Daniel & Val O'Connell
P.O. Box 77
Emigrant, Mt. 59027
406-577-6339
dkoc@mac.com

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

PLAINTIFFS' MOTION RESPONSE FOR DELAY OF ORDERS PENDING RULE 60 MOTION & RESPONSE AGAINST DEFENDANT"S ATTORNEY FEES & COSTS

Plaintiffs,' as a GLA Director & member(s) of the GLA Landowners Association, hereby refute Defendant's Motion Reply and file this "Motion Response..." that seeks relief from Orders of September 9, 2014, because Defendants failed to defend or otherwise argue against the facts below & for the following Orders in err that fatally prejudiced Plaintiffs' due process rights under rules against attorney "fees & costs;"

1) Orders granted "fees and cost;" absent any findings of facts of "undue burden on deposed" contrary to M.R.Civ.P, Rule 45 requirements for sanctions of "fees & cost;"

2) Orders absent ANY "findings of facts" & "conclusions of law" don't allow Plaintiffs to "question the sufficiency of the evidence supporting the findings" granting "fees & costs" or know their ultimate rights and liabilities (per Rule 52 part 5 that says, "(5) A party may later question the sufficiency of the evidence supporting the findings;"

3) Motion to quash depositions and grant motion fees and costs, under M.R.Civ.P., Rule 45, lack of ANY factual evidence: as apparent by two deposed Defendants'

affidavits; which affidavits (attached to the Motion to Quash Subpoenas) fail to claim any "undue burden" as contrary to Rule 45 and contrary to the rules of evidence.

Orders absent findings of sanctions and absent any factual evidence for sanctions, Plaintiffs Rule 60 motion is warranted or else oral hearing is allowed to "decide issues of liability for fees" absent any finding or factual evidence of "undue burden on deposed" pursuant to rule 54.

PROCEDURAL POSTURE

Prior to this complaint, (except costs) Plaintiffs were granted all claims for relief against GLA Defendants in the 193 lawsuit Settlement Agreement, & 164/220 joiner case, Plaintiffs also won one claim for relief reversing a GLA/Minnick Management contract clause that gave Minnick agent "exclusive control over all GLA ...parcels" including O'Connell private property in violation of their property rights.

Motions currently pending include: this Rule 60 Motion for Relief from Orders (granting Defendants motion attorney fees), & Motion For Delay of Orders Pending Rule 60 Motion, Plaintiffs' Complaint for Injunctive Relief, Plaintiffs' Motion for Indemnification, Plaintiffs' Discovery Requests for Defendant Admissions and Interrogatories, & Defendants' Motion Brief for Summary Judgement PENDING the Plaintiffs' Motion For Extension of Time to Answer Defendants' Summary Motion Brief, & Motion to Strike Defendants Summary Motion Brief. All Plaintiffs' motions & pleadings are for a good and proper purpose, such as:

1. Plaintiffs' pre-discovery notice & request for Defendant Admissions & Interrogatories citing numerous legal authorities in support of all complaint claims agains

Defendants Summary Judgement Motion; & Request for Extension of Time to Answer Summary Judgment Motion (citing such discovery needed).

2. Defendants' 27 page Summary Judgment Brief that does not conform to and far exceeds Local Rule 10.H. limit of 20 pages for all briefs waists the courts time and cause all parties unnecessary time and expense; which warrants the motion to strike per Rule 10 & warrants Plaintiffs extension of time to answer that Brief since Defendants likely have to amend and re-file their Summary Judgment Motion & Brief.
3. Defendants "scandalous" Summary Judgement Brief that is AN INAPPROPRIATE, SCURRILOUS, AND UNFAIRLY PREJUDICIAL COMPARISON, INSULT, AND SLUR AGAINST THE PLAINTIFFS CALCULATED TO SEEK, CREATE, ENGENDER, AROUSE, AND ENCOURAGE UNDUE HOSTILITY and PREJUDICE TOWARD O'CONNELLS; which warrants Plaintiffs' Motion(s) to Strike this "scandalous" Defendants Summary Motion Brief.

