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

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

11 Plaintiffs,

12 v.

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

15 Defendants.

Cause No.: DV-2012-220
Judge Brenda R. Gilbert

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' REPLY TO
"DEFENDANTS ANSWER..." TO TRO
COMPLAINT & MOTION TO STRIKE**

16 COME NOW the above named Defendants Glastonbury Landowners Association, Inc. Board of
17 Directors (GLA) and submits this brief in opposition to Plaintiffs' 'Reply to "Defendants Answer..." to
18 TRO Complaint & Motion to Strike.' This is another nearly incomprehensible filing by Plaintiffs and
19 the GLA will attempt to summarize it before answering it. Plaintiffs filing purports to be several things
20 including:
21

- 22 1) A reply to Defendants' Answer filed January 17, 2013.
- 23 2) A motion to strike Defendants answers regarding Plaintiffs' claims on guest house
24 assessments.
- 25 3) An allegation that Defendants have violated Mont. R. Civ. P. 11.
- 26 4) A repeat request for summary judgment which was already filed on January 18, 2013.

27 All these requests are meritless and this latest filing should be denied.
28

1 **1) Plaintiffs “Reply” to Defendants’ Answer is improper.**

2 Mont. R. Civ. P. 7(a) allows a complaint, an answer to a complaint, and “if the court orders one,
3 a reply to an answer.” A search of the Court’s docket reveals that Plaintiffs never requested leave to file
4 a reply to Defendants’ Answer nor has the Court ordered one on its own initiative. Plaintiffs’ “Reply” to
5 Defendants’ Answer was improperly filed without Court order and should be denied.
6

7 **2) Defendants’ Initial Motion to Dismiss held all Plaintiffs’ claims in abeyance until ordered to
8 Answer by this Court and Defendants timely filed their Answer.**

9 This argument is again raised by Plaintiffs, and Defendants have already answered it in its
10 “Response in Opposition to Plaintiffs’ Appeal of Orders Regarding Declaratory Motion & Joinder” and
11 “Response in Opposition to Plaintiffs’ Motion for Summary Judgment & Brief in Support of Its Cross-
12 Motion for Summary Judgment.” Plaintiffs allege:

- 13 1) They assert the GLA filed its Motion to Dismiss in regards to the election claims;
14 2) The GLA did not Answer the allegations regarding guest house assessments within 21 days as
15 required by Mont. R. Civ. P. 12(a)(1)(A);
16 3) Because it did not Answer the guest house claims within 21 days, GLA’s Answer regarding
17 the guest house claims should be stricken from the record.
18

19 As explained before, this argument has no merit. Filing partial motions to dismiss has never been the
20 practice in Montana nor does it align with the Rules of Civil Procedure.
21

22 Mont. R. Civ. P. 12(a)(1)(A) requires a defendant to serve an answer within 21 days after being
23 served with a summons and complaint. However, if the defendant instead serves a motion under rule 12,
24 this period is altered. Mont. R. Civ. P. 12(a)(4). If the motion is denied, the defendant has 14 days after
25 the denial to serve a responsive pleading. Mont. R. Civ. P. 12(a)(4)(A). GLA served both a Motion to
26 Change Venue and a Motion to Dismiss under 12(b)(3) and (6) in response to Plaintiffs’ Petition. The
27 Motion to Change Venue was granted. The Motion to Dismiss was denied on January 9, 2013. GLA
28

1 filed its Answer on January 17, 2013, well within the 14 days granted by Mont. R. Civ. P. 12(a)(4)(A).
2 Simply put, GLA's motions altered the 21 days to answer to 14 days after the Motion to Dismiss was
3 denied.

