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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.	Cause CDV-2020-307 Hon. Kathy Seeley **REPLY IN SUPPORT OF MOTION TO MODIFY SCHEDULING ORDER OR, IN THE ALTERNATIVE, FOR A SCHEDULING CONFERENCE AND REQUEST FOR EXPEDITED RULING**

INTRODUCTION

The State seeks to modify the current scheduling order to allow for adequate discovery in this important, complex case involving at least 59 lay witnesses, numerous expert witnesses, six government agencies, the statewide energy policy and

its implementation in various fields over decades, and the global climate. Plaintiffs oppose the State's Motion. Pls.' Opp. To Defs.' Mot., 1 ("Pls.' Opp."). They argue that extending the scheduling order would not be consistent with Mont. R. Civ. P. 1, which provides that the Rules of Civil Procedure "must be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.* (citing Mont. R. Civ. P. 1). Plaintiffs miss an important adjective in Rule 1: "*just.*" Mont. R. Civ. P. (1) (emphasis added). They also claim that an extension would prejudice them, the State's motion was "ill-timed", and that good cause does not exist for modifying the scheduling order. These arguments fail and the State's Motion should be granted.

ARGUMENT

The current scheduling order does not give the State enough time to present a full defense in this case. Under the current order, the parties have less than two months after lay witness disclosures to complete discovery on these issues. There is simply no way to adequately conduct discovery of the numerous fact-intensive claims and defenses related to Plaintiffs' 104-page Complaint under the current scheduling order. This case deserves more than slapdash discovery under a severely truncated schedule. This Court should grant the State's Motion.

I. Plaintiffs were unwilling to compromise.

At the outset, Plaintiffs claim that the State didn't meet and confer with Plaintiffs to attempt to find a schedule that would work for both parties. This is patently false. The parties did confer by phone regarding the case schedule on May 9, 2022. During this call, the parties discussed two different proposals for modifying the case schedule. Plaintiffs proposed extending only a few deadlines by 45 days. As

the Plaintiffs' own brief acknowledges, the State proposed an extension of deadlines that maintained the current trial date *as a compromise* that would accommodate Plaintiffs' concerns. *See* Pls.' Opp. at 6 ("Defendants proposed no change to the trial schedule [during the parties' May 9, 2022, meet and confer] *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.") Plaintiffs rejected the State's offer. Pls.' Opp. at 6. ("Plaintiffs informed Defendants that their proposed schedule was unacceptable...."). Accordingly, just like it said it would, the State moved for a modification of the current scheduling order, including asking for a new trial date. This Motion is not—as Plaintiffs misrepresent—a "massive change in position,", Pls.' Opp. at 4–5, but merely a response to the realities of this case (which Defendants' counsel thoroughly discussed with Plaintiffs' counsel) and Plaintiffs' rigid unwillingness to compromise to a reasonable schedule.

II. Plaintiffs' arguments against the State's proposed scheduling order fail.

Plaintiffs argue that the State's Motion would prejudice them, is ill timed, and not supported by good cause. These arguments fail.

A. Plaintiffs will not be prejudiced by a fair schedule.

Citing preliminary injunction cases, Plaintiffs claim that they will suffer irreparable harm to their constitutional rights if the Court adopts the State's proposed schedule. *See* Pls.' Opp. at 9 (citing *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161). But—in the more than **two years** since they filed their Complaint—Plaintiffs have not sought injunctive relief to

prevent this alleged "irreparable harm." Also, Plaintiffs provide no evidentiary support for their claim that they will suffer irreparable harm if this case receives a fair schedule.

Plaintiffs next point out that by the time trial begins under the current scheduling order, nearly three years will have passed since they filed their Complaint. But the State did not cause this delay. The State filed its Motion to Dismiss Plaintiffs' massive Complaint just over a month after Plaintiffs filed it in March of 2020. The Court did not rule on that Motion until August 2021—nearly fifteen months later. The current case schedule has only been in place since December 2021. Importantly, disclosure of the parties' lay witnesses on April 18, 2022 only recently revealed the number of potential depositions to be taken. Plaintiffs claim—without support—that the State has disclosed an "unreasonable" number of lay witnesses but ignore the fact that they sued six separate governmental agencies asserting claims about state energy policies spanning decades. In light of these claims, the number of lay witnesses is reasonable. Contrary to Plaintiffs' misrepresentation that Defendants have never responded to their request to narrow this list, Defendants' counsel expressly explained at the meet and confer that these witnesses were identified by going through the Complaint paragraph by paragraph with each agency and identifying the best people from the agency to testify regarding the allegations of each paragraph. Plaintiffs chose to file a 104-page Complaint with 251 paragraphs of allegations. Their complaint that the State's disclosure of 37 lay witnesses is unreasonable is disingenuous.

