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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,

19 Defendants.

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

**DEFENDANT'S RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR RELIEF FROM ORDERS DATED
SEPTEMBER 8, 2014**

19 COMES NOW the above named Defendant Glastonbury Landowners Association, Inc. (GLA)
20 and submits this response in opposition to Plaintiffs' Motion for Relief from Orders Dated September 8,
21 2014. Plaintiffs claim the Court's Order dated September 8, 2014 is the result of "oversight/omissions
22 and mistake, inadvertence, or excusable neglect" and ask for relief under Mont. R. Civ. P. 60. However,
23 Plaintiffs simply reargue their opposition to the GLA's original Motion to Quash Subpoenas without
24 offering any valid reason the Order stemmed from mistake, inadvertence, surprise, or excusable neglect.
25 The order quashing the subpoenas and sanctioning Plaintiffs was the result of their own refusal to
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1 communicate and comply with their duty to avoid imposing an undue burden. Plaintiffs' present Motion
2 simply adds to the time and expense the GLA has expended on this matter, and it should be denied.

3 **1. Plaintiffs have not shown compliance with required pre-discovery disclosure.**

4 Plaintiffs argue that their subpoenas should not have been quashed on the grounds they were
5 attempting to conduct discovery before making the appropriate pre-discovery disclosure as required by
6 the local rules of the Montana Sixth Judicial District Court Rules. Plaintiffs continue to argue they have
7 made the appropriate disclosure, but they have not.
8

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

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

- 14 (a) the factual basis of every claim or defense advanced by the disclosing party. In the event of
15 multiple claims or defenses, the factual basis for each claim or defense;
16 (b) the legal theory upon which each claim or defense is based including, where necessary for a
17 reasonable understanding of the claim or defense, citations or pertinent legal or case authorities;
18 (c) the name, and if known, the address and telephone number of each individual known or
19 believed to have discoverable information about the claims or defenses, and a summary of that
20 information;
21 (d) a copy of, or a description, including the location and custodian, of document or data
22 compilations, and tangible things and relevant documents reasonable likely to bear on the claims
23 or defenses;
24 (e) a computation of any damages claimed;
25 (f) the substance of any insurance agreement that may cover any resulting judgment.

26 Plaintiffs have never sent the required information to the GLA. On September 10, 2014, Plaintiffs filed
27 a document titled Plaintiffs' Pre-Discovery Disclosure Notice" which also is inadequate under local
28 Rule 6. (See Exhibit A). Despite the plain requirements in the above stated rule, Plaintiffs argue 'local
court rule 6(c)(1) fails to define or give example of what constitutes "appropriate pre-discovery
disclosure...."' Obviously, this is not the case. The requirements are clear, and it was not a mistake of
the Court to determine Plaintiffs failed to fulfill them.

1 **2. Requiring Plaintiffs to coordinate future depositions through counsel is not a mistake.**

2 Plaintiffs next argue the rules and law do not require a party to coordinate all depositions
3 through opposing counsel. Plaintiffs claim this part of the Court’s Order imposes an undue burden upon
4 them. Plaintiffs appear to be arguing they may take depositions of witnesses represented by counsel
5 without coordinating such depositions through counsel. This position is contrary to the law. Mont. R.
6 Civ. P. 5(b)(1) states: “If a party is represented by an attorney, service under this rule must be made on
7 the attorney unless the court orders service on the party.” Further, Mont. R. Civ. P. 30(b)(1) states: A
8 party who wants to depose a person by oral questions must give reasonable written notice to every other
9 party.” Read together, notice of depositions must be served on the attorneys. Plaintiffs know both
10 Alyssa Allen and Janet Naclerio are represented in this matter, and they cannot be excused from
11 coordinating depositions through the undersigned counsel.
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14 Finally, the “Standards of Professional Courtesy Among Attorneys” state: “We will contact
15 opposing counsel before scheduling hearings or noticing depositions. We will cooperate with opposing
16 counsel in responding to all reasonable requests for scheduling accommodations, for extensions of time,
17 and waiver of procedural formalities.” (See Exhibit B). Although, Plaintiffs are not attorneys, they
18 choose to practice law in the Courts of Montana, and counsel for the GLA has endeavored to extend the
19 same courtesies it would to an another attorney. It was only when Plaintiffs took the completely
20 unreasonable stance that Janet Naclerio must cancel her plans that the GLA had to file a Motion to
21 Quash and insist Plaintiffs comply with requirements of the rules.
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24 Now, Plaintiffs argue these rules impose an undue burden upon them. It is no mistake for the
25 Court to require Plaintiffs to follow the rules and behave courteously to opposing counsel and the
26 witnesses. Plaintiffs fail meet their burden for relief.
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1 **3. Plaintiffs’ imposing an undue burden on Janet Naclerio justified sanctions.**

