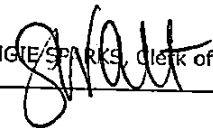


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By ANGIE SPARKS Clerk of District Court
Deputy Clerk



Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Mathew dos Santos (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
mat.dossantos@ourchildrenstrust.org
andrea@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062
(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

<p>RIKKI HELD, et al.,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF MONTANA, et al.,</p> <p>Defendants.</p>	<p>No. CDV-2020-307</p> <p>Hon. Kathy Seeley</p> <p>PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR RULE 26(f) DISCOVERY CONFERENCE</p>
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INTRODUCTION

Plaintiffs agree it is appropriate to have a telephonic discovery conference at the Court's earliest convenience, pursuant to Rule 26(f), Mont. R. Civ. P. However, Plaintiffs are once again forced to take issue with Defendants' characterization of the discovery disputes outlined in Defendants' unilateral motion.¹ The parties have made repeated efforts to resolve discovery disputes. While the parties have been successful in resolving some issues, several disputes remain. The parties believe the assistance of the Court is appropriate to ensure discovery remains on track in accordance with this Court's Modified Scheduling Order.

PROPOSED PLAN AND LIMITATION ON DISCOVERY²

As more fully discussed below, Plaintiffs propose the following plan and limitations on discovery, to be discussed more fully at the Rule 26(f) discovery conference:

1. The Court's assistance is necessary in order to establish a time frame for scheduling depositions of Plaintiffs and their current guardians.
2. The Court's assistance is necessary to determine whether Defendants can require all Plaintiffs and their guardians to travel to Helena for their depositions, despite the fact that

¹ On June 23, 2022, the parties discussed filing a joint motion for a Rule 26(f) status conference. Bellinger Decl., ¶ 8. On July 29, counsel for Plaintiffs informed counsel for Defendants that a draft motion would be circulated for Defendants to review the week of August 2. Bellinger Decl. ¶ 21. Nevertheless, Defendants went ahead and filed their own motion for a Rule 26(f) conference *without informing Plaintiffs or seeking Plaintiffs' position on the motion*. Defendants did not circulate a draft of their motion for a Rule 26(f) conference before filing their motion with the Court. *See* Mont. R. Civ. P., Rule 26(f)(6) ("a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys in the matters set forth in the motion."); MT. R. UDCTR Rule 2(a) ("Prerequisites to Filing a Motion. The text of the motion must state that other parties have been contacted and state whether any party objects to the motion.").

² Plaintiffs agree there are no pending issues related to discovery of electronically-stored information.

many of the deponents live over 100 miles from Helena and some will be out-of-state attending college when the depositions eventually take place.

3. The Court's assistance is necessary to determine: (a) whether Defendants can depose Plaintiffs Nathaniel (age 4) and Jeffrey (age 8), even though these Plaintiffs will not testify at trial, these Plaintiffs are unlikely to have relevant testimony, and their mother and legal guardian is available for a deposition; and (b) whether Plaintiffs' offer of making Lilian (age 11) and Ruby (age 14) available for a deposition, if necessary, only after their father and guardian is deposed is appropriate, in light of the fact that neither of these Plaintiffs will testify at trial.
4. The Court's assistance is necessary to determine if Defendants have a right to depose the non-party former guardians of six of the Plaintiffs and, if so, the appropriate timing of the depositions.
5. Because Plaintiffs have had difficulty getting Defendants to confirm depositions dates in the past, and have parties agreed the Rule 30(b)(6) and fact witness depositions are to take place in September, Plaintiffs request that the Court require Defendants to provide Plaintiffs, no later than August 22, 2022, with dates for the Rule 30(b)(6) depositions for Defendants Department of Environmental Quality ("DEQ") and Department of Natural Resources and Conservation ("DNRC") and the five fact witnesses identified by Plaintiffs during the month of September.
6. Plaintiffs continue to make a good faith effort to promptly address any alleged written discovery response deficiencies raised by Defendants. Therefore, Plaintiffs do not feel the Court's intervention is necessary at this point to address the sufficiency of Plaintiffs' written discovery responses.

7. The Court's assistance is necessary to order Defendants to supplement their written discovery responses as outlined in Plaintiffs' letters of June 3 and August 12, 2022, given Defendants' long delay in responding to the deficiencies raised by Plaintiffs.
8. The Court's assistance is necessary to confirm that discovery will continue while the Court considers Defendants' pending second motion for clarification and motion for Rule 35 psychiatric examinations, such that Defendants cannot use these pending motions as an excuse to delay completing discovery in a manner that will prevent the parties from complying with this Court's Modified Scheduling Order.

