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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	No. CDV-2020-307 Hon. Kathy Seeley PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO MODIFY SCHEDULING ORDER OR, IN THE ALTERNATIVE, FOR A SCHEDULING CONFERENCE AND REQUEST FOR EXPEDITED RULING
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INTRODUCTION

Defendants seek to move deadlines back nine months. The trial date and disclosure deadlines were unambiguously established by this Court over five months ago, after both parties had an opportunity to provide the Court with preferred schedules. Indeed, the Court set February 6, 2023 as the trial date *at the request of Defendants*, as Plaintiffs were requesting an earlier trial date. (Bellinger Decl. ¶ 3).

Time is truly of the essence in resolving this case. The constitutional injuries alleged in the case are ongoing and worsening as Defendants continue their conduct that makes the climate crisis worse. Defendants' Motion to Modify the Scheduling Order ("Motion") amounts to a laundry list of concerns that they are untimely raising for the first time and could have addressed months ago by simply litigating the case during the ample time allowed by the Court for discovery. Indeed, there is no basis for Defendants to file this request on the eve of an important deadline for the Plaintiffs; Plaintiffs' expert disclosures are due on May 18th – a mere *four* business days after Defendants' Motion was filed. While Plaintiffs' expert disclosures must be made in accord with the Court's Scheduling Order, Plaintiffs will be prejudiced if the Court now extends the parallel deadline of June 1 for Defendants' expert disclosures.

Plaintiffs oppose Defendants' Motion, and the Court should deny it because it is ill-timed, fails to show good cause, and would be prejudicial to the 16 children that brought this case. Moreover, Defendants' delay tactics here are contrary to Montana Rules of Civil Procedure, Rule 1, which instructs the Rules "must be construed and administered to secure the just, speedy, and inexpensive determination of every action." At its core, Defendants' Motion is nothing more than a baseless attempt at a wholesale rewriting of the Scheduling Order, including the discovery schedule and trial date ordered by the Court, and *agreed to by Defendants*, nearly five months ago.

Defendants argue that they are short on time, but if so, this is a crisis of their own making. Defendants list six reasons for needing this extension, but fail to even proffer a declaration from their attorneys that supports their claims of good cause. None of their reasons are valid.

(1) and (2) Defendants complain about the complexity of this case, but nothing has changed since the entry of the Scheduling Order. The Complaint was filed over two years ago and has been narrowed by the Court. If anything, Defendants have made the case more complex for themselves in light of their denials of basic scientific facts in their Answer.

(3) Defendants raise new concerns about which claims remain in this case, but it is clear which of Plaintiffs' claims remain at issue. On August 4, 2021, the Court dismissed requests for relief 6, 7, 8, and 9 and allowed all other claims to proceed. (*See* Doc. 46). Defendants cannot now claim confusion because they filed an untimely motion that seeks to relitigate their failed motion to dismiss.¹

(4) Defendants complain about the number of plaintiffs in this case. Again, this case was filed over two years ago and the number of plaintiffs has not changed, including since the entry of the Scheduling Order Defendants seek to adjust. As of the date of this filing, *Defendants have not noticed a single plaintiff deposition* even though the Court's Scheduling Order was issued nearly five months ago and the Court denied Defendants' Motion to Dismiss over nine months ago.

(5) Defendants complain about the number of lay witnesses disclosed, but Plaintiffs disclosed only six new witnesses. To date, *Defendants have not noticed any fact witness depositions*. Defendants, on the other hand, disclosed *thirty-seven* witnesses. Plaintiffs have asked Defendants to narrow this list since it is unreasonable and unnecessary given the nature of the claims in this case, but Defendants have ignored this request. Regardless, Plaintiffs do not need an

¹ Plaintiffs will file a separate brief responding to Defendants' Rule 60(a) Motion for Clarification of Order on State's Motion to Dismiss within the timeframe provided by the Montana Rules of Civil Procedure.

extension, as they currently plan to depose only a small fraction of the witnesses disclosed by Defendants.

(6) Defendants complain about the number of Defendants named. The number of Defendants has not changed since the filing of Plaintiffs' Complaint and there are no details in Defendants' motion as to why the number of Defendants' in this case warrants an extension, nor did Defendants' file a declaration from counsel, or any Defendant Agency, explaining why more time was needed.

