

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' REPLY BRIEF IN  
SUPPORT OF MOTION TO  
COMPEL**

## INTRODUCTION

This responds to Plaintiff's arguments against the City and Library Defendants' motion to compel, filed June 16, 2011. [Doc. 56.] This reply brief also opposes Plaintiff's motion for a denial of discovery. [Plaintiff's Response, 6/23/11, to Motion to Compel, p. 3.] Plaintiff's arguments against the motion to compel and in favor of staying discovery are without merit, and Plaintiff's motion to stay discovery has already been denied by the Court. Therefore, it would be an abuse of discretion to deny the City and Library Defendants' motion to compel, and the Court should award the reasonable expenses, including attorney's fees, incurred in making the motion to compel to the City and Library Defendants.

## DISCUSSION

### **A. Plaintiff Has Waived Any Objection to the Discovery:**

L.R. 26.3(a)(4) reads as follows:

(4) Failure to object to interrogatories or requests for production of documents or things under Fed. R. Civ. P. 33 and 34, within the time fixed by the Rules, or within the time to which the parties have agreed, constitutes a waiver of any objection.

Plaintiff never objected to the discovery served on him within the time fixed by the Federal Rules of Civil Procedure. Similarly, his brief opposing the motion to compel does not assert any substantive objection to the discovery requests.

Instead, he has never responded to the discovery requests. As such, Plaintiff waived any objection to the discovery.

**B. Much of Plaintiff's Argument Has Already Been Rejected By the Court:**

On May 19, 2011, Plaintiff moved to stay discovery pending the decision by the Court on qualified immunity. He relied on the same Supreme Court cases relating to qualified immunity which he again advances. [Doc. 46.] However, on May 25, 2011, the Court entered its order which, in part, denied Plaintiff's motion to stay discovery. As noted by the Court, under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a stay of discovery is for the benefit of a defendant who may be entitled to qualified immunity and not for the benefit of a plaintiff attempting to defeat qualified immunity. [Doc. 47, p. 8.]

**C. Policy Reasons Exist to Reject a Stay of the Discovery Served on Plaintiff:**

As reflected in the Court's Order (Doc. 47, p. 8), filed May 25, 2011, staying discovery served on Plaintiff does not serve the purposes of qualified immunity. It does not protect public officials from broad-ranging discovery that can be particularly disruptive to effective government. *Harlow, supra*, 457 U.S. at 817.

In part, Plaintiff argues that the City and Library failed to raise qualified immunity. [Plaintiff's Response, 6/23/11, p. 4.] However, as this Court is well aware, qualified immunity cannot be raised by a governmental entity. With this in mind, the individual City and Library Defendants have raised qualified immunity. [Doc. 3, Third Defense, No. 18.] In any event, the goal of eliminating unnecessary discovery when qualified immunity is an issue is illusory here. Plaintiff's Amended Complaint alleges 20 counts addressed to the City and Library Defendants. [See Doc. 55, pp. 2-4.] These include state law claims where qualified immunity is not an issue. *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002). Also, again, qualified immunity is not a defense available to a governmental entity in a federal civil rights action. [Amended Complaint, Counts III, VI and X.] Next, qualified immunity is not a defense to a claim for injunctive relief. [Counts XXIV and XXV.] *See, Harlow, supra*, 457 U.S. at 817 (qualified immunity shields liability for civil damages).

Stated differently, Plaintiff relies on the same alleged acts or omissions to support his claims to which qualified immunity may be available as he does to support his claims to which qualified immunity is not available. As a result, the scope of discovery applying to these groups of claims is the same. Under these

circumstances, staying discovery until qualified immunity is determined only delays the case unnecessarily and adds to the burden of the parties and the Court.

In this connection, as addressed in the City and Library Defendants' brief, filed May 19, 2011, in opposition to Plaintiff's motion to stay discovery, Plaintiff's partial summary judgment motion is not dispositive of all the claims raised by him, and defenses other than qualified immunity may be available in connection with his federal civil rights claims. Moreover, prior to any motion by the individual Defendants based on qualified immunity or otherwise, a developed record is necessary. [Doc. 43, pp. 3-5.] Therefore, a stay of discovery is inappropriate.

**D. This is Not a Private Securities Litigation Case:**

Citing 15 U.S.C. § 78u-4(3)(B), Plaintiff argues that this case is subject to an automatic stay of discovery. [Plaintiff's Response, 6/23/11, p. 4.] However, this case does not involve private securities litigation.

**E. Alleged Fraud and RICO Violations Do Not Stay Discovery:**

Based on his "public fraud" allegation, Plaintiff argues the City, the Library and Boone Karlberg are guilty of fraud and RICO violations. [Plaintiff's Response, 6/23/11, pp. 3-4 and 6-7.] However, setting aside that Plaintiff's Amended Complaint does not allege any RICO violation (Doc. 1), Plaintiff's

allegations are not supported by the facts or the law. *See, e.g., Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2138 (2008), and *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 (9<sup>th</sup> Cir. 1987). Specifically, Plaintiff has yet to explain how a coverage and defense decision made by the Montana Municipal Interlocal Authority, including its underwriting committee and its general counsel, gives rise to allegations of “public fraud” by the City, the Library and Boone Karlberg who played no role in making that determination. [Doc. 45, pp. 304; Doc. 45-1, ¶¶ 2-4.] Further, even assuming for purposes of the motion to compel that Plaintiff was correct, Plaintiff has not demonstrated why his “public fraud” allegations are grounds to stay discovery in this action.

**F. Discovery is Not Precluded By a Motion to Dismiss:**

Plaintiff argues a motion to dismiss prohibits discovery. [Plaintiff’s Response, 6/23/11, p. 2.] However, the motions to dismiss in this action were filed by Defendants Lee Enterprises and Boone Karlberg. [Docs. 5 and 11.] The discovery giving rise to this motion to compel was served by the City and Library Defendants. [Doc. 56.] Plaintiff does not explain how a motion to dismiss prohibits discovery by the non-moving parties.

## CONCLUSION

The Court should grant the motion to compel of the City and Library Defendants. Further, Plaintiff has not demonstrated why his refusal to answer discovery is substantially justified or why the circumstances make an award of expenses unjust. Indeed, plaintiff's arguments against the motion to compel reinforce why an award of expenses and fees are justified. In this regard, Plaintiff's motion to stay discovery has already been denied by the Court.

DATED this 30<sup>th</sup> day of June, 2011.

/s/ William L. Crowley  
William L. Crowley  
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 1,122 words, excluding the parts of the brief exempted by L.R. 7(d)(2)(E).

DATED this 30<sup>th</sup> day of June, 2011.

/s/ William L. Crowley  
William L. Crowley  
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 30<sup>th</sup> day of June, 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/ William L. Crowley  
William L. Crowley  
BOONE KARLBERG P.C.  
*Attorneys for Defendants Bitterroot Public  
Library, City of Hamilton,  
and Boone Karlberg P.C.*