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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell (a Director of the )  
Glastonbury Landowners Association )  
Incorporated), & Valery A. O'Connell )  
& on behalf themselves as members of the )  
Glastonbury Landowners Association. )

Cause No.DV-2011-114

Plaintiff(s), )

v. )

PLAINTIFFS' RESPONSE TO DEFENDANTS'  
REPLY TO INDEMNIFICATION MOTION

Glastonbury Landowners Association, Inc. )  
& current GLA Board of Directors )

Defendant(s) )

On June 19, 2014, Plaintiffs received Defendants Motion Reply refusing to indemnify Director-Daniel O'Connell. Plaintiffs hereby file their Response to the Motion to dispute Defendants Motion Reply, against Daniels indemnification. This is because the reasons against indemnification are based solely on Daniel somehow NOT claiming indemnification for his status as a Director in which they falsely conclude he had no liability as such Director. This response and attached affidavit prove otherwise.

INTRODUCTION

Daniel is claiming indemnification of his status as a Director. It is absurd for Defendants to claim otherwise, since Daniel's indemnification and claims for relief of a "judicial" & "derivative proceeding" & indemnification can only be sought because he was a Director at the time this complaint was filed. In

fact, Amended Complaint (page 5) asks for “a judicial proceeding” (per §35-2-423, MCA) and “derivative proceeding” for Directors breach of duty. Amended Complaint claim at ¶ 3 also specifically request relief of a “derivative proceedings” claim. This claim for relief is pursuant to state statute 35-2-1301, MCA as follows:

**35-2-1301. “Standing.** (1) For purposes of this part, "derivative proceeding" means a civil suit in the right of a domestic corporation or, to the extent provided in 35-2-1307, in the right of a foreign corporation.

(2) A derivative proceeding may be commenced or maintained by a complainant who is: (a) a director at the time of the bringing of the proceeding;...”

This complaint claim shows that a “derivative proceeding” may be commenced or maintained by a complainant who is: (a) a director at the time of the bringing of the proceeding;...”as was Daniel; which shows he had standing as a Director. Plaintiffs TRO injunction request also argued that per 35-2-1303, MCA., stay of relief for derivative proceedings should not be allowed for other GLA Directors refusal to “commence an inquiry into the allegations made in the demand or complaint.” These claims were thus made by a Director as was Daniel, without which standing as a Director, Daniel could not make such claims.

As only a Director can file such claims, there is no reason to dispute Daniel’s claim as a Director as the motion states. See also the Complaint & Countersuit (May 2013) heading captions on page one showing Plaintiff filed “as a Director.” Also in dispute is Directors’ liability; which liability does in fact exist under GLA Articles, part VIII., (as cited below and in amended complaint claims).

### ARGUMENT

Defendants & insurer attorney-Brown law Firm Motion Reply (page 3) refused to indemnify Daniel as a Director “for an advance on claims for attorney fees” because he was a Director with no liability under this case. This is not true and contrary to statute §35-2-452. MCA allows that, “the

corporation may indemnify and advance expenses under 35-2-446 through 35-2-454 ... to the same extent as to a director” like Daniel. §35-2-448, MCA, also requires Daniel’s “Mandatory indemnification” “unless limited by its articles of incorporation” which is not the case here.

As the following explains, Daniel’s liability as a Director is the main reason why he sought such complaint relief of “judicial & derivative proceeding” and now indemnification relief. For this pending complaint, the insurer has already indemnified all other Defendant Directors that shows the insurer did not require these Directors to first be “wholly successful, on the merits or otherwise, in the defense of any proceeding.” So to only require this of Daniel who was a Director when this suit was filed, may show breach of insurer contract; especially since the GLA Directors countersued Daniel who has liability under that countersuit and this complaint as a Director at that time.

Defendants and their insurer attorney (Brown law Firm) opinions (page 3) state that Daniel as a Director can not be indemnified for being a Director because, “Plaintiffs have not been compelled to pay damages caused by the GLA-forcing the GLA to fund the suit.”

