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

8 DANIEL and VALERY O'CONNELL (for and
9 on behalf of GLA landowners),

10 Plaintiffs,

11 v.

12 GLASTONBURY LANDOWNERS
13 ASSOCIATION, INC. Board of Directors,

14 Defendants.

Cause No.: DV-12-_____¹

**DEFENDANTS RESPONSE TO
PLAINTIFFS' MOTION FOR
DECLARATORY JUDGMENT & NOTICE
TO JOIN TRO**

15 COME NOW the above named Defendants Glastonbury Landowners Association, Inc. Board of
16 Directors (GLA) submit this answer brief to Plaintiffs Motion for Declaratory Judgment & Notice to
17 Join TRO. GLA requests the Court deny Plaintiffs' Motion and Order them to properly amend their
18 Complaint to include the claims for declaratory relief that were not included in their Complaint. GLA
19 also requests the Court deny the Plaintiffs' Motion on the grounds that this Motion is actually a Motion
20 for Summary Judgment, and GLA should be allowed time to conduct discovery pursuant to Mont. R.
21 Civ. P. 56(f).
22
23

24 **BACKGROUND**

25 Plaintiffs filed a Complaint (titled Petition for Temporary & Permanent Restraining Order) on
26 October 22, 2012 in the Eighteenth Judicial District Court, Gallatin County. In that Complaint they
27

28 ¹ This action was originally filed in Gallatin County under Cause No. DV-12-789C. Judge Brown ordered venue changed to Park County on December 18, 2012.

1 asked for temporary and permanent injunctions against Defendants to prohibit them from collecting
2 homeowner's association assessments on guest houses. Plaintiffs also alleged that elections within the
3 GLA were done improperly and requested injunctive relief to order new elections. GLA filed a Motion
4 to Dismiss these claims which is still pending.

5 Plaintiffs then filed this Motion for Declaratory Judgment & Notice to Join TRO (Motion). This
6 Motion requests declaratory relief from the Court whether the GLA was negligent in its duties, for
7 contract violations regarding elections, and guest house assessments, and for not charging assessments
8 and interest. Plaintiffs allege the exhibits attached to the Motion "factually show" their claims.

10 ARGUMENT

11 GLA recognizes Plaintiffs are unrepresented, but maintains they should be held to the rules of
12 civil procedure. GLA is entitled to notice of Plaintiffs claims without having to confront new claims
13 every time Plaintiffs file something with the Court.

14 **1) Plaintiffs should be ordered to properly amend their Complaint to include new claims.**

15 Plaintiffs Motion improperly injects new declaratory claims into this action without amending
16 their complaint. As noted above, the original complaint alleged injunctive claims against the GLA. This
17 Motion now requests declaratory relief and alleges negligence. It also improperly asks the Court to
18 declare GLA negligent.

19 Mont. R. Civ. P. 15 states that a party may amend its pleading as a matter of course within:
20 (A) 21 days after serving it; or
21 (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a
22 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever
23 is earlier.

24 Plaintiffs filed their Complaint on October 22, 2012. GLA filed its Motion to Dismiss and Motion to
25 Change Venue on November 7, 2012 (Rule 12(b) motions). According to the rule, Plaintiffs had 21 days
26 after service of GLA's motions (November 28, 2012) to amend their pleading as a matter of course.
27
28

1 Plaintiffs filed the instant Motion December 4, 2012, six days too late. Plaintiffs needed leave of
2 Court or consent of GLA to amend their claims to include declaratory and negligence claims. Mont. R.
3 Civ. P. 15(a)(2). GLA requests that the Court Order Plaintiff's to properly amend their Complaint and
4 then re-file this Motion which asks for a dispositive ruling on the claim.

5 **2) The Court should deny Plaintiffs' Motion as it is really a summary judgment motion.**

6 GLA recognizes that leave to amend is usually freely granted. However, the issue here is the
7 GLA's first notice of these new claims came when Plaintiffs filed this Motion for a dispositive ruling on
8 its claims. GLA should be given notice of the claims before having to defend a summary judgment
9 ruling on them.

10 Plaintiffs filed their Motion asking the Court to "declare wether or not Defendants were
11 negligent in their duties per GLA Art. VIII. For contract violations (regarding elections & Guest house
12 assessments, and/or for not charging such assessments and proper penalties/interests) as the GLA
13 newsletter and assessment policy both factually show." They also ask for damages of nearly \$175,000.
14 It also appears they are asking for some sort of injunctive relief. Plaintiffs include a large number of
15 exhibits with their Motion.