The State moved quickly to modify the case schedule in light of the disclosure of 59 combined lay witnesses by the parties. Defendants' proposed case schedule pushes the last proposed deadline to May 31, 2023. If the Court sets this case for trial in June or July of 2023, the delay amounts to a mere four or five months. Plaintiffs cannot seriously contend that such a short delay of the trial prejudices them.

Contrary to Plaintiffs' arguments, it is the State who will suffer prejudice if this case proceeds under the current scheduling order. The State, like any party, is entitled to full and fair discovery and the "full opportunity...to defend" against the claims in this case. *Bates v. Neva*, 2013 MT 246, ¶ 16, 371 Mont. 466, 308 P.3d 114 (quotations omitted). There are 58 days between the date of this Motion and the Close of discovery. If the State's attorneys were to do nothing but depose, and arrange for Plaintiffs' deposition of, witnesses in this case for the next 58 days, they still would not have enough time to depose all 59 lay witnesses and the expected expert witnesses the parties will soon disclose. And the parties still don't know what claims remain viable in this case. *See* (Docs. 75, 76) (State's Rule 60(a) Motion for Clarification and Brief in Support.) Respectfully, the current schedule demands the impossible.

B. The State's Motion is not "ill-timed."

Plaintiffs take issue with the fact that the State filed its Motion close to the deadline for Plaintiffs' expert disclosures. But the State requested an expedited ruling on its Motion and has filed its Reply quickly to give the Court time to rule on the Motion before Plaintiffs' expert disclosure deadline. If the Court is unable to rule on the State's Motion before the Plaintiffs' expert disclosure deadline passes, the

State remains willing to extend the expert disclosure deadlines. In fact, it is Plaintiffs who refused to compromise regarding the extension of these deadlines. Their refusal to compromise cannot be used as both a sword and a shield. Their own failure to extend the deadlines has put them in their present position.

C. Good cause exists for extending the scheduling order.

Finally, the State has clearly shown good cause for extending the case deadlines. Plaintiffs try to dispute the State's showing that good cause supports the State's proposed scheduling order. Plaintiffs first erroneously claim, without citing to any supporting authority, that the State had to submit an attorney declaration showing good cause for an extension. Not so. The Court's Scheduling Order requires only that "[a]ny requests for extension must be in writing setting forth the discovery accomplished and the reason for any uncompleted discovery deadline" and that "[a]ny request for modification must be accompanied by a proposed order setting forth new deadlines." (Doc. 61, ¶ 12.) Mont. R. Civ. P. 16(4) likewise doesn't require any supporting affidavit by the filing attorney. *See id.* ("A schedule may be modified only for good cause and with the judge's consent."). The State's brief in support of its Motion identified several reasons why there's good cause for modifying the current schedule. Each of these reasons is evident from the face of the pleadings filed in this case and the Court's own scheduling order. The Court surely may take judicial notice of its own docket. No attorney declaration is necessary.

Plaintiffs cite *Lindey's v. Prof'l Consultants*, 244 Mont. 238, 797 P.2d 920, 924 (1990) for the proposition that "procrastination and failure to act diligently" do not constitute good cause. *Lindey's* does say that, but it has nothing to do with the

situation here. *Lindey*'s involved a plaintiff that sought to file an amended complaint outside of the time allowed under the Rules of Civil Procedure. *Id.* In contrast, the State has identified numerous grounds showing good cause and has fully complied with Mont. R. Civ. P. 16(4) and the Court's Scheduling Order.

Plaintiffs next say that the State's concern about the 59 lay witnesses and numerous experts in this case is "a red herring and a concern of [the State's own making.]" Pls.' Opp. at 8. Wrong again. As noted above, the State disclosed 37 lay witnesses from the various state agency defendants who have direct knowledge about the allegations in Plaintiffs' complaint and the State's denial of those allegations. Because the Plaintiffs' complaint contains 251 paragraphs of allegations, it is no surprise that many lay witnesses will be necessary to counter the allegations in that Complaint. Nor is it reasonable to say that the number of witnesses is "a red herring." There is no way to arrange for depositions of 59 lay witnesses and several experts between now and July 15—the deadline for completing discovery under the current scheduling order—or August 30—the deadline for completing discovery under Plaintiffs' proposed schedule. Moreover, counsel for the State suspects that much of the evidence uncovered through discovery at trial will be scientifically complex. Plaintiffs' allegations implicate the global, national, and Montana environment and the complicated workings of Montana's environmental policy over decades, among other things. *See generally* Complaint (Doc. 1.) Plaintiffs claim that the State will only have to depose six lay witnesses, *see* Pls.' Opp. at 9, but this number doesn't include the sixteen youth Plaintiffs. The State is clearly entitled to depose each

