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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)	)	

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PLAINTIFFS' MOTION, ORDERING GLA RESPOND TO DISCOVERY OF INTERROGATORIES, REPLY AGAINST DEFENDANTS' EXTENSION MOTION, REPLY AGAINST MOTION TO PROCEED ON SJM & REPLY FOR SANCTION MOTION

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COMES NOW the above named Plaintiffs and Glastonbury Members, and move this Court for an Order accepting Plaintiffs Brief in support of its Motion for GLA to answer its pending discovery requests for interrogatories, allowing discovery to timely proceed and allowing Rule 11 Orders for sanctions against Defendants. Plaintiffs also Reply Against Defendant's Motions' For Extension of Time; Reply against Defendant Motion To Proceed on Summary Judgment Motion; & move for sanctions & Orders striking GLA's Summary Judgment Motion that's admittedly "scandalous" "over the 20 page" limit contrary to Montana Sixth Judicial District Local Rule 10 & especially since GLA Defendants Admissions give the basis for striking the summary judgment motion for such discovery presenting a prima facia case of 40 material complaint facts in dispute.

## FACTUAL BACKGROUND

Defendants in this case, being the "GLA Inc." and "GLA Board of Directors" are all parties to this case and includes persons party to this case at the time this case was filed 2011, namely GLA Directors: Daniel O'Connell, Bolen, Allen, Boise, Smith, Stenburg, Dubiel, Rantalio, Spallone, Naclerio, excluding Kramer & Parker that quit.

Defendants admit or fail to deny "scandalous content" "pervades their whole Summary Judgement Motion" (SLM) contrary to Montana Bar's Voluntary Standards of Professional Courtesy "to act in a civil and courteous manner at all times;" Defendants also admittedly said their 27 page SJM brief "over the 20 page" limit also violates Local Rule 10 of the Montana Sixth Judicial District; also Plaintiffs Request for Admissions to GLA of 40 complaint fact (as summarized in amended complaint page 4), which GLA Defendants denied all 40 material facts; all give the basis for striking GLAs' summary judgment motion for administration of justice for such discovery presents a prima facie case of 40 material complaint facts in dispute.

To help resolve defense and claim issues much earlier, saving the courts and involved parties significant time and resources, that otherwise would needlessly delay discovery & delay resolving the case, Plaintiffs motion requests striking both Defendants summary judgement motion and Sept. 9th Orders (motion to strike allowed under Montana Sixth Judicial District Local Rule 10(e) & M.R.Civ.P., Rule 12(7)(f) for rule 10 violation & scandalous material, & **per** Rule 56(c)(3) for material facts in dispute); also sanction Brown Law Firm to pay all motions costs and fees since August 2014

(allowed under Rule 11 & allowed by the Richardson Opinion above for needless delay of discovery & prejudice to Plaintiffs).

### **STANDARD**

“... as provided by statutes and the Rules of Civil Procedure, these procedural rules define clear boundaries of litigation conduct. If a defense attorney exceeds the boundaries, the judge can strike the answer and enter judgment for the plaintiff, enter summary judgment for the plaintiff, or impose sanctions on the attorney.” *Palmer v. Farmers Ins. Exch.* (1993), 261 Mont. at 121, 861 P.2d at 914 (citations omitted).

Striking a pleading is “requiring it for the administration of justice” and “such defect is plain” *Collishaw v. American Smelting & Refining Co.* 121 Mont. 196, 198, 190 P.2d 673, 674 (1948) (citations omitted).

“Litigants who willfully delay the discovery process ... cause inexcusable prejudice to their opponents. Further, they deprive their opponents of access to the courts as a dispute-settlement mechanism.” *Richardson v. State*, (2006) MT 43, ¶ 57, 331 Mont. 231, ¶ 21, 130 P.3d 634, ¶ 21. Such “conduct prejudiced [the party seeking discovery] and is sufficiently egregious to justify the default sanction.”

### **ARGUMENT**

#### **A. Defendants Motion for Extension of Time:**

On November 20th, Defendants submitted a motion for delay of discovery for extension of time to answer Plaintiffs’ Request for Interrogatories that Defendants received Oct. 22nd and due BEFORE the holidays on November 22nd. Since not only does it normally take a month or more to plead motions, Defendants motion for extension of time needlessly delays discovery more than two months.

