AUSTIN KNUDSEN
Montana Attorney General
DAVID M.S. DEWHIRST
Solicitor General
TIMOTHY LONGFIELD
MORGAN J. VARTY
Assistant Attorneys General
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
david.dewhirst@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

Attorneys for Defendants

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 STATE'S MOTION FOR RULE 26(f) DISCOVERY CONFERENCE**

INTRODUCTION

The parties agree that a Rule 26(f) conference is appropriate. The State would like the conference to foster a productive discussion of certain discovery issues about which the parties have reached an impasse. Plaintiffs, evidently, would like to use

the conference to impose additional deadlines and requirements on top of the scheduling order and rules of civil procedure that already control discovery in this case. The State continues to support a Rule 26(f) conference and offers this reply in response to ensure the conference will be productive.

CORRECTION OF BACKGROUND

Plaintiffs selectively include and omit facts to support their narrative. The State disagrees with Plaintiffs' characterization of several issues. While the State will not belabor every misleading factual contention prior to the 26(f) conference, it provides a few representative examples in the table below.

What Plaintiffs Say	What Plaintiffs Leave Out
"Despite repeated attempts to get [the State] to confirm the dates and locations in August for [Plaintiff depositions], [the State] refused to confirm the August deposition dates." (Doc. 189 at 6.)	Plaintiffs' dilatory tactics and deficient discovery responses prevented the State from deposing Plaintiffs in August. *See, e.g.*, (Doc. 190.1 at 37-51); (Doc. 198.) Plaintiffs have still not provided full and complete discovery responses.
"Plaintiffs strongly disagree there has been any 'gamesmanship' by Plaintiffs' attorneys ...." (Doc. 189, 5 n.3)	Plaintiffs have repeatedly attempted to set arbitrary—and short—turnaround times for the State to respond to scheduling demands. Plaintiffs' attorneys unilaterally withdrew their availability for depositions—after 5:00 p.m. on a Friday—when the State informed Plaintiffs that it was tentatively holding open the dates Plaintiffs requested, but would not be bound to those dates if Plaintiffs continued to refuse to answer written discovery.
"Plaintiffs have served a total of 42,982 pages on Defendants." (Doc. 189, 10).	Plaintiffs have engaged in a document dump. They have repeatedly resisted meaningful responses to requests for information related to Plaintiffs' alleged injuries and have flatly refused to answer five of the State's

	interrogatories and associated requests for production. *See, e.g.*, (Doc. 190.1 at 37–52) Aside from the Van Susteren Report and Disclosure, Plaintiffs have produced an exceedingly small number of documents that tangentially relate to their allegedly unique psychological injuries. (Doc. 190.1 at 68–69.)
"[The State] went ahead and filed [its] own motion for a Rule 26(f) without informing Plaintiffs or seeking Plaintiffs' position on the motion." (Doc. 189 at 2 n.1).	The State waited on Plaintiffs to circulate a Rule 26(f) draft motion for over one month. *See* (Doc. 190.1 at 13) (noting that, during a June 23, 2022, telephonic meet and confer, "[t]he parties agreed that a Mont. R. Civ. P. 26(f) conference might assist the parties in resolving outstanding discovery issues. Plaintiffs stated they would begin drafting a joint motion and send it to the state for additions and review.") One month later, the State was still waiting on Plaintiffs' draft. In a July 25, 2022 letter, counsel for the State reiterated the State's position that a Rule 26(f) conference was appropriate. Counsel further wrote "Please provide us with your draft motion and we will gladly craft the section related to our discovery issues. If you're not wiling to do this, we can file our own Rule 26(f) Motion." (Doc. 190.1 at 52.) On July 29, 2022, Plaintiffs informed the State that they intended to unilaterally withdraw their availability for depositions, the State decided it could wait no longer and needed a Rule 26(f) conference immediately. *See generally* (Doc. 191.) Additionally, the State already knew that Plaintiffs agreed that a Rule 26(f) conference was necessary. After waiting for over a month for Plaintiffs to circulate a draft, the State decided to file its own motion.

