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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

DANIEL and VALERY O'CONNELL, Plaintiffs, v. GLASTONBURY LANDOWNERS ASSOCIATION, INC. Board of Directors, Defendants.	Cause No.: DV-2011-114 Judge David Cybulski **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR DELAY OF ORDERS PENDING RULE 60 MOTION OUTCOME & RESPONSE AGAINST ATTORNEY FEES & COSTS**

COMES NOW the above named Defendants Glastonbury Landowners Association, Inc. (GLA) and submit this brief in opposition to Plaintiffs' Motion for Delay of Orders Pending Rule 60 Motion Outcome & Response Against Attorney Fees & Costs.

PROCEDURAL POSTURE

Currently pending before the Court are Plaintiffs' Motion for Indemnification, Plaintiffs' Motion to Strike, Plaintiffs' Motion for Extension of Time, Plaintiffs' Rule 60 Motion for Relief from Orders, and the GLA's Motion for Summary Judgment. Now, Plaintiffs file yet another Motion, requiring another round of briefing, taking the Court's time, and requiring further time and expense to the GLA. The issues in this case are ready to be decided on summary judgment. Plaintiffs' extensive motions have

not added anything of substance to the case and are simply delay tactics which add to the cost of litigation. The instant motion, like all of Plaintiffs' other motions, should denied so this case can move to a resolution.

ARGUMENT

Plaintiffs request the Court delay enforcing its Order of September 8, 2014, where it ordered Plaintiffs to pay the GLA's attorney fees and costs incurred in bringing and briefing the Motion to Quash. Plaintiffs object to the affidavits of fees submitted by the GLA's counsel claiming they are unproven, unproductive, excessive, or redundant and unreasonable. What Plaintiffs fail to mention is that every penny of attorney fees and costs was within their power to avoid had they simply acted reasonably rather than insisting witnesses comply with defective and unduly burdensome subpoenas.

1. Plaintiffs' objection is premature.

Plaintiffs' object before the Court has determined the amount of attorney fees and costs they must pay. While counsel for the GLA has submitted affidavits as required, the Court has yet to determine what of those fees Plaintiffs must pay. Therefore, Plaintiffs' objection is premature.

2. The amount of fees submitted is reasonable under the facts of this case.

Looking at the lengthy docket sheet in this case, one can see the unique nature of this case. This case was first filed in July of 2011. It made its way up to the Montana Supreme Court and back. Plaintiffs filed two additional cases in that time (DV-12-164 & DV-12-220). Those cases were decided in the GLA's favor, and affirmed on appeal. The instant litigation is the last remaining lawsuit, and Plaintiffs excessively file motions and documents which serve only to clog the docket. The GLA has had to respond to motions, discovery, and other demands continually, and the GLA has done so in good faith. However, when Plaintiffs refused to accommodate requests that deposition subpoenas be withdrawn, the GLA had to act to protect the witnesses. Plaintiffs had every opportunity to be

reasonable and change the deposition dates which they refused to do. This behavior, coupled with the extraordinary amount of filings and other work generated in this case, justify the sanctions under Rule 45.

"The District Court has inherent discretionary power to control discovery," and "must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage ...." *Rix v.General Motors Corp.*, 222 Mont. 318, 333, 723 P.2d 195, 204-205 (1986). Abuse of discovery must not be dealt with leniently and the transgressors of discovery abuses should be punished rather than encourage repeatedly to cooperate. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 70, 16 P.3d 1002, ¶ 70, 303 Mont. 274, ¶ 70. It is not necessary for trial courts to warn of sanctions before imposing them for a violation of discovery. *Smart v. Molinario*, 2004 MT 21, ¶ 13, 83 P.3d 1284, ¶ 13, 319 Mont. 335, ¶ 13.

While pro se litigants are typically allowed wide latitude in their attempts to comply with the technicalities of pleadings, all litigants, including those acting pro se, must adhere to procedural rules. *Xu v. McLaughlin Research Institute for Biomedical Science, Inc.*, 2005 MT 209, ¶ 23, 328 Mont. 232, ¶ 23, 119 P.3d 100, ¶ 23. Discovery abuse is not to be dealt with leniently. *Id.* at ¶ 20.

