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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'S BRIEF IN SUPPORT
OF MOTION TO STRIKE AMARA
REESE-HANSELL AFFIDAVIT
OR, ALTERNATIVELY, TO
VACATE HEARING AND
PROCEED WITH DISCOVERY**

Defendant State of Montana submits this brief in support of its Motion to Strike Amara Reese-Hansell's Affidavit or, alternatively, to vacate the hearing on Plaintiffs' Motion for Partial Summary Judgment scheduled for January 25, 2022, and allow discovery to proceed on disputed fact issues. The Affidavit was not timely

filed and violates the Court's December 7, 2021, Order staying discovery in this case. It should therefore be stricken and not considered in support of Plaintiffs' Motion for Summary Judgment. Alternatively, the Court should vacate the summary judgment hearing and allow discovery to proceed on the disputed fact issues.

Montana Rules of Civil Procedure 6(c)(2), which mirrors the federal rule, provides: "Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time." An untimely supporting affidavit may only be admitted "on motion made after the time has expired if the party failed to act because of excusable neglect." Mont. R. Civ. P. 6(b)(1)(B). Federal courts reason Fed. R. Civ. P. 6(c)(2) as being "applicable to all motions: When a motion is supported by affidavit, the affidavit should be served with the motion. This leaves no room for judicial discretion." *Canning v. Star Publishing*, 19 F.R.D. 281, 284 (D. Del. 1956) (internal citation and quotation omitted); *see also Byrd v. USAA Cas. Ins. Co.*, 2018 WL 8244612 at 9 (E.D. Wash. Nov. 7, 2018) (Supporting affidavit was improper "because it was not filed with the summary judgment motion."). The purpose of the rule is to prevent litigation by ambush and allow for a fair hearing. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (When the moving party submits new evidence on reply, courts "should not consider the new evidence without giving the [non-]movant an opportunity to respond."). Courts should strike new evidence offered for the first time in reply as a matter of fairness and to ensure parties have a meaningful opportunity to respond. *See Worledge v.*

Riverstone Residential Grp. LLC, 2015 MT 142, ¶ 17, 379 Mont. 265, 272, 350 P.3d 39, 44–45.

On August 18, 2021, Plaintiffs filed their brief in opposition to the State’s motion to dismiss. (Doc. 34). Concurrent with that brief in opposition, Plaintiffs moved for partial summary judgment. (Doc. 35). Plaintiffs were on notice at the time of filing the motion for summary judgment that the State vigorously contested their standing to bring these claims. *See* (Doc. 32 at 6–12). A straightforward reading of Rule 6(c)(2) required Plaintiffs to file any supporting affidavits, including affidavits supporting Plaintiffs’ standing, with the motion on August 18, 2021.

Amara Reese-Hassell’s affidavit in support of the motion for summary judgment was filed on January 3, 2022. (Doc. 83). Plaintiffs offer no explanation as to why they filed this affidavit 138 days late, much less anything close to excusable neglect that would justify such a delay. Because Amara Reese-Hassell’s affidavit was filed 138 days late and Plaintiffs fail to offer any justification for the delay, this Court should strike the affidavit as untimely.

The Amara Reese-Hassell affidavit highlights the clear prejudice against the State on evidentiary matters in this litigation. Plaintiffs filed, and this Court granted, a protective order prohibiting *all* discovery in this case. *See* (Docs. 68, 70, 77). The State used what information it had to contest Plaintiffs’ standing at the summary judgment phase. *See* (Doc. 80 at 4–6), *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (Plaintiffs must demonstrate standing at each successive stage of litigation “with the manner and degree of evidence required” at each stage.).

The Amara Reese-Hassell affidavit would introduce new evidence, on reply, after Plaintiffs successfully denied any investigation into their claims and allegations. Plaintiffs seem to believe that they can, at any time, introduce new evidence and that the State cannot impeach or rebut that evidence. That is not how the rules of civil procedure work. A fair hearing requires that the State be able to investigate and respond to the Plaintiffs' claims and allegations. *See Worledge*, ¶ 17.

As a threshold matter, summary judgment requires the absence of disputed material fact. Mont. R. Civ. P. 56(c)(3). The State asserted, through affidavit, material facts contesting Plaintiffs' standing in its Response. (Doc. 81). Plaintiffs then filed the Amara Reese-Hassell affidavit in reply raising brand new factual allegations. (Doc. 83). If the Court proceeds as scheduled, then the Court must draw all reasonable inferences from evidence offered in favor of the State. *See Moe v. Butte-Silver Bow Cnty.*, 2016 MT 103, ¶ 14, 383 Mont. 297, 371 P.3d 415. In other words, the nature of the contested factual evidence creates a jurisdictional failure through lack of standing which renders the summary judgment hearing unnecessary.

At this stage, an appropriate remedial action by the Court would be to vacate the January 25, 2022, hearing and allow the State to conduct discovery as the State has previously requested. *See* (Docs. 43–44, 51, 74, 80). The only way to resolve this *factual* dispute is to allow for discovery, which requires the Court to vacate the pending hearing.

Plaintiffs' desperately wish for this Court to excuse their inability to clearly allege standing. *See* (Doc. 82 at 10) ("Plaintiffs did not present further evidence of

their standing when they filed their brief in support of their motion for summary judgment.”). Their argument that the issue of standing is forever precluded ignores foundational standing jurisprudence. See *Lujan*, 504 U.S. at 561; *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994) (“We first address the threshold question raised by respondents whether petitioners have standing to bring their claim. Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.”); *Stanley v. Lemire*, 2006 MT 304, ¶ 31, 334 Mont. 489, 500,148 P.3d 643, 651 (“[J]urisdictional issues transcend procedural considerations” and the “lack of jurisdiction over the subject matter can be raised at any time and a court which in fact lacks such jurisdiction cannot acquire it even by consent of the parties.”) (internal citations and quotations omitted). Plaintiffs carry a burden of proof through each stage of litigation to demonstrate standing. The State may challenge Plaintiffs’ lack of standing at any time and the jurisdictional question remains open throughout the litigation.

The Amara Reese-Hansell affidavit underscores the need for this Court to restore normal order and allow for the ordinary course of discovery. Plaintiffs cannot both ask for discovery to be stayed and then introduce new evidence with a reply brief to support their position. For the reasons stated, this Court should either strike the


Amara Reese-Hansell affidavit and construe all reasonable inferences in favor of the State, or vacate the January 25, 2022, hearing and allow discovery to proceed.

DATED this 12th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

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Date: January 12, 2022



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