Plaintiffs' gamesmanship, dilatory discovery tactics, and insistence on attempting to hold the State to its arbitrary deadlines that have no basis in this Court's case management Order are key reasons why a Rule 26(f) conference is necessary.

ARGUMENT

II. Some of the issues Plaintiffs raise don't require the Court's intervention.

Plaintiffs raise a few issues that in the State's view, don't need the Court's attention during the Rule 26(f) conference.

A. The Court should reject Plaintiffs' attempt to create their own, additional, scheduling order.

First, Plaintiffs request that the Court impose additional deadlines for plaintiff depositions. *See* (Doc. 189 at 6–7.) The Court has already established a timeframe for completing all depositions. It's the discovery deadline under the Court's scheduling order. Plaintiffs' continual attempts to impose additional, artificial deadlines on the State are unproductive, especially because Plaintiffs themselves fail to follow them.

On August 26, 2022, counsel for the State sent a letter to Plaintiffs with available dates for depositions of five plaintiffs in September. Varty Decl., Ex. A. The State has complied and will continue to comply with all deadlines under the scheduling order. If Plaintiffs want to modify the scheduling order by requesting that the Court impose additional deadlines on the State, they must comply with scheduling order's process for modifying the case schedule and Mont. R. Civ. P. 16. *See* (Doc. 145 at 3) (scheduling order, requiring requests for modification to be in

writing establishing good cause and attaching a proposed order setting forth new deadlines). There is no reason for the Court to impose an additional deadline for depositions on one party. Plaintiffs' request that the Court do so is both unnecessary and improper.

B. State's discovery responses

Attorneys for the State are working diligently—and coordinating with the various defendant state agencies—to provide supplemental discovery responses to Plaintiffs. Varty Decl. Ex. A. Coordinating responses to discovery with five large State agencies is time consuming. Each agency has its own counsel who must approve responses and document production. Many of these people have been out of the office in recent weeks. The State, however, continues to work with these agencies to obtain all information needed to respond to Plaintiffs' request for supplementation. Additionally, instead of providing piecemeal responses, the State prefers to provide Plaintiffs with one supplementation. Discovery closes in over four months. *See* (Doc. 145 at 2) (Modified Scheduling Order). The Court's intervention isn't necessary at this time.

II. The State disagrees with Plaintiffs' framing of several other issues.

While the State is glad that Plaintiffs agree that resolution of a few outstanding issues could assist the parties in efficiently completing discovery, the State disagrees with the way in which Plaintiffs have framed many of those issues.

A. Depositions of young plaintiffs.

1. A four-year-old and an eight-year-old should not be plaintiffs in this lawsuit.

First, Plaintiffs try to blame the State for their strategic decision to use very young children as plaintiffs in this lawsuit. *See, e.g.*, (Doc. 189 at 7.) But that's just wrong. The State has maintained for months that it's *profoundly inappropriate* for Our Children's Trust to use a four- and an eight-year old as plaintiffs in a civil lawsuit. A four- and an eight year-old cannot consent to—and should not be asked to—actively participate as plaintiffs in a constitutional lawsuit. Plaintiffs shouldn't continue to use a four- and eight-year-old in this lawsuit. Especially when they've conceded that the four- and eight-year-old "will not testify at trial" and "are unlikely to have relevant testimony." (Doc. 189 at 3.) And Plaintiffs acknowledge that the four- and eight-year-old won't testify at trial and are unlikely to have relevant testimony. One wonders what the point of leaving them in this lawsuit is. This Court should issue an order dismissing these two young children from the lawsuit.

The same is true for plaintiffs Lillian and Ruby. Their guardians are not the plaintiffs in this case. They are. One can certainly question the wisdom of using an eleven- and fourteen-year-old as plaintiffs in a case like this. And it makes sense that their guardian doesn't want them to be deposed. But making oneself available for deposition is a condition of participating as a plaintiff in a lawsuit. *See* Mont. R. Civ. P. 26(a), (b)(1). Our Children's Trust can't use any of the "youth plaintiffs" as symbolic plaintiffs. Either they are parties to the case and are therefore subject to deposition, or they should be dismissed as Plaintiffs from this case.