The purpose of sanctions is to punish conduct, not reward the opposing party as a fee-shifting device. While discussing Rule 11 sanctions, the Montana Supreme Court noted the more important goal of sanctions is to punish wasteful and abusive litigation tactics in order to deter the use of such tactics in the future. *D'Agostino v. Swanson*, 240 Mont. 435, 445, 784 P.2d 919, 925 (1990). The same punitive purpose applies to sanctions under Rule 45—it is not to shift fees but to discourage abusive tactics. Here, Plaintiffs knew their subpoenas were defective and knew they were causing great stress and an undue burden on a witness yet they insisted on compliance with the subpoenas.

Plaintiffs used the power of the Court to try and issue subpoenas in a defective and burdensome manner. Plaintiffs not only harmed the witnesses and the GLA, but the Court by abusing the subpoena power. Requiring Plaintiffs to pay for their unreasonableness will deter such conduct in the future.

The reasonableness of attorney's fees must be ascertained under the unique facts of each case. *Chase v. Bearpaw Ranch Ass'n.*, 2006 MT 67, ¶ 36, 331 Mont. 421, ¶ 36, 133 P.3d 190, ¶ 36. The following factors should be considered in determining the reasonableness of attorney fees:

(1) the amount and character of the services rendered;

(2) the labor, time and trouble involved;

(3) the character and importance of the litigation in which the services were rendered;

(4) the amount of money or the value of the property to be affected;

(5) the professional skill and experience called for;

(6) the attorneys' character and standing in their profession; and

(7) the results secured by the services of the attorneys. *Id.* at ¶ 38.

These factors, however, are not exclusive. District courts may consider other factors as well. *Id.*

Plaintiffs attach an email from a Chicago law firm to support their argument a motion to quash should cost $750 to $1,000. They also attach a printout which purportedly shows answers by attorneys to someone asking if they charge less than $600 to file a motion to quash a warrant. These documents provide no basis to their claims.

First, as *Chase* states, the amount of reasonable attorney fees is unique to each case. None of the documents Plaintiffs attach address the particular facts of this case. Second, the email Plaintiffs attached is from an Illinois firm, and the attorney references the Plaintiffs to its information pages on quashing subpoenas to internet service providers in intellectual property violation claims. The second printout is from attorneys (none from Montana) answering a question about quashing bench warrants—criminal

law, not civil litigation. Plaintiffs fail to provide evidence to the facts of this case, and instead try to compare apples to oranges.

The *Chase* factors are simply a restatement of Rule 1.5 of the Montana Rules of Professional Conduct. The unique facts of this case show the time and labor necessary to respond to Plaintiffs is great. Two subpoenas were served in unorthodox manners. Each subpoena had different defects. The circumstances of service and the situation of each witness needed to be investigated. Plaintiffs also contacted the witnesses directly regarding the subpoenas.

Numerous letters and emails went back and forth between Plaintiffs and GLA's counsel. Filing a motion to quash a deposition subpoena in a civil case is unusual in Montana as Montana attorneys generally work well with one another to arrange schedules and accommodate witnesses—something Plaintiffs refused to do. Additionally, there were time constraints as the motion and accompanying briefs, affidavits and exhibits needed to be investigated, researched, written, and filed before the depositions dates and scheduled departure of one of the witnesses. All this had to take place quickly to allow the Court time review the briefs and issue an order. The fees incurred by GLA's counsel were not excessive and the billable hour rates are reasonable for their experience and the work done.

Finally, the Court granted the Motion to Quash, justifying the GLA's position and effort expended to obtain the result in a timely fashion. Janet Naclerio was relieved of the considerable loss of money and time enforcing the subpoena would have subjected her to. The Motion to Quash was not frivolous, and in response to truly abusive tactics by the Plaintiffs. This case is unique in the amount of filings, the inflexibility of the plaintiffs, refusal to communicate, and the nature of the filings which have no legal basis, are convoluted, and frivolous. These subpoenas were no exception, and required time and expense commensurate with the time and expense incurred by the GLA for every other aspect of this case.

