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October 14, 2011

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Special Master
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Re: ***Montana v. Wyoming & North Dakota,***
No. 137, Orig., U.S. Supreme Court
Response to Wyoming's Rule 16 Letter Brief

Dear Special Master Thompson:

In its Brief in Opposition to Montana's Right to Raise Article V(B) Claims ("Wyo. Art. V(B) Br."), Wyoming asserted the novel theory that Rule 16 provides an independent basis for the Special Master to recommend dismissal of Montana's Article V(B) claims based on the pleadings and before discovery. Wyo. Art. V(B) Br. 24-28. In response to an inquiry from the Special Master, however, Wyoming conceded that it was aware of no case law that supported its theory. Transcript, *Hearing re: Montana's Right to Article V(B) Claims* 42:5-13 (Sept. 30, 2011) ("Tr."). The Special Master provided Wyoming an opportunity to file a letter brief identifying authority that it believes supports its position. Wyoming filed that letter brief on October 7, 2011. As permitted by the Special Master, Montana submits this Response to Wyoming's Rule 16 Letter Brief. *Id.* at 56:4:15, 57:9-12.

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I. Rule 16 Does Not Provide an Independent Basis to Exclude Montana's Article V(B) Claims at this Stage of the Proceedings

Wyoming argues that, regardless of whether Montana has pled Article V(B) claims, the Special Master should recommend that the Court dismiss those claims and prevent discovery without considering the merits. *Id.* at 40:13-19. At the hearing on Montana's Article V(B) claims, the Special Master requested authority from Wyoming that confirms the power to limit Montana's claims due to a lack of specificity in the pleadings prior to discovery. *Id.*, at 55:23 – 56:3. As demonstrated below, none of the cases cited by Wyoming supports Wyoming's position.

A. The Role of Rule 16 in the Trial Preparation Process

The pleading standard serves as the gateway to the judicial process. That standard is embodied in Rule 8, which requires the plaintiff to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. Rule 8, which has been referred to as the "keystone," Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 68, at 470 (6th ed. 2002), or the "jewel in the crown," Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1917 (1998), of the procedural system embodied in the Federal Rules, was designed to simplify the pleading system and to "focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). As the starting point of the litigation process, Rule 8's primary objective has traditionally been to put the defendant on notice of the claim asserted against it. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).

When a court is presented with a motion to dismiss a claim pursuant to Rule 12(b)(6), it applies the pleading standard to examine whether the claimant has failed "to state a claim upon which relief can be granted." By setting the threshold requirements that the plaintiff must satisfy in order to have access to discovery and other procedural mechanisms applied throughout litigation, Rule 8 serves as the gatekeeper to the federal courts.

Thus, it is Rule 8 and Rule 12 that serve to define the proper scope of Montana's claims in this case. As the Special Master has recognized, "the Complaint is broadly written to claim the protection of Article V as a whole, rather than of individual subparts." First Interim Report 95 ("FIR"). Moreover, Wyoming filed a Motion to Dismiss in the nature of a Rule 12(B)(6) motion, but that motion was denied. Thus, Montana's Article V(B) claims have met the Rule 8 and Rule 12 standards.

In contrast with Rule 8 and Rule 12, "[t]he primary focus of amended Rule 16 is on the mechanics of pretrial conferences and scheduling. The purpose of Rule 16 is to insure early judicial intervention in the process of trial preparation and proper conduct of that entire process." *In the Matter of Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984). Consistent with this purpose, each

of the cases cited by Wyoming in support of its Rule 16 argument focuses not on the scope of a properly pled claim, which is at the heart of the present issue, but on whether the parties have abused the pretrial procedures established by a court.

B. Rule 16 Does Not Apply at this Stage of an Original Proceeding

While it is true that the Federal Rules of Civil Procedure may be taken as guides, *see* Sup. Ct. R. 17.2, in this case, as in other original cases, it is the Case Management Plan ("CMP") that establishes the procedural rules governing the proceedings before the Special Master. The centerpiece of Rule 16 is the adoption of a pretrial order, yet no pretrial order has been adopted in this case, making the importation of Rule 16 principles inappropriate at this time.

That is not to say that Rule 16 will have no bearing on this case. The Court's guidance advises the Special Master to adopt a joint pretrial Order at the conclusion of discovery. That Order "should detail the parties' intended case presentations, list stipulated and contested facts and the credentials of expert witnesses, and lay out a plan for the trial." Guide for Special Masters in Original Cases before the Supreme Court of the United States at 9 (October Term 2004) ("Guide for Special Masters"). Consistent with this guidance, the draft CMP proposed by the parties and the Special Master contemplates a "final pretrial order" that will contain the information required by Rule 16. Draft Case Management Plan No. 1, at 17 (Sept. 28, 2011). But this final pretrial order is contemplated "following the completion of all discovery." *Ibid.* Wyoming's argument that the Special Master should utilize Rule 16 before the adoption of a pretrial order is inconsistent with the Supreme Court's caution that "[s]ince Masters are neither ultimate factfinders nor ultimate decisionmakers, they should err on the side of overinclusiveness in the record." Guide for Special Masters 9; *cf.* Transcript, *Status Conference*, 10:25 – 12:9 (Sept. 30, 2011) (Wyoming counsel explaining that a ruling in Wyoming's favor on either the Article V(B) motion or the interstate priority call motion would necessitate a delay while a second interim report is filed).

