Daniel & Val O'Connell
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406-577-6339

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), v. Glastonbury Landowners Association, Inc. & current GLA Board of Directors Defendant(s)	Cause No. DV–11–114

PLAINTIFFS' REPLY TO MOTION FOR RELIEF FROM ORDERS DATED SEPTEMBER 8, 2014

Plaintiffs,' as GLA Director & member(s) of the GLA Landowners Association, hereby submit this timely motion reply called, "Plaintiffs Reply To Motion For Relief From Orders Dated September 8, 2014." On September 10th, Plaintiffs submitted a "Motion For Relief From Orders Dated September 8, 2014" requesting relief from such Orders per M.R.Civ.P., Rule 60, for "1) oversight/omissions and mistake, inadvertence, or excusable neglect" and for Defendants "misrepresentation" of facts: & for any other reason that justifies relief."

Defendants reply received September 24th denies this motion for no good cause claiming Plaintiffs Rule 60 motion failed to offer any valid reason for Orders being mistaken, inadvertence, or neglect.

On the contrary Defendants response fails to refute Plaintiffs motion claims 3, 4, 6, & 7 below and denied #1, 2, & 5 below, all valid reasons for Orders being mistaken, inadvertence, or neglect, or other reasons to grant this motion (as follows):

1) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for lacked authority to grant attorney fees at that time contrary to rule 45 requirements for Defendants failure to "serve upon opposing counsel an affidavit itemizing the claim."

2) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for demanding "all future requests for depositions shall be coordinated through opposing council" thereby exceeding rule requirements for written depositions (if not oral depositions), as an undue burden on Plaintiffs discovery attempts: and

3) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for Motion admission (page 7) showing Allen was available for depositions September 9th and Plaintiffs affidavit show lack of evidence & foundation to support the Order for quashing depositions and granting attorney fees; and

4) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for lack authority to quash subpoenas & award motion attorney fees for Plaintiffs lack of "pre-discovery disclosure" absent finding any sanctionable "undue burden" on Deposed contrary to rule 45 requirements because pre-discovery notice was given seven times and Defendants failed to cite any prejudice by these notices being insufficient or not appropriate.

5) Orders err (as mistake, inadvertence, neglect) for denying Defendants violation of a written contract with Plaintiffs: in fact Council Brown's letter (Aug. 14) was a contract agreement with Plaintiffs that stated 'unless Plaintiffs contacted Brown to change the deposition dates from August to September 2014 then Defendants would move to quash the depositions.' Plaintiffs complied with this written contract proven by their emails to Brown on August 16th & 18th; which contract agreement Defendants yet violated by their motion to quash.

6) Defendants "misrepresented" facts regarding notice, because Defendants reply (page 1-2) claims Plaintiffs pre-discovery notice was not in "compliance with rule 6(C)(1)(a–f). which implies that notice was given, thus obviously contradicts their motion to quash that claimed no pre-discovery notice was given.

7) Plaintiffs motion for good cause requests relief from all Orders that are in err as mistake, inadvertence, neglect cited in 1-6 (above) and/or for any other reason that justifies relief for Orders that fatally prejudice Plaintiffs, unduly burdens & unlawfully penalizes Plaintiffs' discovery attempts, and needlessly delayed such discovery several months now.

A. PRE-DISCOVERY NOTICE OF SUBPOENAS WAS GIVEN per rule 6:

Defendants motion to quash response (page 6) claimed, "all the conflict arising from these subpoenas could have been avoided with...a letter or email stating who they would like to depose and requesting dates of availability." Defendants response to this motion (page 1-2) also claimed, "the order quashing the subpoenas and sanctioning Plaintiffs was the result of their own refusal to communicate" with Defendants.