ARGUMENT

Parties are unable to understand or adequately defend against or interpret the September 9, 2014 District Court's Orders granting Defendants' motion for attorney fees (under Rule 45) absent factual evidence and a finding of "undue burden or expense on the deposed." Also, Defendants Reply to Plaintiffs' Rule 60(b) Motion failed to refute or otherwise defend against the following claims; which are taken as true:

FACTS NOT IN DISPUTE

A. Defendant's Reply to this Rule 60 Motion claim (page 10) failed to show or otherwise refute Orders lacking authority to quash subpoenas & award motion attorney fees without "statutory or contractual authority" (Id. *Hughes* Opinion), & absent finding any sanctionable "undue burden" on Deposed per rule 45(d); which Orders are thus in err as contrary to rule 45 requirements.

Defendant's Reply to Rule 60 Motion claim (page 10[1]) failed to show or otherwise refute that the September 9th Orders lack authority to quash two subpoenas & award motion attorney fees without "statutory or contractual authority" (Id. *Hughes* Opinion), & since Defendants' Rule 45 Motion claim of "undue burden or expense on the deposed" lacks any supporting evidence below.

B. GLA Defendant's council "Unsupported arguments" "do not establish the existence of "undue burden:"

Defendants "Unsupported arguments of counsel are not evidence and do not establish the existence of the matters that are argued." See, e.g., Montana Metal Buildings, Inc. v. Shapiro (Mont.1997), 942 P.2d 694, 698, 54 St.Rep. 731, 733.

As this Mt. Supreme court opinion shows, GLA Defendant's "Unsupported arguments" within their motion to quash the depositions do not establish the existence of "undue burden." More importantly Defendant council's motion arguments of "Undue burden"are also factually refuted by both Defendants' own affidavits and by O'Connells affidavit as follows:

1. Within Defendants motion for attorney fees & costs (sanctions), M.R.Civ.P. Rule 45 for "undue burden" is the only authority cited. But there is absolutely NO evidence of any "undue burden on deposed." As proof, Defendant–Allen's affidavit cited NO "undue burden" or any burden for that matter. (see Allen affidavit Aug. 20, 2014 attached to Defendant's Motion to Quash).

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[1] **Rule 60 Motion (page 10):** "*Attorney fees were yet awarded without contract or statutory authority. The only possible statutory authority was under rule 45 for sanctions for a finding of "undue burden" on deposed.* However Orders never made such finding. If Orders meant to impose sanctions on Plaintiffs, such Orders error being absent findings that Deposed incurred any "undue burden or expense." More importantly, the motion made NO "undue burden" claims for Allen, only for Naclerio. Motion page 7 is prima facia evidence of this by saying, "Ms. Allen is available on September 9th" for deposition. This admission clearly shows the motion never claimed any "undue burden" on Allen, who was available for depositions on September 9th."

2. Also Defendant–Naclerio's affidavit cited NO "undue burden." Instead Naclerio's affidavit stated only one "would be" future burden of: "chang[ing] the date of the deposition to September 8, 2014... would create a great burden and expense for me." (see Naclerio's Aug. 20, 2014 affidavit attached to the Motion to Quash). Notice Naclerio's affidavit alleges that a burden "would" happen, but has not yet happened. In other words Naclerio's affidavit cited no current burden and so Naclerio does not claim any actual "undue" burden.

3. Also, Plaintiffs affidavit (attached to their Reply to the Motion to Quash) tried to avoid any burden & states they offered in good faith to change Naclerio's deposition date for a second time to "the morning of" September 8th so that Naclerio could catch a later flight that day and not miss her vacation plans. O'Connell affidavit also stating that they checked all Bozeman airlines to find Naclerio could get a later airline flight the same day of September 8th eliminating any burden on Naclerio's vacation plans.

4. Furthermore, Naclerio's deposition date on her subpoena was actually September 9th: which date was chosen not by Plaintiffs but by Naclerio's council. Such Sept. 9th deposition date allegedly conflicting with Naclerio's vacation was due to no fault of Plaintiffs, but due only to Brown Law Firm failure to FIRST consult with their client-Naclerio before the Brown Law Firm agreed to the Sept. 9th deposition date requested by Brown.*

(*See Brown emails attached to this Rule 60 motion showing: Plaintiffs had previously requested a August 28th deposition date which Brown Law Firm rejected for

a substitute deposition date of September 9th. (see motion document of August 14th Brown Law Firm letter) to reschedule depositions on council's requested date of September 8th or 9th. So Naclerio's deposition date change was requested by Brown for Brown's requested benefit that unknown to Plaintiffs ended up conflicting with his client Naclerio's vacation date by one day. Thus Brown's failure to first consult with Naclerio before scheduling Naclerio's deposition is the sole cause of Naclerio's scheduling conflict and negate Orders imposing motion attorney fees against Plaintiffs.)

