

1 Michael P. Heringer
2 Seth M. Cunningham
3 BROWN LAW FIRM, P.C.
4 315 North 24th Street
5 P.O. Drawer 849
6 Billings, MT 59103-0849
7 Tel (406) 248-2611
8 Fax (406) 248-3128
9 *Attorneys for Respondents Glastonbury*
10 *Landowners Association, Inc.*

6 Alanah Griffith
7 Pape & Griffith, PLLC
8 26 E. Mendenhall
9 Bozeman, MT 59715
10 Tel (406) 522-0014
11 Fax (406) 585-2633
12 *Attorneys for Respondents Glastonbury*
13 *Landowners Association, Inc.*

11 MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

12 DANIEL K. O'CONNELL and VALERY A.
13 O'CONNELL,

14 Plaintiffs,

15 v.

16 GLASTONBURY LANDOWNERS
17 ASSOCIATION, INC. & Current GLA Board
18 of Directors,

18 Defendants.

Cause No.: DV-2011-114
Judge David Cybulski

**DEFENDANT'S REPLY TO PLAINTIFFS'
RESPONSE IN OPPOSITION TO MOTION
TO QUASH SUBPOENAS FOR
DEPOSITIONS**

19 COMES NOW the above named Defendant Glastonbury Landowners Association, Inc. (GLA)
20 and submits this reply to Plaintiffs' Response in Opposition to the GLA's Motion to Quash Subpoenas
21 for Depositions. Plaintiffs do not justify the defects in their subpoenas nor do they justify imposing an
22 undue burden on the deponent. However, it is for these reasons that the subpoenas should be quashed.

23 **1. Plaintiffs fail to explain the defects in their subpoenas.**

24 A subpoena must specify a time and place to attend and testify and it must set out the text of
25 Rule 45(d) and (e). Mont. R. Civ. P. 45(a)(1)(A). A subpoena must be served by a person who is not a
26 party, and if the person's attendance is commanded, by tendering fees for one day's attendance and
27
28

1 mileage. Mont. R. Civ. P. 45(b). Proof of service when necessary shall be filed with the clerk of court.

2 Mont. R. Civ. P. 45(c)(3).

3 Neither of the subpoenas Plaintiffs served set out Rule 45(d) and (e). Plaintiffs also personally
4 served Alyssa Allen which is not allowed, and failed to tender the proper fees to Janet Naclerio at the
5 time of service. Finally, the subpoenas were never corrected to reflect the date at issue here. Open-
6 ended subpoenas are not contemplated by the Rules of Civil Procedure.

7
8 Plaintiffs fail to explain why the Court should not quash these defective subpoenas. Plaintiffs
9 argue Ms. Allen and Ms. Naclerio signed a “certificate of service” and so consented to service under
10 Mont. R. Civ. P. 5(b)(2)(F) as if this would waive any defects in service. Plaintiffs are wrong.

11 First, Rule 5 has to do with service of pleadings and other papers and applies “unless these rules
12 provide otherwise....” Mont. R. Civ. P. 5(a)(1). Subpoenas clearly have their own rules for service
13 under Rule 45 so Rule 5 does not apply which is why subpoenas are not listed in Rule 5(a)(1). Second,
14 Rule 5(b)(1) clearly requires “[i]f a party is represented by an attorney, service under this rule must be
15 made on the attorney unless the court orders service on the party.” Plaintiffs did not serve their
16 “subpoenas” in accordance with either Rule 45 or Rule 5.

17
18 Finally, Plaintiffs rely on Rule 5(b)(2)(F) which states:

19
20 A paper is served under this rule by: delivering it by any other means that the person consented
21 to in writing—in which event service is complete when the person making service delivers it to
22 the part or agency designated to make delivery.

23 Plaintiffs apparently believe they may freely contact a person represented by an attorney and demand
24 they sign an incomprehensible statement purporting to waive any rights they have to object. This is the
25 very reason the Rules require subpoenas to be served under special rules and other documents be served
26 on the attorney—so that lay people are protected.

1 Plaintiffs cannot violate the Rules and then claim the Rules do not apply. If Plaintiffs had
2 communicated about the depositions through counsel to begin with, this Motion would not have been
3 necessary. Plaintiffs' refusal to communicate and refusal to abide by the Rules justifies quashing the
4 subpoenas and imposing a sanction on Plaintiffs.