16 The Motion requests a dispositive ruling from the Court. A judgment on the pleadings is allowed
17 after the pleadings are closed. Mont. R. Civ. P. 12(c). Here, GLA has pending a motion to dismiss and
18 has not filed an answer yet. The pleadings are not closed so a judgment on the pleadings is not proper.

19 In any case, Plaintiffs motion clearly presents matters outside the pleadings such as exhibits and
20 affidavits as a basis for their Motion. Thus, this Motion should be treated as a motion for summary
21 judgment pursuant to Mont. R. Civ. P. 12(d). A party may move for summary judgment on all or part of
22 the claim. Mont. R. Civ. P. 56(a). This rule presupposes that the claim for which a party has moved for
23 summary judgment on has actually been pled. As shown above, this Motion asks for summary judgment
24
25
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1 on matters not set forth in the complaint, which is why the Court should order Plaintiffs to amend their
2 Complaint before proceeding with summary judgment.

3 **3) GLA has 14 days from filing its Answer once its Motion to Dismiss is denied and 21 days after**
4 **that to file a response to a Motion for Summary Judgment.**

5 GLA timely responded to Plaintiffs' Complaint with a Motion to Change Venue and a Motion to
6 Dismiss. While the Motion to Change Venue has been resolved, the Motion to Dismiss is still pending.
7 Once the Eighteenth Judicial District Court granted GLA's Motion to Change Venue, only the Sixth
8 Judicial District Court has the power to decide GLA's Motion to Dismiss. Mont. R. Civ. P. 12(b). If the
9 Court denies GLA's Motion, then it has 14 days to file an Answer to Plaintiffs' Complaint. Mont. R.
10 Civ. P. 12(a)(4)(A).
11

12 GLA must respond to any motion for summary judgment within 21 days after it is served or a
13 responsive pleading is due, whichever is later. Mont. R. Civ. P. 56(c)(1)(B). As mentioned above, GLA
14 has yet to file an Answer due to its pending Motion to Dismiss. Thus, no answer to Plaintiffs' Motion is
15 due now. However, GLA has responded to this Motion for the purpose of arguing its procedural
16 deficiencies and requesting that the Court Order Plaintiffs to correct those deficiencies. In the
17 alternative, the Court should continue any hearing or ruling on Plaintiffs' Motion in order to give GLA
18 time to conduct discovery pursuant to Mont. R. Civ. P. 56(f).
19
20

21 **4) In the alternative, the Court should order Rule 56(f) discovery.**

22 Mont. R. Civ. P. 56(f) allows the Court to order a continuance when a party opposing summary
23 cannot present essential facts to allow discovery such as depositions or obtaining affidavits. Attached to
24 this brief as Exhibit A is the affidavit of Seth Cunningham, an attorney with the Brown Law Firm,
25 detailing the discovery which the GLA wishes to conduct in this matter.
26

27 Specifically, it appears that the Plaintiffs have been members of the GLA since 2005. They have
28 participated in the elections, and Daniel O'Connell was elected to the GLA board in 2009 using the

1 same election procedures the Plaintiffs now argue are improper. It is anticipated that deposition
2 testimony and records of previous elections will show the Plaintiffs have consented to these election
3 procedures and have been elected to the board under them for since 2005. GLA wishes to depose Daniel
4 and Valery O'Connell to establish their consent and participation in the elections which would estop
5 them from challenging them now. Further, Plaintiffs' claims of negligence of the GLA in years past
6 would include the time period that Daniel O'Connell served on the GLA board. Deposing Daniel
7 O'Connell is necessary to determine why he did not act to prevent this alleged negligence and whether
8 he had any part in it.

10 Finally, GLA needs time to review its own historical records which it is believed will establish
11 these now challenged election procedures have been in use for many years and are the result of the GLA
12 Board's interpretation of its Bylaws as allowed by Article XII, Amendment A of the Bylaws. For these
13 reasons, the Court should continue this summary judgment Motion to allow GLA time to conduct
14 discovery.

16 **5) A declaratory judgment is not proper for determining negligence.**

18 Plaintiffs request the Court to "declare wether or not Defendants were negligent in their
19 duties...." Declaring a party negligent is not within the purview of the declaratory judgment act which
20 provides:

21 Any person interested under a deed, will, written contract, or other writings constituting a
22 contract or whose rights, status, or other legal relations are affected by a statute, municipal
23 ordinance, contract, or franchise may have determined any question of construction or validity
24 arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of
rights, status, or other legal relations thereunder. Mont. Code Ann. § 27-8-202.