Defendants motion for sanctions (under rule 45) for "undue burden" are therefore "Unsupported arguments." This lack of supporting evidence that granted attorney "fees and costs" thus are an abuse of court's discretion absent any supporting evidence regarding "undue burden or expense on the deposed."

C. Rule 60 Motion claim (page 8) showing Orders err for local Rule 15 violation:

"Orders demand that Plaintiffs follow the Sixth Judicial District Court Local Rules for "pre-discovery disclosure" notice; which Plaintiffs arguably did. However court Orders by mistake or oversight allowed Defendants to violate these same local court rules.

This absence of such affidavit proves Orders granted 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 attorney fees before granting attorney fees (in violation of this rule)."

D. Rule 60 Motion claim (page 8) for Defendant Council contract violation:

"Council Brown's letter (Aug. 14) also made a contract agreement with Plaintiffs that if Plaintiffs contacted Brown then no motion to quash would be filed. Plaintiffs agreed to this contract by emailing Brown Law Firm August 16th and 18th. This written contract was obviously violated by Brown who yet filed a motion to quash after Plaintiffs contacted them. This Brown's contract violation and Brown's failure to first consult with Naclerio and MT. Supreme Court ruling below all negate Orders imposing motion attorney fees against Plaintiffs."

E. Motion claim (page 9) for motion to quash claiming ONLY Naclerio NOT Allen was burdened by the subpoena:

"If Orders meant to impose sanctions on Plaintiffs, such Orders error being absent findings that Deposed incurred any "undue burden or expense." More importantly, the

motion made NO "undue burden or expense" claims for Allen, only for Naclerio. Motion page 7 is prima facia evidence of this by saying, "Ms. Allen is available on September 9th" for deposition. This admission clearly shows the motion never claimed any "undue burden" on Allen, who Defendants said "Allen is available for depositions on September 9th.""

F. Motion claim (page 10) showing Defendants could find no Supreme Court cases involving rule 45 sanctions, and Kansas Court decision supports this Rule 60 motion for relief from all Orders of September 8th:

"Since 1980, the Montana Supreme Court has only allowed a handful cases to be sanctioned or allow attorney fees under rule 45. But none of these few Montana cases ever awarded attorney fees for lack of "pre-discovery disclosure" notice. Only one case found in Kansas even addresses this rare issue... The Kansas court (2007, Case No. 06-2422-JWL) stated, ... The court notes as an initial matter that few cases in this district have directly addressed whether notice under [this] Rule 45 must be provided prior to or contemporaneous to service of a subpoena. .. but such violations of Rule 45 [notice] do not necessarily warrant quashing the subpoena. Rather, 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."

G. Motion claim (page 4) wether or not seven pre-discovery disclosures were "appropriate" precludes motion "costs and fees" showing Orders err for such oversight, omission.

Any failure on Plaintiffs' part to respond adequately to pre-discovery requests was not an intentional act, because Plaintiffs several times thought that they had complied with such pre-discovery notice seven times:

""Appropriate pre-discovery disclosure" includes the May 23rd "Notice of Delayed Discovery & [notice of] Oral Deposition" for Allen's deposition. In August both Allen and Naclerio were deposed and notice was given to all parties by a Aug. 28th deposition request; and by council Brown Law Firm August 14th letter stating what dates Allen & Naclerio was available for depositions; and also by Plaintiffs three attached emails. Then on August 18th, Both Allen and Naclerio were given Plaintiffs "Notice to modify...Depositions" further notice. All these notices amount to seven (7) different notices of pre-discovery depositions.). ... Sixth Judicial District local court rule 6(c)(1) requires "making an appropriate pre-discovery disclosure" prior to seeking discovery, (which was not clear to Plaintiffs what this meant, nor which local court rules to follow since the Judge is from another court). However, local Rule 6 referred to in the Motion

to Quash (page 4) only cite a claim for lacking any "pre-discovery disclosure" NOT for inappropriateness and rule 6 above does not define what is "appropriate" disclosure."

H. Rule 60 Motion (various pages) Plaintiffs unable to understand, defend against, or adequately interpret Orders granting Defendants' motion for attorney fees & cost which Rule 45 allows only for a finding of "undue burden or expense."

RULE 45(d)(1) says, "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction -- which may include lost earnings and reasonable attorney fees -- on a party or attorney who fails to comply."

