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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	DV 21–873 Hon. Collette B. Davies **DEFENDANTS' REPLY IN SUPPORT OF MONT. R. CIV. P. 60 MOTION FOR RELIEF FROM CONTEMPT AND ATTORNEY FEES ORDER**

INTRODUCTION

Plaintiffs' Response to Defendants' current Motion is little more than an attempt to preserve the unfair advantage provided to them by the Court's June 26, 2023 Order. Not only do Plaintiffs repeat and defend the same mistaken findings underlying that Order, but they also distort defense counsel's statements, mischaracterize the applicable law, and otherwise ignore or distract from the glaring errors and omissions outlined in Defendants' supporting Brief. (*See* Doc. 150,

generally.) However, nothing in Plaintiffs' Response (Doc. 160) can paper over the mistakes, omissions, and extraordinary circumstances at issue here. As a result, the Court should grant Defendants' Motion as further explained below.

RESPONSE TO PLAINTIFFS' FACTUAL ASSERTIONS

Plaintiffs unsurprisingly deny the factual mistakes underlying Defendants' Motion, but rather than repeat them in full here, Defendants generally refer the Court to the Procedural Background and Statement of Facts in their Brief. (*See* Doc. 150 at 2–9.) However, some of Plaintiffs' factual assertions warrant specific responses:

1. Plaintiffs falsely assert that defense counsel conceded "that the State had violated the Court's April 21, 2022 order (the 'Preliminary Injunction') and the Court's September 19, 2022 order (the 'Clarification Order')." (Doc. 160 at 2.) Instead, defense counsel's apologies with "hat in hand" and assurances of compliance with the Court's directives were an attempt to assuage the Court by acknowledging the Montana Supreme Court's finding that the Preliminary Injunction did indeed require DPHHS to revert to the 2017 Rule, given the Court's prior disposition and apparent disdain for the State's position in this case. (Declaration of Thane Johnson at ¶ 3, (Oct. 20, 2023) attached as **Exhibit A**.) This was a "damage control" effort, referencing DPHHS's actions prior to the Clarification Order and was not a concession that those actions were contemptuous in any way. (*Id.*)[1]

2. Plaintiffs falsely assert that defense counsel conceded "that the state should pay some amount of attorneys' fees." (Doc. 160 at 2.) Defense counsel's statements regarding

[1] The statements only applied to DPHHS's actions prior to the Clarification Order. Subsequent to that Order, any applications for amendment to birth certificate sex designations that were processed to completion were processed under the 2017 Rule. (*See* Doc. 107 at ¶ 2; Doc. 151 at ¶¶ 3-10.)

attorney's fees were again aimed at appealing for leniency with the knowledge that the Court was very likely to award attorney's fees, given the circumstances and its prior disposition. (Ex. A at ¶ 4.)

3. Plaintiffs falsely assert that defense counsel committed "to negotiating with Plaintiffs in good faith regarding the attorneys' fees that *should* be awarded." (Doc. 160 at 3) (emphasis added.) Instead, defense counsel committed to making a strong effort to negotiate fees that he believed the Court was *likely* to award, and that is exactly what he did. (Ex. A at ¶ 5.) Defense counsel, however, did not expect the Court to award the Plaintiffs attorneys' fees for the entire litigation *sua sponte* and without additional briefing and argument on that issue. (*Id.*) Defendants submitted their Objection to Plaintiffs' attorney's fees demand (Doc. 146) as directed, and further efforts to negotiate fees were put on hold, pending resolution of Defendant's current Motion. (*Id.*)

4. Plaintiffs inaccurately characterize defense counsel's comments regarding the Court's demeanor during the June 1, 2023 hearing as broadly "applaud[ing] the Court for its conduct." (Doc. 160 at 3.) Rather, defense counsel made those comments again with the intention of mollifying the Court in an appeal to leniency, but he was not commenting on or otherwise applauding the Court's conduct or demeanor prior to that hearing. (Ex. A at ¶ 6.)[2] Nor was defense counsel expressing any agreement with the Court preventing his attempts at further explanation via nonverbal gestures. (*Id.*; *see also* Doc 153 at 3.)