C. The Cases Cited by Wyoming Do Not Support Exclusion of Montana's Article V(B) Claims

After conducting its supplemental research on Rule 16, Wyoming has identified five cases that it contends support the dismissal of Montana's Article V(B) claims. Contrary to Wyoming's contention, however, not one of the cases cited by Wyoming stands for the proposition that Rule 16 provides a court the authority to dismiss or limit claims at the pleading stage prior to discovery, and prior to the adoption of a pretrial order (or CMP). A review of each of the five cases collected by Wyoming reveals that they are not applicable or even slightly analogous to the present matter:

- *Veranda Beach Club Ltd. P'ship v. Western Sur. Co.*, 936 F.2d 1364 (1st Cir. 1991). A partnership sued its former authorized agent and the agent's employer based on the forgery of a loan document. On the eve of trial, after discovery, and after the entry of the final pretrial order, the court struck plaintiff's negligent entrustment claim as a sanction for failure to comply with the pretrial orders. The court repeatedly observed that "the record confirms that [the plaintiff] failed to advance the [claim at issue] in any of its pretrial submissions." *Id.* at 1371.

- *In the Matter of the Sanction of Baker*, 744 F.2d 1438 (10th Cir. 1984). On the eve of trial, after discovery, and after the entry of the final pretrial order, the defendant sought a continuance for the convenience of counsel. The continuance was denied. Four days before trial, the third-party defendant moved separately for a continuance based on a failure to depose a critical witness. *Id.* at 1439. The court granted the requested continuance, but imposed a $175 sanction on each of the attorneys responsible for the failure to take the deposition in compliance with the Rule 16 scheduling order. According to the court, the record reflected a "pattern of negligence" in following the pretrial orders that "necessitated the cancelling of the jury trial and either wasting that jury time or trying to reschedule other matters to accommodate the unwarranted delay." *Id.* at 1441. It is also noteworthy that the court took pains to avoid sanctions that would have impacted the merits of the case. *Id.* at 1439.

- *Smith v. Gulf Oil Co.*, 995 F.2d 638 (6th Cir. 1993). Seamen brought an action against shipowners to recover for asbestos-related disease. The shipowners argued that the disease was caused by cigarette smoking, not asbestos. To counter this defense, at trial plaintiffs claimed for the first time that the shipowners were themselves responsible for plaintiff's tobacco-related conditions. *Id.* at 640-42. Two days after trial had commenced, the court ruled that Rule 16 barred plaintiffs from raising their claim. According to the court, "plaintiff's never identified [the claim] as a grounds for liability until two days after trial commenced." *Id.* at 642-43. "Neither their complaints . . . nor any of their discovery materials or other pretrial documents named cigarette smoke as a cause of injury." *Id.* at 643. Instead, the court viewed the plaintiffs' new claim as nothing more than a "tactical effort to persuade the shipowners not to offer -- or the court not to permit -- their defense." *Id.* at 644. According to the court, pursuant to Rule 16, "[i]f counsel fail to identify an issue for the court, the right to have the issue tried is waived." *Id.* (internal quotation omitted).

- *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212 (3rd Cir. 2007). Shareholders brought suit against an automaker in connection with a corporate

merger. The defendant failed to produce discoverable documents until the final day of a long trial. As a sanction for the egregious violation of Rule 16(f), Defendants were fined $500,000 for violating the court's scheduling order. *Id.* at 240-42.

- *Malone v. U.S. Postal Serv.*, 833 F.2d 128 (9th Cir. 1987). Plaintiff brought an employment discrimination action against the United States. Trial began in November 1984, but because plaintiff's attorney presented the case in a confused and inefficient manner, the court ordered a mistrial. *Id.* at 129. In December of 1984, the court issued a new pretrial order requiring both parties to submit a "complete list of witnesses and a thorough and complete list of each and every direct question and anticipated response." *Id.* After four months had passed, and two days before the list was due, plaintiff's attorney informed the defendant that plaintiff did not intend to comply with the pretrial order. *Id.* The day after the list was due, the plaintiff filed an objection to the pretrial order. The court applied a five factor test to determine that, based on the egregious and "bad faith" failure to follow the pretrial order, dismissal of the case was warranted. *Id.* at 130-31.

In summary, several key distinctions jump out that render the cases offered by Wyoming immaterial:

1. Not one of the cases offered by Wyoming limited a claim prior to discovery.

2. Not one of the cases offered by Wyoming limited a claim prior to the issuance of the final pretrial order.

3. Not one of the cases offered by Wyoming limited a claim based on the pleadings.

4. In this case, Montana has steadfastly maintained its Article V(B) claims.

5. Montana has complied with all orders and directives of the Special Master.

6. Each of the cases offered by Wyoming presents an extreme situation of bad faith or considerable prejudice that is not present in this case.