In short, Defendants' Motion amounts to a laundry list of concerns that they are untimely raising for the first time and could have addressed months ago by simply litigating the case during the ample time allowed by the Court for discovery. Indeed, there is no basis for Defendants to file this request on the eve of an important deadline for the Plaintiffs; Plaintiffs' expert disclosures are due on May 18th – a mere *four* business days after Defendants' Motion was filed. Meanwhile, Plaintiffs continue to suffer ongoing constitutional harms at the hands of the state, including respiratory illness, mental health injuries, and cultural harms that are only getting worse as the climate crisis worsens and while Defendants continue their allegedly unconstitutional conduct.

Plaintiffs have expressed a willingness to agree to a short 30- or 45-day extension to the close of discovery, provided that the February 6, 2023 trial date is not changed. A longer extension that necessitates the postponement of trial would unduly prejudice Plaintiffs. Moreover, Defendants raised a 9-month extension for the first time just *fifteen minutes* before filing their Motion, thus failing to meaningfully meet and confer. Previously, Defendants asked for a 90-day extension but are now seeking nine months. Because Plaintiffs continue to suffer ongoing constitutional harms at the hands of the state, while Defendants have not explained this massive

change in position, have failed to show good cause, and failed to meet and confer, this Court should deny Defendants' Motion.

PROCEDURAL HISTORY

This case began on March 13, 2020 when Plaintiffs filed their Complaint alleging that Montana's fossil fuel energy policy harms 16 young Montanans and that the Climate Change Exception to the Montana Environmental Policy Act ("MEPA") is unconstitutional. (*See* Doc. 1). Defendants moved to dismiss, (*see* Docs. 11, 12), which was granted with respect to prayers for relief 6, 7, 8 and 9 and denied on all other claims (*see* Doc. 46). Defendants filed an Answer which amounted to a near complete denial of every substantive paragraph, including the breath-taking denial that climate change is caused by human activity.² (*See* Doc. 54). On December 27, 2021, after both parties had an opportunity to provide proposed schedules, the Court entered the Scheduling Order, which provided seven months for fact discovery and expert discovery, and over 13 months to prepare for trial. (*See* Doc. 61).

On March 18, 2022, Defendants served their First Discovery Requests on Plaintiffs, including 39 Interrogatories and 34 Requests for Production.³ (*See* Bellinger Dec. ¶ 4, Doc. 68). Plaintiffs responded to these discovery requests in the time required by Montana Rules of Civil Procedure. In accordance with the Scheduling Order, the Parties filed their lay witnesses and exhibits lists on April 18, 2022. (*See* Docs. 73, 79). Plaintiffs' list named six lay witnesses in addition to the Plaintiffs. (*See* Doc. 73). Defendants' list named thirty-seven lay witnesses. (*See* Doc. 79). Plaintiffs promptly contacted Defendants after receiving such an unwieldy witness list

² Mark Lynas et al., *Greater than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, 16 *Env't Rsch. Letters* 114005 (2021), <https://doi.org/10.1088/1748-9326/ac2966> ("We conclude with high statistical confidence that the scientific consensus on human-caused contemporary climate change – expressed as a proportion of the total publications – exceeds 99% in the peer reviewed scientific literature.").

³ Defendants served 34 Requests for Production, not 35 as indicated in the State of Montana's First Discovery Requests to Plaintiffs; Request for Production No. 23 was omitted. (*See* Bellinger Decl. ¶ 4, Doc. 68).

to discuss narrowing the list to avoid unnecessary depositions. (Bellinger Decl. ¶ 5). Defendants never responded.

On May 2, 2022, Plaintiffs proposed a brief extension to facilitate scheduling of depositions and motion practice. (Bellinger Decl. ¶ 6). Plaintiffs' proposal included an extension of 45 days to the close of fact discovery and the briefing of all dispositive and pretrial motions. (*Id.*). Plaintiffs' proposed schedule left the May 18, June 1, and June 15 expert disclosures unmodified. (*Id.*). Plaintiffs were also very clear that they did not want the February 6, 2023 trial date to be impacted. (*Id.*). On May 3, 2022, Defense counsel informed Plaintiffs' counsel that they were not available to meet to discuss changes to the Scheduling Order until May 9, 2022. (Bellinger Decl. ¶ 7). Counsel met telephonically on May 9, 2022, and Defendants, at that time, proposed a more expansive extension, including pushing back Plaintiffs' expert disclosures that were due in six business days. (Bellinger Decl. ¶ 8). Defendants proposed *no change to the trial schedule* on that call, but noted that if Plaintiffs did not agree with Defendants proposed extension, Defendants might move the court for an extension including a delayed trial schedule. (*Id.*). On May 11, 2022 at 10:45 am PDT (11:45 am MDT), Plaintiffs informed Defendants that their proposed schedule was unacceptable, and again proposed a 45-day extension to the discovery and motions practice deadlines (but not the expert disclosure deadlines or the trial dates). (Bellinger Decl. ¶ 9). On May 12, 2022 at 1:13 pm PDT (2:13 pm MDT), Defendants rejected Plaintiffs' 45-day extension and notified Plaintiffs that they intended to file a Rule 16 motion. (Bellinger Decl. ¶ 10). On May 12, 2022 at 2:39 pm PDT (3:39 pm MDT), Defendants notified Plaintiffs *for the first time* that they planned to move the Court for a 9-month extension, including an extension of the trial date. (Bellinger Decl. ¶ 11). Fifteen minutes later, on May 12, 2022 at 2:54 pm PDT (3:54 pm MST), Defendants filed this Motion. (Bellinger Decl. ¶ 12).

