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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK,

Plaintiffs,

vs.

THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor,

Defendant.

Cause No. ADV-2021-611

Hon. Mike Menahan

**STATE OF MONTANA'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

## INTRODUCTION

Plaintiffs (hereinafter "Forward Montana") refuse to comply with reasonable discovery requests. They would rather avoid any and all fact-finding and argue a "purely legal" summary judgment that, if successful, will foreclose any inquiry into even the most basic question of whether the organizational plaintiffs even exist beyond the pleading that is the *Verified Amended Complaint.* When the Defendants (hereinafter "State") requested discovery as allowed under the Civil Rules, Forward Montana filed its present Motion for Protective Order to block *any* discovery.

Forward Montana's demand for the prohibition of routine discovery assumes that the hearing held October 25, 2021, involved that request. It did not. That hearing involved the Defendants' Mont. R. Civ. P. 56(f) motion to stay the Plaintiffs' pending summary judgment motion from proceeding apace until after the State had a reasonable chance to conduct discovery. While the Court apparently denied the State's Rule 56(f) motion (an order has yet to be entered) the Court did not issue any directive preventing discovery. Rather, it provided the State with a summary judgment response deadline of December 20, 2021. That allows time for discovery and the State provided notice of their intent to pursue discovery almost immediately after the hearing.

When the undersigned attempted to schedule discovery there was neither a scheduling order nor a protective order in place. Forward Montana refused to cooperate even though there are no grounds or authority for that refusal. The State did not ask to be sued and is defending in the normal course under the Civil Rules.

Pending summary judgment or not, Forward Montana must be required to prove who they are, what they do, what they intend to do, and what proof they have supporting their claims, alleged injuries, and any other relevant issue of fact framed in a fact-laden complaint.

Forward Montana's motion for a protective order preventing all discovery should be denied.

## ARGUMENT

### I. Plaintiffs fail to meet the threshold requirement of Rule 26(c)(1).

Forward Montana's motion and brief cite the proper rule for the issuance of a protective order barring depositions—Mont. R. Civ. P. 26(c)(1)(A)—but they fail to present any evidence or even an explanation that would support the Court finding "good cause [to] issue an order to protect [Plaintiffs] from annoyance, embarrassment, oppression, or undue burden or expense." Mont. R. Civ. P. 26(c)(1)

A *strong* showing is required before a party will be denied entirely the right to take a deposition. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (denying motion for protective order based upon claimed redundancy). "Conclusory, pattern, or boilerplate objections that merely assert that a discovery request is privileged, overly broad, unduly burdensome, irrelevant, or not reasonably likely to lead to relevant information are insufficient and unresponsive." *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 72, 392 Mont. 139, 424 P.3d 571. The party resisting discovery must specifically state how each contested discovery request is objectionable. *Id.*

The State wishes to take depositions, at the State's expense. The discovery sought is prompted by the allegations of the *Verified Amended Complaint.* The State has not been able to take *any* discovery to date. Plaintiffs should have little if any difficulty explaining what they allege and providing the proof.

Forward Montana's "[c]onclusory, pattern or boilerplate objections" that merely contend that the State's discovery requests will result in "annoyance, embarrassment, oppression, or undue burden or expense" under Rule 26(c)(1) (Ct. Doc. 69 at 3) are plainly insufficient grounds. The factors of annoyance, embarrassment or oppression are absent since Plaintiffs initiated the lawsuit, pleaded facts, verified those facts through only one party and no plaintiff has ever been called to explain itself or its claims under oath. The State simply wants to test the allegations in the *Verified Amended Complaint* considering each Plaintiffs' burden of proof. Forward Montana has failed to present any evidence of specific prejudice or negative effect that the discovery will visit on any plaintiff. That failure alone requires denial of the protective order.