D. Montana's Article V(B) Claims Are Not Frivolous

In its Article V(B) brief, Wyoming argued that Rule 16(c)(2)(A) provides authority for the Special Master to dismiss Montana's Article V(B) claims at this stage of the proceeding. However, Wyoming cites only a single case that relies on this provision of the rule. *See Smith v.*

Gulf Oil Co., 995 F.2d 638 (relying on former version of Rule 16(c)(2)(A)). Rule 16(c)(2)(A) provides in relevant part that "[a]t any pretrial conference, the court may consider and take appropriate action on . . . formulating and simplifying the issues and eliminating frivolous claims or defenses." Based on the text of Rule 16(c)(2)(A), there are several problems with Wyoming's position.

First, as described above, Wyoming can cite to no case in which a court has dismissed a claim prior to discovery and prior to entry of the final pretrial order. To the contrary, courts have been clear that "[p]re-trial proceedings are designed to complement the trial function by simplifying issues and should not be used to invade the function of resolving such issues." *Klenk v. Capital Transit Co.*, 139 A.2d 275, 277 (D.C. Ct. App. 1958); *see also Ida Trust Co. v. U.S.*, 221 F.2d 303, 305 (2nd Cir. 1955) ("The functions of the Pretrial Conference described in rule and the Summary Judgment motion . . . are entirely different."); *McBryde v. Amoco Oil Co.*, 404 A.2d 200 (D.C. Ct. App.) ("It is only where the facts material to a cause of action are shown to be undisputed, and those facts so established indicate an unequivocal right to judgment favoring a party, that [sua sponte pretrial] summary disposition will be permitted" (internal quotation omitted)).

Next, no pretrial conference has been held, and no pretrial order has been entered.

Third, Montana's Article V(B) claims do not rise to the level of a "frivolous claim." According to Wyoming, *Smith* provides the measure of a frivolous claim. In that case, as described above, "[n]either [plaintiff's] complaints . . . nor any of their discovery materials or other pretrial documents named cigarette smoke as a cause of injury." 995 F.2d at 643. Rather, plaintiff's reliance on the new claim was no more than a "tactical effort." Here, Montana has raised real issues regarding Article V(B) that it has maintained since the inception of this case. Moreover, in *Smith*, the use of Rule 16 was justified because "counsel fail[ed] to identify an issue for the court [in the pretrial order]," and thus, plaintiff's "right to have the issue tried [was] waived." *Id.* (internal quotation omitted). No such waiver in a pretrial order has occurred in this case, and Wyoming's reliance on *Smith* and Rule 16(c)(2) is misplaced.

E. Sanctions Are in No Way Justified

Based on the cases submitted, Wyoming's primary Rule 16 argument seems to be that the Special Master should dismiss Montana's Article V(B) claims as a sanction for violating Rule 16. If so, Wyoming's position is itself frivolous.

Rule 16(f) provides in relevant part that "[o]n a motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . *fails to obey a scheduling order or other pretrial order*." (Emphasis added). However, as

discussed above, the CMP has not yet been entered, there is no scheduling order, and no pretrial order. Indeed, Montana has complied with every order of the Special Master and the Court.

Montana has attempted to be forthcoming about its Article V(B) claims, and has endeavored to meet the requests of the Special Master. At no time has Montana disregarded an order of the Special Master or engaged in "contumacious" behavior. Wyo. Ltr. Br. 2 (quoting *Matter of the Sanction of Baker*, 744 F.2d at 1440). For that reason, Wyoming's suggestion that the Special Master impose the drastic sanction of dismissal of Montana's Article V(B) claims is wildly inappropriate.

Courts "have long held that dismissal of an action with prejudice is a drastic sanction that should be employed only as a last resort." *Davis v. Miller*, 571 F.3d 1058 (10th Cir. 2009). As Wyoming acknowledges, the courts have applied five factors to determine if the drastic sanction of dismissal is appropriate:

> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Malone v. U.S. Postal Serv., 833 F.2d at 130. Each of these factors weighs heavily against dismissing Montana's Article V(B) claims in this action.

F. Original Jurisdiction Procedures Disfavor Exclusion of Montana's V(B) Claims

The dignity of this original action between States under the Constitution counsels against dismissing the Article V(B) claims under Rule 16. Further, dismissal of Montana's Article V(B) claims would be inconsistent with the Court's clear direction that original actions should be decided on their merits, after full-development of the facts. *See* Montana's Reply Brief in Support of Its Article V(B) Claims 10-11 (and cases cited therein). Nor would dismissal be consistent with the Court's guidance that Special Masters "should err on the side of overinclusiveness in the record." Guide for Special Masters 9.

II. Wyoming's Implication that Montana Has Failed to Prosecute Its Article V(B) Claims Is Misplaced

Finally, Wyoming cites two cases for the proposition that Montana's Article V(B) claims should be dismissed for failure to prosecute under either Rule 41(b) or the Court's inherent powers. But, as Montana has explained, this case is still in the preliminary stages, Montana has steadfastly maintained its Article V(B) claims, and Montana has never engaged in any action or lack of action that would justify a Rule 41(B) dismissal.

III. Conclusion

Montana should be allowed to pursue its Article V(B) claims in this case.

Sincerely yours,

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