Defendants motion stated no reason for waiting 28 days to request such delay of discovery. The GLA also had a Board meeting on Nov. 17, 2014 (see attached agenda) that admitted the GLA had not answered a single request for interrogatories in

the past 24 days. As proof, (attached) CD recording of GLA Board stated as one purpose of this Nov. 17th GLA Board meeting was to, "hire Alyssa Allen ... part-time at \$20.00 per hour... to answer [Plaintiffs'] Request for Interrogatories" due six days later.

Defendants claim their motion to delay such discovery was due to the "holidays," but again discovery of answers to Interrogatories were due on December 3, 2014 twenty three days BEFORE Christmas holiday(s) begin. The GLA failed to say why it delayed taking any action sooner shows the GLA willfully and needlessly delayed discovery by waiting 28 days to request an extension of time, and by not hiring Alyssa sooner that this; which is the sole cause of the GLA Defendants' extension to request 50 days to answer discovery and delay discovery.

Plaintiffs attached Nov. 19th email tried to avoid delay of discovery by allowing a fair solution of giving the GLA an extension of time to answer some Interrogatories, but answer the rest by the Dec. 3rd deadline. Defendants refused this reasonable offer & failed to answer any interrogatories now 4 days past the deadline.

As stated above, "Litigants who willfully delay the discovery process ... cause inexcusable prejudice to their opponents." And Such "conduct prejudiced [the party seeking discovery] and is sufficiently egregious to justify the default sanction." *Richardson at ¶57.*

Even if this court denies Defendants motion for extension of time, which it should, they already caused a delay of discovery past the Nov. 22 deadline. But Defendants motion that willfully delayed the discovery process by not hiring Alyssa sooner & the GLA Defendants' waiting 28 days to request an extension of time both needless delayed discovery, wastes this courts time, and caused unnecessary

prejudice, time and expense to Plaintiffs & motions against Defendants needless delays of discovery; which justify default sanctions against Defendants.

## **B. Motion(s) to Strike:**

### **1. GLA Defendants denial of Admissions give the basis for striking its summary judgment motion for such discovery presenting a prima facia case of 40 material complaint facts in dispute.**

On Nov. 17, 2014 GLA Defendants submitted answers denying 40 Requests for Admissions that come from claims summarized on page 4 of the amended complaint. These Defendants denial of such Admissions give the basis for striking GLAs' summary judgment motion for such discovery presenting a prima facia case of 40 material complaint facts in dispute. For example:

Amended Complaint claim (page 4) says, 'GLA repeatedly overspent non-aggregately (contrary to Covenant 8.01(h)) on South Glastonbury Roads; which also misappropriated GLA member assessment funds (as breach of fiduciary duty & liability per GLA Articles of Inc. VIII).'

GLA Covenant 8.01(h) requires GLA "Association's road maintenance responsibility is limited by and conditioned upon the Landowners' individual and collective payment of and the aggregate amount of the "annual community assessment"..."

Yet Defendants' Admission Answers (# 8, 9, 10, 11, 43) disputes these complaint claim facts that GLA failed to spend member assessments "aggregately," and agree that such facts are in dispute on page 2 saying, "the definition of "aggregate" as used in the Covenants is an issue in this case..."

Also, Plaintiffs "Pre-discovery Notice for Admissions" give another basis for striking GLAs' summary judgment motion, because such pre-discovery notice presents

numerous procedural and statutory authorities supporting each and every complaint claim cited within its Requests for Admissions.

Also, Defendant admission (#1, 2, 3, 4, 28, 29, 30, & 34) denial of documents & violation of settlement agreement facts give another basis for striking GLAs' summary judgment motion for such discovery presenting more complaint facts in dispute.

"A valid settlement agreement is enforceable like any other binding contract." In re Marriage of Mease, 2004 MT 59, ¶ 57, 320 Mont. 229, 92 P.3d 1148.

Defendants' Admission answers admit that they denied O'Connells several document requests. Defendants yet deny the complaint claim that such denial of documents was a clear violation of member 2012 Settlement Agreement with GLA.

