

William L. Crowley  
 Natasha Prinzing Jones  
 Thomas J. Leonard  
 BOONE KARLBERG P.C.  
 201 West Main, Suite 300  
 P.O. Box 9199  
 Missoula, MT 59807-9199  
 Telephone: (406)543-6646  
 Facsimile: (406) 549-6804  
 bcrowley@boonekarlberg.com  
 npjones@boonekarlberg.com  
 tleonard@boonekarlberg.com

*Attorneys for Defendants Bitterroot Public Library,  
 City of Hamilton and Boone Karlberg P.C.*

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF MONTANA  
 MISSOULA DIVISION

MICHAEL E. SPREADBURY,

Plaintiff,

v.

BITTERROOT PUBLIC LIBRARY,  
 CITY OF HAMILTON, LEE  
 ENTERPRISES, INC., and BOONE  
 KARLBERG P.C.

Defendants.

Cause No. CV-11-064-M-DWM

**CITY AND LIBRARY  
 DEFENDANTS' BRIEF IN  
 OPPOSITION TO PLAINTIFF'S  
 MOTION FOR LEAVE TO FILE  
 SECOND AMENDED  
 COMPLAINT**

On behalf of Defendants Bitterroot Public Library, Dr. Robert Brophy,

Trista Smith, Nansu Roddy, City of Hamilton, Jerry Steele, Steve Snavely, Steven

Bruner-Murphy, Ryan Oster, Kenneth S. Bell and Jennifer B. Lint, this responds to Plaintiff Michael E. Spreadbury's ("Spreadbury") Second Amended Complaint, filed without leave of court on May 4, 2011. The Court should deny leave to file the amended pleading because the proposed amendments are futile.

## **DISCUSSION**

### **I. SPREADBURY MUST OBTAIN LEAVE OF COURT TO FILE HIS SECOND AMENDED COMPLAINT.**

Rule 15, Federal Rules of Civil Procedure, provides "[a] party may amend its pleading once as a matter of course. . . ." Fed. R. Civ. P. 15(a)(1) (emphasis added). Otherwise, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Here, Spreadbury amended his complaint once as a matter of course. The City and Library Defendants oppose his latest amendments. As such, Spreadbury's Second Amended Complaint may only be filed with leave of Court. *See id.*; *see also, e.g., Glaros v. Pense*, 628 F.2d 679, 686 (1st Cir. 1980) (party entitled to only one amendment as a matter of course); *Deutsch v. Health Ins. Plan of Greater New York*, 573 F.Supp. 1443, 1445 (S.D.N.Y. 1983) (same).

Before a scheduling order is entered, leave to amend shall be "freely given." *E.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). However, that is not to say that leave to amend should be granted automatically. *See Ynclan*

*v. Dept. of Air Force*, 943 F.2d 1388, 1391 (5th Cir. 1991). Rather, leave should be denied where, as here, the proposed amendment is futile and subject to dismissal. *Saul v. U.S.*, 928 F.2d 829, 843 (9th Cir. 1991). An amendment is “futile” when no set of facts can be proved under the amendment that would constitute a valid claim. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). Such is the case with Spreadbury’s Second Amended Complaint.

## **II. SPREADBURY’S PROPOSED AMENDMENTS ARE FUTILE.**

The vast majority of Spreadbury’s Second Amended Complaint is identical to his prior pleading. Spreadbury does attempt to add a new legal theory (“public fraud”), and also includes two legal arguments, one challenging the Court’s jurisdiction over his emotional distress claims, and one challenging the justiciability of pending motions to dismiss. More specifically, the proposed amendments that can be fairly characterized as “substantive” (Spreadbury makes a number of minor editing changes) are as follows:

- Spreadbury seeks to add a new theory entitled “public fraud,” in which he asserts that the Bitterroot Public Library is accepting “ineligible funds as a municipality in this cause of action” which are being paid to Boone Karlberg PC as counsel. (Second Amended Complaint, p. 1.)
- Spreadbury adds allegations supporting the jurisdiction of this Court, which are unnecessary following removal. Spreadbury then asserts that while the Court has jurisdiction over most of his claims, the claims for infliction of emotional distress are state law causes of action over which this Court does not have jurisdiction. (Second Amended Complaint, p. 2.)

- Spreadbury asserts that Defendants’ motions to dismiss are “improper” because they were submitted before he amended his complaint “for Federal jurisdiction.” (Second Amended Complaint, p. 2.)
- On pages 19 and 20 of the Second Amended Complaint, Spreadbury adds a series of allegations of additional defamatory statements by Defendants.
- Spreadbury increases the amount of damages sought by \$5 million (\$2 million additional in compensatory damages, \$3 million additional in punitive damages), for a grand total of \$27,055,000.

