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

12 DANIEL K. O'CONNELL and VALERY A.
13 O'CONNELL,

14 Plaintiffs,

15 v.

16 GLASTONBURY LANDOWNERS
17 ASSOCIATION, INC. & Current GLA Board
18 of Directors,

18 Defendants.

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

**DEFENDANT'S ANSWER TO PLAINTIFFS'
OBJECTION TO ITS MOTION FOR A
PROTECTIVE ORDER**

19 COMES NOW the above named Defendant Glastonbury Landowners Association, Inc. (GLA)
20 by and through their counsel of record, and answers Plaintiffs Brief & Counter-Motion for Protective
21 Order & Sanctions against GLA defendants & Plaintiffs' Reply to Defendants Motion for Protective
22 Order. Plaintiffs' response to the GLA's Motion for a Protective Order is a hodgepodge of various
23 claims, excuses, tangents, and attempts to muddy the waters. However, certain facts stand-out:
24

- 25 1) Plaintiffs provided a copy of the recording of the closed session May 18, 2015 meeting
26 proving that they did in fact record a portion of that meeting.
- 27 2) Plaintiffs refused to provide a copy when the GLA requested it and only did so in response
28 to the GLA's Motion for Protective Order demonstrating the Motion's necessity.

- 1 3) Plaintiffs repeatedly allege they were not given documents they are entitled to or that
- 2 documents they were given were incomplete which is one of their claims in this case.
- 3 4) Plaintiffs admit they have conducted discovery in this case but now claim "Plaintiffs do not
- 4 need nor request any more discovery at this time." P.'s Br. At 19 (Aug. 7, 2015).
- 5 5) Despite professing no need for discovery, Plaintiffs continue to make demands for GLA
- 6 documents.
- 7
- 8 6) Plaintiffs claim no knowledge of who took the GLA meeting minutes at the May 18, 2015
- 9 meeting but then offer to pay for them.

10 These facts demonstrate the necessity of the Motion as Plaintiffs refused to engage in any meaningful
11 attempts to resolve the issues.

12 ARGUMENT

13
14 Plaintiffs' response to the GLA's Motion goes well beyond the issues raised in it, but Plaintiffs
15 raise no meritorious defenses to the GLA's Motion. Plaintiffs give no good reasons for denying the
16 Motion or for granting their "counter-motion" for a protective order and sanctions.

17 **1. Plaintiffs provide no justification for recording the closed session.**

18
19 Plaintiffs provide nothing to dispute the Affidavit of Daniel Kehoe that they recorded a portion
20 of a closed session board meeting where the GLA met by teleconference with their attorney. Indeed,
21 they produced a copy of the recording in response to this Motion. They refused to do so when requested
22 by the GLA's attorney showing this Motion was necessary to compel its production.

23
24 Now, Plaintiffs claim it is impossible to remove the information published regarding the
25 recording because "this article is within hundreds of members emails." P.'s Br. At 9 (Aug. 7, 2015).
26 Plaintiffs also claim ignorance about the recording (despite providing a copy), and try to argue they
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1 were confused by the GLA's letters requesting the recording and takedown of information from
2 www.mygla.org. Plaintiffs argue the GLA should be sanctioned for failing to confer in good faith.

3 Additionally, Plaintiffs argue the destruction and takedown of the information would violate
4 their free speech Constitutional rights and then go onto tangents about other members who express
5 dissatisfaction with the GLA on websites and other mediums.
6

7 Finally, Plaintiffs make the baffling argument that the recording was not actually of the closed
8 session. Daniel Kehoe testified in his affidavit that "Everyone but the board was asked to leave at the
9 conclusion of the open meeting, and the closed session began." Aff. Kehoe at ¶ 2 (Jul 27, 2015). The
10 recording shows not only that this lawsuit was mentioned but the attorney was on the phone during a
11 portion of the recording. The doors were closed, the board was discussing privileged matters, yet
12 Plaintiffs make the bizarre claim this meeting was not a privileged meeting. Whether or not the
13 recording picked anything up of use to Plaintiffs is irrelevant.
14

15 The fact remains despite Plaintiffs' attempt to deflect—they recorded an attorney-client
16 privileged meeting then published content from the meeting. Montana law clearly protects the attorney
17 client-privilege. Mont. Code Ann. § 26-1-803. The Montana Supreme Court has upheld this privilege,
18 and it is not Un-Constitutional for a Court to enforce it. *American Zurich Ins. Co. v. Mont. Thirteenth*
19 *Jud. Dist. Ct.*, 2012 MT 61, ¶ 9, 364 Mont. 299, ¶ 9, 280 P.3d 240, ¶ 9.
20

21 Plaintiffs' Exhibit 1 is irrelevant to this issue. Nothing in that Exhibit published attorney-client
22 privileged information. Further, Plaintiffs' claimed ignorance of who published excerpts from the
23 recording is disingenuous. Plaintiffs control www.mygla.org and Plaintiffs admitted to recording the
24 meeting—Plaintiffs have violated the GLA's attorney-client privilege warranting this Motion. The GLA
25 attempted to obtain Plaintiffs' agreement and a stipulate protective order which they refused. Sanctions
26 against the GLA are not warranted—rather they are warranted against Plaintiffs.
27
28