To the contrary, Orders failed to deny or acknowledge that Deposed witnesses received what amounted to seven (7) different communications or notices of pre-discovery depositions as follows:

1.May 23rd "Notice of Delayed Discovery & [notice of] Oral Deposition" for Allen's deposition. (Note: Defendants motion page 1 &2 admits "on May 23, 2014... Plaintiffs filed "Notice of Delayed Discovery & [notice of] Oral Deposition" ... stating they were going to subpoena Alyssa Allen for [oral] depositions."). 2&3) the Allen and Naclerio subpoenas & notice August 8th and again Aug. 28th; 4) council Brown Law Firm August 14th letter stating what dates Allen & Naclerio was available for depositions; 5,6,&7) Plaintiffs three attached emails including the August 18th email to Brown, Allen and Naclerio called Plaintiffs "Notice to modify...Depositions" to September.

B. <u>Defendants motion to quash "misrepresented" facts regarding notice</u>

Defendants reply (page 1-2) also claims Plaintiffs pre-discovery notice was not in "compliance with rule 6(C)(1)(a–f).

This Defendant statement above obviously contradicts their motion to quash that claimed no pre-discovery notice was given. In fact if there was no pre-discovery notice then Defendants response (page 2) could not now claim that notice was not in compliance with this local rule 6. This is proof that Defendants motion to quash "misrepresented" facts regarding notice.

However, wether or not these (7) pre-discovery notices were in "compliance" with local rule 6(C)(1)(a-f) was NOT a finding of court Orders. None the less, this local rule 6(C)(1)(a-f) does NOT apply to Plaintiffs subpoena, because it obviously does not "advance a claim or defense" nor a "legal theory" nor did it request "documents or data

computations" nor "damages" nor "insurance agreement." Plaintiffs subpoena(s) was merely fact finding or discovery for the amended complaint; which complaint DID already advance claims or defenses. So it is impossible and absurd to claim this local rule 6 applies to the subpoena(s) or that Plaintiffs subpoena(s) must "advance a claim or defense" when there are no claims or defenses other than the complaint itself. Therefore appropriate pre-discovery notice was given to Defendants, since under this rule there is no other information to send to Defendants other than the subpoena(s). For Defendants (page 2) to now claim that Plaintiffs subpoena(s) "withheld required information" or withheld "advanc[ing] a claim or defense" is false and also a misrepresentation of the facts of their motion to quash.

Also, Defendant August 14, 2014 letter states" If we do not hear back from you, we will move to quash the subpoenas because they are defective." This Defendant letter (& contract) was not part of the motion to quash, yet seemed to shows that if Plaintiffs give notice to Defendants to change deposition dates this would eliminate and fix any lack of pre-discovery notice. On August 16th and 18 (just 5 days before the motion to quash) Plaintiffs e-mail to Defendants did give pre-discovery notice. Notice Defendant's Aug. 16th letter only claimed the "subpoenas ... are defective," and made no mention of pre-discovery notice being defective. As PRO SE Plaintiffs, if the Defendants had made this claim, Plaintiffs would have remedied any defective notice. So wether or not Plaintiffs failed to do so BEFORE this time is harmless error, because Plaintiffs complied with pre-discovery notice requirement since there was "no claim or defense" other than the complaint & Brown Law Firm agreed to by their August 16th letter. This shows Defendants motion to quash again misrepresented the facts, because

Defendants seem to agree to notice given and only threatened to quash for defective subpoena that they later claim was lacking a statement under the rules. Yet Orders failed to find any lack of statement under rule 45, rule 6 or lack of service requirements.

Orders contrary to this rule 45 requirements thus err (as mistake, inadvertence, neglect) lacking "undue burden" foundation & statutory authority to quash the subpoenas and impose attorney fees just for lack of pre-discovery notice. This is also because Orders preclude quashing the subpoenas and granting attorney fees due to Brown's contract violation (August 14th letter), Brown's failure to consult with their client-Naclerio before agreeing to deposition date of Sept. 9th, & statutory ruling above, together refute Naclerio's "undue burden" claim.

