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

12 DANIEL and VALERY O'CONNELL,
13
14 Plaintiffs,

15 v.

16 GLASTONBURY LANDOWNERS
17 ASSOCIATION, INC. Board of Directors,
18
19 Defendants.

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

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR 2015 AMENDED COMPLAINT &
MOTION AGAINST CONSIDERATION OF
DEC. 28, 2016 PROPOSED ORDER**

18 COMES NOW the above named Defendants Glastonbury Landowners Association, Inc. (GLA)
19 and submits this response in opposition to Plaintiffs' Motion for 2015 Amended Complaint & Motion
20 Against Consideration of Dec. 28, 2015 Proposed Order.
21

22 **Background**

23 Plaintiffs original complaint in this matter was filed in June of 2011. That complaint was
24 dismissed, and the Montana Supreme Court determined Plaintiffs should be given a chance to amend
25 their complaint. Plaintiffs filed a "New Amended Complaint & Motion for Pleading" dated February 31,
26 2013 [sic]. After Plaintiffs were given ample time for discovery, the GLA moved for summary
27 judgment in August of 2014. Plaintiffs filed numerous motions to strike, for extensions, sanctions, and
28

1 other motions against the Motion for Summary Judgment but eventually filed a "Response in
2 Opposition to Defendants' Summary Judgment Motion" dated April 20, 2015. This document was filed
3 by the Clerk of Court on April 22, 2015 as documents 173 and 174.

4 Defendants filed a timely reply, and the Motion for Summary Judgment is now fully briefed.
5 Defendants filed a proposed "Decision and Order Granting Defendants' Motion for Summary Judgment
6 and Resolving other Pending Motions" on December 28, 2015. In response to that submission, Plaintiffs
7 sent an email stating "We will be filing our Plaintiffs' amended complaint in a day or two." (See Exhibit
8 A). Defendants' counsel received Plaintiffs' unsigned and undated "Motion for 2015 Amended
9 Complaint & Motion Against Consideration of Dec. 28 2015 Proposed Order" and "Plaintiffs' 2015
10 Amended Complaint" on January 4, 2016.

11
12
13 **1. Plaintiffs' Motion to Amend is untimely and prejudicial.**

14 Mont. R. Civ. P. 15(a) allows a party to amend a pleading with the court's leave when "justice
15 so requires." "Although the rule has been liberally interpreted, a district court is justified in refusing
16 amendment because of undue prejudice to the opposing party, undue delay, and dilatory tactics by the
17 moving party." *Smith on Behalf of Smith v. Butte-Silver Bow Cty.*, 266 Mont. 1, 10, 878 P.2d 870, 875
18 (1994) abrogated on other grounds by *Citizens Awareness Network v. Montana Bd. of Envtl. Review*,
19 2010 MT 10, 355 Mont. 60, 227 P.3d 583.
20

21 Here, it is obvious that Plaintiffs have done everything in their power to avoid this matter
22 coming before the Court on summary judgment. Plaintiffs now try to avoid Defendants' summary
23 judgment motion by filing another amended complaint with 12 new claims and over 20 pages of new
24 allegations in addition to including all the claims from the 2013 complaint. Plaintiffs claim these new
25 claims have arose since 2013. Conveniently, Plaintiffs point out their new claims make the summary
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27
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1 judgment proposed order “obsolete and moot.” Seeing their 2013 claims have no merit, Plaintiffs now
2 try to move the goalposts to avoid defeat.

3 This lawsuit is approaching its five year anniversary from inception and three years from the
4 first amendment. Plaintiffs have filed numerous motions and done other delaying tactics. Now, once the
5 summary judgment motion is fully briefed and ready to be ruled upon, Plaintiffs try to add new claims.
6 “Generally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time
7 and which would further justice; on the other hand, amendments which would result in undue delay or
8 undue prejudice to the opposing party or amendments which would be futile need not be permitted.”
9 *Reier Broad. Co. v. Montana State Univ.-Bozeman*, 2005 MT 240, ¶ 8, 328 Mont. 471, ¶ 8, 121 P.3d
10 549, ¶ 8. Plaintiffs motion to amend is not timely, and it is prejudicial.
11

12 The new claims are new theories of liability that do not relate to the original allegations. The
13 GLA would be forced to litigate anew after nearly five years already spent on this case. “[L]iberal
14 construction and amendment of pleadings does not grant carte blanche to advance new theories on an
15 unsuspecting opponent.” *McJunkin v. Kaufman & Broad Home Sys., Inc.*, 229 Mont. 432, 437, 748 P.2d
16 910, 913 (1987). Undue prejudice occurs when the opposing party has already expended substantial
17 effort and expense that would be wasted if the moving party were allowed to proceed on the new legal
18 theories. *Farmers Co-op Ass’n. v. Amsden, LLC*, 2007 MT 286, ¶ 14, 339 Mont. 445, ¶ 14, 171 P.3d
19 690, ¶ 14.
20