5. Plaintiffs assert that "Defendants erroneously claim that Plaintiffs did not challenge the 2021 Rule in their original Complaint." (Doc. 160 at 9.) To the contrary, *nowhere* in Plaintiffs

[2] It should be quite understandable for defense counsel to engage in "damage control" as a strategic matter in this context in the hopes of reaching a reasonable final resolution of this case.

original Complaint (Doc. 1) do they mention the 2021 Rule, seek a declaratory judgment on its validity or application pursuant to Mont. Code Ann. § 2-4-506 (Montana Administrative Procedure Act ("MAPA") provision addressing challenges to administrative rules), or otherwise directly seek its invalidation in their Complaint's Prayer for Relief. (*See* Doc. 1, *generally*.)

6. Plaintiffs also dispute Defendants' explanations regarding the significant confusion concerning the effect of the Preliminary Injunction and DPHHS's perception that it left a regulatory gap. (Doc. 160 at 9.) However, Plaintiffs merely repeat the Court's findings, without meaningfully addressing the extraordinary circumstances and tenuous position DPHHS was in, given its obligations under MAPA. (*See* Doc. 150 at 3, 5.)

7. Plaintiffs further distort the Montana Supreme Court's decision on Defendant's Petition for a Writ of Supervisory Control, claiming that it "simply concluded that the rulemaking process that led to the 2022 Rule could not itself be enjoined…." (Doc. 160 at 10.) In doing so, Plaintiffs fail to acknowledge the Montana Supreme Court's specific holding that "DPHHS is entitled to relief insofar as the Clarification Order purports to enjoin DPHHS from engaging in rulemaking, as Plaintiffs have not properly challenged the 2022 Rule under MAPA and its *implementation* therefore has not been brought before the District Court." (Doc. 97 at 7) (emphasis added.)[3] Plaintiffs also completely ignore the fact that the Montana Supreme Court expressly granted the State's Petition "to the extent that the District Court's [Clarification Order] *enjoins the 2022 Rule*. (*Id.*) (emphasis added.) Nonetheless, it is abundantly clear that DPHHS was <u>*not*</u> enjoined from implementing (*i.e.* putting into effect) the 2022 Rule. Plaintiffs' characterization of the Montana Supreme Court's decision in favor of DPHHS as being limited solely to the

[3] To "implement" is "to fulfill; perform; carry out" or "to put into effect according to or by means of a definite plan or procedure." https://www.dictionary.com/browse/implement (accessed Oct. 18, 2023).

rulemaking process is absurd on its face. (*Id.*) Plaintiffs apparently seek to distract from the obvious dilemma DPHHS faced by simultaneously being permitted to implement the 2022 Rule and being required to apply the 2017 Rule, presumably because they likewise have no explanation, and acknowledging as much would be to admit at least some of the extraordinary circumstances justifying the relief Defendants seek in their present Motion.

8. Plaintiffs next dispute that Defendants acted in good faith or that they submitted any "actual evidence" of the same. (Doc. 160 at 10.) Not only do Plaintiffs ignore the sworn affidavit testimony and detailed citations to the record (*i.e.*, "actual evidence") explaining in detail DPHHS's concerns, reasoning, and decision-making that demonstrate its good faith (*see* Doc. 150 at 2–6), but they also repeat the mistake the Court made in conflating the contempt analysis with the analysis underlying its award of attorney's fees for the entire litigation.

9. Plaintiffs go on to quibble about the exact moment they believe Defendants should have become aware of Plaintiffs' conflicting interpretation of the Montana Supreme Court's Order (Doc. 97) after its issuance. (Doc. 160 at 10.) This completely misses the point that DPHHS paused application processing, pending further guidance from this Court in its good faith attempt to comply with the law and relevant orders and considering the dilemma it was in as described above. (*See* Doc. 150 at 5.)[4] Moreover, Plaintiffs' implication that a press release somehow constitutes sufficient notice of any party's position in a lawsuit is legally baseless. The Court should disregard Plaintiffs' implication. (*See* Doc. 160 at n.5.)

