

Leslie Halligan, District Court Judge
Fourth Judicial District
Missoula County Courthouse
200 West Broadway Street
Missoula, MT 59802-4292
(406) 258-4771

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

L. SCOTT MILLS, Individually and as
Personal Representative of the Estate
of LINNEA MILLS; ROBERT
GENTRY; SHANNON GENTRY; E.G.,
a Minor, by her Mother and Next
Friend, Shannon Gentry, and JOEL
WILSON,

Plaintiffs,

v.

DEBBIE SNOW; DAVID OLSON;
JENNINE OLSON; GULL SCUBA
CENTER, LLC d/b/a GULL DIVE
CENTER; HEIDI HOUCK; PADI
WORLDWIDE CORPORATION; PADI
AMERICAS, INC., AND JOHN DOES 1-
10,

Defendants.

Dept. No. 1
Cause No. DV-21-544

**ORDER ON AMENDED
PLEADING AND
PROTECTIVE ORDER**

This matter comes before the Court on the *Motion for Protective Order Pursuant to M.R.CIV.P. 26(c)* and the *Motion for Leave to Amend First Amended Complaint Pursuant to M.R.CIV.P. 15(a) and M.R.CIV.P 21*, both

1 filed by the several Plaintiffs. The Court has considered the materials filed
2 in support of and in opposition to the two motions. The Court finds the
3 briefing sufficient and that oral argument is not necessary. Having reviewed
4 the record before it, the Court rules as follows:

5 **ORDERS**

6 (1) The Court grants Plaintiffs' Motion for Leave to Amend Plaintiffs'
7 First Amended Complaint and Demand for Jury Trial.

8 (2) The Court recognizes the [Proposed] Second Amended
9 Complaint submitted by Plaintiffs on December 2, 2021 as the operative
10 pleading in this matter and has accordingly adopted its case caption. Heidi
11 Houck is added as a party Defendant. The Court instructs Plaintiffs to file
12 the Second Amended Complaint without delay and serve it in accordance
13 with the law.
14

15 (3) The Court dismisses, with prejudice, former defendants Kendra
16 Potter and Seth Liston.
17

18 (4) The Court denies Plaintiffs' Motion for Protective Order as it is
19 currently presented. Because a protective order will be necessary and
20 appropriate in this case, the Court instructs the parties to attempt to reach
21 an agreement on its terms, informed by the Court's analysis below. If the
22 parties are unable to reach agreement, Plaintiffs may move for again for a
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1 protective order, asking the Court to break the deadlock on any discreet
2 disagreements arising on specific proposed terms. The Court welcomes the
3 submission of an agreed upon proposed order that the Court can adopt.

4 (5) The Court DENIES Seth Liston's request for an award of his fees
5 and costs arising from responding to the Motion for Protective Order. No
6 party demonstrated exemplary communication in advance of the motion.
7

8 **MEMORANDUM**

9 **I. FACTUAL AND PROCEDURAL BACKGROUND**

10 This case arises from a tragic diving incident on November 1, 2020 that
11 left a young woman dead and others potentially traumatized. The several
12 Plaintiffs commenced the lawsuit in early May 2021. Before any answers
13 were filed, Plaintiffs filed an amended complaint in July. Several defendants
14 appeared and answered the First Amended Complaint ("FAC") over the next
15 few months. In October, the Court issued a case scheduling order which
16 included, *inter alia*, a December 2, 2021 deadline by which "[a]ll parties are
17 to be joined and all amendments to the pleadings are to be filed."
18

19 Formal discovery commenced immediately. The Court is unaware of
20 the full extent of discovery that has already occurred, but from the Motion for
21 Protective Order, the Court knows that one of the defendants named in the
22 FAC, Seth Liston, propounded written discovery requests on Plaintiffs along
23

1 with his Answer. On brief review, the scope of the requests are probably
2 proportional to the FAC's allegations. Some of the requests asked for
3 materials in the possession of Plaintiffs that Plaintiffs considered
4 exceptionally confidential and a discussion ensued between counsel for at
5 least some of the parties on the necessity of protecting these materials. The
6 discussion did not lead to an agreement, but instead led to Plaintiffs moving
7 the Court to impose a broad confidentiality order on the discovery in this
8 case.
9