Each of Spreadbury’s proposed amendments is futile, and is addressed in turn below.

**A. “Public Fraud”**

Spreadbury seeks to add the following theory in his Second Amended Complaint: “*Public fraud* is being committed by Defendant Bitterroot Public Library by accepting ineligible funds as a municipality in this cause of action, Defendant Boone Karlberg PC is accepting these funds as counsel.” (Second Amended Complaint, p. 1 (emphasis in original).) Spreadbury cannot prove any set of facts that would entitle him to relief under the “public fraud” theory.

Article III of the Constitution limits the judicial power of the United States to the resolution of “Cases” and “Controversies,” and “Article III standing ... enforces the Constitution's case-or-controversy requirement.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). “No principle is more fundamental to

the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

Standing is one of the controlling elements in the definition of case or controversy under Article III. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989). To establish standing, “[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751(1984) (emphasis added); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597-603 (2007).

Here, Spreadbury claims the Bitterroot Public Library is committing a fraud on the public by accepting coverage in its defense of this lawsuit. (Second Amended Compliant, p. 1.) The only interest Spreadbury may have as to the alleged “public fraud,” therefore, is as a taxpayer. (Of course, taking Spreadbury’s Motion To Proceed In Forma Pauperis at face value, Spreadbury does not appear to be a taxpayer either.) To the extent Spreadbury can claim any interest as a taxpayer, his interest is too generalized and attenuated to support Article III standing.

Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing

“would be[,] not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another. . . .” *Frothingham v. Mellon*, 262 U.S. 447, 489 (1923); *see also Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 434 (1952). “[A] plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992).

The same is true under Montana law. The Montana Supreme Court has noted that “standing is a threshold jurisdictional question, especially in cases where a statutory or constitutional violation is claimed to have occurred.” *Fleenor v. Darby School Dist.*, 128 P.2d 1048, ¶ 7 (Mont. 2008). It is “well established” in Montana “that all persons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers, lack standing.” *See id.*, ¶ 9 (*citing Flesh v. Bd. of Tr. Of J. School Dist. 2*, 786 P.2d 4, 7 (Mont. 1990)). Thus, the injury alleged must be personal to the plaintiff as distinguished from the community in general. *Id.*

An individual may seek recovery for a fraud allegedly perpetrated against the individual, but the same individual may not generally seek to recover damages on the basis of a “public fraud.” Thus, as to the allegations the Bitterroot Library is accepting “ineligible funds as a municipality,” Spreadbury’s interest is that of a member of the general public only. He has no standing to pursue this claim under state or federal law.

Moreover, on a closely-related question, Spreadbury has not alleged an interest upon which to base a viable civil rights claim. *See, e.g., Inyo County, California v. Paiute-Shoshone Indians of Bishop Community of the Bishop Colony*, 538 U.S. 701, 712 (2003) (“42 U.S.C. § 1983 was designed to secure private rights against government encroachment”). To state a claim under Section 1983, a plaintiff must allege that a state actor has violated “a right secured by the Constitution and the laws of the United States.” *West v. Atkins*, 487 U.S. 42, 48 (1988). Here, Spreadbury has not alleged, nor could he, that the Bitterroot Public Library’s acceptance of “ineligible funds” somehow violates his rights under the U.S. Constitution. *See, e.g., Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding a due process violation must be based on a real liberty or property interest of the individual asserting the violation).

Also, with respect to the acceptance of insurance coverage, there is no act or omission of the Bitterroot Public Library upon which to base a claim. There is no allegation that the Bitterroot Public Library determines whether insurance coverage is available for a particular claim. Nor is there support for the dubious proposition that accepting insurance coverage is somehow wrongful. In fact, based on its information, MMIA has determined that coverage exists for the defense of this claim. In other words, even if Spreadbury could claim he has sustained personal harm by way of the Bitterroot Public Library's insurance coverage, no wrongful act or omission has been alleged that could lead to liability under any set of facts.

Similarly, if Spreadbury wishes to allege an action for "public fraud," he must not only identify a wrongful act or omission, he must plead the action with particularity. Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). In order to plead fraud with particularity, "[e]very element of the cause of action for fraud must be alleged...with sufficient specificity to allow defendant to understand fully the nature of the charge made." *Miron v. Herbalife Int'l, Inc.*, 2001 WL 564338 (9th Cir. 2001). In order for the defendant to fully understand the nature of the charge, the plaintiff must set forth exactly what statements were made that were false, and precisely why the statements were false. *See In re Glenfed, Inc. Sec.*



*Litig.* 42 F.3d 1541, 1547-48 (9th Cir. 1994). Needless to say, Spreadbury's allegations do not come close to meeting this standard. If the Bitterroot Public Library made false statements to the public regarding insurance coverage, Spreadbury needs to identify them and state how they were false. Fed. R. Civ. P. 9(b).