[4] After the Court made its position on the various orders (including the Montana Supreme Court's Order) clear during the June 1, 2023 hearing, DPHHS began processing the applications it had held pursuant to the 2017 Rule. (*See* Doc. 151 at ¶¶ 8-10.) This further demonstrates Defendants' good faith efforts to comply with the law and relevant orders.

10. Plaintiffs next mischaracterize Defendants' reference to the "narrowing" of their position at summary judgment, and their own assertion demonstrates the linguistic sleight of hand they have employed here. (Doc 160 at 10.) Indeed, Plaintiffs use the terms "gender" and "sex" interchangeably in one circumstance, while implying differing meanings of those terms in another. (*Contrast* Doc. 160 at 10 (claiming that "gender-affirming surgery…does not 'change' their sex, but rather reaffirms it."), *with* Doc. 1 at ¶ 19 ("Transgender people have a gender identity that differs from their assigned sex at birth.") *and* Doc. 42 at Ex. A, ¶ 25 (same).) The reality is that "gender" and "sex" are terms that refer to separate and distinct concepts,[5] and Plaintiffs' seemingly intentional conflation of those terms is a prime example of the confusion that plagues the debate on this issue more broadly. In any event, the uncertainty surrounding Plaintiffs' actual position regarding their vagueness claim should be entirely understandable against this backdrop.

11. Lastly, Plaintiffs construct a strawman from Defendants' reference to the absence of any factual findings as to the conduct of the State of Montana or Governor Gianforte, arguing that both are responsible for the actions of DPHHS. (Doc. 160 at 10–11.) Defendants never argued against the non-controversial proposition that DPHHS is an arm of the State and under the Governor's general purview. However, since the Governor must delegate the operation of the State's discrete agencies, given their diffuse and often intricate nature, one would reasonably expect a court of law to support such strong accusations as knowingly and repeatedly violating court orders and showing contempt for the judicial system as a whole, among many others (*see* Doc. 150 at 7–8, 18–19), with specific factual findings regarding each Defendant instead of simply

[5] "Gender" is a social and cultural concept, whereas "sex" is a distinct biological classification that is encoded in every person's DNA. (*See* Nat'l Inst. of Health, *How Being Male or Female Can Affect Your Health*, NIH News in Health, available at https://perma.cc/CJM3-ZZP4; Nat'l Inst. of Health, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, available at https://perma.cc/9EP5-MXK8.)

imputing the conduct of one Defendant to all others, as the Court seems to have done here. This further demonstrates the prior judge's lack of precision in its attorney's fee awards and underlying analyses, as well as the need for the current Court to correct the resulting errors.

Considering the above, Plaintiffs' Response exposes the true nature of their tactics here—engage in obfuscation and seek to take unfair advantage of the resulting confusion.[6]

ARGUMENT

I. PLAINTIFFS MISSTATE THE STANDARDS APPLICABLE TO AND SUBSTANCE OF DEFENDANTS' MOTION.

Plaintiffs begin their argument by asserting, without any citation to controlling authority, that Rule 60(b) must be "narrowly construed." (Doc. 160 at 4.) The reality is that Rule 60(b) provides numerous avenues for a party to seek relief from a judgment or order (Mont. R. Civ. P. 60(b)(1)-(6)),[7] and the Montana Supreme Court has "applied M. R. Civ. P. 60(b)(6)…in a broad range of circumstances." *Mont. Prof'l Sports, LLC v. Nat'l Indoor Football League, LLC*, 2008 MT 98, ¶ 55, 342 Mont. 292, 180 P.3d 1142.

> We determined in *Hall v. Heckerman*, 2000 MT 300, PP 6-10, 18, 302 Mont. 345, PP 6-10, 18, 15 P.3d 869, PP 6-10, 18, that a district court properly awarded relief under M. R. Civ. P. 60(b)(6) when it reversed a motion for summary judgment because the facts and law did not support the judgment. We determined in *Shultz v. Hooks*, 263 Mont. 234, 235-37, 867 P.2d 1110, 1111-12 (1994) *overruled on other grounds by In re Markegard*, 2006 MT 111, P 24, 332 Mont. 187, P 24, 136 P.3d 532, P 24, that potential judicial bias constituted proper grounds for relief under M.

