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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 RESPONSE FOR DELAY OF ORDERS PENDING RULE 60 MOTION & RESPONSE AGAINST DEFENDANT'S ATTORNEY FEES & COSTS FOR PROTECTIVE ORDER**

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

PROCEDURAL POSTURE

The GLA moved for a protective order with this Court on July 27, 2015. After briefing, the Court granted the GLA's motion and issued a Protective Order including an award of attorney fees and costs related to the motion on September 19, 2015. The GLA submitted its attorney fees and costs related to the motion on October 20, 2015. Plaintiffs filed their above titled response on November 5, 2015 (although the document is dated October 4, 2015. Plaintiffs' response objects to the GLA's

submission of attorney fees and costs and appears to move for a delaying granting those attorney fees and costs on the grounds they intend to file a motion under Mont. R. Civ. P. 60 at a later date.

ARGUMENT

Plaintiffs oppose the GLA's attorney fees and costs on the bases that requiring them to conduct discovery is an undue burden, that it was a mistake to require them to use discovery to obtain requested documents, they are denied due process rights, they are denied contract rights, that they did not agree to novation, that the GLA's motion had nothing to do with discovery so an award of attorney fees and costs is not justified, and that the amount submitted was excessive. Plaintiffs fail to acknowledge that every penny of attorney fees and costs was within their power to avoid had they simply acted reasonably by following the Rules of Civil Procedure in a lawsuit they filed.

1. Plaintiffs' objections are without merit.

Plaintiffs' arguments that having to conduct discovery is an undue burden or that it is a mistake to require them to conduct discovery essentially ask the Court to exempt them from following the Rules of Civil Procedure. Plaintiffs filed this lawsuit; they cannot now object to having to use the discovery process. Similarly, Plaintiffs' arguments they have been deprived of due process are misplaced. The Rules of Civil Procedure do provide due process to both Plaintiffs and the GLA—they provide a mechanism in which information is exchanged in litigation.

Plaintiffs also argue they have a contractual right to request documents under the 2012 Settlement Agreement and that they did not agree to the novation of the Settlement Agreement. However, Plaintiffs voluntarily filed this lawsuit, making their receipt of documents under the Settlement Agreement an issue in this case, therefore it is reasonable to require them to use the formal channels of discovery. Further, by voluntarily suing the GLA, the Plaintiffs have voluntarily abrogated whatever rights they have under the Settlement Agreement or the Montana Nonprofit Corporation Act for the duration of the litigation while the issue of the scope of those rights is settled.

Finally, Plaintiffs' contention that the GLA's motion had nothing to do with discovery is wrong. The GLA asked Plaintiffs to use discovery multiple times to no avail. Instead, Plaintiffs sent demands, took GLA documents, and inappropriately recorded and used information from a GLA closed session meeting. These issues fall squarely within the Court's power to specify the terms of discovery, prescribing the methods of discovery, and limiting the scope of discovery under Mont. R. Civ. P. 26(c).

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 June 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 comply with the Rules of Civil Procedure, the GLA had to act to protect itself. Plaintiffs had every opportunity to be comply with the reasonable requests of the GLA, and they refused to do so. This behavior, coupled with the extraordinary amount of filings and other work generated in this case, justify the sanctions under Rule 37.

"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 37—it is not to shift fees but to discourage abusive tactics. Here, Plaintiffs continued to send requests for documents, took documents without permission, refused to return documents, and used information obtained by recording a closed session board meeting on their website. They knew or should have known they were causing great stress and an undue burden on the GLA yet they continued with this behavior.

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 claim "several other attorneys find $2K to be a reasonable amount for Defendants' motion, not $5k." However, they do not identify these other attorneys nor the basis of such a claim. The fees in this case are a direct result of Plaintiffs' excessive filings, demands, and actions.

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. Numerous letters and emails went back and forth between Plaintiffs and GLA's counsel. Filing a motion for a protective order in a civil case is unusual in Montana as Montana attorneys generally work well with one another to resolve discovery disputes—something Plaintiffs refused to do. The motion and accompanying briefs, affidavits and exhibits needed to be investigated, researched, written, and filed. The motion addressed three different issues which all required investigation and research into the circumstances and law for each issue. The fees incurred by GLA's counsel were not excessive and the billable hour rates are reasonable for their experience and the work done. This case has been unique in the amount of filings, the inflexibility of the plaintiffs, the lack of meaningful communication, and the nature of the filings and issues that have arisen.

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 refused to use the discovery process. 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 $5,112.50 incurred by the GLA in bringing and briefing its Motion to for a Protective Order.

CONCLUSION

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

DATED this 18th day of November, 2015.

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 18th day of November, 2015:

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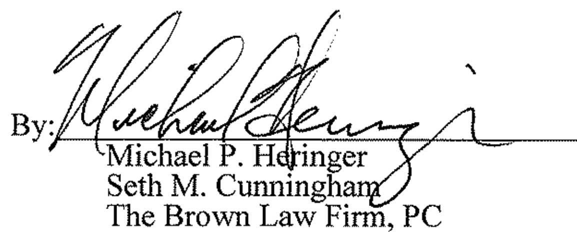

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