Furthermore, Motion page 7 is prima facia evidence saying, "Ms. Allen is available on September 9th" for deposition. Defendants motion to quash NEVER claimed "undue burden" for Allen and the only "undue burden" claim made was for Naclerio's scheduling conflict (summarized below); which lacked foundation & refuted by Plaintiffs' affidavit.

In another case involving a pre-discovery notice issue, the Kansas court (2007, Case No. 06-2422-JWL) concluded, "when notice has been given [contemporaneous or] after a subpoena is served but before the response period has expired, courts generally look to whether opposing counsel has had sufficient time to object. Specifically, when opposing council has notice and sufficient time to object, they are not prejudiced by the [notice] violation." This ruling shows Plaintiffs notice given contemporaneous to the GLA Defendants & council for a subpoena failed to i*mpose any undue burden.*

C. ORDERS LACK AUTHORITY TO REQUIRE all depositions be coordinated...

Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for demanding "all future requests for depositions shall be coordinated through opposing council" thereby exceeding rule 30 & 31 requirements for written depositions, if not oral depositions, as an undue burden on Plaintiffs discovery attempts.

Defendants response (page 3) seems to think this Order to 'coordinate with opposing council' only means to provide service of depositions to council under rules 5 & 30 which Plaintiffs have been doing all along. The legal definition of coordinate is *"to negotiate with others in order to work together."* Defendants again misrepresent the fact that rule 31 relating to written depositions and subpoenas does not require Plaintiffs to coordinate (as in negotiate) with council; which Orders thus lack authority and impose an undue burden on Plaintiffs. In fact local rule 6(C)(1) requires pre-discovery disclosure and service of such disclosure, but does not require Plaintiffs to 'coordinate with opposing council' as the Orders now impose on Plaintiffs that exceeds this rule as an undue burden on Plaintiffs only.

D. WRITTEN CONTRACT BETWEEN DEFENDANTS & PLAINTIFFS PRECLUDE ORDERS TO QUASH:

Both Allen and Naclerio were deposed in July after which Defendant Council Brown sent Plaintiffs a letter (& email dated Aug. 14 attached) that was a contract agreement to do a certain thing that stated,

"We are available for these deposition[s] on August 26, 2014 or September 8, 9, 10, or 11, 2014. Please let us know if one of those dates will work for you. If we do not hear back from you, we will move to quash the subpoenas because they are defective."

Defendants response (page 4) yet claims that the following state law does not apply to this their contract agreement with Plaintiffs: §**28-2-101MCA says" Contract**

defined. A contract is an agreement to do or not to do a certain thing." This Aug. 14 letter was a contract, because per §28-2-102, the essential elements of this contract had identifiable parties, which parties consented to a lawful object that Plaintiffs must communicate back to Brown (which they did) for the cause or consideration of avoiding a motion to quash & changing the deposition dates to September which Plaintiffs also did execute or fully perform the terms of this contract above proven by their emails to Brown on August 16th & 18th agreeing to change the deposition dates to September 9th. Defendants yet violated their contract agreement after Plaintiffs complied with the terms when Defendants yet filing a motion to quash on August 22, 2014. In fact such contract agreement consented to by all parties implied that Defendants would not file a motion to quash if Plaintiffs agreed to change the deposition dates; which they did.

This contract between parties also shows Defendants objected to a defective subpoenas, but that Plaintiffs contacting Brown to change the deposition dates could remedy any lack of notice. Thus Plaintiffs complied with all objects to this written contract agreement with Defendants that preclude a motion to quash subpoenas. Defendants violated this contract when they filed their motion to quash. Therefore for this other reason and many more valid reasons above, this motion should be granted because the motion to quash violated this contract.

E. *COURT ABUSED its DISCRETION or LACK AUTHORITY TO GRANT ATTORNEY FEES:*

Sixth Judicial District Court Local Rules 15 requires, "in all civil cases in which attorney's fees are requested in the pleading, the party seeking an award of attorney fees shall file and serve upon opposing counsel an affidavit itemizing the claim..."