Cases wherein a protective order is warranted typically involve endless, arduous, redundant and expensive discovery after sufficient discovery has already taken place or ample opportunity has been wasted. It is Forward Montana's burden to demonstrate a specific harm or prejudice if a protective order is not granted. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy,* 860 F.3d 1244, 1260 (9th Cir. 2017) (citing *Phillips v. GMC,* 307 F.3d 1206, 1210–11 (9th Cir. 2002)). "[B]road allegations of harm, unsubstantiated by specific examples or

articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). In this case Plaintiffs are not trying to shield confidential information from disclosure to the public, as in *Phillips, Beckman or Rivera v. DIBCO, Inc.*, 364 F.3d 1057, 1063–64 (9th Cir. 2004). Rather, Plaintiffs simply contend that discovery at this stage of the case would be really inconvenient. No affidavits or fact-based arguments are presented. The only specific complaint Forward Montana makes is that an estimated 25 hours of deposition time for six identified witnesses is unreasonable or "bullying." Those "undue burden" or "harassment" contentions fall flat since the Civil Rules allow a greater number of depositions and far more time without leave of court.[1]

Additionally, the State did not initiate this proceeding. The State only seeks information from Forward Montana because Forward Montana brought this action. Far from 'bullying,' this information is necessary to rebut Forward Montana's claims and defend the duly enacted laws of the State of Montana. *See Western Tradition Partnership v. Gallik*, 2011 Mont. Dist. LEXIS 62, *2 (First Jud. Dist. Dec. 2, 2011) (Denying plaintiff's request to stay discovery because "the State wants that information pursuant to its need to address the complaint" and the "Plaintiffs, themselves, have placed their [] information into dispute by bringing this suit.").

[1] The Montana Civil Rule for depositions provides one day of seven hours per witness. Mont. R. Civ. P. 26(d)(1). The defendants are allowed up to 42 hours of deposition time for the six witnesses requested without leave of the court. It should also be noted that a party may take up to 10 depositions without leave of court. Mont. R. Civ. P. 26(a)(2)(A)(i).

Forward Montana has failed to present any justification preventing routine discovery.

## II. Discovery is intended to fairly ascertain the truth.

At an "irreducible minimum" the Montana Constitution requires the plaintiff to show that he or it has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 244 P.3d 80. Montana's "case or controversy" requirement follows the federal constitution's Article III. *Id.* ¶ 30 n.3. A "personal stake in the outcome of the controversy at the commencement of the litigation" is required in every case. *Id.* ¶ 30; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982); *see also Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 272 Mont. 226, 316 P.3d 831. Plaintiffs must demonstrate a personal stake throughout the course of the litigation. *Id.*

At this point in the case all we have is Mr. Gallagher's verification of facts and allegations for entities and an individual over which he has neither control nor interest, and the hearsay and speculative testimony of an MACDL representative at a preliminary injunction hearing. To proceed the Plaintiffs must all have a personal stake in the outcome of this case throughout the case. Only discovery will either verify the Court's jurisdiction or demonstrate the need for dismissal.

Forward Montana is dictating the procedure and pace of this case by refusing discovery until after its dispositive motion. The State does not even know who the

Plaintiffs are. The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties, which are essential to proper litigation. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947), cited in *Massaro v. Dunham*, 184 Mont. 400, 405, 603 P.2d 249, 252 (1979). In that vein, the discovery rules are "liberally construed to make *all relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." *Richardson v. State*, 2006 MT 43, ¶¶ 22, 24, 331 Mont. 231, 130 P.3d 634 (emphasis original). The District Court has the inherent discretionary power to control discovery based on the District Court's authority to control trial administration. In controlling discovery, the District Court must regulate traffic to ensure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage. *Massaro*, 603 P.2d at 251–52. Here, Forward Montana will most definitely gain an unfair advantage if the State is prevented from developing a record.[2] The prejudice to the State is obvious.

## III. The nature of the question before the court does not dictate whether discovery is allowed.

At the heart of Forward Montana's argument is the contention that its summary judgment motion involves "purely legal" issues that do not require discovery. Apparently, if this Court denies the summary judgment, then discovery

[2] "The State has preserved its standing objections and may take them up on appeal." Ct. Doc. 69 at 2. Objections are not the same as a rigorous examination of a plaintiff's factual allegations central to the very viability of a claim or suit. Defendants doubt that Plaintiffs' counsel is that naïve.

would then be a relevant undertaking ... but only after the summary judgment is heard and decided. Therefore, Forward Montana insists on a protective order before any discovery has occurred. Given the liberal construction and allowance of discovery other courts disagree.