4 Plaintiffs argue GLA should have answered their claims not addressed in the Motion to Dismiss.
5 This argument goes against the plain language of the rule which broadly alters the time to respond for
6 any motion filed under rule 12. Further, attorneys and courts in Montana have followed the rule in this
7 matter, waiting to file an answer until motions under rule 12 are resolved. See *Sealey v. Majerus*, 149
8 Mont. 268, 425 P.2d 70 (1967). The federal rules of civil procedure mirror the Montana rules, and
9 federal courts have addressed Plaintiffs' partial motion to dismiss argument.
10

11 In *Batdorf v. Trans Union*, 2000 WL 635455, (N.D. Cal. 2000), the defendant moved to dismiss
12 13 of 16 causes of action in the plaintiff's complaint before filing its answer. The plaintiff moved for
13 summary judgment on the three claims not addressed by the motion to dismiss. The Court ruled:
14

15 Plaintiff's motion for summary judgment fails because Trans Union has not admitted plaintiff's
16 allegation with respect to the first, third and fifth causes of action. Trans Union was not required
17 to file an answer to the causes of action it was not moving to dismiss while its motion to dismiss
18 is pending. The filing of a motion to dismiss the other causes of action enlarged the time for
19 Trans Union to respond to the entire complaint, including those causes of action it did not move
20 to dismiss. To hold otherwise would create the possibility of duplicative pleading in the event
21 the motion to dismiss is denied and the moving party is then required to answer the causes of
22 action it had moved to dismiss. (citations omitted) *Id.* at 5.

23 This view is the majority view among federal courts. The language of rule 12(a) speaks to the answer as
24 a whole, to a complaint as a whole, and not in terms of individual answers to separate counts or claims.
25 *Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F.Supp.2d 598, 638 (2006)¹.

26 In multi-claim litigation in which a party mounts a Rule 12(b) challenge to only some of the
27 claims against it, it makes no sense to impose upon the parties some kind of "dual-track"

28 ¹ *Ideal Instruments* cites many other cases in support of this position: *Brocksopp Engineering, Inc. v. Bach-Simpson, Ltd.*,
136 F.R.D. 485 (E.D. Wis. 1991). *Godlewski v. Affiliated Computer Servs., Inc.*, 210 F.R.D. 571 (E.D. Va. 2002). *Tingley
Sys., Inc. v. CSC Consulting, Inc.*, 152 F.Supp.2d 95 (D. Mass. 2001). *Finnegan v. University of Rochester Med. Ctr.*, 180
F.R.D. 247 (W.D.N.Y. 1998).

1 litigation involving an answer and further proceedings on some claims, while other claims are
2 subject to review on the motion dismiss. The inefficiencies for both the parties and the court as
3 well as the potential for confusion and unnecessary procedural convolutions posed by such
4 “dual-track” litigation are obvious. *Id.* at 639.

5 Plaintiffs may cite *Gerlach v. Michigan Bell Tel. Co.*, 448 F. Supp. 1168, 1174 (E.D. Mich.) for
6 the proposition that: “Separate counts are, by definition, independent bases for a lawsuit and the parties
7 are responsible to proceed with litigation on those counts which are not challenged by a motion under
8 F.R.C.P. 12(b).” In *Gerlach*, the court considered whether to enter default against a defendant who did
9 not address all of the plaintiffs’ claims in its complaints. The court decided not to but ordered the
10 defendant to answer the claims within 10 days. Here, Plaintiffs did not move for default before the GLA
11 filed its Answer. They move to strike the Answer claiming the GLA waited too long to file it yet did
12 nothing until the Answer was filed so they can hardly claim prejudice.

13 In any case, the proposition in *Gerlach* is wrong. “No other court has adopted the *Gerlach*
14 court's reasoning or ruling; indeed, every court to consider the decision in *Gerlach* on this point has
15 disagreed with and declined to follow it.” *Ideal* at 638². The court in *Brocksopp Engineering, Inc. v.*
16 *Bach-Simpson, Ltd.*, 136 F.R.D. 485, 486-7 (E.D.Wis.1991).stated:

17
18 I decline to adopt the *Gerlach* court's interpretation of rule 12(a). By my reading of the rule's
19 language, a partial 12(b) motion enlarges the time to file an answer. [The defendant] has 10 days
20 after the court rules on its motion to dismiss to file an answer. I also agree with legal
21 commentators who suggest that the *Gerlach* approach has significant disadvantages. It requires
22 duplicative sets of pleadings in the event that the 12(b) motion is denied and causes confusion
over the proper scope of discovery during the motion's pendency. 5A C. Wright and A. Miller,
Federal Practice and Procedure § 1346 at p. 181 (1990).

