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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

LYLE PHILLIPS, ANNE DEE RENO,  
TURNER ASKEW, and BEN WHITTEN,

Plaintiffs,

v.

CITY OF WHITEFISH and the BOARD OF  
COMMISSIONERS OF FLATHEAD  
COUNTY,

Defendants,

and

CITY OF WHITEFISH,

Third Party Plaintiff,

v.

THE BOARD OF COMMISSIONERS OF  
FLATHEAD COUNTY,

Third Party Defendant,

and

DAN WEINBERG and ED MCGREW,  
individually and on behalf of LET  
WHITEFISH VOTE, a ballot committee  
lawfully organized under the laws of  
Montana, MARY PERSON and MARILYN  
R. NELSON,

Intervenors.

Cause No. DV-11-1535D

Judge David M. Ortleby

**PLAINTIFFS' REPLY TO  
WHITEFISH'S RESPONSE TO THEIR  
MOTION TO STRIKE PORTIONS OF  
WHITEFISH'S BRIEF IN SUPPORT OF  
THE CITY'S MOTION FOR SUMMARY  
JUDGMENT**

Plaintiffs Lyle Phillips, Anne Dee Reno, Turner Askew, and Ben Whitten ("Plaintiffs"), through their attorneys Scott & Kienzle, P.C. (Duncan Scott), hereby reply to Whitefish's response to their Motion to Strike Portions of Whitefish's Brief in Support of the City's Motion for Summary Judgment that Plaintiffs filed January 11, 2013.

**I. THE COURT SHOULD STRIKE PORTIONS OF WHITEFISH'S STATEMENT OF FACTS:**

As in Plaintiffs' motion to strike, the following bolded sections are from Whitefish's Statement of Facts in its summary judgment brief, and the numbers correspond to the numbers in Whitefish's brief:

1. **~~"The City of Whitefish (the City) is a fast growing community concerned with maintaining its unique character as a resort/retirement area and protecting its economic base."~~**

While Plaintiffs in their motion point out that the affidavits that Whitefish cites for this "fact" do not support Whitefish's conclusion that the city "is" (current tense) a fast growing community, Plaintiffs' principal objection to this "fact" is relevance. Under Montana Rule of Evidence 402, "Evidence which is not relevant is not admissible." Whitefish's growth (or non-growth) and economic base have nothing to do with the summary judgment issues before the Court.

In its response, Whitefish carefully avoids any discussion of relevance. Instead, it argues Plaintiffs "failed to meet their burden to establish their factual objection to Taylor's affidavit testimony" and Plaintiffs have a duty to respond with "affidavits or other sworn testimony." See, Response, page 7. However, a Rule 402 objection to an affidavit is not lodged by sworn testimony; it is raised by counsel through a motion to strike. See,

Hefferman v. Missoula City Council, 360 Mont. 207, 255 P.3d 80 (2011). Whitefish has failed to show this “fact” is relevant and therefore should be stricken.

3. ~~The County has attempted to unilaterally withdraw from the 2005 IA and “take back” the ETA on two occasions, but both efforts have met with strong resistance from the City.~~

Whitefish assumes, correctly, that “Plaintiffs take no issue with the balance of the statement that the County attempted to take back the doughnut on two occasions, but both efforts have met with strong resistance from the City.” See, Response, page 8. Plaintiffs objection here is that this “fact” is written to suggest that the second time the County sought to resume Doughnut jurisdiction, as reflected in the County’s letter to Whitefish dated June 22, 2011 (see Exhibit “Q” to Plaintiffs’ summary judgment motion), the County was seeking to withdraw from the 2005 IA. In fact, in this second attempt to assume Doughnut jurisdiction, the County was seeking to terminate the 2010 IA, not “unilaterally withdraw from the 2005 IA,” as Whitefish suggests. Whitefish offers no evidence to support any assertion that the County was seeking to withdraw from the 2005 IA in 2011 or later. The Court should strike this “fact.”

6. ~~...From March through October 2010, a joint City and County committee met and finally prepared draft language calling for a third amendment to the 2005 IA. That draft paragraph extended the 2005 IA for five more years and created a one-year withdrawal process. For purposes of clarity those changes became a new paragraph 13, providing for term and unilateral withdrawal, the third amendment to the 2005 IA (referred to as the third amendments (sic) or 2010 IA).~~

Whitefish here is attempting to offer its characterization of the 2010 IA as “fact.” Rather than accept this characterization, Plaintiffs agree with Whitefish that the Court should be “directed to the four corners of the respective documents, which speak for themselves.” See, Response, page. 8. Characterization of underlying documents, as Whitefish has attempted to do here, is not “fact.” It is argument and should be stricken.