Plaintiffs Rule 60(b) motion against the Sept. 9th Orders are warranted, because the Court Orders of Sept. 9th gave no finding of facts, no authority, or no legal basis for granting Defendants attorney fees (or sanctions). Without such findings, it is impossible to ascertain whether the award of attorney "fees and costs" constituted an abuse of discretion under rule 45 for sanctions. As stated above, Plaintiffs yet contend that it is an abuse of court's discretion to grant Defendants attorney fees & costs absent any findings of facts per rule 45 regarding any "undue burden or expense on the depose."

For this reason, Plaintiffs are forced to guess what Orders intended based solely on Defendants' Motion to Quash:

Defendants' Motion to Quash (page 6) asked for motion attorney fees under Rule 45 for Plaintiffs alleged, "failing to comply with discovery procedures and ... discovery rules [Local District Court Rule 6]... All of the conflict arising from these subpoenas could have been avoided with the simple courtesy–a letter stating who they would like to depose and requesting dates of availability."

As Defendants's motion explains above, they asked for sanctions (of attorney fees & costs) ONLY under rule 45 and ONLY for unsubstantiated reason of Plaintiffs failing to write a letter to Defendants "stating who they would like to depose and requesting dates of availability." To the contrary, as this rule 60 motion already

explained, Plaintiffs did write Defendants several email letters noticing who they would like to depose and agreeing to the date of availability imposed by Defendants council.

I. Defendants failed to make a timely claim under rule 37:

Plaintiffs completely reject and deny Defendant's new claim for **"abuse of discovery process"** (under rule 37) not made before such Orders were granted, and having nothing to do with their motion to quash & sanctions made only under rule 45. **Defendants could find no applicable Supreme Court cases involving a rule 45 motion for attorney fees or sanction, INSTEAD Defendants Motion Reply (page 6) makes a new argument for the first time ever for, "Plaintiffs abused the discovery process by using defective subpoenas to summon witnesses to depositions. Despite being informed the subpoenas were defective..."**

This new claim is NOT found anywhere in Defendants Motion to Quash & Sanctions (Aug. 2014) nor made before such Orders were granted. Therefore this new claim has has no bearing and not allowed under the rules for this rule 60 motion. Thus this new claim should be ignored by the Court.

Otherwise: Defendants Motion Reply brief (page 4 & 6) cite cases[2] NOT applicable to this case (this case involved alleged defective subpoenas), because:

Chase v. Bearpaw Ranch (2006) was settled for wholly different reasons of, "the court justified awarding fees-for-fees because Chase's recalcitrance in persistently re-raising settled issues qualifies as an "extraordinary circumstance" that merits such a sanction. *See Slack*, ¶ 33 (noting that fees-for-fees are justified only in those "extraordinary

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[2] cases: *Dambrowowski v. Champion* (2003) imposed sanction under rule 37 for failure to make timely discovery]; *Stipes v. First Interstate* (2005) imposed sanction under Rule 11 after Stipes signed a Stipulation to Vacate May 6, 2004 Hearing on Award of Attorney Fees); & *Dr. Xu v. MCLaughlin Research Institute* (2005) imposed sanctions under rule 37 for Dr. Xu failing to attend two scheduled/Court Ordered depositions.

circumstances" when the "State's objection to a condemnee's fee claim is unreasonable").Other cases not applicable involve "abuse of discovery process" under rule 37 and ONLY for a parties unresponsiveness to discovery requests; which rule 37 is not applicable to Plaintiffs requesting discovery and have NOTHING to do with Defendants rule 45 Motion to quash depositions.

So these rule 36 and rule 37 sanction cases do not apply. What is applicable is that Defendants NEVER informed Plaintiffs (being Pro Se) of any specific "abuse of discovery process;" as required by Local Rule 6(C)(2):

Sixth Judicial District Court, Rule 6(C)(2) " The disclosure obligation is reciprocal and continues throughout the case. A party who has made a pre-discovery disclosure is under a duty to supplement or correct the disclosure within a reasonable time if the party learns that the information disclosed is not complete and correct or is no longer complete and correct."

As this Local Rule 6(C)(2) requires as prerequisite, Defendants should have, but failed to disclose to Plaintiffs (being Pro Se) of any specific notice or subpoena defects,* nor does Defendants (untimely) new claim identify or disclose which parts are not complete or correct.