plaintiff. It is unreasonable to expect that the State can depose Plaintiffs' 22 lay witnesses and soon-to-be-disclosed experts in the next 8 weeks.

Next, the State has pointed out that this case is fact-intensive, document-intensive, expert-intensive, and legally and scientifically complex. Plaintiffs respond by saying, effectively, "this case isn't complex, but if it is, it's the Defendants' fault." *See* Pls.' Opp. at 7–9. First, Plaintiffs apparently disagree with the State that this is a complex case. That is surprising, given that the length of Plaintiffs' own pleading. If Plaintiffs' allegations were so "simple," one would think that Plaintiffs could have raised them in fewer pages. And as the State pointed out in its Brief in Support, these allegations implicate topics as broad as the global environment and the implementation of Montana's environmental policy over the course of decades. There's no real question that this is a complex, fact-intensive, document-intensive, and expert-intensive case. Plaintiffs cannot make a molehill out of a mountain.

Plaintiffs also contend that the State could have simplified the case by admitting to key allegations in the Complaint. But the State doesn't have to gut its own defense in this case to get a fair schedule. Every party in a case is entitled to a fair and full defense. Plaintiffs' argument that the State could simplify this case by refusing to adequately litigate it fails on its face. And while it's good to know that Plaintiffs agree the Court's Motion to Dismiss Order "narrowed the *form* of relief available," *see* Pls.' Opp. at 8 (emphasis added), Plaintiffs still intend to oppose the State's Rule 60(a) Motion for Clarification asking the Court to acknowledge the same. *Id.* at 3. Thus, the parties still dispute what claims are still viable in this case. It is

even more unreasonable to expect the parties to conduct full and fair discovery when it is not clear whether this case still involves claims for injunctive relief.

Plaintiffs also fault the State for not seeking discovery as soon as they filed their Complaint. *See* Pls.' Opp. at 8, 10. But this argument falls flat too. The State filed a Motion to Dismiss Plaintiffs' claims in April 2020, just over a month after Plaintiffs filed their Complaint. The Court ruled on the State's Motion to dismiss in August 2021. There was no scheduling order until the end of December 2021, and the parties disclosed lay witnesses on April 18, 2022. And, as noted, we still don't know what claims remain live in this case. It is unrealistic to contend that the State should have conducted speculative discovery when the parties did not know what, if any, claims would survive the State's Motion.

Finally, Plaintiffs cite several inapposite cases in support of their argument that there is no good cause to modify the current scheduling order. *See* Pls.' Opp. at 7 (citing *Lindey's*, 244 Mont.at 243 ,797 P.2d at 923–24 (1990); *In re Marriage of Smith*, 270 Mont. 263, 271, 891 P.2d 522, 527 (1995); and *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶¶ 10–11, 332 Mont. 116, 135 P.3d 797). In each of each of these cases, the party seeking an extension had previously failed to meet a discovery deadline. The State has not missed—and will not miss—any deadlines. The State's motion is a prophylactic attempt to stave off discovery issues that are sure to arise under the current Scheduling Order. This Court should reject Plaintiffs' attempts to minimize the breadth of the claims in this case and allow the State the amount of

time necessary to defend against them, especially when this will result in only a few months' delay of the trial date.

CONCLUSION

Good cause supports the State's Motion to extend the scheduling order in this case. Plaintiffs' arguments to the contrary are unpersuasive. This Court should grant the State's motion and allow this parties in this case sufficient time to conduct discovery. Adequate discovery on these important and complicated issues cannot occur with the truncated case schedule now in place. As demonstrated above, good cause exists to extend all case deadlines. For these reasons, Defendants respectfully request that the Court adopt the proposed schedule submitted by Defendants, or in the alternative, hold a scheduling conference to set a new case schedule. Mont. R. Civ. P. 16(b)(4). Defendants respectfully request an expedited ruling on their Motion.

DATED this 17th day of May, 2022.

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Date: May 17, 2022

Dia C. Lang