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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell & Valery A. O'Connell)	
& on behalf of themselves as members of)	
Glastonbury Landowners Association.)	Cause No. DV-11-114
)	
Plaintiff(s),)	
)	PLAINTIFFS' MOTIONS FOR:
v.)	DISMISSAL OF DEFENDANT'S
)	COUNTERCLAIM,
Glastonbury Landowners Association, Inc.)	& EXTENSION TO ANSWER,
& current GLA Board of Directors)	& RULE 60(b) MOTION
)	
Defendant(s))	
_____)	

I. INTRODUCTION

Plaintiffs, Daniel and Valery O'Connell, pursuant to M.R.Civ.P., Rule 60(b), hereby file this motion to reverse Court's Orders of April 17th for failure to allow opposing pleadings on the motion which fatally harmed Plaintiffs chances to overcome that counterclaim & motion. Also, Plaintiffs' hereby file this motion to dismiss Defendant's counterclaim & motion pursuant to Mt.R.Civ.P., Rule 13 & Rule 12(b)(6) for its "failure to state a claim upon which relief can be granted" and for Defendants failure to include the GLA, Inc. as Defendants (as contrary to Rule 19(b) putting Plaintiffs at "substantial risk of incurring double, multiple, or otherwise inconsistent" counterclaims or obligations by both the GLA and the GLA Board Defendants)." All of which warrants this Plaintiffs' motion request for extension of time to fully answer the

counterclaim AFTER Plaintiffs motions herein are first settled. Plaintiffs yet deny the entirety of Defendants counterclaim except for ¶ 1-3, 15 & 18.

Other than claims for legal fees and courts help in general, Defendants counterclaim at ¶ 31 mentions one claim for relief to enjoin or restrain Plaintiff/members from filing any **FUTURE** lawsuits or “filing civil litigation without prior court permission.” This Defendant’s claim for relief is conspicuously absent any supporting legal basis; including no affidavit or facts, and also denies Plaintiffs’ constitutional right to the courts to settle property right disputes; which is Plaintiffs’ compulsory right to legally settle civil claims by filing litigation with the court. In fact, Defendant's claim to stop only O’Connells from filing unknown future litigation, or injunction request, only serves to deny Plaintiffs inalienable constitutional right to courts of justice “without denial or delay,” which is clearly not a claim upon which relief can be granted.

ILFATUAL ARGUMENTS AND BRIEF IN SUPPORT

Defendants counterclaim specifically violates Plaintiff/members’ constitutional rights afforded under M.R.Civ.P. Rule 5.1 and Mt. Article II, part 3 -- right to protect property and defend liberties; Art. II, part 16 -- right to administrative justice ... without denial or delay”; Art. VIII, part 1 -- courts power limited to what is provided by law; & Rule 13; such as lacking party jurisdiction and subject matter jurisdiction.

Moreover, the court did not allow any pleadings on the counterclaim motion prior to issuing its April 17th Orders, yet allowed the counterclaim’s untimely filing after the complaint pleadings were filed. Defendant’s counterclaim should not have been filed, because such Orders deny or prejudice Plaintiffs right to oppose the motion thereby fatally harms Plaintiffs chances to overcome that motion. This court Order of April 17, 2013 is thus in error and should be reversed

as fatally prejudicial and bias against Plaintiffs; and for the following reasons warrants Plaintiffs' motion to dismiss Defendant's counterclaim as absent any claim for which relief can be granted.

A. Defendants counterclaim & motion was not timely, nor warranted per Rule 15 & 13:

M.R.Civ.P., Rule 15. Amended and Supplemental Pleadings.

(a) Amendments before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it; or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move -- at any time, even after judgment -- to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(t) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the State of Montana and Other Public Bodies. When the State of Montana, local government, or a state or local officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was served as provided by Rule 4(k) and (l).

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit

supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

M.R.Civ.P., Rule 13. Counterclaim and Crossclaim.