25 The declaratory judgment act's scope is limited to determining rights under contracts and laws. It cannot
26 be used to determine whether or not a party is negligent.

1 **6) GLA requests that the Court strike the censure letter regarding Richard Bolen.**

2 Plaintiffs attached as an exhibit to their Motion a release of information regarding Herman
3 "Richard" Bolen from the Board of Professional Responsibility of the Supreme Court of Tennessee
4 which states that it publicly censured Mr. Bolen (then an attorney in Tennessee) on November 11, 2000
5 for issues arising out of his title business. Mr. Bolen is retired and no longer practicing law. He is the
6 president of the GLA board. This letter has absolutely no bearing on this case and is being presented to
7 harass Mr. Bolen. This is obviously meant to harass because Plaintiffs did not cite to it as an exhibit for
8 any purpose in their Motion. It was attached to the Motion without explanation or reason for the purpose
9 of harassing and embarrassing Mr. Bolen.
10

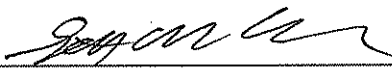
11 The fact of Mr. Bolen's censure is not new information. Plaintiffs previously emailed this letter
12 to members of the GLA accusing Mr. Bolen of illegal and fraudulent conduct. Mr. Bolen responded to
13 the GLA via letter on October 24, 2012 explaining the circumstances of the censure. (See Exhibit B).
14 Despite this, the Plaintiffs clearly attempt to further harass Mr. Bolen by attaching this document to
15 their Motion without even trying to explain why it is relevant to one of their many claims. GLA requests
16 the Court order the censure letter be stricken from the record.
17
18

19 **CONCLUSION**

20 Plaintiffs' Motion for Declaratory Judgment & Notice to Join TRO attempts to amend to their
21 Complaint as it adds new claims while asking the Court for summary judgment on these new claims.
22 For the reasons explained above, the Court should deny Plaintiffs' Motion and order them to properly
23 amend their complaint. Further, Plaintiffs' Motion is a summary judgment motion which GLA is not
24 obligated to respond to until 21 days after it serves its answer. GLA also asks this Court to continue
25 Plaintiffs' Motion if it does not deny it so that discovery, specifically the depositions of Daniel and
26 Valery O'Connell, can be taken to establish essential facts. Also, Plaintiffs request that the Court
27 declare GLA negligent is improper. Finally, GLA requests the Court Order the censure letter of Mr.
28 Bolen stricken from the record.

1 DATED this 19th day of December, 2012.


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3 315 North 24th Street
4 P.O. Drawer 849
5 Billings, MT 59103-0849

6 BY 
7 Michael P. Heringer
8 Seth M. Cunningham
9 *Attorneys for Glastonbury*
10 *Landowners Association, Inc.*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail,
13 postage prepaid, and addressed as follows this 19th day of December, 2012:

14 Daniel and Valery O'Connell
15 PO Box 77
16 Emigrant, MT 59027
17 *Plaintiffs pro se*

18
19 By: 
20 Michael P. Heringer
21 Seth M. Cunningham
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7 **MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

8 DANIEL and VALERY O'CONNELL (for and
9 on behalf of GLA landowners),

Cause No.: DV-12-789C

10 Petitioners,

AFFIDAVIT OF SETH M. CUNNINGHAM

11 v.

12 GLASTONBURY LANDOWNERS
13 ASSOCIATION, INC. Board of Directors,

14 Respondents.

15 STATE OF MONTANA)
16 :ss
17 County of Yellowstone)

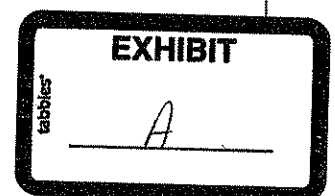
18 Seth M. Cunningham, being first duly sworn on his oath deposes and states:

19 1. I, Seth M. Cunningham, am over the age of 18 years, and after being duly sworn, testify,
20 attest, and state as follows.

21 2. I am an associate in the Brown Law Firm, P.C., and I am working with Michael Heringer in
22 the representation of Defendants Glastonbury Landowners Association, Inc. Board of Directors in the
23 above matter.

24 3. I have discussed this case in detail with Michael Heringer, and we believe there are essential
25 facts yet to be discovered in this case and if the Court is inclined to consider granting the Plaintiffs'
26 Motion for Declaratory Judgment & Notice to Join TRO, it is submitted that more time is needed to
27 conduct discovery, including taking depositions, to find this information.

28 4. We want to depose Daniel and Valery O'Connell.