Defendants response (page 5-6) claims this rule does not apply to them because "the determination of attorney fees is deferred until a final order has been issued..." Orders also lack authority that granted attorney fees to Defendants contrary to local rule 15 for absence of "an affidavit itemizing the claim." This is equally obserd to contemplate that the reasonable course of action is to grant attorney fees then have the Plaintiffs object to those attorney fees after they were granted; which is a waste of the courts time that this rule 15 sought to avoid by requiring "an affidavit itemizing the claim" to be filed with the pleading that seeks attorney fees.

Defendants motion to quash & sanctions of attorney fees failed to give any affidavit itemizing this attorney fee claim BEFORE Orders granted such attorney fees. This absence of such affidavit proves Orders err (as mistake, inadvertence, neglect) to grant Defendant attorney fees in violation of this rule. Such Orders not only harms Plaintiffs equal protect rights under this local rule and constitution, it fatally harmed Plaintiffs rights to plead against such fees.

***F.* OTHER CLAIMS:**

Notice Defendants response ends after this and fails to refute Plaintiffs other motion claims as follows:

3) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for Motion admission (page 7) showing Allen was available for depositions September 9th and Plaintiffs affidavit show lack of evidence & foundation to support the Order for quashing depositions and granting attorney fees; and

4) Orders err (as mistake, inadvertence, neglect) and fatally prejudice Plaintiffs for lack authority to quash subpoenas & award motion attorney fees for Plaintiffs lack of "pre-discovery disclosure" absent finding any sanctionable "undue burden" on Deposed contrary to rule 45 requirements because pre-discovery notice was given seven times

and Defendants failed to cite any prejudice by these notices being insufficient or not appropriate.

6) Defendants "misrepresented" facts regarding notice, because Defendants reply (page 1-2) claims Plaintiffs pre-discovery notice was not in "compliance with rule 6(C)(1)(a–f). which implies that notice was given, thus obviously contradicts their motion to quash that claimed no pre-discovery notice was given.

7) Plaintiffs motion for good cause requests relief from all Orders that are in err as mistake, inadvertence, neglect cited in 1-6 (above) and/or for any other reason that justifies relief for Orders that fatally prejudice Plaintiffs, unduly burdens & unlawfully penalizes Plaintiffs' discovery attempts, and needlessly delayed such discovery several months now.

Defendants failure to defend against these other claims above shows they are well taken. Orders also seem to agree with some of these Plaintiffs claims which would preclude sanctions against Plaintiffs. For instance, the motion to quash argued that Plaintiffs service of the subpoenas was lacking. Obviously the Orders failed to agree that service was lacking, since the deposed signed for service; thus Orders seem to agree with Plaintiffs claim. Orders also failed to find any lack of statement under rule 45, rule 6. Plaintiffs other motion claims also that Orders failed to find any "undue burden" on deposed; which Orders seem to agree with Plaintiffs claim.

Orders yet failed to consider that regarding Allen, Defendants motion to quash never claimed any "undue burden" on Allen. As proof, Defendants response fails to refute this other motion claim showing Orders exceeded its authority to quash Allen's subpoena and Naclerio for lack of any finding of "undue burden" on deposed. Defendants agreed in part, because Defendants motion to quash (page 7) stated, "Ms. Allen is available on September 9th" for deposition which obviously shows no "undue burden" on Allen who was available for depositions on September 9th. Allen being available would preclude any "undue burden" thus preclude sanctions & quashing her

subpoena. As for Naclerio, Naclerio's one day vacation delay was NOT an "undue burden" either.* In fact Defendants only mention of "undue burden" was for "forcing Naclerio to a[pear Sept. 9th imposed undue burden & expense [motion to quash page 5-6 #3]" factually refuted by Plaintiffs affidavit.*