- (a) **Compulsory Counterclaim.**
 - (1) ***In General.*** A pleading must state as a counterclaim any claim that -- at the time of its service -- the pleader has against an opposing party if the claim:
 - (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
 - (B) does not require adding another party over whom the court cannot acquire jurisdiction.
 - (2) ***Exceptions.*** The pleader need not state the claim if:
 - (A) when the action was commenced, the claim was the subject of another pending action; or
 - (B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
- (b) **Permissive Counterclaims.** A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.
- (c) **Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.
- (d) **Counterclaim against the State.** These rules do not expand the right to assert a counterclaim -- or to claim a credit -- against the State of Montana or a state officer or agency.
- (e) **Counterclaim Maturing or Acquired after Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
- (f) [Abrogated.]
- (g) **Crossclaim against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
- (h) **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
- (i) **Separate Trials; Separate Judgments.** If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

1. MT. Supreme Court Order (April 26, 2011) explains, "Abrogation of Rule 13(f) establishes Rule 15 as the sole rule governing amendment of a pleading to add a counterclaim." But Defendants motion to add a counterclaim is contrary to this M.R.Civ.P., Rule 15(a)(1) above which gives "21 days after serving" a complaint "pleading" for an "amendment" to be filed. Defendants motion is untimely based on

this rule, because Defendant's counterclaim or responsive pleading was filed 43 days after the March 4th amended complaint was filed.

2. This rule 15(a), part (2) says "a party may amend its pleading only with the opposing party's written consent or the court's leave..." Justice does not require allowing Defendants counterclaim 43 days after service of the amended complaint; and adds unnecessarily cost and delay of justice sought by the complaint, and denies Plaintiffs' due process & constitutional rights under applicable rules & statutes.
3. Defendants counterclaim should have been treated as a supplemental pleading under rule 15 above and deemed untimely. Pursuant to this rule 15, Defendants counterclaim did NOT arise out of the conduct, transaction, or occurrence set out -- or attempted to be set out in Plaintiffs' amended complaint, nor did it aid in presenting the merits of Defendants answer. Plaintiffs object to the Counterclaim as it is a delay and unnecessarily adds to the costs, prejudices Plaintiffs, and is shown herein to lack merit of any kind.

Almost identical to state rule 13 above, the following is a case law on federal rule 13: Most courts hold that if a party does not timely bring a compulsory counterclaim before the pleadings, the party is estopped from asserting the claim. Fed. R. Civ. P. 13(a), the compulsory-counterclaim rule, requires a defendant to plead any counterclaim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. The claim is not compulsory if it was the subject of another pending action at the time the action was commenced, or if the opposing party brought his suit by attachment or other process not resulting in personal jurisdiction but only in rem or quasi in rem jurisdiction. A counterclaim that is compulsory but is not [timely] brought is thereafter barred. [Baker v. Gold Seal Liquors, Inc., 417 U.S. 467 (U.S. 1974)] For the record, Defendants counterclaim to restrain or hinder Plaintiff/members from filing frivolous, meritless lawsuits is not the subject matter of any other pending action.

4. As contrary to rule 15 and rule 13 above, Defendant's counterclaim brought after the complaint pleadings were filed should be barred as untimely if deemed a compulsory

claim. Defendants counterclaim is compulsory, since it tries to hinder Plaintiffs' constitutional and mandatory right "to protect property and defend liberties," and Art. II, part 16 mandatory right "to administrative justice ... without denial or delay" to settle property right disputes. This mandatory procedure to file civil claims to legally settle civil disputes, and the counterclaim relief asking to limit Plaintiffs' mandatory right to civil filings in court, makes Defendant's counterclaim a compulsory claim for relief.

5. Nothing in the 2013 amended complaint had anything to do with the counterclaim, because there is no frivolous, vexatious, meritless claim arising from the amended complaint. This is proven by the fact that the Supreme Court did not uphold the motion to dismiss, and claims within the amended complaint are factually supported. Defendants compulsory counterclaim is therefore contrary to Rule 13(a), since hindering Plaintiffs **FUTURE** filings does NOT "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim;" and should require adding the GLA Corporation party as defendants.
6. The GLA Board Defendants counterclaim motion implied that the court can not acquire jurisdiction over the GLA, Inc. as Defendants. For instance, Defendant's counterclaim motion at page 1-2 claims the GLA Corporation, who are joint Defendants in the amended complaint, can not be a party to the counterclaim reportedly due to so called "constraints of the insurance provisions." Defendants yet offered no specific "restraints" nor affidavit in support of such motion pleading. Plaintiffs thus oppose the counterclaim and motion for this Defendants failure to

enjoin as Defendants the GLA, Inc.; which is contrary to Rule 19(b), and puts Plaintiffs at “substantial risk of incurring double, multiple, or otherwise inconsistent” counterclaims or obligations filed by both the GLA and the GLA Board Defendants.