STATEMENT OF ISSUES

A. Background

On March 13, 2020, 16 youth Plaintiffs from across Montana filed this case against the State of Montana, the Governor of Montana, the DEQ, the DNRC, the Montana Public Service Commission, and the Montana Department of Transportation. Doc. 01. Defendants filed a motion to dismiss, which was granted in part and denied in part by this Court on August 4, 2021. Doc. 46. On September 17, 2021, Defendants filed their Answer, in which they denied nearly every allegation in Plaintiffs' Complaint. Doc. 53. On December 27, 2021, following a scheduling conference on December 17, 2021, this Court issued a Scheduling Order setting this constitutional case for a ten-day trial, beginning February 6, 2023. Doc. 61. Following the December 27 Scheduling Order, the parties began the discovery process, which remains ongoing.

On June 15, 2022, at the request of Defendants, the Court issued a Modified Scheduling Order. Doc. 145. The Modified Scheduling Order contains the following relevant dates:

- On or before September 30, 2022, Plaintiffs shall disclose expert witnesses;
- On or before October 31, 2022, Defendants shall disclose expert witnesses;

- On or before November 30, 2022, the parties shall disclose any rebuttal expert witnesses;
- All discovery shall be completed by January 9, 2023.

On June 23, the parties held a telephonic conference to attempt to resolve outstanding discovery issues that had arisen during the prior months. Bellinger Decl., ¶ 8. During that call, the parties discussed deposition scheduling, written discovery, protocols for remote depositions, Rule 35(a) psychiatric examinations of Plaintiffs, among other matters. The matters discussed were memorialized in subsequent letters. Bellinger Decl., ¶¶ 9-10. Since that time, the parties have exchanged numerous letters and emails, yet have reached an impasse on several issues, as detailed below. Thus, while Plaintiffs agree a Rule 26(f) discovery conference is appropriate, Plaintiffs disagree with Defendants' characterization of the issues in their Motion for a Rule 26(f) Discovery Conference.³

B. Plaintiff Depositions

i. Scheduling

At the parties' June 23 telephonic conference, and at Defendants' suggestion, the parties agreed Plaintiffs' depositions would occur in late-July through the month of August so the depositions could be completed before school starts.⁴ Bellinger Decl., ¶ 8. On July 6, and again on

³ Plaintiffs strongly disagree there has been any "gamesmanship" by Plaintiffs' attorneys and will not address Defendants' constant need to improperly "point fingers" at opposing counsel. This response focuses on the relevant facts necessary for the Court to determine what issues it needs to address at the discovery conference and will not respond to Defendants' unfounded, unsupported allegations.

⁴ To the extent Defendants assert they need the documents from Plaintiffs' experts before deposing the Plaintiffs, this position is belied by Defendants agreeing on June 23 to the July-August time frame for Plaintiff depositions, knowing Plaintiffs' expert disclosure deadlines had been moved to September 30. Thus, Defendants knew on June 23 that Plaintiffs would not be producing their expert disclosures until September 30, yet agreed to depose Plaintiffs in July and August. If

July 13, Plaintiffs sent Defendants a detailed calendar with dates, times, and locations for the depositions of thirteen Plaintiffs and two guardians to occur between August 9-12, 15-17, and 22-24.⁵ On July 6, July 13, July 22, July 27, and July 28, Plaintiffs requested Defendants confirm they would take the depositions on the proposed dates and at the proposed locations. Bellinger Decl., ¶¶ 12-13, 19-20.

Despite repeated attempts to get Defendants to confirm the dates and locations in August for the depositions of thirteen Plaintiffs and two guardians, and repeated reminders that scheduling these depositions would be harder once school began, Defendants refused to confirm the August deposition dates. Finally, on July 27 and July 28, Plaintiffs told Defendants they needed to know by July 29, at 5pm MST (only six business days before the depositions of thirteen Plaintiffs and two guardians were set to begin) whether Defendants intended to take any of the depositions in August. Bellinger Decl., ¶¶ 19-20. Defendants did not confirm the August deposition dates or notice any of the depositions of thirteen Plaintiffs and two guardians by July 29 at 5pm MST. Bellinger Decl., ¶ 21. Accordingly, Plaintiffs took the deposition dates off calendar. Bellinger Decl., ¶ 21.