On the contrary, GLA’s request for “attorney fees” in this complaint and in GLA’s countersuit is prima facia evidence that possible liability or damages against Daniel as a Director existed then and now. In fact, O’Connell may be compelled to pay damages caused by the GLA suing him in a pending countersuit in this same case filed May 14, 2013; for which GLA countersuit says on page 8-9 that the GLA is “entitled to relief” and such relief and possible damages against Daniel include not just “attorney fees” but also an “injunction” to enjoin Plaintiffs from “filing civil litigation without prior court permission.” These requests for damages against Daniel who sued as a Director thus refute Defendants denial of them.

Furthermore, the rest of the GLA Board Directors are already currently being indemnified as Directors for this complaint & countersuit against O’Connells. GLA Plaintiffs were indemnified for this

countersuit even though the GLA is not compelled to pay damages in their GLA countersuit. GLA's countersuit is prima facia evidence that the Defendants and Daniel CAN be indemnified without such requirements & for possible damages of "injunction" against Daniel and possible damages of "attorney fees" filed against Daniel as a Director in both amended complaint and countersuit against him.

Defendants opinions (page 1 & 3) also falsely states that the motion to indemnify has no basis in law. Contrary to this Defendants Reply, state statutes above compel Daniel's mandatory indemnification as do several statutes below. For instance, Director-Daniel had a duty to the same GLA and members to file claims against other Directors' for their breach of duty to the same corporation and members that the other Directors represent. Daniel as a Director filed suit as a last resort to remove Directors who breached their duty to the corporation and its members (per GLA Art. VIII below). This Article citing Daniels possible liability is certainly in the best interest of the corporation to remove such liability by filing suit; causing no harm to the Corporation so far. Further basis in law and Court's authority to indemnify Director-Daniel is found under state statute §35-2-450, MCA. as follows:

§35-2-450. Court-ordered indemnification. Unless limited by a corporation's articles of incorporation, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court, after giving any notice the court considers necessary, may order indemnification in the amount it considers proper if it determines that the director:

(1) is entitled to mandatory indemnification under 35-2-448, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in 35-2-447(1) or was adjudged liable as described in 35-2-447(4). If the director was adjudged liable, indemnification is limited to reasonable expenses incurred.

This affidavit also refutes Defendants Reply by stating, "Such complaint claims for relief of a judicial or derivative proceeding under state statutes can only be made by another Director like Daniel (absent a member petition)." and also allow his indemnification" and "the amended complaint relief does connect Daniel's tenure on the GLA Board to relief sought by stating:

¶ 5 “Violations were first evidenced & witnessed (authenticated per M.R.Evid. 901) by Mr. O’Connell while he served as a Board Director from Nov. 2009 until Aug. 2011 (authority for injunction claim; Butler v. Germann (1991)). Complaint claims of Director violations & breach of duty to its governing bylaws and articles of incorporation are supported by GLA governing documents or contracts (Two Crow, 149 Mont. at 23, 494 P.2d at 919.)”

¶ 23 “GLA Directors can be held monetarily responsible for breach of fiduciary duties: per Art. VIII Articles of Incorporation & 35-2-4[2]3 MCA Removal of Directors; ... [under] Judicial Proceeding... This includes breach of duties (per Art. VIII. “For a transaction from which a director derived an improper personal economic benefit.”

¶ 25 such claims by Director-Daniel that his Director duties were thwarted and denied by the other Directors for Defendants, “Violation of Bylaw Art. VII (I) Minutes of Committees have not been produced. ¶39 of Complaint, & ¶48 TRO Dist.Ct.Dkt. No. 33. “All committees shall keep Minutes reflecting the committee members attending and the actions taken.” Complaint Exhibit J, part A at p.2. c. Fiduciary duty violation Art. of Inc. VIII. for Covenant 8.01h “The Association’s road maintenance responsibility is limited by conditioned upon the Landowners’ individual and collective [payment of the aggregate amount of the annual community assessment...” Exhibit J part A p.2, Complaint at ¶40, & 41 TRO, Dist.Ct.Dkt. No. 33 d. “Up to 42 proxy votes cast by the GLA Board of Directors were used to remove Mr. O’Connell” (Complaint at ¶14-16, & TRO Dist.Ct.Dkt. No. 33. This action is contrary GLA Bylaw Art VI(B) “Such Directors shall in all cases act as a Board and may do all such acts or things as are not...directed to be exercised and done by the Members;” Complaint at ¶17, TRO Dist.Ct.Dkt. No. 33.”