5 **2. Plaintiffs have not shown compliance with required pre-discovery disclosure.**

6 Rule 6(C)(1) of the Montana Sixth Judicial District Court Rules states:
7

8 Except with leave of Court, a party may not seek discovery from any source before making an
9 appropriate pre-discovery disclosure and may not seek discovery from another party before
10 service that party with an appropriate disclosure....The disclosure shall contain the following
11 information:

12 (a) the factual basis of every claim or defense advanced by the disclosing party. In the event of
13 multiple claims or defenses, the factual basis for each claim or defense;

14 (b) the legal theory upon which each claim or defense is based including, where necessary for a
15 reasonable understanding of the claim or defense, citations or pertinent legal or case authorities;

16 (c) the name, and if known, the address and telephone number of each individual known or
17 believed to have discoverable information about the claims or defenses, and a summary of that
18 information;

19 (d) a copy of, or a description, including the location and custodian, of document or data
20 compilations, and tangible things and relevant documents reasonable likely to bear on the claims
21 or defenses;

22 (e) a computation of any damages claimed;

23 (f) the substance of any insurance agreement that may cover any resulting judgment.

24 Plaintiffs claim their "Notice of Delay of Discovery & Oral Deposition" filed May 23, 2014 constitutes
25 this necessary disclosure. However, that document contains none of the required information and is
26 simply their excuse for having conducted no discovery in over a year. Plaintiffs have not made a pre-
27 discovery disclosure and they are barred from seeking discovery, including taking depositions, until
28 doing so. Therefore, these subpoenas should be quashed.

3. Plaintiffs do not justify imposing an undue burden on Janet Naclerio.

Plaintiffs filed their Amended Complaint in this case in February of 2013. They have had over a
year and half to conduct depositions, and they have not done so. They had deposition scheduled in May
of 2014 and voluntarily canceled them. Now, Plaintiffs argue "it is unfair and undue burden on

1 **Plaintiffs** to delay discovery for months to come for one person whom can reschedule her vacation one
2 day later, rather than inconvenience all other parties (six out of seven people to the matter) that already
3 agree to the deposition date of September 9th, 2014.” Pl.’s Resp. at 6 (Aug. 28, 2014). Rather than
4 acknowledge the burden their own procrastination has placed on others, Plaintiffs dare to claim it is they
5 who have an undue burden.

6
7 As shown in the affidavit of Janet Naclerio attached to the original Motion to Quash, her trip
8 was planned months before Plaintiffs decided to take her deposition. Aff. Naclerio at ¶ 2 (Aug. 20,
9 2014). Requiring her to change flights and accommodations to accommodate Plaintiffs’ inexplicable
10 delay in conducting discovery is unreasonable. Plaintiffs suggest Ms. Naclerio pay to change her flights
11 and cancel hotel accommodations. However, they adamantly argue changing the date of the deposition
12 would be too burdensome.

13
14 Counsel offered alternative dates for these depositions, including a date earlier than what
15 Plaintiffs requested. It is disingenuous for Plaintiffs to claim delaying a deposition a few weeks is unfair
16 to them when they waited over a year before trying to take depositions. Plaintiffs argue that their court
17 reporter is only available for late September and October because of a planned trip, and so Ms. Naclerio
18 must cancel her trip to accommodate the court reporter’s trip. The hypocrisy of this argument is
19 apparently lost on Plaintiffs. They also argue that an alternative court reporter would cost them more but
20 insist Ms. Naclerio pay to change her trip dates.

21
22 Plaintiffs filed this lawsuit, and if they want to take depositions, the cost is their responsibility.
23 This situation is the result of their procrastination. Court reporters are interchangeable, witnesses are
24 not. Plaintiffs can obtain another court reporter is they so desire or wait until Ms. Yoes is available.
25 Nothing here justifies imposing an undue burden and expense on Ms. Naclerio, and the subpoena should
26 be quashed.
27
28