8. **After several public meetings and hearings, on November 15, 2010, the City Council adopted Resolution No. 10-46 (R10-46) attached as Exhibit 7, and approved the 2010 IA, attached as Exhibit 8, which were the joint committee’s third amendment to change the City’s exclusive and continued authority within the ETA by providing a five-year term and one-year unilateral withdrawal process to the 2005 IA.**

This should be stricken for the same reasons set forth in the prior paragraph.

19. **...The referendum repealed the City’s approval of the 2010 IA, and restored the parties to the time before the election.**

Whitefish concedes “this statement appears to be a mixture of fact and conclusion of law.” See, Response, page 9. However, rather than agree that it should be stricken, Whitefish suggests, “the Court in its discretion may give the weight it deserves.” Id. This is not a conclusion of law on some trifling issue. Rather, it is a conclusion on a key summary judgment issue this Court must decide: assuming the referendum is legal, what is its effect? The Court should strike this disputed conclusion of law masked as an undisputed fact.

**II. THE COURT SHOULD STRIKE PORTIONS OF WHITEFISH PLANNING DIRECTOR'S DAVE TAYLOR'S AFFIDAVIT.**

Once again, in its response, Whitefish makes no attempt to show the relevancy of paragraphs 4-6, 13-14, and 16-26 in Dave Taylor's affidavit. It is a tacit admission that these paragraphs are not relevant. These paragraphs should be stricken.

**III. MOTIONS TO STRIKE ARE APPROPRIATE FOR BRIEFS AND AFFIDAVITS.**

Whitefish claims that Montana civil rules do not allow the use of a motion to strike to challenge summary judgment briefs and affidavits. It argues that motions to strike may be used to strike only "material in a pleading" and briefs and affidavits in support of summary judgment "are not a pleading." See, Response, page 2. Consequently, according to Whitefish, Plaintiffs' motion is not allowed under Civil Rule 12(f).

It is surprising that Whitefish advances this erroneous argument for two reasons. First, Plaintiffs cite in their motion, and Whitefish acknowledges in its response, the Montana case Hefferman v. Missoula City Council, 360 Mont. 207, 255 P.3d 80 (2011), in which the Montana Supreme Court upheld the use of a motion to strike when objecting to irrelevant summary judgment affidavits. See, Motion, pages 7-8, Response, page 3. Moreover, there are numerous other Montana cases that acknowledge that motions to strike are appropriate procedurally in these circumstances, even though the motion itself may be denied on other evidentiary grounds. See, Kluver v. PPL Montana, 2012 WL 6740152 (Montana) (motion to strike brief and affidavit); see also, PPL Montana, LLC v. State of Montana, 355 Mont. 402, 229 P. 3<sup>rd</sup>. 421 (2010) (motion to strike summary judgment affidavits allowed but motion denied because affidavits fell within hearsay exceptions).

Second, Whitefish's own co-counsel has authored at least two Montana Supreme Court

opinions that upheld the use of a motion to strike when directed at summary judgment affidavits. In Konitz v. Claver, 287 Mont. 301, 310, 954 P. 2d 1138, 1144 (1998), then Justice Trieweiler wrote:

Accordingly, we conclude that the District Court did not abuse its discretion. . . when it granted [Plaintiff's] motion to strike the additional affidavits.

Similarly, in Heibert v. Cascade County, 311 Mont. 471, 479-480, 56 P.3d 848, 855-856 (2002), then Justice Trieweiler wrote:

It is well-settled that during summary judgment proceedings, the parties must limit affidavits to evidence that would be otherwise admissible pursuant to the rules of evidence.  
...

We also held that it is appropriate for a district court to strike statements in affidavits made without personal knowledge and based upon hearsay evidence.

Based on Rule 56(c), M.R.Civ.P., and our prior decisions, we conclude that the six challenged exhibits were properly stricken by the District Court because they did not set forth facts within the affiants' personal knowledge, nor was a foundation laid for their consideration based on any exception to the rule excluding hearsay evidence.

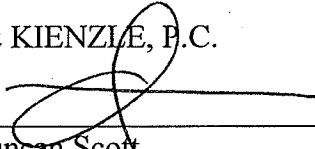
Unquestionably, the proper recourse for a party with evidentiary objections to briefs and affidavits is to file a motion to strike.

**WHEREFORE** Plaintiffs respectfully request the Court grant the following relief:

- A. Strike Whitefish's statements and affidavits as set forth above.
- B. For other relief as this Court deems appropriate.

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By: \_\_\_\_\_

  
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on February 14, 2013.

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