[6] Plaintiffs' criticism of Defendants for not extending a counteroffer in response to their exorbitant demand for attorney's fees and costs shows their own lack of good faith in attempting to exploit the situation. (Doc. 160 at n.2.) Indeed, Plaintiffs' demand seeks fees from *seven* different attorneys at excessive rates (*see* Doc. 146, *generally*), notably including a total of $16,874.00 in fees to draft an unnecessary reply in support of their *uncontested* Motion for Summary Judgment and prepare and attend the hearing on the same, as well as for nonlitigation work. (*Id.* at 6–7.) Plaintiffs' sanctimonious posture is truly palpable.

[7] The Court should be wary of Plaintiffs' reliance on federal precedent addressing the Rule 60(b) standards. *See Wells Fargo Bank, N.A. v. Bowler*, 2020 U.S. Dist. LEXIS 149824, n.2 (Aug. 19, 2020) (noting that "the Montana Supreme Court's articulation of a three-part standard for obtaining relief [under Rule 60(b)]…is not the framework endorsed by the Ninth Circuit.").

> R. Civ. P. 60(b)(6). We determined in *Winn v. Winn*, 200 Mont. 402, 411, 651 P.2d 51, 55 (1982), that an erroneous valuation of husband's stock could have constituted grounds to award relief from a marriage decree pursuant to M. R. Civ. P. 60(b)(6).

Id. See also id. at ¶ 56 (further finding that "[a] punitive damage award rendered in violation of the applicable statute presents a reasonable grounds for relief under M. R. Civ. P. 60(b)(6)."). The Court is also free to consider Defendants' Motion under whichever subsection it deems appropriate in light of Defendants' identification of alternative subsections of Rule 60(b) as the bases for their Motion. *See Maulding v. Hardman*, 257 Mont. 18, 25, 847 P.2d 292, 297 (1993) ("[T]he fact that [the party] requested relief under subsections (1) and (3) and also under subsection (6) is not fatal."), *overruled on other grounds by Green v. Gerber*, 2013 MT 35, 369 Mont. 20, 303 P.3d 729.

Plaintiffs' accusation that Defendants are using Rule 60(b) as a substitute for appeal by merely rehashing the same arguments presented in prior briefing is likewise meritless. Plaintiffs ignore the obvious fact that Defendants' Motion addresses errors arising from the Court's June 26, 2023 Order—issues that could not possibly have been addressed earlier. Defendants' Motion further challenges the Order based on the extraordinary circumstances of this case.[8]

Plaintiffs' citation to *Lussy v. Dye*, 215 Mont. 91, 695 P.2d 465 (1985), only bolsters Defendants' point. Indeed, Defendant's Motion is far more than a mere "request for rehearing or a request that the District Court change its mind." *Id.* at 93. Defendants have set forth numerous examples of how the circumstances "prevented a full presentation of the cause or an accurate determination on the merits[, and] that for reasons of fairness and equity redress is justified." *Id.*

[8] Defendants' Motion also appears necessary to preserve these issues for appeal. *See Mont. Prof'l Sports, LLC*, ¶ 56 (finding that the appellant could not raise its challenge to the punitive damage award for the first time on appeal because such relief was available in the district court pursuant to Rule 60(b)(6)).

Defendants are not "[s]imply arguing that the Court got the law wrong" as Plaintiffs claim. (Doc. 160 at 4.) To be sure, the Court did get the law wrong, but it also deprived Defendants of the ability to fully present its case, and it failed to consider the complete facts, circumstances, and reasoning underlying Defendants' decision making. (*See* Doc. 150, *generally*.)

