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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

DEFENDANT LEE ENTERPRISES,  
 INC.'S RESPONSE BRIEF IN  
 OPPOSITION TO PLAINTIFF'S  
 MOTION TO APPOINT LEAD  
 DEFENSE COUNSEL

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"),  
 through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully  
 files its Brief in Opposition to Plaintiff's Motion to Appoint Lead Defense  
 Counsel.

INTRODUCTION

On May 17, 2011, Plaintiff, Michael E. Spreadbury ("Spreadbury"), moved

DEFENDANT LEE ENTERPRISES, INC.'S RESPONSE BRIEF IN OPPOSITION  
 TO PLAINTIFF'S MOTION TO APPOINT LEAD DEFENSE COUNSEL

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the Court to appoint Jeffrey B. Smith, attorney for Garlington, Lohn & Robinson, PLLP, and counsel for Lee Enterprises, Inc., as lead defense counsel (Dkt. 36).

Although flattered by Spreadbury's apparent confidence in its counsel, Lee Enterprises opposes Spreadbury's motion. It would be an abuse of discretion for the Court to appoint lead defense counsel in this case. Spreadbury chose to bring this action against multiple parties, has not shown prejudice from dealing with two law firms, and his request is inappropriate for this matter.

### DISCUSSION

Spreadbury's request for appointment of lead defense counsel should be denied. Pursuant to Federal Rule of Civil Procedure 42(a),

If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

Fed. R. Civ. P. 42(a)(1)-(3).

Courts have interrupted Rule 42(a)(3) to allow the appointment of a lead counsel in complex litigation. However, the vast majority of such appointments are for plaintiffs' lead counsel, rather than defense counsel, and are ordered at the heels of consolidating numerous actions into one. "In complex cases, it is well established that the district judge may create a *Plaintiffs' Lead Counsel*

Committee.” *In re Bendectin Litig.*, 857 F.2d 290, 297 (6th Cir. 1988) (citing *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 773-774 (9th Cir. 1977)) (emphasis added); *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1992*, 549 F.2d 1006, 1014-1015 (5th Cir. 1977); *Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2d Cir. 1971). As expressed by the Ninth Circuit, appointing lead counsel arose with the advent of complex multiparty litigation and, although the district court has the authority to appoint lead counsel, the court should not do so in the absence of exceptional circumstances. *See Vincent*, 557 F.2d at 773 (citing Manual for Complex & Multidistrict Litigation § 1.92 (1970)).

This is not a complex multiparty litigation, and Spreadbury has not shown exceptional circumstances for the Court to appoint lead defense counsel. Spreadbury claims bringing his action against Defendants represented by separate defense counsel, Boone Karlberg P.C., and Garlington, Lohn & Robinson, PLLP “is not equal protection under the law.” (Dkt. 36:2) However, Spreadbury provides no support for this contention. Instead, Spreadbury cites to case law listing conditions to consider when appointing lead *Plaintiff’s* counsel in *class action cases*. *See* [Dkt. 36:2-3] (“[i]n class action cases, the quality of pleading, relative economic stakes, the ability to vigorously litigate, competence of counsel, and access to resources are factors to choose a lead counsel.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).”

Obviously this is not a class action case and a far cry from the complex litigation in which appointing a lead counsel is appropriate. In *Means v. Montana Power Co.*, 191 Mont. 395, 401, 625 P.2d 32, 36 (1981), the Montana Supreme Court appointed plaintiffs' lead counsel in a case involving 31 different plaintiffs, represented by 10 different attorneys. Similarly, *In re Richardson-Merrell, Inc. Bendectin Prods. Liab. Litig.*, 624 F. Supp. 1212, 1246 (S.D. Ohio 1985), *aff'd sub nom. In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988), involved the appointment of lead plaintiffs' counsel in products liability cases which included hundreds of plaintiffs. In *In re Air Crash Disaster at Florida Everglades*, the court appointed lead counsel in a consolidated case covering 150 claims in both federal and state courts. In stark contrast to the cases in which lead counsel is appointed by the court, Spreadbury is the sole Plaintiff in this matter. He has chosen to bring claims against four named Defendants in the caption of his Amended Complaint. Defendants are only represented by two law firms. Spreadbury has not shown any prejudice from dealing with Defendants' separate counsel.<sup>1</sup>

Moreover, Spreadbury has not cited to any authority for the appointment of lead defense counsel. As shown above, while courts have appointed lead plaintiffs' counsel, Spreadbury fails to cite any cases in which lead defense counsel

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<sup>1</sup> Lee Enterprises also points out that it has joined in multiple briefs filed by Co-Defendants in this matter so that pro-se Plaintiff need only respond to one brief. (*See* Dkt. 8, 20, 25-26, 34.)

was appointed by the court.

Further, appointment of lead counsel is necessary for the Court's convenience not for the parties. "The purpose of consolidation and appointment of lead counsel is to permit trial convenience and economy in administration by avoiding unnecessary costs or delay." *Means*, 625 P.2d at 36.

Finally, appointing lead counsel would prejudice the Defendants. Rule 42 has been interpreted to give district courts the authority to appoint lead counsel, but only if actions before the court involve a common question of law or fact. *See* Fed. R. Civ. P. 42(a); *see also Means*, 625 P.2d at 36 ("the appointment of lead counsel is made in conjunction with a motion and order for consolidation and has been primarily used in federal court proceedings involving multi-party litigation"). In *Feldman v. Hanley*, the court found consolidation of plaintiffs' cases and appointment of lead plaintiffs' counsel appropriate since the essence of all three complaints and the issues of law and fact were the same. *Feldman v. Manley*, 49 F.R.D. 48, 49 (S.D.N.Y. 1969); *see also Barcelo v. Brown*, 78 F.R.D. 531 (D.P.R. 1978) (consolidating plaintiffs' cases and appointing lead counsel since cases presented common question of law and fact). However, here, Spreadbury alleges different counts against each of the named Defendants. Unlike in a class action case when the court appoints a lead counsel to represent each plaintiff's common interests, Defendants have different interests in this matter since Spreadbury has

brought different claims against each of the named Defendants. Therefore, Defendants would be prejudiced if the Court appoints a lead counsel in this matter.

CONCLUSION

Spreadbury's Motion to Appoint Lead Defense Counsel should be denied. Spreadbury's action does not amount to the type of complex litigation in which appointment of lead counsel is granted. Spreadbury did not cite to any authority in support of appointing lead defense counsel, and Defendants would be prejudiced by appointment of lead counsel since they are defending different claims and, thus, have different interests in this matter.

DATED this 20th day of May, 2011.

/s/ Jeffrey B. Smith  
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Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Defendant Lee Enterprises, Inc.'s Response Brief In Opposition to Plaintiff's Motion to Appoint Lead Defense Counsel is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 1097 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Jeffrey B. Smith  
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Attorneys for Defendant, Lee Enterprises, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2011, a copy of the foregoing document was served on the following persons by the following means:

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/s/ Jeffrey B. Smith  
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