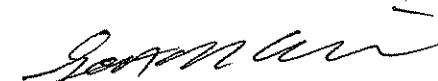
1 5. We believe this testimony will show Plaintiffs have been members of the GLA since 2005.
2 They have participated in the same election process they now challenge without complaint since then.
3 Daniel O'Connell was elected to the GLA board in 2009 using the same election procedures the
4 Plaintiffs now argue are improper. GLA wishes to depose Daniel and Valery O'Connell to establish
5 their consent and participation in the elections which would estop them from challenging them now.
6

7 6. Plaintiffs have also now alleged the GLA board has acted negligently for the past 16 years.
8 This would include the time that Daniel O'Connell served on the board. We want to depose him to
9 determine why he did not act to prevent this alleged negligence and whether he had any part in it.

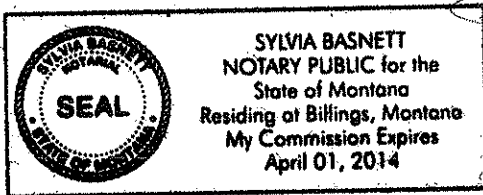
10 7. We believe further discovery, including examination of the GLA's historical documents and
11 past board directors, will reveal these election procedures have been in use for many years and are the
12 result of the GLA Board's interpretation of its Bylaws as allowed by Article XII, Amendment A of the
13 Bylaws.
14

15 8. Further, affiant sayeth naught.

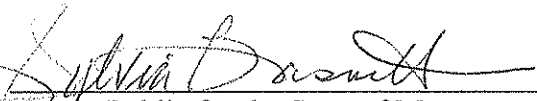
16 DATED this 19th day of December, 2012.

17 
18 Seth M. Cunningham

19 SUBSCRIBED AND SWORN to me by Seth M. Cunningham on this 19 day of December,
20 2012.



25
26
27
28


Notary Public for the State of Montana
Sylvia Basnett
Printed or Typed Name of Notary
Residing at: 315 North 24th Street, Billings, MT
My commission expires: 04-01-2014

GLASTONBURY LANDOWNERS ASSOCIATION, INC.

P.O. Box 1862, Bozeman, Montana 59771

October 24, 2012

Dear GLA Members:

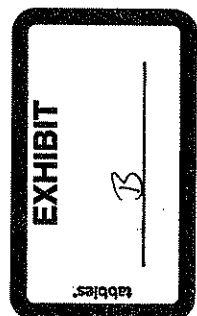
I am writing to provide you with an update on the legal matters for which the community has been engaged for the past year and a half, and other issues of importance.

As you may recall from previous correspondence, Valery and Daniel O'Connell have filed several lawsuits against the Board, the corporation and several individual Board members.

Beginning in June of 2011, the O'Connells filed an action, Park County DV-2011-114, requesting, among many other things, a restraining order to prohibit the Board's approval of the variance requested by the Ericksons for their building project in South Glastonbury. The O'Connells sought to obtain a default order against the corporation without the corporation having been named nor served. Our attorneys got the Court to set aside the default and to order service of process. Our attorneys then moved for a dismissal of the action and the Court granted the dismissal ordering the O'Connells to pay costs and attorney fees. The O'Connells then appealed to the Montana Supreme Court. Briefs by all parties have been filed and we are awaiting the decision of the Supreme Court. The Court could uphold the Judge's dismissal or return the matter to Park County for hearings on some of the issues. Because some of the Board was sued individually and then the corporation was added, and due to potential conflicts, we were required to employ two attorneys for the defense, Frederick Landers and Alanah Griffith, attorneys at law, both practicing in Bozeman, Montana.

In the meantime, the O'Connells filed another action against the Corporation, Park County DV-2011-193. After numerous motions, counter motions and discovery, and a request for permission to file a counter claim, mediation was ordered by the court. Mediation is for resolution, not for determining who is right or wrong. During mediation, compromises by both parties were made and case no DV-2011-193 was dismissed with prejudice with each party bearing their portion of the costs. The term "with prejudice" means that all of the issues raised in that action are concluded and cannot be resurrected. The board agreed to what it considers a few minor concessions such as not casting proxy votes, and changing the customary practice of the president not voting at board meetings since he would be chairing the meeting, and the O'Connells dismissed their claims. Attorney Frederick Landers represented our Association in the foregoing matter.

A few weeks ago, the O'Connells filed another lawsuit, Park County DV-2012-164, challenging the legality of the Erickson project (the same project addressed in the first lawsuit, no. 114) and challenging the legality of the Board's decision to hire a professional management company to provide the necessary administrative duties for the Association, in this case Minnick Management. Our attorney in this matter, Alanah Griffith, has filed an answer on our behalf denying any validity to the claims by the O'Connells. In the meantime, the Erickson family, frustrated by the repeated lawsuits, has decided to abandon their dreams and has withdrawn their request for a variance. The letter from Pete Erickson is attached.