II. PLAINTIFFS CANNOT DISTRACT FROM THE EXTRAORDINARY CIRCUMSTANCES OF THIS CASE.

"Extraordinary circumstances" is perhaps the overarching theme of this case, and Plaintiffs' efforts at distraction and distortion do not alter this reality. While Plaintiffs' constitutional challenge to the statute at issue may be, legally speaking, a "garden variety" declaratory judgment action, the procedural history, mistakes of law and fact, and subject matter of this case are hardly ordinary. This is set forth in detail in Defendants' Brief (*see* Doc. 150 at 2–9), but some points are worth emphasizing.

First, just as the Court did in its June 26, 2023 Order, Plaintiffs appear to cite Defendants' Petition for Writ of Supervisory Control as evidence of contempt, all the while ignoring the fact that the Supreme Court granted Defendants' Petition in part. (*See* Doc. 160 at 8.) The conspicuous omission of Defendants' success in this regard is certainly compelling evidence of error and potential bias. Notably, while Plaintiffs seemingly attempt to invert and minimize the significance of the Montana Supreme Court's Order (Doc. 97), their description of Defendants' Petition as an "extraordinary step" (Doc. 160 at 8) serves to emphasize the extraordinary circumstances leading to Defendants' partially successful Petition. It nevertheless remains completely unclear how this effort could amount to "total disregard for this Court and the established procedures of the judicial branch of government" as the Court asserted and as Plaintiffs appear to endorse. (*See* Doc. 150 at 8; Doc. 160 at 8.) Plaintiffs make no effort to explain as much and instead engage in a counterproductive attempt to ignore this glaring issue entirely. The fact remains that Defendants

followed the appropriate judicial procedures by filing their Petition, which the Montana Supreme Court partially granted. This simply cannot be considered evidence of contempt, and it only underscores the extraordinary circumstances justifying the relief Defendants seek herein.

Plaintiffs also offer no coherent argument to counter the fact that the Court failed to follow proper procedure in its *sua sponte* invocation of the private attorney general doctrine to award Plaintiffs attorney's fees for the *entire litigation* without prior notice, briefing, or argument. *See* Mont. R. Civ. P. 54(d)(2)(A) (requiring claims for attorneys' fees to be made by motion). Plaintiffs instead argue that this failure to follow proper procedure did not prejudice Defendants, based in part on their absurd and unsupported suggestion that Defendants are not entitled to due process simply because they are governmental defendants. (*See* Doc. 160 at n.8). Plaintiffs also speculate, without *any* factual support, that the prior judge "no doubt" determined that due process was not warranted as a matter of convenience to his replacement after his retirement. (*Id.*)[9] One could just as easily (and more reasonably) conclude that this deprivation of due process was the result of ill-considered, imprecise, and legally infirm analysis given the numerous other bases for that conclusion. Regardless of the reason, a substantial award of fees without prior notice to Defendants and an opportunity to be heard is inherently prejudicial, especially to Montana's taxpayers who would ultimately foot the bill. The list of extraordinary circumstances grows longer.

Moreover, the relatively recent explosion of individuals identifying as "transgender" and who may (or may not) seek to alter their birth certificates to reflect their subjective perceptions is an extraordinary circumstance unto itself. Add in the apparently deliberate manipulation of language by those pushing the underlying ideology, and it should be no surprise that regulatory

[9] While Defendants do not seek to inconvenience the Court, judicial convenience cannot trump the due process rights of a litigant.

agencies struggle with the resulting contradictions and confusion. (*See*, *e.g.*, Response to Plaintiffs' Factual Assertions at ¶ 10, *supra*.) Regulatory agencies must operate and rely on objective reality and that words or terms in the Montana Code Annotated have consistent and articulable meanings, but even straightforward efforts to provide the requisite objectivity and consistency face legal challenges.[10] It is against this backdrop that the Court must consider the Attorney General's defense of Senate Bill ("SB") 280, and these extraordinary circumstances cannot be ignored.