1 **2. Plaintiffs confuse civil and criminal law.**

2 Plaintiffs discuss Mont. Code Ann. § 45-8-213 claiming their recording was allowed under this
3 law and somehow precludes this Motion under Mont. R. Civ. P. 26(c). Mont. Code Ann. § states:

- 4 (1) Except as provided in 69-6-104, a person commits the offense of violating privacy in
5 communications if the person knowingly or purposely: (c) records or causes to be recorded a
6 conversation by use of a hidden electronic or mechanical device that reproduces a human
7 conversation without the knowledge of all parties to the conversation. This subsection (1)(c)
8 does not apply to:
9 (i) elected or appointed public officials or to public employees when the transcription or
10 recording is done in the performance of official duty;
11 (ii) persons speaking at public meetings;
12 (iii) persons given warning of the transcription or recording, and if one person provides the
13 warning, either party may record; or
14 (iv) a health care facility, as defined in 50-5-101, or a government agency that deals with health
15 care if the recording is of a health care emergency telephone communication made to the facility
16 or agency.

17 Plaintiffs claim their recorder was not hidden so they did not violate this law. Plaintiffs then claim
18 because they did not violate this statute the GLA's Motion is not warranted.

19 Plaintiffs' argument fails because there is a distinction between criminal and civil law. The GLA
20 could report Plaintiffs' possible illegal recording under Mont. Code Ann. § 45-8-213 but ultimately, the
21 decision to charge Plaintiffs with a crime rests with the County Attorney. The issue here however, is the
22 protection of privilege in a civil lawsuit and the Rules of Civil Procedure apply making the GLA's
23 Motion for a Protective Order proper and foreclosing Plaintiffs' claims for sanctions.

24 **3. Plaintiffs offer nothing to dispute they took the GLA's records.**

25 Plaintiffs do not outright deny, Valery O'Connell took GLA meeting minutes from the May 18,
26 2015 board meeting, but instead argue that there is no proof. The GLA offered the sworn affidavit of
27 Karleen McSherry, and Plaintiffs try to twist the affidavit into saying something it did not.
28

1 Plaintiffs alleges the affidavit 'only claims Val O'Connell "removed pages of minutes out of the
2 binder" in order to share them with other members." P.'s Br. At 13 (Aug. 7, 2015). The true quote
3 states:

4 At the May 18, 2015 board meeting, I observed Plaintiff Valery O'Connell with a meeting
5 minute binder removing several pages of minutes from the binder. Plaintiffs did not replace
6 these documents prior to leaving the meeting. Aff. McSherry at ¶ 3 (Jul. 27, 2015).

7 The sworn affidavit clearly identifies Valery O'Connell removing several pages of meeting minutes and
8 never replacing them. Plaintiffs simply change the words to suit their argument.

9 Plaintiffs then reference an email (their Exhibit 9) from "Donna" saying anyone could have
10 taken the minutes and once again asking how it can be proven. Plaintiffs' Exhibit 9 is not a sworn
11 affidavit and adds nothing to the argument other than speculation from someone named Donna. The
12 GLA provided sworn testimony which is credible evidence despite Plaintiffs' claimed lack of proof.

13
14 Finally, Plaintiffs rely on their offer to pay the GLA for the missing minutes as justification for
15 objecting to this Motion. Plaintiffs' offer of compensation is a tacit admission they have the minutes,
16 but it does not constitute a good faith effort to resolve the dispute. Plaintiffs removed the minutes,
17 which did not belong to them, and refused to return them. An offer to pay for the minutes after the fact
18 does not make it right.

19
20 **4. Plaintiffs' Response demonstrates the need for using discovery procedures.**

21 Plaintiffs Response to this Motion claims they are being denied documents they are entitled to
22 inspect under a previous settlement agreement, Montana law, and the GLA's Bylaws. They also allege
23 documents are missing or incomplete. Plaintiffs have put these issues before the Court, and discovery is
24 the proper tool when embroiled in a lawsuit. Plaintiffs acknowledge they have already been given the
25 opportunity to inspect GLA documents, but they want more. One purpose of discovery is to avoid such
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1 repetitive requests. Another benefit of discovery is that it creates a clear record of what was asked for
2 and what was given. Plaintiffs' previous inspections left no such record.

3 A major issue in this case is the scope of Plaintiffs' inspection rights under the Montana
4 Nonprofit Corporation Act and the GLA Bylaws. Judge Jones's words in an opinion on this same issue
5 bear repeating:

6
7 Because the parties are in litigation where access to the records and the content of the records is
8 at issue, it is reasonable to require the parties to exchange such records through formal channels
9 of discovery. Doing so aids in identifying which records have been produced and the scope of
10 the requests and avoids inadvertent duplicity of effort and expense. (Exhibit D to the GLA's
11 Motion for a Protective Order).