On August 3, Plaintiffs wrote Defendants to obtain the status on the depositions of Plaintiffs and the current guardians in order to develop an alternative deposition calendar that

Defendants' position was that they would not depose any of the Plaintiffs before Defendants had all the expert disclosures on September 30, they should have stated that position clearly before Plaintiffs and their counsel exerted considerable effort to provide dates and locations for Plaintiffs' depositions in August.

⁵ Plaintiffs did not provide deposition dates for Nathaniel (age 4) and Jeffrey (age 8) because, as explained below, it is Plaintiffs' position that it is inappropriate for these two Plaintiffs to be deposed given their age. Plaintiffs did provide a deposition date and location for the mother and guardian of Nathaniel and Jeffrey. Additionally, one Plaintiff was unavailable for a deposition in August because of international travel plans, but Plaintiffs indicated that an alternate date would be provided once that Plaintiff returned.

would work with Plaintiffs' school schedules. Bellinger Decl., ¶ 22. As of this filing, Defendants have not indicated that they are prepared to take *any* of the Plaintiffs' depositions during any specific timeframe.

The Court's assistance is necessary in order to establish a time frame for scheduling depositions of Plaintiffs and the current guardians.

ii. Locations

Plaintiffs' proposed August deposition calendar offered to consolidate Plaintiffs' depositions on successive days in Missoula, Helena, and Kalispell, respectively where groups of the depositions could be taken consecutively, reducing travel time and expense. *See* Mont. R. Civ. P. 45(c)(2)(B)(i) (in the case of residents located within Montana, depositions can be taken "within 100 miles of where that person resides or is employed or transacts business in person . . ."). Without any legal authority, Defendants repeatedly demanded that all the Plaintiffs' depositions be taken *only* in Helena, even though this location is not where the Plaintiffs or their guardians reside. Bellinger Decl., ¶ 10.

The Court's assistance is necessary to determine whether Defendants can require all Plaintiffs and their guardians to travel to Helena for their depositions, even when many of the deponents live over 100 miles from Helena and some will be out-of-state attending college when the depositions eventually take place, due to Defendants' delay in taking the depositions during the summer months.

iii. Depositions of the four youngest Plaintiffs

Defendants have consistently insisted on deposing all sixteen youth Plaintiffs, including the four youngest Plaintiffs: Nathaniel (age 4), Jeffrey (age 8), Lilian (age 11), and Ruby (age 14). Plaintiffs' counsel have repeatedly stated that *none* of these Plaintiffs will testify at trial. Bellinger

Decl., ¶ 11. Therefore, these depositions are unnecessary and are unlikely to yield information for purposes of trial. *State v. Stock*, 2011 MT 131, ¶ 40, 361 Mont. 1, 256 P.3d 899 (upholding District Court order that a four-year-old did not have to testify because he “did not have relevant testimony to offer, was incompetent to testify, and would be psychologically harmed if required to testify”). Further, Plaintiffs’ counsel have repeatedly offered to make the guardians for these Plaintiffs available for deposition. Bellinger Decl., ¶¶ 11-12, 14, 16, 19. On July 6 and July 13, Plaintiffs provided dates for the depositions of the two guardians for these four Plaintiffs. Bellinger Decl., ¶¶ 12, 14. Plaintiffs also offered to make Lilian (age 11) and Ruby (age 14) available for a deposition immediately following the deposition of their guardian, should Defendants have questions their guardian is unable to answer. Bellinger Decl., ¶¶ 12, 14. Yet Defendants still insist on deposing these four Plaintiffs.

The Court’s assistance is necessary to determine: (a) whether Defendants can depose Plaintiffs Nathaniel (age 4) and Jeffrey (age 8), even though these Plaintiffs will not testify at trial, are unlikely to have relevant testimony, and when their mother and legal guardian is available for a deposition; and (b) whether Plaintiffs’ offer of making Lilian (age 11) and Ruby (age 14) available for a deposition, if necessary, *after* their father and guardian is deposed is appropriate.

iv. Deposition of Plaintiffs’ Former Guardians

When six of the Plaintiffs turned 18 years of age, their litigation guardians were removed from the case when the Court granted Plaintiffs’ unopposed motion to amend the case caption. Doc. 152. Plaintiffs maintain there is no need for Defendants to depose the original guardians as they are no longer parties, will not be witnesses at trial (neither party identified them as witnesses on their April 18, 2022 fact witness disclosure), and are unlikely to yield relevant information Defendants could not otherwise obtain by deposing the Plaintiffs in question. Plaintiffs have

offered to revisit this issue, if, *after* Defendants have deposed Plaintiffs, they can demonstrate a need to depose the former guardians of the six Plaintiffs now age 18 or over. Bellinger Decl., ¶ 20.