B. Defendants counterclaim & motion should be denied as all of the factual allegations if well-pleaded are true, it yet fails to state a claim upon which relief can be granted.

M.R.Civ.P., Rule 12(b). A motion to dismiss under rule 12(b)(6) allows the district court to examine only whether “a claim has been adequately stated” in a counterclaim. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, 337 Mont. 39, 343, 160 P.3d 552, 556. A claim should be dismissed on the basis when it appears, based on the pleadings, that the [claimant] cannot prove any set of facts in support of their claim which would entitle the [claimant] to relief. *Fandrich v. Capital Ford Lincoln Mercury*, 272 Mont. 425, 428-29, 901 P.2d 112, 114 (1995).

The Defendants counterclaim pleading did not adequately state a claim for relief for lack of any supporting legal authority for such relief; including no factual allegations to impugn Plaintiffs litigation, no affidavit, and no legal rule of law to limit Plaintiffs’ constitutional right to to file civil litigation “without denial or delay” to settle property right disputes.

NO civil litigation filed by Plaintiffs have ever been proven as so called “frivolous” vexatious” or “meritless.” Yet these Defendant’s false assertions are the sole basis for Defendants injunctive counterclaim against FUTURE filings. In fact, case DV-11-193 was settled by giving Plaintiff members all their claims for relief and dismissing GLA Defendants counterclaims; which settlement agreement (attached to 2013 amended complaint) is prima facia evidence of Plaintiffs claims being NON-frivolous, NON-vexatious, and having merit.

As contrary to MCA Title 27 if injunctive relief is sought in Defendants counterclaim to restrain O'Connells filings, it lacks relief to maintain the status quo, because it is impossible to prevent so called "frivolous" filings by any one of the hundreds of GLA members. There is no rule or state statute that prevents **filing of** frivolous civil claims as the counterclaim requests.

Yet to deny GLA members from filing unknown future lawsuits, would certainly hinder their inalienable constitutional right to protect their property, defend liberties, and "right to administrative justice ... without denial or delay." GLA Defendant's counterclaim against its members is thus clearly unconstitutional, and lacks any claim upon which relief can be granted being absent any facts in support, much less any legal authority for its absurd, frivolous false conjecture and opinions.

III. CONCLUSION.

It seems the GLA Defendants raised the bar on their quest to silence its members. None of Plaintiff members four civil complaints were ever proven "vexatious" "meritless" or "frivolous" as was falsely asserted as the sole justification for Defendant's counterclaim relief. This motion to dismiss Defendant's counterclaim is warranted for lack of any claim upon which relief can be granted, and for Defendant's absurd, frivolous counterclaim vexatiously brought to deny members the constitutional "right to administrative justice ... without denial or delay." Defendant GLA Board's counterclaim is vexatious because it lacks sufficient grounds to win the impossible relief of usurping the rule of law just to deny its own members the constitutional right to file future civil litigation claim(s) against them.

The motion to extend the time to answer is also just to first settle this Rule 60(b) motion against erroneous Orders that fail to allow such opposing pleadings to the counterclaim motion,

and failed to find the Defendant's counterclaim lacks any legal claim for relief to warrant Plaintiffs' Rule 12(b)(6) motion to dismiss; which motion must be made before a responsive pleading or answer; also per Rule 12(b)(1) lack of subject matter jurisdiction; and Rule 12(b)(2) lack of personal jurisdiction, and/or Rule 12(b)(7) failure to join a party (GLA, Inc.) as defendants.

This motion also asks for such further relief as the court deems equitable and just, and for Defendants to pay Plaintiffs and GLA Association monies back for any costs incurred for Defendant's frivolous, vexatious counterclaim.

Respectfully submitted this 24th day of April, 2013.

Signed *Daniel K. O'Connell* Signed: *Valery O'Connell*
Daniel O'Connell Valery O'Connell

Certificate of Service

A true and correct copy of forgoing document(s) were sent to the following parties via first class mail on this same day to:

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