Lastly, it is as hypocritical as it is improper for Plaintiffs to reference a politically motivated, vigorously disputed, and unadjudicated disciplinary complaint filed against the Attorney General as if it were evidence of an "assault[on] the integrity of members of Montana's judiciary" in this or any other case. (Doc. 160 at n.9.) Indeed, Plaintiffs' own counsel might be subject to similar proceedings should disagreement with a court's ruling or conduct be found to warrant professional disciplinary action.[11] The reality is that, like anyone else, judges are human: they sometimes make mistakes and have their own biases. The Montana Supreme Court acknowledges this in its Rule 60(b) jurisprudence. *See Mont. Prof'l Sports, LLC*, ¶ 55. Not only is it proper, but it is also imperative in maintaining the integrity of the judiciary, that mistakes and bias be identified if and when they arise. That is exactly what Defendants have done here with detailed references to the record. The Court should, therefore, disregard Plaintiffs' argument to the contrary as the baseless and underhanded attack on opposing counsel that it is, and correct the mistakes that were made.

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[10] For example, ideological opponents to Senate Bill 458's definition of "sex" have filed suit seeking its invalidation. *See* https://dailymontanan.com/2023/10/12/residents-file-lawsuit-challenging-montanas-attempt-to-narrowly-define-sex/.

[11] *See* https://www.nbcnews.com/politics/politics-news/montana-judge-denies-zooey-zephyrs-request-return-house-floor-rcna82574 (quoting Plaintiffs' counsel as describing a district court's ruling against his client as "a dark day for democracy" in Montana).

In sum, Defendants have clearly satisfied the requisite elements for relief under Rule 60(b)(6): (1) there is no reasonable dispute that this case presents extraordinary circumstances; (2) Defendants acted within a reasonable time period, and Plaintiffs make no argument otherwise; and (3) Defendants are blameless for the circumstances justifying the sought relief.[12] *See Bahm v. Southworth*, 2000 MT 244, ¶ 14, 301 Mont. 434, 10 P.3d 99. The Court should, accordingly, grant Defendants' Motion.

III. PLAINTIFFS CONFLATE THE FACTORS RELEVANT TO THE COURT'S ERRONEOUS ATTORNEYS' FEE AWARDS.

While "extraordinary circumstances" may be the overarching theme of this case, "conflation" is the theme that emerges from Plaintiffs' Response, particularly with respect to the proper fee shifting analyses. The Court's June 26, 2023 Order separately awards attorney's fees to Plaintiffs for (1) the contempt proceedings, and (2) the entire litigation for prevailing on summary judgment. Defendants challenge those awards for different reasons. Because Plaintiffs muddle the separate and distinct analyses applicable to these fee awards, they bear repeating briefly.

First, Defendants challenge the Court's award of fees related to the contempt proceedings on the basis that it premised its contempt finding on mistakes of fact. (*See* Doc. 150 at 10.) Plaintiffs obviously insist that the Court made no such mistakes, but Defendants have demonstrated otherwise. Any award of attorney's fees predicated on the erroneous contempt finding is, therefore, erroneous as well.

[12] While Plaintiffs insist that Defendants are very much to blame for the circumstances of the Court's June 26, 2023 Order, Defendants have demonstrated the opposite in their Brief (Doc. 150) and herein. Defendants surely cannot be blamed for the underlying factual and legal errors, nor can they be blamed for the prior judge's apparent bias. *See Skogen v. Murray*, 2007 MT 104, 337 Mont. 139, 157 P.3d 1143 (finding the appellant in a boundary dispute blameless when the court approved the surveys at issue before the appellant's objections were filed).

Second, Defendants challenge the Court's award of fees for the entire litigation on the basis that this award stems from mistakes of law and fact, as well as the prior judge's apparent bias, described in detail in Defendants' Brief (Doc. 150 at 10-20) and herein. This includes the Court's denial of due process by imposing fees pursuant to its *sua sponte* invocation of the private attorney general doctrine, the Court's error in finding that the Defendants defended SB 280 in bad faith, and the chilling effect the imposition of fees has on the State's legitimate interests in ensuring that laws duly passed by the Legislature are implemented, enforced, and defended, given that such laws are presumed constitutional. *See Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357 ("The constitutionality of a legislative enactment is prima facie presumed[.]"); *Western Tradition P'ship v. Bullock*, 2012 MT 271, ¶ 17, 367 Mont. 112, 291 P.3d 545 (declining to grant attorney's fees because of the equitable interests in the Attorney General defending the constitutionality of duly enacted statutes). Plaintiffs offer no reasoned argument to the contrary, and the Court should grant Defendants' sought relief for this reason as well.