In sum, Spreadbury's "public fraud" claim is futile for a number of reasons. He has no standing to bring the claim. There is no constitutional right to base the claim upon. There is no wrongful act or omission of the Bitterroot Public Library. Also, Spreadbury has failed to plead fraud with particularity. For these reasons, the Court should deny leave to file the Second Amended Complaint.

#### **B. Jurisdiction Over Emotional Distress Claims**

Spreadbury asserts this Court does not have jurisdiction over his emotional distress claims because they arise under state law. (Second Amended Complaint, p. 2.) Spreadbury is incorrect. The Court has supplemental jurisdiction over Plaintiff's state law claims, including his infliction of emotional distress claims. 28 U.S.C. § 1367. As such, the amendment is futile.

#### **C. Pending Motions To Dismiss**

Contrary to Spreadbury's argument, his decision to file a Second Amended Complaint does not moot pending motions to dismiss or render them "improper."

Defendants were not required to wait for Spreadbury to amend his pleading “for Federal jurisdiction” before filing motions under Rule 12(b)(6). Indeed, Spreadbury was under no obligation to amend his complaint at all after removal to federal court. Fed. R. Civ. P. 81(c)(2) (“After removal, repleading is unnecessary unless the court orders it.”).

Moreover, the motions to dismiss should be decided even if Spreadbury is granted leave to file his amended pleading. As set forth above, very little of substance has been changed in the Second Amended Complaint. For example, none of the new allegations affect any part of Boone Karlberg’s pending motion. Although Plaintiff has added new allegations that “Boone Karlberg defames Plaintiff in Defendants April 26, 2011 Answer to this court. . . .” (Second Amended Complaint, ¶ 92), and “alleges false information of crime in writing Defendants answer. . . .” (Second Amended Complaint, ¶ 93), these allegations only add to a list of allegedly defamatory statements made by Boone Karlberg in various court records. The allegations fail for the same reasons already set forth in Boone Karlberg’s motion – Spreadbury’s claims against Boone Karlberg are based exclusively on statements which are privileged as a matter of law. *See, e.g., Montana Bank of Circle, N.A. v. Ralph Meyers & Son, Inc.*, 769 P.2d 1208, 1213 (Mont. 1989) (“It has long been held that statements made in a judicial proceeding

are absolutely immune and a cause of action for defamation cannot be predicated thereon.”). Thus, the new factual allegations have no bearing on the legal issues now before the Court, and Spreadbury’s procedural manoeuver should not delay the Court’s disposition of the pending motions to dismiss.

#### **D. Increased Damages**

In his latest complaint, Spreadbury seeks an additional \$5 million in damages. This brings his grand total to \$27,055,000. There is no requirement to plead a specific amount of damages. Fed. R. Civ. P. 8(a). Moreover, if a complaint alleges damages in *excess* of the federal amount-in-controversy requirement, as here, then the amount-in-controversy requirement is presumptively satisfied unless “it appears to a ‘legal certainty’ that the claim is actually for less than the jurisdictional minimum.” *Lowdermilk v. U.S. Bank Natl. Ass'n*, 479 F.3d 994, 998 (9th Cir. 2007). Thus, Spreadbury’s amendment is unnecessary and futile.

## CONCLUSION

For the reasons stated, the Court should deny leave to file the Second Amended Complaint.

DATED this 9<sup>th</sup> day of May, 2011.

/s/Thomas J. Leonard  
Thomas J. Leonard  
BOONE KARLBERG P.C.  
*Attorneys for Defendants*  
*Bitterroot Public Library, City of*  
*Hamilton and Boone Karlberg P.C.*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 7(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 2,227 words, excluding the parts of the brief exempted by L.R. 7(d)(2)(E).

DATED this 9<sup>th</sup> day of May, 2011.

/s/ Thomas J. Leonard  
Thomas J. Leonard  
BOONE KARLBERG P.C.  
*Attorneys for Defendants Bitterroot  
Public Library, City of Hamilton and  
Boone Karlberg P.C.*

CERTIFICATE OF SERVICE

I hereby certify that, on the 9<sup>th</sup> day of May, 2011, a copy of the foregoing document was served on the following persons by the following means:

- 1        CM/ECF
- Hand Delivery
- 2        Mail
- Overnight Delivery Service
- Fax
- E-Mail

- 1.      Clerk, U.S. District Court
- 2.      Michael E. Spreadbury  
         700 South Fourth Street  
         Hamilton, MT 59840

/s/ Thomas J. Leonard  
Thomas J. Leonard  
BOONE KARLBERG P.C.  
*Attorneys for Defendants Bitterroot Public  
Library, City of Hamilton,  
and Boone Karlberg P.C.*