Specifically, the presentation of a "purely legal" issue alone is not sufficient to prevent discovery. *See USAA Cas. Ins. Co. v. Eighth Judicial Court,* 2019 Mont. LEXIS 157 at **4–5, 396 Mont. 547, 449 P.3d 793 (Apr. 23, 2019) (affirming the District Court's refusal of a protective order from a Rule 30(b)(6) deposition despite the insurance company's argument that the case, a declaratory judgment action, was controlled by the "plain language of the insurance policy," precisely Forward Montana's position here); *see also Estate of Kearney v. Mont. Thirteenth Judicial Dist. Court,* No. OP 07-0348, 2007 Mont. LEXIS 710, **4–6, 10–11 (Aug. 22, 2007). A protective order at this time would place the State at a significant disadvantage in the ultimate resolution of the litigation. *Id.* at *6. "[A]ny verdict reached would be questionable, subsequent litigation and additional costs would be inevitable, and a remedy by appeal would be inadequate." *Id.*

There are seven causes of action alleged by Forward Montana, the final Count having already been decided by the Court. The remaining four causes (beyond those argued as "purely legal") involve allegations of activities and the claimed result of their prohibition. The Plaintiffs' success on even one of the two "purely legal" summary judgment arguments will not end the case since Counts III through VI of the *Verified Amended Complaint* remain. Forward Montana's approach invites

piecemeal litigation for strategic advantage. If Forward Montana prevails at summary judgment, nothing stops them from then seeking to dismiss the remaining claims to avoid discovery and the full litigation of the case. If that happens neither the Court nor the State would ever know if any of the allegations of fact in the *Verified Amended Complaint* were true. Certifying a summary judgment as final for the purposes of appeal, on this record, would visit the greatest prejudice on the State: the complete inability to defend before the trial court and no record at all for the appeal.

Perhaps the State's defense will be limited to "standing," as Forward Montana alleges. Yet, that does not provide any basis to shut off discovery. The State has no idea who any of the Plaintiffs are, what legal status any of them operate under, if there are members of the organizations, their activities, and data or other evidence of any of the claimed potential injuries supporting their respective positions. The discrete factual issues relevant to each Plaintiff must be explored. Standing in this context is not a "purely legal" issue. Rather it requires the development of a record of facts, just as allegations of activities and injuries or harm require vigorous inquiry. Without standing, or a personal stake in the litigation, there is no case. *See Heffernan*, ¶ 29.

The information sought through discovery relates to the pending summary judgment motion since it is the most relevant evidence in this case. As this case sits now it is merely an academic exercise, litigation for sport. The Rule 30(b)(6) notices provided to the organization Plaintiffs demonstrated legitimate inquiries into the formation, legal status, activities and alleged injuries of the entities. If the summary

judgment motion is heard and decided without discovery it will never be known if the organizational Plaintiffs are real or exist simply in the *Verified Amended Complaint*. Are the organizations a "real party in interest" or just strawmen for the purpose of challenging the statutes? If either or both of the organizations are not proper parties or their claims have no basis in fact, the court must dismiss.

Insofar as the individual Plaintiffs are concerned, there is not one shred of evidence from Plaintiff Zadick. Plaintiff Gallagher verified the *Amended Complaint* on behalf of all Plaintiffs, including private practice attorney Zadick, which is troubling since Mr. Gallagher is an elected official, a long-time Lewis & Clark County Prosecutor and has no obvious connection to a campus political group in Missoula, the Montana Association of Criminal Defense Lawyers (which would create a conflict in Gallagher's office), or with private attorney Zadick. Mr. Gallagher's status as an elected official does not shield him from being deposed, regardless of Forward Montana's objections. *See Grove v. City of Helena,* No. ADV-2010-233, 2011 Mont. Dist. LEXIS 6, *1 (Mont. First Jud. Dist. Jan. 20, 2011). MACDL's Stephens testimony on June 28, 2021,[3] was admittedly speculation based upon hearsay and did not support preliminary injunction. *See Benefis Healthcare v. Great Falls Clinic,* No. DV-06-149, 2006 Mont. Dist. LEXIS 171, **28–29 (Mont. Eighth Jud. Dist. Mar. 23, 2006). Even so, clearing the very low bar during a preliminary injunction hearing