Also Defendants Admission answers (at #14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 32, & 33) denial of Plaintiffs amended complaint facts that seek to enjoin Directors for "misappropriation of member assessments" and "breach of fiduciary duties," give another basis for striking GLA's summary judgment motion for such discovery presenting more complaint facts in dispute, specifically:

a. four GLA Directors admit being paid to maintain GLA Roads or manage the GLA with GLA assessments; but which is an obvious "conflict of interest transaction with the corporation in which a director of the corporation has a direct or indirect interest;" and "Material facts of the transaction and the director's interest were [NOT] disclosed or known to [all] the members" and NONE of the members "authorized, approved, or ratified the transaction" of paying these Directors; as contrary to state statute **§35-2-418 MCA**; AND

b. four GLA Directors admit being paid to maintain GLA Roads or manage the GLA with GLA assessments without seeking any competitor bids for all such jobs given to these four GLA Directors; which the complaint says is not “consistent with its responsibilities and good business practice” per Covenant 11.05:

Covenant 11.05 says “The Association shall account for funds paid by Landowners ... in any manner consistent with its responsibilities and good business practice.”

Defendants denial of admissions all together, give the basis for striking

Defendants’ summary judgment motion for such discovery presenting a prima facia case of 40 material complaint facts in dispute.

**2. Plaintiffs motions to strike Defendants’ Summary Judgement Motion is proper for material facts in dispute above and under Montana Sixth Judicial District Local Rule 10(e) & M.R.Civ.P.,Rule 12(7)(f).**

MT. Sixth Judicial District Court Rule 10.H.”No brief shall exceed 20 pages in length exclusive of indices and appendices, without prior leave of the court.”

MT. Sixth Judicial District Court Rule 10.E. “Striking Pleadings. Any papers filed which do not conform to Rule 10 or 11, MRCP, may be stricken by the Court, on its own initiative and upon such terms as to the Court may appear just.”

M.R.Civ.P., Rule 12(7)(f) provides, in pertinent part, that “upon motion made by a party . . . the court may strike from a pleading ... any redundant, immaterial, impertinent, or scandalous matter.”

Pursuant to the above Local Rule 10(e) & M.R.Civ.P., Rule 12(7)(f), Plaintiffs two motions to strike Defendants’ Summary Judgement Motion are allowed and needed.

The need for such an order to strike Defendants’ Summary Judgement Motion is

apparent by Defendants admissions of its rule violation that the 27 page brief “exceeds 20 pages” and in light of the “scandalous<sup>1</sup> content” “that pervades the whole motion.”

To permit Defendants to file pleadings of this nature, without the Court’s admonition, provides the Court’s tacit approval of Defendants’ abusive practices. Defendants’ tactics damage more than the targets of their vicious & groundless rhetoric; they damage the judicial process itself, and this Court should not countenance them.

Thus Defendants’ summary judgement motion undisputedly violates Rule 10 and Rule 12(7)(f) apparent by Defendants admissions of its rule violation that its 27 page brief “exceeds 20 pages” and in light of the “scandalous content” “that pervades the whole motion,” warranting Plaintiffs two timely motions to strike it as a pressing concern, including Plaintiffs motion for extension of time to answer that SJM, pending outcome of its motions to strike it.

### **C. Motion(s) for Sanctions:**

**3. Defendants motion to quash was an unnecessary delay of discovery to quash two subpoenas under false pretenses absent any evidence of sanctionable “undue burden” on the deposed per rule 45.**

This District Court Orders gave no findings of fact or conclusions or law and the Court does not identify the procedural or statutory basis for its award of GLA’s motion costs and fees. GLA’s motion allegations appear to be based on M.R.Civ.P., Rule 45 related to discovery, however examining attorney fees and costs award within the

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<sup>1</sup> see 5C C. Wright and A. Miller, Federal Practice and Procedure (Civil) 2d § 1382, at 465 (2004) (“Scandalous’ matter is that which improperly casts a derogatory light on someone, most typically on a party to the action.”)



context of the discovery rule 45, there is no evidence of any sanctionable “undue burden on the deposed.”

Defendants “Response In Opposition To Plaintiffs Local Rule 10 Motion... Motion For Rule 11 Sanctions...” on page 5 admit “the GLA sought sanctions against Plaintiffs under Rule 45 ... for imposing an undue burden or expense on Janet Naclerio .. by refusing to reschedule the deposition.”

Defendants’ motion under rule 45 for “undue burden on deposed” requested sanctions to quash both Allen’s and Naclerio’s depositions, even though its motion claimed no undue burden on Allen, and even though both Naclerio’s and Allen’s deposed affidavits claimed no undue burden. Orders without rationale and explanation then quashed Allen’s AND Naclerio’s subpoenas & granted Defendants motion costs and fees under false pretenses because there was no motion evidence of any undue burden on the deposed as Brown Law Firm claimed.