Attached affidavit also states:

“Director Daniel had a duty of loyalty to GLA members and corporation under GLA Articles VIII. All complaint claims for relief were not only relief for this possible liability to Daniel and others as Director, and other Director liability that prevented him for properly exercising his Director duties as Director. All such complaint claims were also born out of such duty. At all times Daniel and his suit was the best interests of the corporation and its members amounting to no harm against them. For instance it is in the best interest of the corporation and its members to allow complaint relief (page 5) that requests GLA Defendant Directors “injunction will, b. prevent the Defendants from practicing further harm, or violations of members rights, causing further undue burdens and liability upon the Association.” c. to ‘restrain GLA committee actions conducted in secret with no minutes or notice’ to members per Bylaw VI.(I.) (Exhibit J,O), d. to restrain ‘GLAs’ public & private meetings and/or votes conducted in secret without minutes or notice’ to members per (Bylaw VI.(F) & (G)), (Exhibit O)”, e. ‘to restrain GLAs’ misappropriation of funds; illegal compensation of volunteer Directors per Bylaw VI.(K)\* and non-aggregate spending’ (per Covenant 8.01h.\*\* ands more.”

#### **DANIEL’S LIABILITY AS A DIRECTOR ALLOWS INDEMNIFICATION**

It is now undisputed that the GLA Corporation purchased insurance on behalf of all individual Directors including Daniel; who was serving as a Director in 2011 at the time of this complaint, and whom as a Director filed a judicial proceeding claim on behalf his duty to the corporation and its members. Other basis in law for his indemnification is thus found under state statute §35-2-453, MCA:

35-2-453. "Insurance. A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify the individual against the same liability under 35-2-447 or 35-2-448."

This last statute allows indemnification for a Director such as Daniel for his possible "liability arising from the individual's status as a director." Contrary to Defendants Reply, they did not dispute the fact that that Daniel's liability as a GLA Director's does exist under GLA Articles VIII (below).

GLA Director's liability under GLA Articles VIII states, "Members of the Board of Directors of the Corporation shall not be liable to the Corporation or to members of the Corporation for monetary damages for breach of a director's duties to the Corporation and its members, provided that this provision does not eliminate or limit the liability of a director:

1. For a breach of the director's duty of loyalty to the Corporation or its members;
2. For acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law;
3. For a transaction from which a director derived an improper personal economic benefit; or
4. Pursuant to M.C.A. Sections 35-2418, 35-2435, or 35-2436."

As claimed on page 5 of O'Connells' amended complaint, a Director, including Daniel, could be found liable under GLA Articles of Incorporation, part VIII (above). Daniel's indemnification is proper & allowed to avoid and limit such Director liability and to limit or remove other Directors liability under breach of duty; which if true, is no doubt in the best interest of the corporation and its members.

This GLA Article VIII (above) exempts the GLA from having to pay for a directors breach of duty, so there is no contemplation of the GLA paying any damages for any Director as Defendants Reply to the motion (pages 5-7) tried to claim. This is proof that no harm could be done to the GLA as a result of indemnifying Daniel to the same extent as all the other Directors indemnified; especially since GLA Art. VIII above demands individual Directors to pay back misappropriated funds, not the GLA. ONLY the GLA's insurer is compelled to pay any money for attorney fees to indemnify all current and former GLA

Directors; which should NOT exclude indemnifying Director-Daniel in his standing. Affidavit attached states, "the only means for Daniel to have standing to request a "judicial" or "derivative proceeding" per 35-2-1301.MCA., is as a Director. Contrary to Defendants claim raised for the first time. Daniel's claims for relief did arise for a proper purpose and reasonable cause, because all GLA Directors including Daniel were and are liable under Articles of Inc. Art. VIII (cited above) for possible breach of Duty to members or the corporation."