[3] The Court noted Stephens' testimony during the October 25, 2021 Rule 56(f) hearing as a basis for denial of Defendants' Rule 12(b) motion. Tr. 12:8–12 (Ct. Doc. 69, Ex. A). The Rule 12(b) motion should have been decided on the four corners of the Complaint and not outside evidence, including testimony from a witness in a hearing subject to different procedural standards.

does not equate to proof of jurisdictional facts binding on the parties upon the ultimate trial of the case. *See Armstrong v. State*, No. BDV-97-627, 1997 Mont. Dist. LEXIS 810, *18 (Mont. First Jud. Dist. Nov. 25, 1997) (assertion of a "rather broad, non-specific, almost speculative" statement of harm might suffice at the preliminary injunction stage but "these same facts would be insufficient to grant a permanent injunction").

> Because satisfaction of the grounds for issuance of a preliminary injunction is not an adjudication on the merits of any aspect of an underlying claim for relief (citation omitted) an applicant has the initial burden of making a prima facie showing of the asserted basis for the requested preliminary injunction under § 27-19-201, MCA. (citations omitted) A prima facie showing is no more than a legal and factual showing that would satisfy the claimant's burden of proof or persuasion if unrebutted. (citations omitted) The burden then shifts to the opposing party to rebut the applicant's prima facie showing. (citation omitted)

*Driscoll v. Stapleton*, 2020 MT 247, ¶ 33, 401 Mont. 405, 473 P.3d 386 (Sandefur, J., dissenting). These authorities protect the fairness of litigation after issuance of a preliminary injunction: that a *prima facie* showing may be rebutted later during litigation since the burden then shifts to the opposing party. Under *Armstrong, Driscoll* and the cases cited therein, even though Forward Montana made it past the preliminary injunction stage of the proceeding the State is not foreclosed from litigating the case and developing a record for its defense to challenge the facts alleged, including jurisdictional facts.

By simply rejecting the State's reasonable discovery request and then seeking Court protection from the normal burdens of litigation, Forward Montana seeks to set a precedent that discovery will be allowed only when the party from whom

discovery is requested consents. Defendants would be required to plead their case to the court in each instance before discovery commenced. Because of this new rule, each case would start with an extensive, perhaps days-long discovery conference—or several throughout the litigation—setting the limits of what is allowed each time. That is certainly not the purpose of the discovery rules.

Further, the Court has never been requested to rule on the merits of whether Forward Montana has a personal stake in this litigation. The Court did not rule on the issue during the preliminary injunction hearing[4] (Ct. Doc. 28) and it denied Defendants' motion to dismiss based solely upon the allegations of the complaint under Rule 12(b). Ct. Doc. 61 at 3, 5–6. The standing question, including ripeness, is a mixed question of law and fact that has never been decided by this Court based upon a record of evidence. The Plaintiffs demand blocking any discovery is unreasonable and unjustified. Fairness dictates that the State be allowed discovery into the persons and organizations that are Plaintiffs herein.

## CONCLUSION

Based upon the foregoing arguments and authorities, and the remainder of the records and files in this case, Defendants State of Montana and Gianforte respectfully submit that this Court should enter an Order denying the Plaintiffs' Motion for a Protective Order.

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[4] When the Court relied on Mr. Stephens' testimony from the preliminary injunction hearing to deny the Defendants later-filed Rule 12(b) motion, the Court's reliance on that testimony converted the motion into something of a Rule 56 summary judgment motion based upon evidence. Neither party submitted Mr. Stephens' testimony or any other evidence for consideration during the Rule 12(b) motion.

DATED the 15th day of November, 2021.

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