CONCLUSION

For all of the reasons stated herein and in Defendants' Brief, the Court erred in holding Defendants in contempt and awarding attorney's fees to Plaintiffs both based on the alleged contempt and its improper *sua sponte* assertion of the private attorney general doctrine. The Court should accordingly grant Defendants relief from these provisions of the June 26, 2023 Order.

DATED this 20th day of October, 2023.

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Exhibit A

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

AMELIA MARQUEZ, et al., Plaintiffs, v. STATE OF MONTANA et al., Defendants.	Cause No. DV 21–00873 Hon. Colette B. Davies **DECLARATION OF THANE JOHNSON**

Thane Johnson declares:

1. I, Thane Johnson, am an Assistant Attorney General for the State of Montana, and I represent the Defendants in this matter. I submit the following Declaration in support of the State's Mont. R. Civ. P. 60 Motion for Relief from Contempt and Attorney Fees Order ("Motion") and to provide additional context and clarification for the same after having reviewed Plaintiffs' Response to Defendants' Motion ("Response"/Doc. 160).

2. My statements from the June 1, 2023 hearing quoted in the Response (Doc. 160 at 2–3) do not reflect the complete context, and Plaintiffs incorrectly characterize them as concessions of violations or contemptuous conduct.

3. First, Plaintiffs incorrectly assert that I had conceded "that the State had violated the Court's April 21, 2022 order (the 'Preliminary Injunction') and the Court's September 19, 2022 order (the 'Clarification Order')." (Doc. 160 at 2.) Being aware of the Court's prior disposition and apparent disdain for the State's position in this case, my apologies with "hat in hand" and assurances of compliance with the Court's directives were my attempt to assuage the Court by acknowledging the Montana Supreme Court's finding that the Preliminary Injunction did indeed require DPHHS to revert to the 2017 Rule. In other words, this was a "damage control" effort referencing DPHHS's actions prior to the Clarification Order. This should not be construed as a concession that DPHHS's actions were contemptuous in any way.

4. Second, I did not concede that the State should pay some amount of attorney's fees. My statements regarding attorney's fees were again aimed at appealing for leniency with the knowledge that the Court was very likely to award attorney's fees given the circumstances and its prior disposition.

5. Furthermore, I did not commit to negotiating attorney's fees that *should* be awarded. (Doc. 160 at 3.) I committed to making a strong effort to negotiate fees that I believed the Court was *likely* to award, and that is exactly what I did. However, I did not expect the Court to award Plaintiffs attorneys' fees for the entire litigation *sua sponte* and without additional briefing and argument on that issue. Defendants submitted their Objection to Plaintiffs' attorney's fees demand (Doc. 146) as directed, and further efforts to negotiate fees were put on hold pending resolution of Defendant's current Motion.

6. Lastly, Plaintiffs' characterization of my comments to the Court regarding its demeanor during the June 1, 2023 hearing as broadly "applaud[ing] the Court for its conduct" is also inaccurate. (Doc. 160 at 3) (emphasis omitted). I made those comments again with the intention of mollifying the Court in an appeal to leniency, but I was not commenting on or otherwise applauding the Court's conduct or demeanor prior to that hearing. Nor was I expressing any agreement with the Court preventing my attempts at further explanation via nonverbal gestures. (*See* Doc. 153 at 3.)

I declare under penalty of perjury and under the laws of the State of Montana that the foregoing is true and correct, based on my personal knowledge.

DATED this 20th day of October, 2023.

Thane Johnson

CERTIFICATE OF SERVICE

I, Michael D. Russell, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 10-20-2023:

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