12 Plaintiffs attempt to distinguish this issue. They attach the losing party's brief while minimalizing Judge
13 Jones's actual opinion. Plaintiffs claim unlike there, they have already conducted discovery, and they
14 "do not need nor request any more discovery at this time." P.'s Br. At 19 (Aug. 7, 2015). This flies in
15 the fact of reason.

16 Plaintiffs claim they do not need any more discovery but then they keep making requests
17 for documents to the GLA Plaintiffs fail to explain why they should be exempt from using the discovery
18 process. Instead, they make requests claiming it is not related to the lawsuit. However, this lawsuit was
19 filed over an alleged lack of access to records, and any records given to Plaintiffs are potential exhibits.

20 Further, Plaintiffs claim other members in the GLA have made requests for corporate documents
21 and received them. Plaintiffs fail to recognize those members are not in current litigation with the GLA.
22 Plaintiffs instead claim they are unduly burdened by having to use discovery to access corporate
23 records. Plaintiffs are the ones who filed this lawsuit. If Plaintiffs did not want to follow the rules, then
24 they should not have filed the lawsuit.

25
26 Additionally, the fact that the GLA has accommodated past document requests has no bearing
27 on this issue. Parties to a lawsuit conduct informal discovery all the time. When it became clear that no
28

1 matter what the GLA did it would not be enough for Plaintiffs, the GLA reasonably requested Plaintiffs
2 make all such requests through formal discovery. In fact, Judge Jones noted in the *Sullivan v.*
3 *Remington Ranch Association, Inc.* that those plaintiffs had also been accommodated on two occasions
4 before the defendants requested future requests be made through discovery. (Exhibit D to GLA's
5 Motion for Protective Order at 3).

6
7 Finally, Plaintiffs raise the GLA's Privacy Policy and claim it violates Montana law. This really
8 has no bearing on whether or not Plaintiffs should follow the Rules of Civil Procedure. Plaintiffs simply
9 argue about the policy and how it allegedly limits their access to GLA records. Again, this demonstrates
10 the need for discovery. Plaintiffs take issue with what the GLA has determined is the scope of its
11 members' inspection rights. This is the issue before the Court. Requiring the parties to conduct
12 discovery on matters at issue in the lawsuit not only aids in identifying documents and avoids duplicity
13 and expense, it will ultimately aid the Court by establishing a clear record. Plaintiffs give no good
14 reason why they should not be required to conduct discovery during this litigation.

15
16 **4. Plaintiffs do not support their "counter-motion" for a protective order and sanctions.**

17
18 Plaintiffs ask the Court for a protective order relieving them from conducting discovery. As
19 argued above, they offer no compelling reason for the Court to allow them to not follow the Rules of
20 Civil Procedure. Plaintiffs further ask for sanctions against the GLA. As shown above, the GLA's
21 Motion is well-founded and therefore no sanctions are warranted.

22
23 As supposed justification for sanctions, Plaintiffs claim they tried to resolve this dispute in good
24 faith. However, Plaintiffs did not produce a copy of their recording until after the GLA's Motion was
25 filed and refused to do so beforehand. Additionally, Plaintiffs' offer to pay for the missing GLA records
26 is not a valid substitute for the return of the actual records.

1 Plaintiffs also claim documents they wanted to inspect were missing from the inspections that
2 took place on June 28, 2014 and July 8, 2014. However, as pointed out above, whether the GLA is
3 missing records is an issue in this lawsuit. Further, the fact remains that Plaintiffs have never requested
4 through discovery these alleged "missing" documents. The last communication on this subject was sent
5 by the GLA on July 22, 2014 which asked Plaintiffs to make all future requests through discovery. (See
6 Exhibit A-55 to GLA's Motion for Protective Order). Then, Plaintiffs sent discovery requests to the
7 GLA in the fall of 2014 which were answered. As to the statement in the July 22, 2014 letter that the
8 GLA would produce electronic versions of documents previously produced for inspection in hard copy
9 to Plaintiffs once they were scanned, these GLA records are still not scanned due to other issues in this
10 litigation and to the very lengthy process of reorganizing and replacing missing records after they were
11 left in complete disarray by the last inspections by Plaintiffs. (See Aff. Allen at ¶ 5 (Jul. 27, 2015).
12
13 Now, for some reason, Plaintiffs have gone back to making new demands to inspect more GLA records
14 without discovery.
15

16 Plaintiffs are capable of making discovery requests by their own admission and past practice.
17 They should not be relieved of doing so now. Further, the GLA should not be sanctioned for asking
18 Plaintiffs to put their requests into formal discovery.
19

20 CONCLUSION

21 For the above reasons, the GLA respectfully requests the Court to issue an order requiring
22 Plaintiffs use the formal discovery process, prohibiting improper communications between the parties,
23 prohibiting requests for previously provided information and documents, ordering the surrender of the
24 recording to the GLA's attorneys, ordering the destruction and takedown of a closed session board
25 meeting recording, prohibiting the publication, reference to or use of the recording in any way, and
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1 ordering the return of GLA documents taken by Plaintiffs. Finally, the GLA requests its expenses,
2 including attorney fees, incurred in filing this Motion.
3

4 DATED this 29th day of August, 2015.
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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 28th day of August, 2015:

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