The only motion evidence was O’Connells’ affidavit and both Naclerio and Allen deposed affidavits that cited NO “undue burden” (see affidavits attached to GLA’s Motion to Quash Depositions & cited on page 4-5 of “PLAINTIFFS’ MOTION RESPONSE FOR DELAY OF ORDERS PENDING RULE 60 MOTION & RESPONSE AGAINST DEFENDANT’S ATTORNEY FEES & COSTS).

Affidavits’ are factual evidence Defendants motion to quash two subpoenas was an unnecessary delay of discovery under false pretenses for the motion being absent any evidence of sanctionable “undue burden” on the deposed per rule 45.

“Litigants who willfully delay the discovery process ... cause inexcusable prejudice to their opponents. Further, they deprive their opponents of access to the courts as a dispute-settlement mechanism.” *Richardson v. State*, (2006) MT 43, ¶ 57, 331 Mont. 231, ¶ 21, 130 P.3d 634, ¶ 21.

Such "conduct prejudiced [the party seeking discovery] and is sufficiently egregious to justify the default sanction."

Again as this Opinion above allows, sanctions against Defendants are necessary for Defendants motion (lacking any evidence) that willfully delayed the discovery process and violated this rule 45 requirement, wastes this courts time, and caused unnecessary prejudice, time and expense to Plaintiffs having to file motions against.

**4. Other examples of GLA Defendants needlessly deny or delaying Plaintiffs' discovery attempts:**

As explained above, Defendants motion to quash was an unnecessary delay of discovery to quash two subpoenas under false pretenses absent any evidence of sanctionable "undue burden" on the deposed per rule 45. Other examples:

Defendants refused to answer some of Plaintiffs' requests for admissions #7, 8, 9, 10, 11, 39, 44, and 45. The reasons given to not to answer some of these requests are factually disputed by Defendants own records such as GLA budget reports for 2010- 2013 that show how much was spent on South Glastonbury Roads for each year specified. The GLA also did NOT answer Request #44 that asks the GLA Board to admit that they took votes by written consent via email without a meeting for these years. The GLA instead gave an unrelated answer that they "follow Bylaw Article VI. 3...." So for no reason given, GLA refused to answer this question #44.

Also, Defendants "Motion To Proceed On Defendants' Summary Judgment Motion Brief ..." (page 2) agreed, "Plaintiffs have pending discovery requests to the GLA [for interrogatories] which it will respond to by December 1, 2014." But one day later on Nov. 19th, GLA Oct. 19, 2014 (attached) letter threatened they will not give

answer and instead seek to delay such discovery for another "30 day[s]" unless Plaintiffs agreed to GLAs' demands for a twenty day extension of time ("December 19") to answer all interrogatories. Defendants then filed motion for delay of discovery and refuse to accept Plaintiffs (attached) offer of a fair solution to such delay of discovery.

**5. Defendants avalanche of motions that refuse to answer discovery requests unnecessarily denies or delays discovery and a resolution of this case; showing the Richardson Opinion above and M.R.Civ.P., Rule 11(c)(1) for sanctions is applicable and warranted against GLA & Brown Law Firm:**

M.R.Civ.P., Rule 11(1)(b) allows sanctions, "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;" and part "(c) Sanctions. (1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee..."

On November 5th, Plaintiffs filed a motion requesting sanctions against GLA and Brown Law Firm under rule 11 (see PLAINTIFFS' MOTION RESPONSE FOR DELAY OF ORDERS PENDING RULE 60 MOTION & RESPONSE AGAINST DEFENDANT'S ATTORNEY FEES & COSTS). The need for Defendant sanctions are evident by Defendants avalanche of unnecessary motions, including:

1. Defendants' motion to quash two depositions under false pretenses (being absent "undue burden");
2. Defendants' admission of its Summary Judgment Motion Brief "exceeds 20 pages" a Local Court Rule 10 violation;
3. Defendants' failure to deny "scandalous content" "that pervades Defendants' whole summary judgement motion;" which undisputedly violates Rule 12(7)(f);
4. Defendants' failure to answer some of Plaintiffs' request of oral depositions;