2 Plaintiffs clearly have a duty to avoid imposing undue burden and expense with their subpoenas
3 under Mont. R. Civ. P. 45(d)(1). “The issuing court must enforce this duty and impose an appropriate
4 sanction—which may include lost earnings and reasonable attorney fees—on a party or attorney who
5 fails to comply.” Mont. R. Civ. P. 45(d)(1). The GLA moved to quash the subpoenas because they were
6 defective and imposed an undue burden. The GLA asked for sanctions against Plaintiffs in the form of
7 attorney fees and costs under Rule 45(d)(1) in its original Motion specifically because of the hardship
8 Plaintiffs insisted on imposing upon Janet Naclerio. The Court granted GLA’s and ordered Plaintiffs to
9 pay the GLA’s reasonable attorney fees and costs incurred in bringing and briefing the Motion. It is
10 self-evident that Court’s imposition of sanctions was for Plaintiffs’ failure to avoid imposing an undue
11 burden on Janet Naclerio.
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14 Now Plaintiffs argue the Order fails to impose sanctions properly, and reargue whether or not it
15 was an undue burden on Janet Naclerio to cancel her vacation plans which were set months before
16 Plaintiffs decided to depose her. Under any reasonable interpretation, causing a witness to lose time and
17 money is an undue burden. There are no urgent circumstances, and Janet Naclerio offered alternative
18 dates for her deposition. The Motion and the sanctions were the result of Plaintiffs’ unreasonableness,
19 and the Order should stand.
20

21 **4. There is no “contract” prohibiting a sanction of attorney fees.**

22 Plaintiffs argue that GLA’s counsel “contracted” with them that they would not file a motion to
23 quash if Plaintiffs contacted them. This is simply nonsensical. There is no “contract.” There was an
24 attempt to communicate with Plaintiffs and warn them that their subpoenas were defective and a motion
25 to quash would be forthcoming if they continued to insist upon the appearance of the witnesses.
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1 Plaintiffs had plenty of warning yet continued to down the path that led to the Order. Rule 45 allows the
2 imposition of attorney fees and costs and is a statutory exception to the American Rule.

3 **5. Kansas case law offers no support to Plaintiffs' Motion.**

4 Plaintiffs cite Kansas case law for the proposition "when opposing council has notice and
5 sufficient time to object, they are not prejudiced by the [notice] violation." This lends no support to
6 Plaintiffs' argument. The GLA did not contend it lacked notice and time to object to the subpoenas. The
7 GLA did object on the grounds that Plaintiffs failed to comply with the local rules, the subpoenas were
8 defective in service and content, and Janet Naclerio was subject to an undue burden. First, Plaintiffs
9 continue to demonstrate a lack of understanding of the local rules and what constitutes proper pre-
10 discovery disclosure. They did not comply and have produced nothing that would comply. Second,
11 Plaintiffs do not dispute the service and content deficiencies of their subpoenas which made them
12 defective on their face. Finally, Plaintiffs continue to insist Ms. Naclerio should have canceled and
13 changed her vacation plans and claim that would not have been an undue burden. The Court's Order
14 granted GLA's Motion on the grounds it stated; nothing in this case supports Plaintiffs' argument.
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18 **6. The GLA has not violated local Rule 15.**

19 Plaintiffs finally argue the GLA has violated Rule 15(E) of the Montana Sixth Judicial District
20 Court Rules which states:

21 Attorney Fees. In all civil cases in which attorney's fees are requested in the pleadings, the party
22 seeking an award of attorney fees shall file and serve upon opposing counsel an affidavit
23 itemizing the claim. The opposing party shall within ten (10) days thereafter file a request for a
24 hearing thereon. Failure to file such a request shall be deemed a waiver of the right to a hearing
25 on fees. In a contested proceeding, receipt of evidence pertaining to attorney's fees shall be
deferred until a final disposition or order on the merits of the case has been issued by the Court.
(emphasis added).