2. *The State is entitled to depose every plaintiff in this lawsuit.*

The State would greatly prefer that Plaintiffs select 3–5 older plaintiffs and allow the remaining child plaintiffs to be, well, ... children. But plaintiffs get deposed. Should Our Children's Trust insist on using young children as plaintiffs in this case—despite conceding that some of these children will not testify at trial and are unlikely to have any relevant testimony, *see* Doc. 189 at 3,—the State cannot consent to forego depositions of plaintiffs in this case. That's especially true because standing will play a prominent role in the case. Each plaintiff must allege particularized harms that are specific to him or her. *See, e.g., Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 37, 356 Mont. 41, 230 P.3d 808. If the Court allows these young children to proceed as plaintiffs, the State fails to see how it has any option but to depose them. It will, of course, conduct these depositions in an age-appropriate manner.

B. Depositions of former guardians

The State seeks to depose the former guardians of certain plaintiffs. These former parties to the case are likely to have discoverable information relevant to the issue of standing. Plaintiffs claim that "there is no need for [the State] to depose the original guardians." (Doc. 189 at 8.) Plaintiffs cite no legal authority to support this proposition. Nor can they. "The rules of civil procedure are premised upon a policy of liberal and broad discovery." *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d 642. Plaintiffs don't get to decide what discovery the State needs.

Also, the State is under no obligation to accept Plaintiffs' "offer" to "revisit the issue" if it convinces Plaintiffs it "needs" to depose these individuals after taking Plaintiffs' depositions. (Doc. 189 at 9–9.) The Rules of Civil Procedure don't require the State to prove to Plaintiffs that the State has some unspecified degree of "need" for these depositions. Nor do Plaintiffs get to superimpose their own illiberal discovery standards atop Montana's rules of civil procedure. To the contrary, Plaintiffs, instead, have an obligation to make these "former guardians" available for depositions. *See* Mont. R. Civ. P. 26(a), (b)(1). Plaintiffs don't get to create their own discovery rules.

C. Plaintiffs' deficient discovery responses

Plaintiffs have flatly refused to answer several of the State's interrogatories. These interrogatories seek plainly relevant information. *See* (Doc. 190.1 at 49–52.) The State further believes that many of Plaintiffs' responses to the State's discovery requests are improper, conclusory, or boilerplate objections. *See* (190.1 at 49–52.) The State believes the Court's intervention is necessary to confirm that Plaintiffs may not continue to obstruct the State's access to discoverable information.

D. 35 IME and 60(a) motion are proper topics to discuss at the 26(f) conference.

Lastly, Plaintiffs seek to preclude discussion of the State's pending Rule 35 motion and Second Motion for Clarification. The State struggles to understand Plaintiffs' position. The Court's ruling on these motions will certainly shape the course of discovery. It will also advance judicial economy to address any questions the Court has about these motions during the Rule 26(f) conference. All parties will

benefit from a resolution to these motions. Discussion of these motions can only serve to advance discovery and ultimate case resolution.

CONCLUSION

On all other issues, the State rests on its motion and supporting brief. The State believes that the Court's assistance on the roadblocks the parties have identified will ensure that discovery proceeds smoothly.

DATED this 1st day of September, 2022.

AUSTIN KNUDSEN
Montana Attorney General

DAVID M.S. DEWHIRST
Solicitor General

TIMOTHY LONGFIELD
MORGAN J. VARTY
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
david.dewhirst@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

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

Roger M. Sullivan
Dustin A. Leftridge
rsullivan@mcgarveylaw.com
dleftridge@mcgarveylaw.com

Melissa A. Hornbein
Barbara Chillcott
hornbein@westernlaw.org
chillcott@westernlaw.org

Nathan Bellinger
nate@ourchildrenstrust.org

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