Office of the Attorney General

Governor
Matthew H. Mead

Attorney General
Gregory A. Phillips

Water and Natural Resources Division
123 State Capitol
Cheyenne, Wyoming 82002
307-777-6946 Telephone
307-777-3542 Fax

Chief Deputy Attorney General
Peter K. Michael

Division Deputy
Jay A. Jerde

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Barton H. Thompson Jr.
Special Master
Susan Carter, Assistant
Jerry Yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205

Re: *Montana v. Wyoming & North Dakota*
No. 137 Orig., U.S. Supreme Court
Rule 16 Letter Brief

Dear Special Master Thompson:

The State of Wyoming submits this list of cases regarding your authority to dismiss a claim for relief under the Federal Rules of Civil Procedure or your inherent case management power. As you instructed at the hearing of September 30, 2011, a brief description of each case is included.

Rule 16 Cases

1) *Veranda Beach Club Ltd. P'ship v. W. Sur. Co.,* 936 F.2d 1364 (1st Cir. 1991). The First Circuit Court of Appeals affirmed the order of a magistrate judge striking a claim under Rule 16(f) even though it had appeared in the complaint. *Id.* at 1370. It held that the plaintiff had an obligation to keep the claim "sufficiently developed and perennialized" during pretrial proceedings: "As a case takes shape and the court struggles to narrow and pinpoint the issues, the parties have an unflagging obligation to spell out squarely and distinctly those claims they desire to advance at the trial proper. Good-faith

compliance with Civil Rule 16 plays an important role in this process." *Id.* at 1371. The First Circuit stated that "[t]he proper performance of the case-management function requires that the trial court be allowed great latitude in applying Rule 16(f)." *Id.* at 1370.

2) *Matter of Sanction of Baker,* 744 F.2d 1438 (10th Cir. 1984). In discussing the 1983 amendments that added subsection (f) to Rule 16, the Tenth Circuit stated: "[T]here can be no doubt that subsection (f), added as part of the 1983 amendments to Rule 16, indicates the intent to give courts very broad discretion to use sanctions where necessary to insure not only that lawyers and parties refrain from contumacious behavior, already punishable under the various other rules and statutes, but that they fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial." *Id.* at 1440. The court also held that the sanctions allowed under Rule 16(f), through incorporation of Rule 37, can be applied to all pretrial matters, not just to formal pretrial conferences. *Id.* at 1441.

3) *Smith v. Gulf Oil Co.,* 995 F.2d 638 (6th Cir. 1993). Here, counsel for the plaintiff seamen in a Jones Act case relied on asbestos exposure to support shipowner liability during the four years between filing suit and the trial. *Id.* at 642. The seamen then attempted at trial to assert a new mechanism of liability, exposure to second hand smoke in the confined quarters aboard ship. *Id.* The Sixth Circuit affirmed the district court's refusal to allow this new factual theory based on Rule 16, stating: "While a party's tardiness in raising an issue may not always render the issue extraneous, tardiness coupled with other indications can raise doubts as to the seriousness with which that party is prepared to present the argument at trial." Id. at 643. The court also cited *Veranda Beach,* 936 F.2d 1364, for the proposition that even if a claim is contained in the complaint, it can be lost due to the plaintiff's failure to pursue it during pretrial proceedings. *Smith,* 995 F.2d at 643 n.4.

4) *Tracinda Corp. v. DaimlerChrysler AG,* 502 F.3d 212, 240-41 & n.20 (3rd Cir. 2007). Among the sanctions contemplated by Rule 16 (f)(1) are dismissing the case or striking claims or defenses because such sanctions are specified in Rule 37(b)(2)(A)(iii) & (v) which Rule 16(f)(1) incorporates by reference.

5) *Malone v. U.S. Postal Serv.,* 833 F.2d 128 (9th Cir. 1987). The Ninth Circuit affirmed the district court's dismissal of the plaintiff's entire employment discrimination suit under Rules 16(f) and 41(b). *Id.* at 130. The district court had ordered plaintiff's counsel to list witnesses and give expected questions and answers on direct examination because the case had already been mistried because of lack of preparation by the plaintiff, but the plaintiff had not complied. *Id.* at 129. The Ninth Circuit followed a five-factor test in reaching its conclusion that the district court did not abuse its discretion by dismissing. *Id.* at 130.

Inherent Authority and Rule 41(b)

1) *Link v. Wabash R.R. Co.,* 370 U.S. 626 (1962). A court may dismiss for want of prosecution under Rule 41(b), in the absence of a motion by the opposing party. *Id.* at 630. The Court stated: "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31.

2) *Indus. Bldg. Materials, Inc. v. Interchemical Corp.,* 278 F. Supp. 938 (C.D. Cal. 1967). The district court accepted a pretrial procedure proposed by the plaintiff to sharpen the issues. *Id.* at 945. The court required the plaintiff to provide a written narrative of its claims under the anti-trust laws. This procedure followed the plaintiff's repeated failure to give facts in its answers to the defendant's interrogatories. When the court received an inadequate narrative, it dismissed, not only in response to the defendant's motion to dismiss for lack of prosecution under Rule 41(b), but also under its inherent powers to protect the integrity of the court and its orders. *Id.* at 948-49 (citing *Link,* 370 U.S. at 629).

Sincerely,

Peter K. Michael
Counsel of Record
Chief Deputy Attorney General
David Willms
Senior Assistant Attorney General

cc: Jennifer Anders
Jennifer Verleger
William M. Jay
Jeanne S. Whiteing
John B. Draper
James DuBois
Michael Wigmore