5. Defendants failure to answer some of Plaintiffs Requests for Admissions for no good cause given;
6. Defendants' Nov. 19th letter (attached) and their eminent motion that unreasonably demands delay of all discovery requests for interrogatories more than 50 days;

Of pressing concern, Defendants motion to quash subpoenas under false pretenses (being absent "undue burden") and five other unnecessary delay of discovery cited above; are for an improper purpose, "to harass, cause unnecessary delay, or needlessly increase the cost of litigation" (per rule 11); and also needlessly denies or delays discovery & resolution of this case (causing more time and expense for Plaintiffs to timely file motions to strike it & for extension of time). Therefore, this court should Order rule 11 sanctions against Defendants.

Again to help resolve defense and claim issues much earlier, saving the courts and involved parties significant time and resources, that otherwise would needlessly delay discovery & delay resolving the case, Plaintiffs motion requests striking both Defendants summary judgement motion and Sept. 9th Orders (motion to strike allowed under Montana Sixth Judicial District Local Rule 10(e) & M.R.Civ.P.,Rule 12(7)(f) for rule 10 violation & scandalous material, & per Rule 56(c)(3) for material facts in dispute); also sanction Brown Law Firm to pay all motions costs and fees since August 2014 (allowed under Rule 11 & allowed by the Richardson Opinion above for needless delay of discovery & prejudice to Plaintiffs).

### **CONCLUSION**

For all the above reasons, Plaintiffs' motion relief & Rule 11 sanctions requested against Defendants are for:

a. Orders to strike Defendants Summary Judgement Motion; and as these rules allow such motion to be stricken in light of the "scandalous content" "that pervades the whole motion" contrary to M.R.Civ.P.,Rule 12(7)(f), this 27 page motion brief "exceeds 20 pages" contrary to Montana Sixth Judicial District Local Rule 10(e) ; and material complaint facts in dispute do not allow Rule 56 summary judgment.

b. Orders striking its September 9th Orders; Defendant motion requested to quash subpoena and for motion fees and costs under false pretenses, being that there is no evidence of any undue burden on the deposed, as contrary to Rule 45 sanction requirements;

c. Orders denying Defendants Summary Motion; cited above of material complaint facts in dispute that preclude such Rule 56 summary judgment.

d. Orders denying Defendants Motion for extension of time to answer Plaintiffs' Interrogatories, and answer Plaintiffs interrogatories 14 days from service of this Order.

e. Orders granting sanctions against Defendants' council under Rule 11 requiring Brown Law Firm pay all motions costs and fees since August 2014 for reasons above showing Defendants & Brown Law Firm motions causing needless delay of discovery;

f. Default sanctions against GLA Defendants at the Courts discretion allowed under Rule 11 by Defendants not taking action sooner but delayed such action of hiring Alyssa Allen, & GLA Defendants' waiting 28 days to request an extension of time; both needless delay of discovery.

*Filed Nov 28th 2nd December*  
Respectfully submitted this 28th day of November, 2014,

By: Daniel K. O'Connell  
Daniel O'Connell

By: Valery 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  
Valery O'Connell



HON. DAVID CYBULSKI  
District Judge  
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**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. )  
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Plaintiff(s), )  
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Glastonbury Landowners Association, Inc. )  
& current GLA Board of Directors )  
 )  
Defendant(s) )  
\_\_\_\_\_ )

Cause No.DV-2011-114  
Judge David Cybulski

**ORDER GRANTING  
PLAINTIFFS’ MOTIONS**

THE COURT, having reviewed all pending parties motion pleadings: Plaintiffs’ Motions to Strike Defendants’ Summary Judgement Motion, & Rule 60 Motion to Strike Sept. 9th Orders quashing subpoenas, Defendants’ Motion to Proceed on Summary Judgment Motion, and Defendants Motion for Extension of Time to answer Plaintiffs’ written Interrogatories, now makes the following Order:

a. Plaintiffs motion to strike Defendants Summary Judgement Motion is GRANTED; and as these rules allow such motion to be stricken in light of the “scandalous content” “that pervades the whole motion” contrary to M.R.Civ.P.,Rule 12(7)(f), this 27 page motion brief “exceeds 20 pages” contrary to Montana Sixth Judicial District Local Rule 10(e) ; material complaint facts in dispute do not allow Rule 56 summary judgment.