ARGUMENT

I. Good Cause Does Not Justify Defendants' Extension of Time

Under Rule 16(b)(4) a “schedule may be modified only for good cause and with the judge’s consent.” Mont. R. Civ. P. 16(b)(4); *accord* Scheduling Order at ¶ 12. Good cause is defined as a “legally sufficient reason” and has been referred to as “the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused.” *City of Helena v. Roan*, 2010 MT 29 ¶ 13, 355 Mont. 172, 175-76, 226 P.3d 601, 604 (2010) (quoting *Black’s Law Dictionary* 251 (Bryan A. Garner ed., 9th ed., West 2009)). If a party has had sufficient time to comply with the schedule, this weighs against finding good cause. *Lindey’s, Inc. v. Pro. Consultants, Inc.*, 244 Mont. 238, 243, 797 P.2d 920, 923-24 (1990); *In re Marriage of Smith*, 270 Mont. 263, 271, 891 P.2d 522, 527 (1995), *overruled (on other grounds) by In re Marriage of Funk*, 2012 MT 14, 363 Mont. 352, 270 P.3d 39. Montana courts frequently deny motions to modify scheduling orders if the conduct of the party seeking the extension is the reason for the delay or purported inability to meet court-ordered deadlines. *See, e.g., Lindey’s*, 244 Mont. at 243, 797 P.2d at 923-24 (1990) (affirming denial of extension for discovery when movant was aware of purported complications with its expert two months prior to filing motion and missed the deadline); *In re Marriage of Smith*, 270 Mont. at 271, 891 P.2d at 527 (affirming denial of extension for discovery when movant failed to move for the extension during the six months prior to the deadline and instead filed the motion after the deadline had passed); *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶¶ 10-11, 332 Mont. 116, 119, 135 P.3d 797, 799-800 (affirming denial of extension for disclosure of experts when movant did not provide “sufficient justification for its failure to meet the scheduling deadline” after being aware of the approaching deadline in advance and failing to act).

Here, Defendants do not meet their burden to establish good cause because, first, they provided this Court with no evidence, in the form of an attorney declaration or otherwise, to justify the extension of time. A finding of good cause cannot be based upon unsupported allegations of inconvenience when it is the party seeking to modify the scheduling order whose conduct gives rise to the purported need. *Lindey's*, 244 Mont. at 243, 797 P.2d at 924 (“procrastination and failure to act diligently” do not give rise to good cause).

Second, the claims at issue in this case and the alleged “complexity” of this case have been known to Defendants since the case was filed over two years ago. This case has not gotten more complex since then; in fact just the opposite since this Court partially granted Defendants’ motion to dismiss and narrowed the form of relief available. Moreover, Defendants’ could have narrowed the issues in this case by admitting some of the factual allegations in Plaintiffs’ Complaint when they filed their Answer. Instead, Defendants refused to admit anything substantive, and denied even the most basic facts. For example, Defendants’ Answer denies that the atmospheric carbon dioxide concentration has increased as a result of human combustion of fossil fuels and denies allegations about the current concentration of carbon dioxide in the atmosphere – facts that could have easily been admitted after a reasonable inquiry. (Defs.’ Answer ¶ 144; Pls.’ Compl. ¶ 144). Defendants’ Answer even denies allegations where the source of the information was Montana government documents. (*See, e.g.*, Defs.’ Answer ¶¶ 125, 162; Pls.’ Compl. ¶¶ 125, 162). Simply stated, Defendants could have eliminated some of the alleged “complexity” of this case by admitting some basic scientific facts.