GLASTONBURY LANDOWNERS ASSOCIATION, INC.

P.O. Box 1862, Bozeman, Montana 59771

As I write this report, the O'Connells have vowed to file yet another lawsuit. They have threatened a total of four new lawsuits in the last two weeks.

To date we have spent over \$26,000 in costs and attorney fees in defense of the actions brought by the O'Connells, and further bills are pending. The Association has never been a plaintiff and has never instigated any of these legal matters. Unfortunately, because Mr. O'Connell was a Board member at the time he filed the first lawsuit, insurance did not cover the fees. We are working with insurance today to see that the third lawsuit is covered by insurance.

It has also come to the Board's attention that the O'Connell's have sent out an e-mail regarding my past practice of law. The Board has requested that I also address the accusation in that e-mail that I was guilty of fraud and acting illegally. This accusation is of course, untrue.

The O'Connell's attached a "Letter of Censure" which I received from the Tennessee Board of Professional Responsibility in which I was cited for not following ethical guidelines in the administration of an escrow account. As you can see from that letter, I was never found "guilty of fraud" or any illegal act, only censured (as opposed to suspension or revocation of my license to practice). Censure is essentially a "slap on the wrist" when there is a technical violation of the rules of ethics. Since the letter attached by the O'Connells does not really explain what occurred, the Board has requested that I let the membership know what happened.

I was engaged in a title business. I and another attorney did title searches and closed loans and sold title insurance to the mortgagee. Upon closing of the loan, the money was held in escrow until cleared and then many checks were issued for things such as termite inspections, repair work, old liens and finally distribution to the entities such as sellers, buyers, real estate agents, title companies and so forth. Our administrative assistant was reconciling the incoming checks to each file, but unfortunately, she was not looking at the overall account when a group of forgers copied one of our checks with a color copy machine and wrote about \$84,000 worth of checks on our escrow account.

In Tennessee, forged instruments must be challenged to the bank within three days after receipt of the bank statement. (Many states allow two weeks to a month to challenge). Unfortunately, several weeks elapsed before our discovery that the checks were forged. We argued with the banks, hired a banking lawyer to assist us, reported the matter to the police and FBI and tried to pull ourselves out of the hole by using other assets and our operating account. We were able to hang on for a few months, but by October, we found we could not pay some accounts.

We reported our situation to the insurance company who promptly cancelled our contract thereby ending the business. The insurance company paid \$35,000 in claims. The insurance company sought reimbursement from us but the business was wiped out without any remaining assets. The insurance company then sued us individually,

GLASTONBURY LANDOWNERS ASSOCIATION, INC.

P.O. Box 1862, Bozeman, Montana 59771

but we were protected by the corporate shield. The insurance company then vindictively filed with the Board of Professional Responsibility.

The hearing was to be 180 miles away and I was tired and broke and decided not to fight the request for sanctions. I knew that if I had presented my side of the story and corrected certain errors in the report, the censure may not have occurred. But I was planning to retire and chose not to appear. As you know, the Board of Professional Responsibility gave me the slap on the wrist, nothing more.

The FBI caught the gang of forgers who were operating out of Salt Lake City, Utah. The gang had targeted title companies like ours as well as several banks, reaping in excess of \$2,000,000 dollars. I went to the Federal Court in Salt Lake to testify. The culprits were convicted and sentenced to Federal Prison and, of course, ordered to pay restitution. None of the proceeds were ever recovered and the money earned by the prisoners never amounted to more than a few hundred dollars.

I put the nightmare behind me, retired and moved here to enjoy living in Montana, fishing and hiking and enjoying some of the people. Unfortunately, the nightmare has been resurrected by yet another party with vindictive purpose.

I do not practice law here nor do I have any control of Association funds. I am only serving as a director because I was requested to and continue only because of repeated continued requests. I would prefer to be enjoying my retirement rather than dealing with these repeated conflicts. However, I believe in the work the Board does for the community. We do our best to preserve our property values and maintain our rural way of life.

Thank you for reading our update. We will endeavor to continue to ensure that the community is well represented. If you have any further questions about the various lawsuits or my censure, please do not hesitate to contact myself, or any other member of the Board. Ms. Griffith will be present at the annual meeting to answer any questions you may have. We look forward to a beautiful winter in our valley.

Sincerely,



H. Richard Bolen
President

cc: file