3. Other Montana case law validates the sanction.

While every case has its own unique facts, and the facts of this case justify the sanction, for comparison purposes, a look at other Montana cases may be helpful. First, in *Dambrowski v. Champion Intern. Corp.*, 200 MT 149, 300 Mont. 76, 3 P.3d 617, the district court ordered the plaintiff's attorney to pay discovery sanctions under Rule 37 of $16,704.12 to one defendant and $8,873.98 to another defendant as reimbursement for the fees incurred in litigating discovery disputes. *Id.* at ¶ 16. In total, the defendants were reimbursed for having to respond to the plaintiff's motion to quash, participation in two canceled depositions and a hearing, and the cost of filing briefs. *Id.* at ¶¶ 11-12. The order was affirmed.

Second, in *Stipe v. First Interstate Bank of Polson*, 2005 MT 295, 329 Mont. 320, 125 P.3d 591, the district court ordered the plaintiff to pay the attorney fees and costs the defendant incurred in responding to motion for an injunction to halt discovery which totaled $11,741. *Id.* at ¶¶ 9-12. On appeal, the Montana Supreme Court affirmed the sanction. *Id.* at ¶ 29.

Finally, in *Xu*, the district court dismissed the plaintiff's case with prejudice for abusing the discovery process by not attending his scheduled depositions. *Id.* at ¶ 14. On appeal, the Montana Supreme Court affirmed the dismissal as an appropriate sanction for discovery abuse. *Id.* at ¶ 31. The Court noted sanctions are intended to discourage discovery abuse. *Id.*

Here, Plaintiffs abused the discovery process by using defective subpoenas to summon witnesses to depositions. Despite being informed the subpoenas were defective and they were placing an undue burden on a witness, Plaintiffs steadfastly refused to act reasonable or communicate in a meaningful way. This behavior is precisely what needs to be deterred in future Montana litigation. Given the amounts imposed in *Dambrowski* and *Stipe* and the outright dismissal in *Xu*, Plaintiffs have no grounds

to object to the relatively small amount of $4,984.50 incurred by the GLA in bringing and briefing its Motion to Quash.

4. The insurance agreement providing a defense to the GLA has no bearing.

Plaintiffs also make the improper argument that because insurance is providing some of the cost of the defense in this matter the GLA is not entitled to attorney fees and costs. This is wholly inappropriate. First, the purpose of sanctions is not fee-shift but to punish abusive tactics. Following Plaintiffs argument would defeat the purpose of the sanction. Second, the existence or non-existence of insurance has no bearing on the imposition of a sanction. (See *Dambrowski* where the sanctioned plaintiff was suing for worker's compensation insurance benefits). (See also *Stipe* where the sanctioned plaintiff was suing a bank which was undoubtedly insured). How the GLA has chosen to pay for litigation against—whether by insurance agreement or some other means—has no bearing on its right to be awarded attorney fees under Rule 45. How the insurance agreement between the GLA and its insurer disposes of the award is not material to the Court's analysis.

Finally, the Montana Supreme Court has stated both insurers and insured have important and meaningful stakes in the outcome of a lawsuit against the insured. *In re Rules of Prof. Conduct*, 200 MT 110, ¶ 37, 299 Mont. 321, ¶ 37, 2 P.3d 806, ¶ 37. These stakes included money paid by the insurer in defense and settlement, uninsured liabilities of the insured including excess judgments and the insured's reputation and other non-economic stakes. *Id.* Certainly, all of these stakes by insurer and the GLA are present in this case. The GLA's attorneys had to bring a motion to quash to protect the GLA from Plaintiffs' abusive tactics—Plaintiffs must be punished, and the GLA must be reimbursed.

CONCLUSION

For the above reasons, GLA respectfully requests an Order from the Court denying Plaintiffs' Motion for Delay of Orders Pending Rule 60 Motion Outcome & Response Against Attorney Fees & Costs.

DATED this 27th day of October, 2014.

BROWN LAW FIRM, P.C.

BY _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail, postage prepaid, and addressed as follows this 27th day of October , 2014:

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