Defendants’ concerns about the number of witnesses in this case is another red herring and a concern also of their own making. Plaintiffs only provided six new witnesses in their lay witnesses disclosure, whereas Defendants disclosed *thirty-seven*, an unreasonable number.

Defendants have refused to even respond to Plaintiffs' attempts to have Defendants' narrow the list. (Bellinger Decl. ¶ 5). That said, Defendants do not need nine additional months to depose six lay witnesses and Plaintiffs do not intend to depose all thirty-seven of Defendants witnesses, instead opting to depose agency representatives using Rule 30(b)(6).

Defendants say it is impossible to conduct depositions in the time frame allotted, but they have not noticed a single deposition and rejected Plaintiffs' offer of an additional 45 days to conduct discovery. Defendants' conduct in this case simply does not match up with their claims of inconvenience and fails the "good cause" standard.

II. Plaintiffs Would Be Prejudiced By Moving The Trial Date

Plaintiffs do not need more time to prepare their case, and in fact would be significantly burdened should they lose their February 6, 2023 trial date. The constitutional injuries alleged in the case are ongoing and worsening as Defendants continue their conduct that makes the climate crisis worse. Montana's courts have recognized that "the loss of a constitutional right constitutes irreparable harm." *Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 286 P.3d 1161, 1165 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (upholding the district court's granting of a preliminary injunction due to the constitutional rights implicated in the case, including the fundamental right to pursue one's own health); *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

By the time that this case reaches trial under the current Scheduling Order, the Plaintiffs will have waited almost three years for their ability to testify to the Court about the injuries they have suffered, while they continue to be injured by the dangerous wildfires threatening their homes, and the suffocating wildfire smoke, excessive heat waves, and drought harming their health and livelihoods, to name but a few of the injuries they are experiencing.

III. The Extension Defendants Seek Is Untimely and Unreasonable

Defendants are presenting an objection to the Scheduling Order almost *five months* after it was entered, and on the eve (four business days to be specific) of a significant deadline, Plaintiffs' expert disclosures. It is thus not timely made. Discovery in this case is well underway and there is still ample time for both parties to meet the deadlines set forth in the Scheduling Order, particularly in light of Plaintiffs' reasonable proposal to push the discovery deadline back an additional 45 days. Defendants could have pursued discovery after the Complaint was filed to provide themselves with more time, but they declined to do so.

Plaintiffs asked the Defendants to agree to extend the discovery deadline by 45 days to ensure the parties had ample time to complete depositions sufficiently in advance of the preliminary motions deadline and trial. The Defendants rejected that proposal and instead seek to move deadlines back nine months. The trial date was unambiguously established by this Court over five months ago, after both parties had an opportunity to provide the Court with preferred schedules. Indeed, the Court set February 6, 2023 as the trial date *at the request of Defendants*, as Plaintiffs were requesting an earlier trial date. (Bellinger Decl. ¶ 3). Defendants' unsupported claims that the case schedule is insufficient comes five months too late and the extension they seek is unreasonable and should be rejected.

IV. Defendants Did Not Meet And Confer Prior To Seeking Court Intervention

Parties must confer in good faith before asking the Court to intervene on discovery disputes. Defendants did not attempt to meet and confer in good faith when they told Plaintiffs about their intent to seek a 9-month extension a mere fifteen minutes before filing this Motion. Defendants' feeble attempt to cloak this discovery dispute in purported prejudice which derives entirely from their lack of diligent preparation should be rejected.

CONCLUSION

This Court should summarily deny Defendants' Motion to Modify this Court's December 27, 2021, Scheduling Order. A 9-month delay to discovery and the cancellation of the trial date will prejudice the 16 Montana youth who have already waited years to have their day in court. As demonstrated, Defendants' have failed to make a showing of good cause to modify the Scheduling Order. Plaintiffs are prepared to proceed with the current Scheduling Order. Alternatively, Plaintiffs continue to be amenable to a 30- to 45-day extension to the discovery deadline and any pretrial motions, provided that the February 6, 2023 trial date is not changed. Plaintiffs oppose any modification of time to the deadlines to disclose expert witnesses and disclosures, which are due in 3 days.

In sum, Plaintiffs respectfully request that the Court deny the Defendants Motion in its entirety, or alternatively deny any modification of the Scheduling Order beyond a 45-day extension as laid out in the Plaintiffs' Proposed Scheduling Order. (See Plaintiffs' Proposed Amended Scheduling Order submitted herewith.)

DATED this 15th day of May, 2022.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on May 15, 2022:

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