1 **4. Plaintiffs should be sanctioned.**

2 All of this could have been avoided with simple communication and courtesy from Plaintiffs.
3 Despite repeated requests from GLA's counsel, Plaintiffs have yet to try and coordinate depositions
4 through counsel. Instead, they serve defective subpoenas on witnesses they know are represented by
5 counsel. When counsel tries to coordinate agreeable dates and inform Plaintiffs of conflicts, Plaintiffs
6 simply refused to be professional or courteous.
7

8 Plaintiffs clearly have a duty to avoid imposing undue burden and expense with their subpoenas.
9 "The issuing court must enforce this duty and impose an appropriate sanction—which may include lost
10 earnings and reasonable attorney fees—on a party or attorney who fails to comply." Mont. R. Civ. P.
11 45(d)(1). Plaintiffs have violated this duty which justifies the imposition of an appropriate sanction
12 upon Plaintiffs. Further, Plaintiffs should be ordered to contact the GLA's counsel in writing regarding
13 any future depositions to request the availability of who they would like to depose.
14

15 **CONCLUSION**

16 For the above reasons, GLA respectfully requests an Order from the Court quashing Plaintiffs'
17 defective subpoenas, sanctioning Plaintiffs, and ordering them to consult with the undersigned counsel
18 regarding any future depositions before serving future subpoenas.
19

20 DATED this 3rd day of September, 2014.

21 BROWN LAW FIRM, P.C.
22 315 North 24th Street
23 P.O. Drawer 849
24 Billings, MT 59103-0849

25 BY 

26 Michael P. Heringer
27 Seth M. Cunningham
28 The Brown Law Firm, PC
Attorneys for Glastonbury
Landowners Association, Inc.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail, postage prepaid, and addressed as follows this 3rd day of September, 2014:

Daniel and Valery O'Connell
PO Box 77
Emigrant, MT 59027
Plaintiffs pro se

Daniel and Valery O'Connell
PO Box 774
Cayucos, CA 93430
Plaintiffs pro se

Alanah Griffith
Pape & Griffith, PLLC
26 E. Mendenhall
Bozeman, MT 59715
Tel (406) 522-0014
Fax (406) 585-2633
*Attorneys for Respondents Glastonbury
Landowners Association, Inc.*

Honorable Judge David Cybulski
573 Shippe Canyon Road
Plentywood, MT 59254

By: 
Michael P. Hefinger
Seth M. Cunningham
The Brown Law Firm, PC

1 HON. DAVID CYBULSKI
District Judge
Fifteenth Judicial District
2 573 Shippe Canyon Road
Plentywood, Montana 59254
3 (406) 286-5615
4
5

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

7 DANIEL K. O'CONNELL and VALERY A.
8 O'CONNELL,

9 Plaintiffs,

10 v.

11 GLASTONBURY LANDOWNERS
12 ASSOCIATION, INC. & Current GLA Board
of Directors,

13 Defendants.

Cause No.: DV-2011-114
Judge David Cybulski

**ORDER GRANTING DEFENDANT'S
MOTION TO QUASH SUBPOENAS
FOR DEPOSITIONS**

14 THE COURT, having reviewed Defendant Glastonbury Landowners Association, Inc.'s (GLA)
15 Motion to Quash Subpoenas for Depositions, Plaintiffs' Response in Opposition, and the GLA's Reply
16 to the Response, the file and the law, now makes the following Order:
17

18 1. Defendant's Motion to Quash Subpoenas for Depositions is GRANTED, and the subpoenas
19 commanding Alyssa Allen and Janet Naclerio to appear for their depositions are hereby quashed and
20 any upcoming depositions are canceled.

21 2. Before conducting any more discovery in this case, Plaintiffs are ordered to comply with Rule
22 6 of the Montana Sixth Judicial District Court Rules and make an appropriate pre-discovery disclosure.
23

24 3. Once Plaintiffs comply with the above requirement, all future requests for depositions shall be
25 coordinated through opposing counsel.
26
27
28

1 4. Plaintiffs shall pay Defendant's reasonable attorney fees and costs incurred in bringing and
2 briefing this Motion. Defendants shall submit to the Court an affidavit of fees and costs with a proposed
3 order no later than _____ for approval by the Court.

4 SO ORDERED this _____ day of September, 2014.

7 _____
8 DAVID CYBULSKI, District Judge

9
10 cc: Daniel and Valery O'Connell
11 Michael P Heringer
12 Alanah Griffith
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28