23 The plain language of the rule, custom and practice in Montana, and the majority of other courts to
24 address Plaintiffs’ argument all come to the conclusion that motions under rule 12 hold the entire
25

26 ² Noting that the following cases have all rejected *Gerlach*: *Godlewski v. Affiliated Computer Servs., Inc.*, 210 F.R.D. 571, 572
27 (E.D.Va.2002). *Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F.Supp.2d 95, 122 (D.Mass.2001). *Finnegan v. University of*
Rochester Med. Ctr., 180 F.R.D. 247, (W.D.N.Y.1998). *Alex. Brown & Sons, Inc. v. Marine Midland Banks, Inc.*, 1997 WL
28 97837, * 7 (S.D.N.Y.1997) (unpublished op.). *Circuit City Stores, Inc. v. Citgo Petroleum Corp.*, 1994 WL 483463, *4
(E.D.Pa.1994) (unpublished op.). *Ricciuti v. New York City Transit Auth.*, 1991 WL 221110, *2 (S.D.N.Y.1991)
(unpublished op.). *Brocksopp Engineering, Inc. v. Bach-Simpson, Ltd.*, 136 F.R.D. 485 (E.D.Wis.1991).

1 answer to the entire complaint in abeyance until those motions are resolved. For this reason, Plaintiffs'
2 argument fails and their "Motion to Strike" should be denied.

3 **3) Plaintiffs allegations of violations of Mont. R. Civ. P. 11 are improper.**

4 Plaintiffs improperly filed a separate "Motion for Sanctions against GLA Defendants' Council"
5 on February 1, 2013. They also raise some of those allegations in their 'Reply to "Defendants
6 Answer..." to TRO Complaint & Motion to Strike.' Defendants have responded fully and separately to
7 the motions for sanctions and incorporate those arguments in response to the same allegations here.

8 Plaintiffs did not properly allege sanctionable conduct pursuant to Mont. R. Civ. P. 11(c)(2).
9 Further, the basis of their argument is that the GLA denied some of the allegations in their Complaint.
10 They move for sanctions without ever conducting discovery to discover the reasons for those denials
11 and act if every allegation in their Complaint should be deemed true. Simply put, they do not understand
12 it is their burden of proof to prove their claims by a preponderance of evidence. Sanctions against the
13 GLA are not warranted, and Plaintiffs should be ordered to pay GLA's reasonable attorney fees and
14 costs for the time spent responding to those meritless claims.
15
16
17

18 **4) Plaintiffs repeat request for summary judgment should be denied.**

19 Plaintiffs also repeat their requests for summary judgment which they filed on January 18, 2013.
20 Defendants filed a full response and cross-motion for summary judgment. The arguments and
21 authorities of that response are incorporated into this response and there is no need to repeat them here.
22

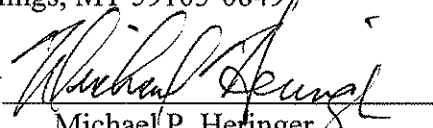
23 **CONCLUSION**

24 For the above stated reasons, Plaintiffs' 'Reply to "Defendants Answer..." to TRO Complaint &
25 Motion to Strike' should be denied.
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28

1 DATED this 13th day of February, 2013.

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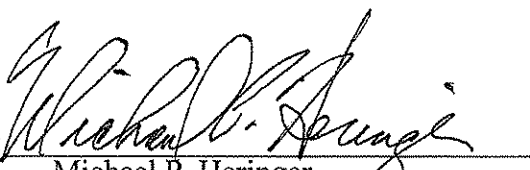
11 **CERTIFICATE OF SERVICE**

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 13th day of February, 2013:

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