(* 'Plaintiffs affidavit reply argued Defendants gave no foundation showing Naclerio's one day vacation delay allegation caused an "undue burden" by Plaintiffs, because any burden was caused solely by Brown Law Firm. In other words, Naclerio's deposition schedule conflict was due to Brown's request & benefit that ended up conflicting with his client Naclerio's vacation date by one day, because Brown failed to to consult with their client-Naclerio before they agreed to the deposition date of September 9th. Plaintiffs should not be punished with paying attorney fees; since Allen was available on Sept. 9th, and Defendant council-Brown caused Naclerio's scheduling conflict that yet at most would have been one day vacation delay. Orders did not refute this Plaintiff claim for "undue burden" thus Orders seem to agree with Plaintiffs claims against "undue burden" which preclude sanctions of attorney fees.')

Furthermore, Defendants response to this motion failed to defend against these other claims & obvious err (as mistake, inadvertence, neglect) in the Orders that quashed Allen's subpoena even though Defendants admit Allen was available for depositions; especially the claim that Orders exceed authority under rule 45 for being absent a finding of "undue burden on the deposed." Thus Defendants response fails to refute all other motion claims showing Orders exceeded its authority to quash both Allen's & Naclerio's (especially without a finding of "undue burden on the deposed" as rule 45 requires); all of which needlessly delays discovery & prejudiced Plaintiffs.

SUMMARY & CONCLUSION

Montana generally follows the American rule that a party may not recover attorney fees in a civil action absent statutory or contractual authority. Hughes v. Ahlgren, 2011 MT 189, ¶ 13, 361 Mont. 319, 258 P.3d 439.

Contrary to the Opinion above, there was no contract that allowed attorney fees and the only statutory authority under rule 45 for sanctions is for a finding of "undue

burden" on deposed; which Orders never made such finding. Orders are thus in err (as mistake, inadvertence, neglect) absent a finding of "undue burden" on deposed & failing give any reason to quash subpoenas & grant attorney fees to Defendants. Defendants motion to quash (page 3) claimed the subpoenas were defective and thus violated rule 6 as to why they should be quashed, but this has nothing to do with rule 45 that only allows a motion to quash for an "undue burden" on deposed.

Defendants response also agreed (did not refute) the fact that *Montana Supreme Court, s*ince 1980, has only allowed a handful cases to be sanctioned or allow attorney fees under rule 45, **none of which cases ever awarded attorney fees for lack of "pre-discovery disclosure" notice**. Yet this is what this district court Orders seemed to do in err (as mistake, inadvertence, neglect). Only AFTER their motion to quash claimed no notice was given, for this motion Defendants (page 2) now claim that per local court rule 6(C)(1)(a-f), Plaintiffs subpoena(s) "withheld required information" of "advanc[ing] a claim or defense;" which Defendants motion to quash thus "misrepresented" facts, since there is no new information to send to Defendants other than what was in the subpoena(s). Orders are thus in err (as mistake, inadvertence, neglect) absent factual proof that Plaintiffs withheld information in the subpoenas.

Allen being "available for depositions on September 9th" also precludes Orders that err (as mistake, inadvertence, neglect) for quashing subpoenas & granting attorney fees; Brown's failure to first consult with client-Naclerio also precludes Orders that err (as mistake, inadvertence, neglect) quashing subpoenas & granting attorney fees; so does statutory authority to quash require "undue burden" on deposed as absent in the

Orders; so does Brown's contract violation preclude Orders. Orders also fatally prejudice Plaintiffs for lacked authority to grant attorney fees contrary to rule 45 requirements Plaintiffs contend such attorney fees (alleged in Brown's September 26th affidavit of more than $5k for filing one motion to quash) are unnecessary and exorbitant; but that this affidavit submitted **AFTER** this Order granted attorney fees for failure to "serve upon opposing counsel an affidavit itemizing the claim" factually proves Orders are in violation of rule 15; which fatally harmed Plaintiffs constitutional due process rights to object & plead against such attorney fees granted by that Order.