The Court's assistance is necessary to determine if Defendants have a right to depose the non-party former guardians of six of the Plaintiffs and, if so, the appropriate timing of the depositions.

C. Fact Witness and Rule 30(b)(6) Depositions

On April 18, 2022, consistent with the Court's December 27, 2021 Scheduling Order, both parties filed their lists of lay witnesses and exhibits. Plaintiffs disclosed six fact witnesses, in addition to Plaintiffs; Defendants disclosed thirty-seven fact witnesses. Docs. 73 & 74. After the Court modified the Scheduling Order on June 15, 2022 at Defendants' request, the parties had a telephonic meet and confer on June 23, during which they agreed that September 2022 would be the month for fact witness depositions and Rule 30(b)(6) depositions for Defendants DEQ and DNRC.⁶ Bellinger Decl., ¶ 8. On August 3, Plaintiffs wrote to Defendants requesting dates in September for the Rule 30(b)(6) depositions of Defendants DEQ and DNRC and for 5 of the 37 fact witnesses Defendants listed in their April 18, 2022 fact witness disclosure. Bellinger Decl., ¶ 22. On August 4, Defendants indicated that they are working to confirm dates for Rule 30(b)(6) depositions for DEQ and DNRC and the five fact witnesses. Bellinger Decl., ¶ 23. As of the filing, nearly two weeks later, Defendants have not confirmed any dates for Rule 30(b)(6) depositions for DEQ and DNRC or the five fact witnesses.

⁶ Plaintiffs took the Rule 30(b)(6) deposition for the Public Service Commission on June 17, 2022.

Because Plaintiffs have had, and continue to have, difficulty getting Defendants to confirm depositions dates in the past,⁷ and the Rule 30(b)(6) and fact witness depositions are set to take place in September, Plaintiffs respectfully request the Court to require Defendants to provide Plaintiffs, no later than August 22, 2022, with dates for the Rule 30(b)(6) depositions for Defendants DEQ and DNRC and the five fact witnesses identified by Plaintiffs during the month of September.

D. Written Discovery

i. Defendants' Discovery Requests to Plaintiffs

On March 22, 2022, Defendants served their first discovery requests on Plaintiffs. Doc. 68; Bellinger Decl., ¶ 2. On April 20, 2022, Plaintiffs timely served their discovery responses on Defendants. Doc 78; Bellinger Decl. ¶ 3. Since then, Plaintiffs have supplemented their discovery responses four times: May 27, 2022, June 10, 2022, July 27, 2022, and July 28, 2022. Bellinger Decl. ¶ 3. Plaintiffs have served a total of 42,982 pages on Defendants. Plaintiffs' July 27 and 28, supplemental discovery responses were in response to letters sent by Defendants on July 12, July 19, and July 25, where, months after Plaintiffs' initial discovery responses, Defendants identified perceived deficiencies in Plaintiffs' discovery responses. Bellinger Decl., ¶¶ 13, 15, 17.

On August 8, Defendants wrote Plaintiffs, arguing Plaintiffs' discovery responses are still deficient and requesting a response by August 17 at 5pm MST. Bellinger Decl., ¶ 24. Even though Defendants delayed *three months* after receiving Plaintiffs' responses to raise these alleged

⁷ Before the Court modified the Scheduling Order, Plaintiffs noticed Rule 30(b)(6) depositions for Defendants DEQ and DNRC, but after trying to confirm dates with Defendants for nearly three weeks, Defendants never confirmed dates for the depositions. Plaintiffs agreed to withdraw the Rule 30(b)(6) deposition notices after the Court modified the Scheduling Order, but remain concerned about Defendants' willingness to provide a timely confirmation of dates for depositions.

deficiencies, Plaintiffs anticipate being able to respond to Defendants' latest discovery letter by August 17 or shortly thereafter as requested by Defendants.