(*So Plaintiffs never learned what specifically was not complete or correct as to depositions or pre-discovery disclosure; which precludes sanctions for lack of such disclosure. Based on what Plaintiffs thought was correct to the best of their ability, Plaintiffs DID amend their pre-discovery disclosure & subpoenas twice then re-served them with the date agreed to by council. So it is ridiculous to make such new claim that Plaintiffs requests for depositions (subpoenas) and seven pre-discovery notices were anything but reasonable and communicated in a meaningful way to avoid burden)

And in other cases under rule 37 sanctions, the MT. Supreme Court in *Smith v. Butte-Silver Bow County* (1996), the court required, "an actual failure to comply with the judicial process, and whether the severity of the sanction was appropriate."

In this *Smith* case cited above, the Supreme Court actually reversed or dismissed sanctions, because those "sanctions and any resulting prejudice for any failure of discovery bears little or no relationship to the nature and extent of abuse of discovery." For this case, Orders granting motion attorney fees, cost, and quashing

Plaintiffs subpoena (as discovery) failed to find any sanctionable act nor did Plaintiff refuse to comply with the judicial process evident by seven pre-discovery notices; which shows this case absent such findings, the Orders should be reversed.

J. Orders fatally arbitrarily and capriciously prejudice Plaintiffs rights of "equal protection" under the rules.

M.R.Civ.P., Rule 52. in part says, "(a)(1) In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58."
M.R.Civ.P., Rule 54, "the court must, on [this Plaintiffs] request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c)" for oral hearing. Then "the court may decide issues of liability for fees [for lack of any sanctions or finding of "undue burden on deposed"] before receiving Defendants submissions on the value of legal services. The court must find the facts and state its conclusions of law as provided in Rule 52(a)."

If this motion for relief from Orders is not granted, then Plaintiffs' request oral hearings allowed per rule 54 (above) to decide issues of liability for such motion "fees costs;" which Orders violate Plaintiffs' due process rights under the rules; like rule 52 for Orders being absent findings and conclusions of law. **Also Orders arbitrarily and capriciously fatally prejudice Plaintiffs rights of "equal protection" as contrary to the rules, because:**

1) Orders granted "fees and cost;" absent any findings of facts of "undue burden on deposed" contrary to M.R.Civ.P., Rule 45 requirements for sanctions of "fees and cost;"
2) Orders absent ANY "findings of facts" & "conclusions of law" don't allow Plaintiffs to "question the sufficiency of the evidence supporting the findings" granting "fees & costs" or know their ultimate rights and liabilities (per Rule 52 part 5 that says, "(5) A party may later question the sufficiency of the evidence supporting the findings;"

3) Motion to quash depositions and grant motion fees and costs, under M.R.Civ.P., Rule 45, lack of ANY factual evidence: as apparent by two deposed Defendants' affidavits; which affidavits (attached to the Motion to Quash Subpoenas) fail to claim any "undue burden" as contrary to Rule 45 and contrary to the rules of evidence.

CONCLUSION

For all the above reasons, September 9, 2014 Orders err as contrary to rule 45 AND contrary to M.R.Civ.P., Rule 52 requirements for Orders not supported by any evidence of "undue burden on the deposed," and omission of failing to "find the facts specially" and lack any "conclusions of law" as rule 52 requires in its absence of sanction findings. Plaintiffs' Rule 60 motion is thus warranted for relief from September 9, 2014 or else request an oral hearing to "decide issues of liability for fees" pursuant to rule 54 (cited above).

Respectfully submitted this 12th day of November, 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 and postage paid, 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

HON. DAVID CYBULSKI
District Judge
Fifteenth Judicial District
573 Plentywood, Montana 59254
(406) 286-5615

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

Daniel K. O'Connell (a Director of the Glastonbury Landowners Association Incorporated), & Valery A. O'Connell & on behalf themselves as members of the Glastonbury Landowners Association. Plaintiff(s), v. Glastonbury Landowners Association, Inc. & current GLA Board of Directors Defendant(s)	Cause No.DV-2011-114 Judge David Cybulski ORDER GRANTING MOTION REVERSING SEPT. 9, 2014 ORDERS

This matter first came before the Court upon the "Defendants' Motion to Quash Subpoenas for Depositions..." submitted on August 26, 2014. The Court, having reviewed this pleading and subsequent motion reply and response, now finds:

Defendants' Motion to Quash (page 6) asked for motion attorney fees under "Rule 45" for Plaintiffs, "failing to comply with discovery procedures and ... discovery rules [Local District Court Rule 6]... All of the conflict arising from these subpoenas could have been avoided with the simple courtesy–a letter stating who they would like to depose and requesting dates of availability."

