) without a valid underlying claim of employment discrimination. *See McLaughlin v. City of Lowell*, 992 N.E.2d 1036, 1058 (Mass. App. Ct. 2013) (dismissing interference claim because "[a]bsent actionable discriminatory conduct, there exists no basis on which to ground a claim of interference"); *see also Araujo v. UGL Unicco-Unicco Operations*, 53 F. Supp. 3d 371, 383 (D. Mass. 2014) (O'Toole, J., adopting report and recommendation) (where complaint's allegations of underlying discrimination were too conclusory to state plausible claim, interference claim failed as a matter of law) (*citing McLaughlin, supra*). The NFB's Complaint neither asserts an underlying claim of disability discrimination nor alleges facts plausibly suggesting such discrimination occurred. Therefore, the NFB's interference claim fails as a matter of law.

The Complaint is devoid of any allegations related to any employment discrimination faced by any person. The Complaint does not allege, for example, that any person was not hired, not promoted, terminated, subject to harassment, not permitted a reasonable accommodation, or otherwise discriminated against on the basis of being blind (or as a result of any other disability). Rather, the Complaint requires the Court to speculate that because Epic sells software to some (though not all) hospitals and healthcare providers in Massachusetts, and blind persons are

employed by, or desire to be employed by, hospitals or healthcare providers, that Epic's sale and licensing of its software to these employers has the effect of introducing an "artificial job requirement of sight." But to make this leap, the Court would have to assume that employers actually require familiarity with, or use of, Epic's software as an essential job requirement, that these employers are not willing to provide any reasonable accommodations, and that blind employees or applicants will suffer adverse consequences as a result. None of these facts are actually pled in the Complaint. In other words, there are no facts alleged to establish a claim of employment discrimination in the first instance, and that deficiency dooms the NFB's interference claim.[11]

Because the Complaint neither asserts any underlying claim of disability discrimination under Chapter 151B, nor contains factual allegations plausibly suggesting that such discrimination has occurred, the NFB's interference claim fails as a matter of law. *See McLaughlin* at 1058.

CONCLUSION

For the reasons stated herein, Epic respectfully requests that this Court dismiss the Complaint in its entirety with prejudice.

[11] Although the Complaint contains the conclusory allegation that the use of Epic's software has had a disparate impact on the rights of blind persons, it alleges no specific facts to support this claim. It is well-established that conclusory allegations are not to be considered in evaluating the legal sufficiency of a complaint. *See, e.g.*, *In re Curran*, 855 F.3d 19, 25 (1st Cir. 2017) (on motion to dismiss, court "must set aside the complaint's conclusory averments").

Respectfully submitted,

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By its Attorneys,

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Dated: February 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I filed this document through this Court's electronic filing system, and sent courtesy electronic copies to counsel for the NFB, and served this document on the NFB through US mail at the following addresses:

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REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Defendant Epic Systems Corporation requests a hearing on the within motion.

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(a)(2)

I hereby certify that, on February 1, 2019, I spoke via telephone with counsel for the NFB, Kevin Docherty, Esq., to inquire whether the NFB would agree to voluntarily dismiss the Complaint in this action. Mr. Docherty advised that the NFB will not agree to voluntarily dismiss the Complaint.

/s/Michael E. Steinberg
Michael E. Steinberg