10 Seth Liston led the defendants' opposition to this Motion. His
11 Response argued that some of the terms in the protective order proposed by
12 Plaintiffs were "unworkable," too rigid, and would likely lead to further
13 discovery motions. But the main focus in Liston's Response concerned the
14 manner in which Plaintiffs went about filing this Motion and how they have
15 conducted themselves in discovery already. The other defendants later filed
16 Joinders with Liston's Response, adding their own unfavorable assessment
17 of Plaintiffs' approach to discovery. Plaintiffs' Reply denies the allegations
18 of acting in bad faith and provides an alternative version of the facts.
19

20 On the same day that Liston filed his Response to the Motion for
21 Protective Order, Plaintiffs filed a Second Amended Complaint ("SAC") along
22 with a notice that they are doing so pursuant to the Scheduling Order.
23

1 Despite the simultaneous filing, Liston's Response briefly addresses the
2 SAC, noting how it does not include him as a defendant and suggesting that
3 it leaves him in an uncomfortable limbo without a more formal dismissal. The
4 other defendants' Joinders, referenced above, find the SAC even more
5 objectionable in its content, but also (again) objectionable in how Plaintiffs
6 went about filing it in clear violation of the Montana Rules of Civil Procedure.
7

8 To their credit, Plaintiffs responded to the objections by filing the
9 present (and necessary) Motion for Leave to Amend, with a proposed order
10 that includes a formal dismissal of Liston and other individual defendant, with
11 prejudice. The remaining defendants filed Responses that, while not
12 opposing Liston's dismissal, ask the Court to deny the Motion because both
13 the content and the manner in which Plaintiffs filed it violates procedural rules
14 and because some of the SAC's allegations are inflammatory and not based
15 in fact. And again, to their credit, Plaintiffs' Reply was accompanied by a
16 redlined version of the SAC that shows the differences between it and the
17 FAC. Plaintiffs should have provided this with its motion, as required by Rule
18 3(H) of the Fourth Judicial District Rules. The violation of this Local Rule
19 was a source of some frustration and complaint on the part of the defendants.
20

21 The Court has now reviewed all of these filings and it is not encouraged
22 by the way this case has started. The briefing has revealed disputes in this
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1 case that go beyond the discreet questions posed by the two motions, and
2 the Court finds it appropriate to not only rule on the questions, but to also
3 address the other issues presented. Plaintiffs need to understand that the
4 Court is not going to be the ultimate finder of fact in this case and thus they
5 can reserve their emotional appeals regarding the tragic genesis of this case
6 for the jury. And all parties need to understand that discovery is going to be
7 burdensome. Given the allegations, Plaintiffs can also expect some intrusion
8 into what they may see as their own affairs. The Court is going to allow
9 discovery of any non-privileged matter that is relevant to any party's claim or
10 defense, but the Court is not going to tolerate discovery abuse, which to the
11 Court includes unjustified objections (often signaled by the use of boilerplate
12 language), excessive demands, and the lack of civility between counsel.

14 The Court also is not going to tolerate unnecessary discovery motions
15 that should be resolved by counsel. While all of the parties in this case may
16 not be familiar with litigation, all of their attorneys are. They know what right
17 looks like, and they know when they must be advocates and when they must
18 instruct their clients. The Court anticipates a great deal of conferences and
19 communications between counsel in this matter. From the evidence
20 provided in the present motions, the Court sees room for improvement and
21 expects it.
22
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II. LEGAL ANALYSIS

A. Procedural Rules for Amending a Pleading.

As an initial matter, the Court must address Plaintiffs' claim or understanding that a deadline for amending pleadings set in a scheduling order gives litigants free reign to amend their pleadings at will up to that point. Setting a deadline for pleading amendment does no such thing. The Court knows of no Montana authority for the proposition that setting a pleading amendment deadline impliedly waives the rules of civil procedure. Without more, a simple deadline (like the one here) certainly does not do so expressly. In brief research, the Court found one published and a number of unpublished Montana Supreme Court opinions that indicate that a litigant must still comply with the procedural rules to amend a pleading even when acting before the deadline set in the case schedule. *See, e.g., Gursky v. Parkside Prof'l Vill.*, 258 Mont. 148, 151-52, 852 P.2d 569 (1993). Taken to its logical end, Plaintiffs' claim of amendment at will would disrupt the orderly administration of a lawsuit and be prejudicial of the rights of the litigants. Plaintiffs were wrong to assume that they could simply file the SAC before the December 2 deadline and have it be respected as the operative pleading.