Defendants have cited no applicable Supreme Court cases involving a rule 45 motion for attorney fees or sanction and Plaintiffs completely reject and deny Defendant's new claim for

"abuse of discovery process" (under rule 37) not made before such Orders were granted, and **not applicable** having nothing to do with their motion to quash & sanctions made only under rule 45. What is applicable is that Defendants failed to timely disclose to Plaintiffs (being Pro Se) of any "abuse of discovery process;" as required by Local Rule 6(C)(2):

Sixth Judicial District Court, Rule 6(C)(2) " The disclosure obligation is reciprocal and continues throughout the case. A party who has made a pre-discovery disclosure is under a duty to supplement or correct the disclosure within a reasonable time if the party learns that the information disclosed is not complete and correct or is no longer complete and correct."

As this above Local Rule 6(C)(2) requires as prerequisite, Defendants should have, but failed to disclose to Plaintiffs (being Pro Se) of any specific notice or subpoena defects,* nor does Defendants (untimely) new claim identify or disclose which parts are not complete or correct. Therefore this new claim should be ignored by the Court.

For this case motion, Orders granting motion attorney fees, cost, and quashing Plaintiffs subpoena (discovery request) failed to find any evidence of a sanctionable act, nor did Plaintiff refuse to comply with the judicial process evident by seven pre-discovery notices; which shows this case is absent such findings and evidence.

Instead evidence supports Plaintiffs. Defendant–Allen and Naclerio's affidavits cited NO actual "undue burden" or any burden in Allen's case. And Plaintiffs affidavit was not refuted that shows they tried to avoid any burden & states they offered in good faith to change Naclerio's deposition date for a second time to "the morning of" September 8th so that Naclerio could catch a later flight that day and not miss her vacation plans. O'Connell affidavit also stating that they checked all Bozeman airlines to find Naclerio could get a later airline flight the same day of September 8th eliminating any possible undue burden on Naclerio's vacation plans. Also Naclerio's deposition date on her subpoena was actually September 9th; which date was chosen

not by Plaintiffs but by Naclerio's council. Such Sept. 9th deposition date allegedly conflicting with Naclerio's vacation was due to no fault of Plaintiffs, but due only to Brown Law Firm failure to FIRST consult with their client-Naclerio before the Brown Law Firm agreed to the Sept. 9th deposition date requested by Brown.

Furthermore Without "statutory or contractual authority" (Id. *Hughes* Opinion), & without any supporting evidence of "undue burden or expense on the deposed," Orders lack authority to quash Alyssa Allen and Janet Naclerio subpoenas & award motion attorney fees and costs. Defendants motion for sanctions (under rule 45) for "undue burden" are therefore "Unsupported arguments" and GLA Defendant's council "Unsupported arguments" "do not establish the existence of "undue burden."

"Unsupported arguments of counsel are not evidence and do not establish the existence of the matters that are argued." See, e.g., Montana Metal Buildings, Inc. v. Shapiro (Mont.1997), 942 P. 2d 694, 698, 54 St.Rep. 731, 733.

Finally, Council Brown's letter (Aug. 14) to Plaintiffs also offered an agreement with Plaintiffs that if Plaintiffs contacted Brown then no motion to quash would be filed. Plaintiffs agreed and upheld the terms of this agreement (contract) by emailing Brown Law Firm August 16th and 18th. This written contract was obviously violated by Brown who then filed a motion to quash after Plaintiffs contacted them. This Brown's contract violation and Brown's failure to first consult with Naclerio and MT. Supreme Court ruling below all negate Orders imposing motion attorney fees against Plaintiffs.

Orders omission of failing to "find the facts specially" that lacks evidence of "undue burden on the deposed," and lacking "conclusions of law" as rule 52 requires in the absence of sanction findings, is enough to grant Plaintiffs rule 60 motion.

FOR GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that this court's Orders issued on September 9, 2014 are REVERSED and DISMISSED & Defendants shall hereby timely comply with Plaintiffs discovery request for admissions and interrogatories.

DATED this ____ day of November, 2014.

D. Cybulski, District Judge

cc: Daniel and Valery O'Connell,
Brown Law Firm