All of the above show valid reasons of how the court abused its discretion or else exceed statutory authority for quashing the subpoenas and granting Brown's attorney fees. Therefore, as summarized on page 1-2 above, there are more than six valid reasons to grant this Rule 60 motion relief from Orders.

Respectfully submitted this 6th day of October, 2014,

By: _____ By: _____

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

Alannah Griffith
26 E. Mendenhall
Bozeman, Mt. 59715

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

Brown Law Firm, P.C.
315 N. 24th St. (PO Drawer 849)
Billings, MT. 59103-0849

By: _____
Valery O'Connell

BROWN LAW FIRM, PC

315 N. 24th Street | PO Drawer 849 | Billings, Montana 59103-0849
Phone: 406.248.2611 | Fax: 406.248.3128

John J. Russell
Michael P. Heringer
Guy W. Rogers
Scott G. Gratton
Kelly J.C. Gallinger
Jeffrey T. McAllister
Jon A. Wilson
Seth M. Cunningham
Shane A. MacIntyre
Thomas R. Martin
Andrew J. Miller
Adam M. Shaw

Retired
Rockwood Brown
John Walker Ross
Margy Bonner

August 14, 2014

Daniel and Valery O'Connell
PO Box 77
Emigrant, MT 59027
dko@mac.com

Via U.S. Mail and Email

RE: O'Connell v. Glastonbury Landowners Association
Our File No. 73200.005

Dear Mr. and Ms. O'Connell:

We have received copies of the subpoenas you served on Alyssa Allen and Janet Naclerio commanding them to appear at depositions on August 28, 2014. Unfortunately, this date will not work for us as we have depositions already scheduled in another case on that date.

We are available for these deposition on August 26, 2014 or September 8, 9 10, or 11, 2014. Please let us know if one of those dates will work for you. If we do not hear back from you, we will move to quash the subpoenas because they are defective.

In the future, if you want to take depositions, it would be helpful to simply write us and let us know who you want to depose. Then, we can provide dates that the deponent and attorneys are available to avoid scheduling conflicts. Please feel free to contact me if you have any questions.

Sincerely,

Michael P. Heringer

MPH:amr
Cc: Alyssa Allen

EXHIBIT B
(OF ATTACHMENT 4)

Seth Cunningham

From: Daniel OConnell [dko@mac.com]
Sent: Monday, August 18, 2014 10:27 PM
To: Kelly Anderson; Michael Heringer; Seth Cunningham; Anna Robertus
Cc: alyssaallen33@gmail.com; Janet Naclerio
Subject: Re: O'Connell v Glastonbury Landowners Association

Date: Aug. 18, 2014
Re: Brown Law Firm letter of Aug. 18, 2014
To: Brown Law Firm and Alyssa Allen, and Janet Naclerio,

The notice to modify date and place was changed at the last minute to September 9th, because Emigrant Hall was not available on the 8th.
and pleadings paPage one caption reads Defendants are "Glastonbury Landowners Association, Inc. & current GLA Board of Directors." Thus Allen and Naclerio are Defendants.
Any captions without this are a typo and should read as stated above for Defendants.

Janet Naclario must be at the oral deposition Scheduled for September 9, 2014. We changed the date at your request and booked the Emigrant Hall. We can not change it
Emigrant Hall is not back to August as the 26th is not available, nor are we. We also need time to prepare and 7 days is not enough, since we put this off due to the date change. Therefore, September
Sin
Sincerely,
Damn and Val O'Connell

On Aug 18, 2014, at 4:02 PM, Kelly Anderson <KAnderson@brownfirm.com> wrote:

Attached is a letter from Mike Heringer regarding the depositions of Alyssa Allen and Janet Naclerio. The original is being sent U.S. mail.

Kelly Anderson
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email kanderson@brownfirm.com

<8-18-14 O'Connell re depositions.pdf>

EXHIBIT E
(OF ATTACHMENT 4)