Secondly, and as recognized in the Motion for Leave to Amend, Rule 15(a)(2) of the Montana Rules of Civil Procedure governs amendment of

1 pleadings. It provides that, before trial: “a party may amend its pleading only
2 with the opposing party’s written consent or the court’s leave. The court
3 should freely give leave when justice so requires.” Rule 15(a) is to be
4 interpreted liberally, making the allowance of amendments the general rule
5 and denials the exception, but a court must not automatically grant a motion
6 to amend. *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.*, 249 Mont.
7 322, 325, 815 P.2d 1153 (1991). “[L]eave should be denied if the
8 amendment is legally insufficient to support the requested relief . . . or if the
9 amendment would be frivolous, meritless or futile.” *Gordon v. Kuzara*, 2012
10 MT 206, ¶ 23, 366 Mont. 243, 286 P.3d 895 (internal citation omitted).
11 Additionally, a court is within its discretionary authority to deny a motion to
12 amend pleadings if the amendment would cause its opponent to incur
13 “substantial prejudice” or “if the motion causes undue delay, is made in bad
14 faith, is based upon a dilatory motive on the part of the movant, or is futile.”
15 *Stundal v. Stundal*, 2000 MT 21, ¶ 12, 298 Mont. 141, 995 P.2d 420.
16
17

18 Here, Plaintiffs wish to replace the FAC with the SAC because their
19 ongoing investigation has uncovered additional facts that warrant new and/or
20 amended allegations and the dismissal of two individual defendants named
21 in the FAC. These are excellent reasons to amend a pleading and the Court
22 is unpersuaded by Defendants’ arguments against this amendment.
23

1 On the objection that the SAC violates Rule 8 of the Montana Rules of
2 Civil Procedure due to its extraordinary length, the Court agrees that the SAC
3 may be unnecessarily long. But, the Court also agrees that this is a complex
4 case and that it is not inappropriate for Plaintiffs to be detailed in their
5 allegations. The Court does not consider the SAC to be so long as to
6 preclude the Plaintiffs from filing it.

7 On the objection that Plaintiffs violated the rules by filing the Motion for
8 Leave to Amend without first contacting Defendants and ascertaining
9 whether they will object, the Court agrees that this is a violation. The Court
10 considers this sort of violation to immediately render a motion suspect. But,
11 at this point in the case and under the circumstances, the Court does not
12 consider this violation to compel the Court to deny the Motion for Leave to
13 Amend. However, the Court cautions the parties that repeated violations of
14 the simple and well-justified Local Rule 3(G)(2) may result in sanctions.
15

16 On the objection that certain allegations are vitriolic and inflammatory
17 and without a factual basis, the Court does not find them to be so scandalous
18 or prejudicial as to preclude the filing of the SAC. If these allegations are
19 untrue, Defendants should simply deny them in their Answer.
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21
22
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1 The Court finds none of the authoritative reasons for denial of a motion
2 for leave to amend to be present here, but finds good reasons to allow it.
3 Thus the Court must grant Plaintiffs' Motion for Leave to Amend.

4 **B. Clear Need for a Protective Order.**

5 Plaintiffs moved for the Court to impose a protective order pursuant to
6 Rule 26(c). Rule 26(c) includes the unambiguous directive:

7 The motion must include a certification that the movant has in
8 good faith conferred or attempted to confer with other affected
9 parties in an effort to resolve the dispute without court action.

10 The Court does not see this certification in Plaintiffs' Motion, its supporting
11 brief, or its supporting reply brief. This absence is sufficient reason for the
12 Court to deny the Motion outright. Similarly, the fact that the protective order
13 that Plaintiffs had proposed to Defendants in pre-motion correspondence is
14 different than the one Plaintiffs proposed to the Court is another good reason
15 to deny the motion. Finally, like the Defendants, the Court agrees that the
16 protective order proposed by Plaintiffs may be excessive in its protection and
17 burdensome to manage.

18 The parties agree that a protective order is necessary and appropriate
19 in this case to deal with certain categories of sensitive material. The Court
20 is only aware of a sliver of that material and is not in the best position to know
21 how much protection is appropriate and how certain protections would work
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23

1 out in practice. The parties did not sufficiently attempt to negotiate terms of
2 a protective order to which they can all agree. They shall have another
3 chance.

4 DATED this 10th day of January, 2022.

5
6 
7 Leslie Halligan
8 District Court Judge

9 cc: Terence P. Perry, Esq.
10 David G. Concannon, Esq.
11 Susan Moriarity, Esq.
12 Scott C. Black, Esq.
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