### CONCLUSION

These alleged facts in attached affidavit demonstrated that "Daniel brought the indemnification claim for the legitimate purpose to limit this liability & attain all available recourse under GLA contract (GLA Articles VIII) & several state statutes" cited above. GLA Insurer and their attorney-Brown Law Firm refusal to now indemnify Director-Daniel under such liability is in violation of the Montana Unfair Trade Practices Act (hereafter MUTPA) that yet requires GLA insurers (U.S.L.I. Insurance Agent) to "attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Section 33-18-201(6), MCA. "A violation of this provision gives rise to an independent cause of action pursuant to § 33-18-242, MCA. The commencement of a lawsuit by the insured does not end an insurer's duties to the insured." See Palmer v. Farmers Ins. Exch. (1993), 261 Mont. 91, 121, 861 P.2d 895, 913. "Therefore, the continuing duty of good faith can be breached by an insurer's postfiling conduct. This includes the actions of attorneys conducting the defense of the insurer as its agents." See Safeco Ins. Co. v. Ellinghouse (1986), 223 Mont. 239, 252\_53, 725 P.2d 217, 225-26.

For all the above, this court's authority to indemnify Daniel boils down to whether or not in Daniel's capacity as a Director his complaint claims sought to limit such liability (per GLA Articles VIII), except for §35-2-450, MCA that allows Daniel's indemnification if he "is fairly and reasonably entitled to

indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in 35-2-447(1) or was adjudged liable as described in 35-2-447(4). If the director was adjudged liable, indemnification is limited to reasonable expenses incurred.”

Respectfully Submitted on June 30th, 2014.

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

**Certificate of Service**

We, Daniel & Val O'Connell, swear that a true and correct copy of forgoing document(s) were sent to the following parties via certified mail on this same day to:

United States Liability Insurance (U.S.L.I.)Group: Alanah Griffith  
Agent PayneWest Insurance 26 E. Mendenhall  
2925 Palmer, Suite B, Bozeman, Mt. 59715  
Missoula, MT. 59808-1658

Hon. Judge David Cybulski  
573 Shippe Canyon Rd.  
Plentywood, Mt. 59254

Attorney for GLA & U.S.L.I. Insurance Agent:  
Brown Law Firm, P.C.  
315 N. 24th St. (PO Drawer 849)  
Billings, MT. 59103-0849

By Daniel K. O'Connell By: Valery O'Connell  
Daniel O'Connell Valery O'Connell



**PRO SE**

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**MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

Daniel K. O'Connell (a Director of the )  
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& on behalf themselves as members of the )  
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Cause No.DV-2011-114

Plaintiff(s), )

v. )

**ORDER TO INDEMNIFY**

Glastonbury Landowners Association, Inc. )  
& current GLA Board of Directors )

Defendant(s) )

This matter first came before the Court upon the Plaintiffs' Motion for Indemnification on June 3, 2014. The Court, having reviewed the Motion pleadings, find the following:

This court's authority, as pursuant to §35-2-450.MCA, to indemnify Daniel O'Connell is wether or not in Daniel's capacity as a Director, if his complaint claims sought to limit such liability (per GLA Articles VIII), except for §35-2-450, MCA that allows Daniel's indemnification if he "is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in 35-2-447(1) or was adjudged liable as described in 35-2-447(4). If the director was adjudged liable, indemnification is limited to reasonable expenses incurred." The court finds during his time as a GLA Director, Daniel O'Connell could be deemed liable under these standards.

FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that since DV-11-114 was filed

while Daniel was a GLA Director & could be deemed liable under these standards, the GLA & Insurers shall immediately indemnify Daniel O'Connell for such DV-11-114 complaint pleadings and GLA counterclaim against him.

DATED this \_\_\_\_ day of September, 2011.

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Wm. NELS SWANDEL, District Judge

cc: Daniel and Valery O'Connell, Brown Law Firm