Because Plaintiffs continue to make a good faith effort to address any alleged discovery response deficiencies not timely raised by Defendants, Plaintiffs do not feel the Court's intervention is necessary at this point.

ii. Plaintiffs' Discovery Requests to Defendants

On April 20, 2022, Plaintiffs served their first discovery requests on Defendants. Doc. 78; Bellinger Decl., ¶ 4. On May 20, Defendants served their discovery responses on Plaintiffs. Doc. 101; Bellinger Decl. ¶ 5. Less than two weeks later, on June 3, Plaintiffs sent Defendants a detailed letter outlining the numerous deficiencies they had identified in Defendants' discovery responses. Bellinger Decl., ¶ 6. On June 6, during a telephonic meet and confer, counsel for Defendants told counsel for Plaintiffs they were reviewing the June 3 discovery letter and would respond in due course. Bellinger Decl., ¶ 7. At the parties' June 23 telephonic meet and confer, Defendants indicated that, by July 7, they expected to be able to supplement their discovery responses to address the deficiencies Plaintiffs identified. Bellinger Decl., ¶ 8. After Defendants failed to supplement their discovery responses by July 7, Plaintiffs wrote again on July 13 and July 22, asking Defendants to supplement their discovery responses. Bellinger Decl., ¶¶ 14, 16. Finally, over seven weeks later, on July 25, Defendants served their supposed supplemental discovery responses. Doc. 175; Bellinger Decl., ¶ 18.

Defendants' supplemental response only produced *four* documents using bates numbers that Defendants had already used for previously produced documents. Plaintiffs maintain that Defendants' supplemental response is untimely and fails to respond to the deficiencies Plaintiffs

identified in their June 3 letter. On August 12, Plaintiffs sent Defendants another letter identifying the deficiencies that remain with Defendants' discovery responses. Bellinger Decl., ¶ 25.

The Court's assistance is necessary to order Defendants to supplement their written discovery responses by a specific date to correct the deficiencies outlined in Plaintiffs' letters of June 3 and August 12.

D. Other Matters

Defendants' Motion for Rule 26(f) discovery conference also raises two of their pending motions: 1) Defendants' second motion for clarification; and 2) Defendants' motion for Rule 35 psychiatric examinations. Because Defendants' second motion for clarification is fully briefed and Defendants' motion for Rule 35 psychiatric examinations will be on August 16, and because those motions address issues wholly separate from Defendants' Rule 26(f) motion, Plaintiffs do not think they are appropriate matters to discuss at the Rule 26(f) discovery conference. However, Plaintiffs seek confirmation from the Court that those pending motions may not serve as the basis for additional delay or non-compliance with the Court's modified scheduling order. *See, e.g.*, Doc. 171 at 2 (Defendants' Motion for Expedited Consideration of Second Motion for Clarification arguing, "the State cannot calibrate its discovery objectives with adequate precision" and knowing the Court's rationale "is indispensable for informing the parties' discovery and further motions practice").

The Court's assistance is necessary to confirm discovery will continue while the Court considers Defendants' pending motions for clarification and for Rule 35 psychiatric examinations such that these pending motions do not justify delay in completing discovery consistent with the Court's modified scheduling order.

CONCLUSION

In sum, Plaintiffs respectfully join Defendants' request the Court set a Rule 26(f) discovery conference and work with the parties to resolve the foregoing discovery issues in order to ensure discovery is completed expeditiously, consistent with this Court's Modified Scheduling Order, and such that there are no additional delays in this case.

Respectfully submitted this 15th day of August, 2022.

/s/ Melissa Hornbein

Melissa Hornbein
Barbara Chillcott
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
(406) 708-3058
hornbein@westernlaw.org
chillcott@westernlaw.org

Roger Sullivan
Dustin Leftridge
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
dlefridge@mcgarveylaw.com

Nathan Bellinger (*pro hac vice*)
Mathew dos Santos (*pro hac vice*)
Andrea Rodgers (*pro hac vice*)
Our Children's Trust
1216 Lincoln Street
Eugene, OR 97401
(413) 687-1668
nate@ourchildrenstrust.org
mat.dossantos@ourchildrenstrust.org
andrea@ourchildrenstrust.org

Philip L. Gregory (*pro hac vice*)
Gregory Law Group
1250 Godetia Drive
Redwood City, CA 94062

(650) 278-2957
pgregory@gregorylawgroup.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
DEREK OESTREICHER
General Counsel
TIMOTHY LONGFIELD
MORGAN VARTY
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
david.dewhirst@mt.gov
derek.oestreicher@mt.gov
timothy.longfield@mt.gov
morgan.varty@mt.gov

EMILY JONES
Special Assistant Attorney General
Jones Law Firm, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

/s/ Melissa Hornbein
Melissa Hornbein