26 Plaintiffs argue the GLA's motion failed to give an affidavit of attorney fees which, in their minds,
27 "proves Orders granted Defendant attorney fees in violation of this rule."
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1 Again, Plaintiffs simply fail to read the rule. This is obviously a contested case, and so the
2 determination of attorney fees is deferred until a final disposition or order has been issued by the Court.
3 Here, the Court issued an Order which granted attorney fees and costs to the GLA and ordered it to
4 provide an affidavits of attorney fees and costs by October 1, 2014. Clearly, this follows the rule and is
5 the reasonable course of action. Plaintiffs argument fails.
6

7 **CONCLUSION**

8 For the above reasons, GLA respectfully requests the Court deny Plaintiffs' Motion for Relief
9 from Orders Dated September 8, 2014. Plaintiffs have failed to show the Court's Order was the result of
10 mistake, inadvertence, surprise, or excusable neglect under Rule 60. Plaintiffs simply cost the Court and
11 Defendants time and expense in responding to their meritless Motion.
12

13 DATED this 22nd day of September, 2014.

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18 BY 

19 Michael P. Heringer
20 Seth M. Cunningham
21 The Brown Law Firm, PC
22 Attorneys for Glastonbury
23 Landowners Association, Inc.
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1 **CERTIFICATE OF SERVICE**


2 I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail,
3 postage prepaid, and addressed as follows this 22nd day of September, 2014:

4
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21 Honorable Judge David Cybulski
22 573 Shippe Canyon Road
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24
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By: 
Michael P. Helinger
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SEP 15 2014

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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

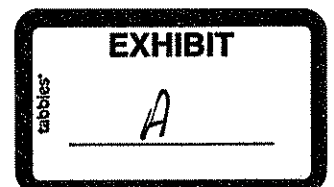
Daniel K. O'Connell & Valery A. O'Connell)	
& on behalf of themselves as members of)	
Glastonbury Landowners Association.)	
)	
Plaintiff(s),)	Cause No. DV-11-114
)	
v.)	
)	
Glastonbury Landowners Association, Inc.)	
& current GLA Board of Directors)	
)	
Defendant(s))	

PLAINTIFFS' PRE-DISCOVERY DISCLOSURE NOTICE

Per M.R.Civ. P., Rule 4 & 6, Plaintiffs hereby give pre-discovery disclosure notice of intent to conduct further discovery by requesting any or all Defendants' admissions and interrogatories pursuant to M.R.Civ. P., Rules 33 & 36. Such written requests for admissions and interrogatories will be forthcoming within a week or two.

Also, Plaintiff's hereby give pre-discovery disclosure notice of intent to conduct further discovery by requesting oral depositions of Alyssa Allen and Janet Naclerio on October 14th, 2014 (10AM-2PM) at Emigrant Hall. This notice will be mailed and emailed to opposing council for coordination purposes. If Defendants' or opposing council do not respond back via email or otherwise by September 19th, then Plaintiffs will take this as agreement for such discovery and depositions date.

Submitted this 10th day of September, 2014,



By: Daniel K. O'Connell By: 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:

Sixth Judicial District Clerk of Court
414 E. Callender St.
Livingston, Mt. 59047

Alanah Griffith
26 E. Mendenhall
Bozeman, Mt. 59715

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

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Billings, MT. 59103-0849

By: Valery O'Connell
Valery O'Connell

STANDARDS OF PROFESSIONAL COURTESY AMONG ATTORNEYS

We will serve our community and our profession and will rededicate ourselves to the highest ideals of the profession not only for the benefit of the public but also for the enrichment of the system of justice.

We will remember a dispute is between the parties and not between the attorneys. Effective representation does not require antagonistic behavior.

We will never intentionally mislead another attorney.

We will practice law so that we need few favors from opposing counsel, but we will practice law so that when we need a favor, opposing counsel will not refuse us.

We will be civil and prompt in all communications and will return telephone calls and respond to letters in a timely manner.

We will not quarrel over matters of form or style, but will concentrate on matters of substance.

We will refrain from making and will not tolerate derogatory comments or personal attacks upon other attorneys, their clients, or the judiciary.

We will contact opposing counsel before scheduling hearings or noticing depositions. We will cooperate with opposing counsel in responding to all reasonable requests for scheduling accommodations, for extensions of time, and waiver of procedural formalities.

We will prepare documents accurately, reflecting the agreement of the parties and will observe all understandings and adhere to all agreements with other attorneys.

We will not practice by default or by taking advantage of opposing counsel on technicalities. Unless it is necessary for protection of our client's case and is fully justified by the circumstances, we will not seek sanctions or disqualification of opposing counsel.