

No. 137, Original

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In The  
Supreme Court of the United States

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STATE OF MONTANA,  
Plaintiff,

v.

STATE OF WYOMING  
and

STATE OF NORTH DAKOTA  
Defendants.

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Before the Honorable Barton H. Thompson, Jr.  
Special Master

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**ERRATA NOTICE FOR PAGES 15 AND 16 TO MONTANA'S  
OBJECTIONS TO WYOMING'S EXPERT DESIGNATION  
AND EXPEDITED MOTION FOR SUPPLEMENTAL DEPOSITIONS**

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April 15, 2013

The State of Montana submits this Errata Notice to correct pages 15 and 16 of Montana's Objections to Wyoming's Expert Designation and Expedited Motion for Supplemental Depositions. The following language on the original pages 15 and 16 has been removed:

Additionally, the Special Master warned Wyoming that the failure to provide adequate disclosures by the April 2, 2013, deadline could provide a basis for an extension of time for Montana to provide rebuttal disclosures. *See Exhibit A, Feb. 25, 2013 Status Conference Transcript, Pgs. 28-29.* Any prejudice caused by Wyoming's inadequate disclosure should be borne by Wyoming, not Montana. Accordingly, Montana should be granted an extension of time to file its rebuttal expert reports equal to the number of days between April 2, 2013 and the actual date Wyoming provides adequate non-retained expert disclosures.

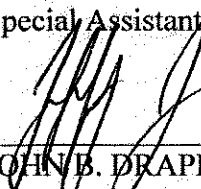
In place of this language, footnote 4 has been added, which states as follows:

Montana reserves the right to request an extension of time to file its rebuttal expert disclosure in the event that Wyoming's improper Designation prevents Montana from being able to fully respond.

Corrected pages 15 and 16 are attached hereto as Exhibit A.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of Errata Notice for Pages 15 and 16 to Montana's Objection to Wyoming's Expert Designation and Motion for Supplemental Depositions was served electronically, and by placing the same in the U.S. mail on April 15, 2013, to the following:

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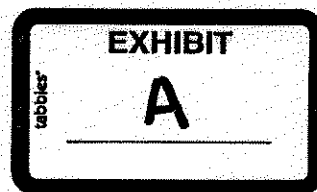
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I further certify that all parties required to be served have been served.

  
\_\_\_\_\_  
Jeffrey J. Wechsler

fact witnesses, produced them for depositions, and then subsequently informed the plaintiff that they intended to use them as expert witnesses at trial. Thereafter, the defendants refused to produce those same witnesses for an expert deposition and did not produce written expert reports. The court upheld the plaintiff's objections to these actions, and held that "once defendants designated [previously identified fact witnesses] as experts under Rule 26(a)(2)(A), they [were] subject to being deposed as experts notwithstanding their prior depositions as fact witnesses." *Id.*; see also *Paper Mill Holding Co., Ltd. V. D.R. Horton, Inc.*, 2009 WL 189936 (E.D. Penn.) (party entitled to redepose a previously disclosed fact witness because he was identified as an expert). The same reasoning applies in this case.

Finally, in rejecting Montana's request to take supplemental depositions of the individuals identified as experts, Wyoming ignores not only the requirements of Rule 26(a)(2), but the provisions of CMP No. 1. Section VIII.C.3.(b) of CMP No. 1 governs Wyoming's Rule 26(a)(2) expert disclosures. That section expressly precludes Montana from seeking "the content of Wyoming's disclosure through prior discovery." The prior depositions of Pat Tyrrell, Jeff Fassett, Sue Lowry, Pat Boyd, Mike Whitaker, David Schroeder, Dave Pelloux, Bill Knapp, Carmine LoGuidice, Kim French, Lisa Lindemann, John Barnes, and Alan Cunningham constitute such "prior discovery." See CMP No. 1, Sec. VIII.C.2 (provisions for "Deposition Discovery" are listed under general "Discovery" section). Thus, Montana was prohibited from inquiring into matters of expert opinion testimony during those depositions.



Accordingly, Montana should be allowed a supplemental deposition for each of the Employee Witnesses.<sup>4</sup>

### CONCLUSION

Wyoming's Disclosure reveals a strategy of trial by surprise contrary to the spirit of the discovery set forth in the Federal Rules of Civil Procedure and the specific requirements of Rule Rule 26(a)(2)(C) and the Special Master's CMP No. 1. Such dilatory trial strategy is not permitted by the Federal Rules and should not be permitted by the Special Master. For the reasons set forth above, Montana requests the following relief:

- a) With respect to Objection No. 1: An order either striking the Employee Witnesses listed in the Designation or requiring Wyoming to amend its Designation within three days to include a summary of the expert opinions and testimony for each of the Employee Witnesses, and the facts on which they base their opinions;
- b) With respect to Objection No. 2: An order precluding Wyoming from designating the entire transcripts for each of the fact-based depositions of the Employee Witnesses as expert testimony;
- c) With respect to Objection No. 3: An order clarifying that Wyoming's expert witnesses may only offer testimony that is based on or related to the opinions in the Designation;

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<sup>4</sup> Montana reserves the right to request an extension of time to file its rebuttal expert disclosure in the event that Wyoming's improper Designation prevents Montana from being able to fully respond.