21 Here, the GLA has expended substantial effort and expense litigating both Plaintiffs’ 2011
22 complaint and the 2013 complaint. When the Montana Supreme Court allowed Plaintiffs to amend their
23 2011 complaint, all the effort by the GLA was wasted. Now, if this Court allows Plaintiffs to amend
24 again, all the effort and expense since 2013 will be wasted as well. Such a result is likely what Plaintiffs
25 are trying to achieve, a long and costly drain on the GLA and the property owners it represents.
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1 'A district court "is justified in denying a motion for an apparent reason such as undue delay,
2 bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by
3 amendments previously allowed, undue prejudice to the opposing party by allowance of the
4 amendment, futility of the amendment, etc.'" *Farmers* at ¶ 12. Plaintiffs claim the GLA is not
5 prejudiced because it had notice because the 2013 complaint told of "likely" amendments by reserving
6 the right to amend the complaint. Plaintiffs' "notice" is insufficient. It simply states they amend later
7 without giving any indication of what that amendment may involve.
8

9 Plaintiffs' Motion to Amend is dilatory in that it seeks to circumvent a fully briefed Motion for
10 Summary Judgment. Plaintiffs' Motion is untimely nearly five years into this lawsuit. And Plaintiffs'
11 Motion is prejudicial in the extreme to the GLA.
12

13 **2. If the validity of Plaintiffs' new claims is considered, the GLA requests further briefing.**

14 Plaintiffs' assert 12 new claims and over 20 pages of new allegations. However, none of these
15 claims have merit. They all take issue with discretionary actions of the GLA and/or misconstrue the law.
16 The 2015 Amended Complaint is futile. If the Court decides to delve into the merits of the 2015
17 Amended Complaint, the GLA requests that further briefing be allowed as the time allowed by the
18 Rules of Civil Procedure and page limits is not enough to fully address the 23 pages of baseless claims.
19

20 **3. Plaintiffs arguments against the proposed Decision and Order have no merit.**


21 Plaintiffs also object to the submission of the GLA's "Decision and Order Granting Defendants'
22 Motion for Summary Judgment and Resolving other Pending Motions." They argue they need a
23 continuance to respond despite having filed a response over eight months late with numerous motions in
24 between. Plaintiffs also claim the GLA's proposed Decision and Order makes new arguments yet they
25 do not identify these alleged new arguments. Plaintiffs are free to submit their own proposed order for
26 the Court's consideration, but they did not do so.
27
28

1 **Conclusion**

2 Plaintiffs' Motion to Amend should be denied because it is dilatory, untimely, and unduly
3 prejudicial to the GLA. Further, their objections to the proposed Decision and Order have no merit. The
4 Court will decide what the Decision and Order will contain and is free to accept as much or little of the
5 GLA's proposal as it sees fit.

6 DATED this 12th day of January, 2016.

8 BROWN LAW FIRM, P.C.

9
10 BY 
11 Michael P. Heringer
12 Seth M. Cunningham
13 The Brown Law Firm, PC
14 Attorneys for Glastonbury
15 Landowners Association, Inc.

1
2 **CERTIFICATE OF SERVICE**

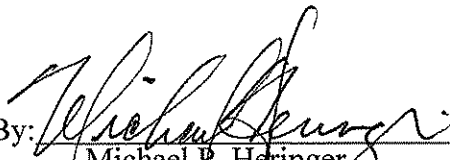
3 I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail,
4 postage prepaid, and addressed as follows this 21st day of January, 2016:

5
6 Daniel and Valery O'Connell
7 PO Box 77
8 Emigrant, MT 59027
9 *Plaintiffs pro se*

10 Daniel and Valery O'Connell
11 PO Box 774
12 Cayucos, CA 93430
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20 Judge David Cybulski
21 573 Shippe Canyon Road
22 Plentywood, MT 59254

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

Seth Cunningham

From: Daniel O'Connell <dko@mac.com>
Sent: Monday, December 28, 2015 2:54 PM
To: Sandy Williams
Subject: Re: O'Connell v. GLA (DV-2011-114)

We will be filing our Plaintiffs' amended complaint in a day or two.

On Dec 28, 2015, at 10:41 AM, Sandy Williams <swilliams@brownfirm.com> wrote:

Attached please find Defendant's Submission of Proposed Decision and Order Granting Defendant's Motion for Summary Judgment and Resolving Other Pending Motions. Also attached, please find the Proposed Decision and Order Granting Defendant's Motion for Summary Judgment and Resolving Other Pending Motions. Copies will also be in today's U.S. Mail.

Thank you,

Sandy Williams

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<D's Submission of Proposed Decision and Order Granting D's MSJ and Other Pending Mtns_12-28-15.pdf><Proposed Decision and Order Granting D's MSJ and Resolving Other Pending Mtns.pdf>

