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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**THE HOMESTEAD AT
WHITEFISH LLC,**

Debtor.

Case No. **14-60353-BPH**

O R D E R

At Butte in said District this 11th day of August, 2020.

Pending in this Chapter 11 bankruptcy is the Motion for Sanctions and Attorneys' Fees for Violation of Debtor's Confirmed Plan and Plan Confirmation Order filed by GFY87, LLC, Mark Kvamme, and K2M, LLC ("Movants") on June 29, 2020, at ECF No. 293 ("Fee's Motion") and the Motion to Alter or Amend Its Order Including a Request for Clarification filed by Don and Emily Maschmedt ("Maschmedts") on June 29, 2020, at ECF No. 294 ("Amend Motion"). Appearances were noted on the record.

Maschmedts served a subpoena dated August 6, 2020 on Movant's counsel James Andrew Patten ("Patten"). The subpoena requires production of nine categories of documents related to the 2014 plan confirmation process three business days after service of the subpoena by Patten. Further Maschmedts filed their exhibit list which recites:

Don and Emily Maschmedt, by and through their counsel of record, and hereby submits the following Exhibit List for the Hearing scheduled for August 19, 2020 at 9:00 a.m. regarding (1) Motion for Sanctions and Attorneys' Fees for Violation of Debtor's Confirmed Plan and Plan Confirmation Order filed by GFY87, LLC, Mark Kvamme, and K2M, LLC on June 29, 2020, at ECF No. 293; and (2) Motion to Alter or Amend It's Order Including a Request for Clarification filed by Don and Emily Maschmedt on June 29, 2020, at ECF No. 294

The list then identifies 26 separate documents.

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Movants filed a Motion to Quash Subpoena (“Quash Motion”) at ECF No. 325, and an amended Motion to Prohibit New or Supplementary Evidence in conjunction with the hearing on the pending Motion to Alter or Amend or Sanctions (Supplemental Motion”) at ECF No. 328 scheduled to be heard on August 19, 2020. A hearing on the Quash Motion and Supplemental Motion was held August 10, 2020.

Federal Rule of Civil Procedure 45(d)¹ provides in part:

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

Having considered each of the 9 categories of documents identified in the subpoena, the arguments of counsel at the hearing and the procedural context of this case, the subpoena is quashed because: (i) it fails to allow a reasonable time to comply; and, (ii) and is unduly burdensome.

The subpoena required production of 9 categories of documents in 3 business days, which

¹ At the hearing the Court mistakenly referred to subpart c, rather than d.

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strikes the Court as unreasonable and burdensome under these circumstances. This matter has been ongoing for more than 2 years, and the nexus between the items requested and the Sanctions Motion is tenuous at best. Maschmedts' counsel drafted the First Amended Complaint.² This Court determined that the First Amended Complaint violated provisions and terms of the Debtors' Plan, and Order confirming the Plan. ECF Nos. 289, 290. The First Amended Complaint was signed by Maschmedts' counsel, and its filing was authorized by Maschmedts. Ultimately, this Court's consideration of whether there exists "fair ground of doubt" will turn on the actions of counsel who signed the First Amended Complaint and Maschmedts, not Maschmedts' bankruptcy counsel, Debtor's counsel or the communications that occurred between Dye and Patten more than 2 years before the First Amended Complaint was filed.³

Along with the Subpoena, Maschmedts served a Notice of Deposition. As the Court noted at the hearing, more than 12 years ago Judge Kirscher explained:

As for the depositions and discovery directed to CrossHarbor, the Ad Hoc Committee of the Yellowstone Club Members and Discovery Land Company, this Court's policy in limiting application of discovery rules to contested matters is embodied in its Local Rules. Mont. LBR 9014-1 provides that [u]pon the request of any party, the Court, in its discretion, will determine whether the provisions of F.R.B.P. 7016, 7026, and any other rules should apply to any contested matter, given the facts and the issues alleged in such matter. . . . This Court has steadfastly required that parties adhere to Mont. LBR 9014-1 and the Court will not waive such Rule at this time.

² At the hearing, the Court referred to "Cotner or Cotner Law" to distinguish the author of the complaint from Maschmedts' bankruptcy counsel Harold Dye, and their new counsel in this bankruptcy case Bradley Duncan.

³ As noted at the hearing, Maschmedts have already filed a Declaration of their bankruptcy counsel indicating he advised Maschmedts' counsel that Maschmedts did not have the right to pursue a money damages claim against the Debtor. Despite this, Maschmedts' First Amended Complaint asserts no less than 6 claims against the Debtor and requests actual and consequential damages.

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In re Yellowstone Club, LLC, Case No. 08-61570, ECF No. 127. This explanation is applicable here, and to the extent the subpoena, or notice of deposition imposes on Patten an obligation to appear for a deposition, it is quashed, and of no force or effect.

Finally, with regards to the Supplemental Motion, it will be held in abeyance pending Maschmedts' submission of a table consistent with the following example that clarifies its exhibits and intended use at the hearing. As the Court explained at the hearing, the issues raised in the Supplemental Motion seem to be premised on a misunderstanding by Movants of Maschmedts intended use of exhibits at the hearing. Maschmedts' Exhibit List at ECF No. 324 identifies 26 specific exhibits. For each exhibit, Maschmedts' shall provide the following information in a table, or other format:

Ex. #	Description	Alter/Amend or Sanctions Hearing	New evidence or if previously admitted, or in the docket, ECF No. reference
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In accordance with the Court's oral ruling, as supplemented by this Order:

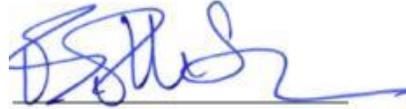
IT IS ORDERED that the Quash Motion filed at ECF No. 325 is granted; the subpoena dated August 6, 2020, is quashed pursuant to Fed.R.Civ.P. 45(d)(3)(i) and (iv); and the Notice of Deposition to James A. Patten is quashed for failure to comply with this Court's Local Rules.

IT IS FURTHER ORDERED that the Court will hold the Supplemental Motion in abeyance pending the Maschmedts submission of a table that identifies each of their exhibits listed at ECF No. 324 and identifies whether each exhibit is offered in connection with the Motion for Sanctions and Attorneys' Fees for Violation of Debtor's Confirmed Plan and Plan Confirmation Order filed at ECF No. 293 or the Motion to Alter or Amend Its Order Including a Request for Clarification filed at ECF No. 294, and whether each exhibit has been admitted at a prior hearing or is otherwise already part of the record. If the Exhibit is already part of the

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record, the Maschmedts shall identify where in the record the exhibit can be found. The table shall be filed on or before August 14, 2020.

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana