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Listed on Exhibit A

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER, Individually and on Behalf of Others Similarly Situated,

Petitioners,

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE CORPORATION,

Intervenor.

WCC No. 2000-0222

COMMON FUND INSURERS' GENERAL MOTION TO DISMISS

COME NOW the Common Fund Insurers listed on Exhibit A hereto, and pursuant to the Court's April 22, 2009 status conference and minute book hearing entry, submit this General Motion to Dismiss with supporting authority and argument. Common Fund Insurers respectfully move to dismiss the common fund claims asserted against them by Petitioners Robert Flynn and Carl Miller for the following reasons:

I. Because Common Fund Insurers were not parties to the case at the time, this Court's decisions finding a global common fund cannot be enforced against Common Fund Insurers consistent with the Due Process clause of the United States and Montana Constitutions. Once the common fund slate is wiped clean, it is readily apparent that no common fund could ever be maintained against Common Fund Insurers because workers' compensation claim files generally do not identify a claimant's attorney in a separate, wholly unrelated Social Security Disability benefits matter, much less the exact amount charged by that attorney.

Thus, potential beneficiaries of the Supreme Court's decision in *Flynn v. State Fund*, 2002 MT 279, 312 Mont. 410, 60 P.3d 397 ("*Flynn I*"), are not identifiable on superficial file review, and benefits cannot be calculated with certainty – two critical components of any common fund.

II. Petitioners lack standing to pursue any claims against Common Fund Insurers. They have already been paid, and have no stake in the outcome of this proceeding. Absent a genuine case or controversy, the Court lacks subject matter jurisdiction, and the case must be dismissed as to Common Fund Insurers.

III. Petitioners' claims against Common Fund Insurers must be dismissed because they have not mediated with Common Fund Insurers, a jurisdictional prerequisite to summoning Common Fund Insurers before this Court. *See* § 39-71-2401, MCA, *et seq.*

IV. Requiring Common Fund Insurers to identify and solicit claims from potential *Flynn I* beneficiaries would impermissibly reverse the burden of proof.

V. In the alternative, in the event this Court does not dismiss this action as against Common Fund Insurers, this Court should rule that any claim for common fund attorney fees by Petitioners' counsel is limited to $326 – the amount of fees actually incurred by the active litigants.

This General Motion to Dismiss presents the constitutional, statutory, and common law grounds for dismissal of Common Fund Insurers.[1] In light of the dispositive nature of this General Motion to Dismiss, Common Fund Insurers do not present or move on any "implementation" issues that presume common fund liability, and are not aware of any present disputes with Petitioners over such implementation issues. Until such time as this proceeding reaches the "implementation" stage and disputes arise, Common Fund Insurers submit that it would be inappropriate to seek the Court's advisory opinion on such issues. In the event, however, that other parties raise and brief implementation issues, Common Fund Insurers reserve their rights to join and brief such issues.

[1] As the Court is aware, Common Fund Insurers have previously briefed these issues in *Schmill v. Liberty Northwest Ins. Corp.*, WCC No. 2001-0300. Adopting the special master's recommendations, the Court denied Common Fund Insurers' motion to dismiss in *Schmill* "because it challenge[d] determinations already made by the Montana Supreme Court," and because the "WCC is not empowered to alter those decisions." *Schmill*, 2008 MTWCC 38, ¶ 9. The Court therefore did not address the substantive arguments presented, but certified the decision for appeal. Mindful of the Court's interest in judicial efficiency, Common Fund Insurers note that the appeal of the ruling in *Schmill* has been fully submitted to the Supreme Court following oral argument on May 20, 2009.

BACKGROUND

On December 2, 2002, the Montana Supreme Court held in *Flynn I* that State Fund must contribute to the litigation costs and attorney fees that Petitioners incurred in pursuing Social Security Disability ("SSD") awards, in proportion to the benefits that State Fund actually received by offsetting Petitioners' workers' compensation indemnity benefits as authorized by Montana law. The Court later found that *Flynn I* resulted in a global common fund. 2003 MTWCC 55, DE# 63; *see also* 2004 MTWCC 17, DE# 86[2] (Order Clarifying Global Lien). Over a year later, around May 4, 2005, nearly all workers' compensation insurers registered to write business in the State since 1974, including Common Fund Insurers, were summoned to appear as respondents in this common fund action. Summons, DE# 132.

On behalf of claimants who may benefit from *Flynn I*, Petitioners seek in this common fund action to collect from those insurers who, as authorized by existing law, partially offset workers' compensation indemnity benefits to account for the claimants' receipt of SSD benefits without adjusting the offset amount to account for insurers' share of claimants' SSD attorney fees and expenses. Petitioners seek to require Common Fund Insurers to analyze claim files stretching back to 1974 to determine if any claimants may be eligible for a retroactive adjustment of indemnity benefits based on *Flynn I*. Petitioners do not identify any beneficiary of *Flynn I* who is owed benefits by any Common Fund Insurer. Petitioners also do not explain why they believe that Common Fund Insurers would be able to calculate with certainty the amount of retroactive benefits owed – a calculation based on the amount of attorney fees and costs incurred by the claimant in a wholly unrelated proceeding.

Common Fund Insurers submit that the common fund action brought by Petitioners suffers from numerous Constitutional, statutory, and common law infirmities that warrant dismissal with prejudice of Common Fund Insurers.

ARGUMENT

I. EARLIER DECISIONS IN THIS CASE MAY NOT BE ENFORCED IN A GLOBAL COMMON FUND ACTION WITHOUT VIOLATING COMMON FUND INSURERS' DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS

Petitioners seek in this common fund action to apply their judgment against State Fund in *Flynn I* against an entire class of industry defendants. But Common Fund Insurers were not parties to the case when *Flynn I* was decided, or when the Court found that *Flynn I* created a global common fund. Petitioners' argument directly conflicts with the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated

[2] References to documents filed in this action are identified by reference to their docket number on the electronic docket maintained by the Court in the format "DE# [docket entry number]."

as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Taylor v. Sturgell*, 553 U.S. __, 128 S.Ct. 2161, 2166-67 (quoting *Hansberry*).[3] Indeed, any "holding to the contrary would . . . endorse a Kafka-like view of American law" that would be unconstitutional under the Due Process Clause." *In re Kewanee Boiler Corp.*, 297 B.R. 720, 729 (N.D. Ill. Bankr. 2003) (holding that a "claimant who is not noticed and therefore is not allowed to participate in the Chapter 11 process is not bound by it").

Petitioners' common fund theory threatens the minimum due process requirements that the United States Supreme Court has recognized consist of notice and an opportunity for hearing before liability is established:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta v. Heights Med. Center, Inc.*, 485 U.S. 80, 84 (1988) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

Montana decisions echo this bedrock principle that those who are not parties to an action are not bound by it. *See Anderson v. Werner Enters., Inc.* (1998), 292 Mont. 284, 291 (a statute violates "due process to the extent that it allowed apportionment of liability to parties who were not named in the pleadings and did not have the opportunity to appear and defend themselves"); *S-W Co. v. Schwenk* (1977), 173 Mont. 481, 553-54 (individual "was not bound by the court's conclusions of law and judgment since he was not a party"); *State ex rel. McKnight v. Dist. Ct.* (1941), 111 P.2d 292, 295("[N]o one acquainted with the elemental Anglo-Saxon requirement of due process and a fair opportunity to be heard could have expected to bind those not made parties."). But that is exactly what Petitioners seek to do – to enforce under the "global common fund doctrine" the judgment in *Flynn I* against hundreds of insurers that were not summoned to become parties to the case until over two years after *Flynn I* was decided. *See* DE# 132. Such after-the-fact enforcement of judgments against non-parties is precisely what our federal and state constitutions forbid.

A. Due Process Required Petitioners to Join and Serve Responding Insurers with Summonses Before, Not After, Judgments and Orders Were Entered

[3] United States Supreme Court decisions interpreting federal constitutional rights are binding precedent on both federal and state courts. *See J.I. Case Threshing Mach. Co. v. Stewart* (1921), 60 Mont. 380, 199 P. 909, 911 ("[T]he decisions of the Supreme Court of the United States are conclusive and binding upon us to the same extent and with the like effect as are the Constitution and laws of the United States, anything in our own Constitution, statutes, and decisions to the contrary notwithstanding.").

In order to join and state a claim against Common Fund Insurers, Petitioners were required to serve Common Fund Insurers with summons before entry of judgment.[4] That is how our legal system affords respondents adequate notice and a meaningful opportunity to be heard. *See Richland Nat. Bank & Trust v. Swenson* (1991), 249 Mont. 410, 423, 816 P.2d 1045, 1053 ("Service of the summons is the means by which the district court acquires personal jurisdiction over the defendant."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (explaining that the requirement of personal jurisdiction flows from the Due Process Clause – "It represents a restriction on judicial power . . . as a matter of individual liberty"). Courts are clear that the notice and opportunity to be heard must be "meaningful and timely." *Crismore v. Montana Bd. of Outfitters*, 2005 MT 109, ¶ 15, 327 Mont. 71, ¶ 15, 111 P.3d 681, ¶ 15 (citations omitted); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'") (citation omitted); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 833 (3rd Cir. 1973) ("[D]ue process is of 'little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'") (citations omitted).

Notice is not timely and meaningful, and thus constitutionally inadequate, if it does not afford a meaningful opportunity to prepare one's case. *Tax Lien Services v. Hall* (1996), 277 Mont. 126, 131, 919 P.2d 396, 399 (holding that actual notice is a "minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertain-able") (citation omitted); *In re Gault,* 387 U.S. 1, 33 (1967) (holding notice to parents the night before a juvenile delinquency hearing was constitutionally inadequate; due process requires that notice "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"). As Justice Brandeis explained in words that ring true today:

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . . Unless duly summoned to appear in legal proceeding, a person not privy may rest assured that a judgment recovered therein will not affect his legal rights.

Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441 (1934).

Common Fund Insurers were not parties and had not been afforded notice or an opportunity to be heard when this Court (1) ruled on the merits of *Flynn I*, and (2) found that *Flynn I* created a global common fund. 2003 MTWCC 55, DE# 63; *see also* 2004 MTWCC 17, DE# 86. Petitioners, however, did not seek to "duly summon" and join Common Fund Insurers as party respondents until over a year after the Court issued its global common fund decision. *See* DE #132. Such after-the-fact notice provided Common Fund Insurers with no meaningful opportunity to be heard in violation of their due process rights.

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[4] The docket does not reflect proof of service upon Common Fund Insurers, or the method of service for that matter.

B. Judgment and Decisions Entered Without Due Process May Not Be Enforced Against Common Fund Insurers

Because Common Fund Insurers were not joined as parties to this action until May 2005, the Court may not enforce its prior judgment in *Flynn I* and its global common fund decision against them. Under binding precedent from both the United States Supreme Court and the Montana Supreme Court, enforcement of these decisions against Common Fund Insurers would violate their due process rights. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996) (concluding "that the State Supreme Court's holding that petitioners are bound by the [earlier] adjudication in *Bedingfield* deprived them of the due process of law guaranteed by the Fourteenth Amendment"); *Loeger v. Reiner*, 2005 MT 155, ¶ 18, 327 Mont. 424, ¶ 18, 114 P.3d 1028, ¶ 18 (holding that due process would not allow plaintiff to serve and join sole member of LLC to action after judgment had been entered); *Hughes v. Salo* (1983), 203 Mont. 52, 59, 659 P.2d 270, 273 ("Montana has long recognized that the judgment of a court acting without jurisdiction is invalid from its inception.").

C. Only Wiping the Common Fund Slate Clean Would Restore Common Fund Insurers to the Position They Would Have Occupied Had Due Process Been Afforded Them in the First Place

Only by wiping the common fund slate clean and considering the common fund issues *de novo* would Common Fund Insurers be afforded adequate due process rights. It is no answer to argue that the Court has already addressed and decided these issues. Such reasoning would eviscerate the fundamental protection afforded by the Due Process Clause of the Fourteenth Amendment to the United Stated Constitution and Article 2, Section 17 of the Montana Constitution.

Indeed, the Supreme Court has addressed, and rejected, this very argument. In *Peralta*, the plaintiff argued that although its attempt at service was ineffective, the default judgment entered against the defendant should stand because "no meritorious defense had been shown" as required to vacate such a judgment under Texas law. *Peralta*, 485 U.S. at 86. The Supreme Court resoundingly rejected this contention, stating in terms that apply squarely to this case:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 356 S.Ct. 625, 629, 59 L.Ed. 1027 (1915). As we observed in *Armstrong v. Manzo*, 380 U.S., at 552, 85 S.Ct., at 1191, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

Id. at 86-87 (alteration in original).

"Wiping the slate clean" is particularly warranted in this case. Indeed, the Court has previously recognized that "other insurers should be provided an opportunity to contest the retroactivity issue of the *Flynn* decision and the existence of a common fund." DE# 93 (Minute Book Hearing #3500, at 2). Moreover, refusing to wipe the slate clean in this case would only exacerbate the prejudice to Common Fund Insurers. Although State Fund initially appealed the Court's finding of a common fund, it "thereafter entered into a mutually agreeable settlement which resulted in the dismissal of the appeal." DE# 99 (Decision and Order Regarding Disclosure of Claimant Information, ¶¶ 3-4). Moreover, the record does not reflect any objection by State Fund or intervenor Liberty to the "global" common fund or to the issuance of summons to Common Fund Insurers and others. As the Court is aware, Common Fund Insurers raised its Due Process and other defenses with their initial response to the Summons. *See* DE# 278.

Common Fund Insurers also asserted in their initial response to the Summons that no common fund claim may be maintained as against them because the purported non-participating beneficiaries of the *Flynn I* decision are not readily ascertainable. DE # 278. Fifteen months after Common Fund Insurers raised that defense in this case, the Court in *Stavenjord v. State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 (*Stavenjord II*) accepted that very defense by ruling that a common fund cannot exist unless its beneficiaries are readily identifiable upon "superficial review of case files." *Stavenjord II*, ¶ 27. Thus, unlike the case of *Peralta*, Common Fund Insurers have already presented a meritorious defense to Petitioners' claim that a common fund was created by the *Flynn I* decision.

Enforcing the Court's prior common fund rulings in this case would deprive Common Fund Insurers of all opportunity to contest the existence of a global common fund – contrary to both Judge McCarter's understanding and due process. *See Valley Nat'l Bank of Az. v. A.E. Rouase & Co.*, 121 F.3d 1332, 1338 (9th Cir. 1997) (holding "that the judgment against the Varga Group can not be enforced against the Rouse Partnerships [general partners of the Varga Group], or against the Rouses individually as partners of those partnerships, because the Rouse Partnerships were neither served nor named in the underlying lawsuit"); *Hughes*, 203 Mont. at 58, 659 P.2d at 273 ("*A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.*" (quoting *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878) (emphasis added by Montana Supreme Court))).

D. After Wiping the Common Fund Slate Clean, it is Readily Apparent that No Common Fund Resulted From *Flynn I* as to Common Fund Insurers

This Court decided in 2004 that *Flynn I* gave rise to a global common fund. 2004 MTWCC 17, DE# 86. Two years later, in *Stavenjord II*, the Montana Supreme Court clarified the requirements for a common fund to arise from a judicial decision. As the Petitioners must surely recognize, *Stavenjord II* is binding precedent that is presumed to apply retroactively. *Stavenjord II*, ¶ 9 (citing *Dempsey v. Allstate Ins. Co.*, 2004 MT 391,

¶ 15, 325 Mont. 207, ¶ 15, 104 P.3d 483, ¶ 15). No common fund could arise from *Flynn I* under *Stavenjord*'s guidance.

Stavenjord set forth the three (3) elements necessary to establish a common fund for workers' compensation claims:

> First, a party ... must create, reserve, preserve, or increase an identifiable monetary fund of benefit in which all active and non-participating beneficiaries have an interest. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, non-participating beneficiaries.

Stavenjord II, ¶ 24 (citing *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, ¶ 16, 322 Mont. 478, ¶ 16, 97 P.3d 561, ¶ 16). The Court reiterated the requirement that non-participating beneficiaries and the benefits due them must be "readily identifiable on a superficial review of case files." *Stavenjord II*, ¶ 27.

Stavenjord II's common fund criteria cannot be remotely met in this case. No common electronic tags indicate claims where an offset was taken to account for a SSD award. As such, Common Fund Insurers would be required to manually identify and search each workers' compensation claim file to determine if the claimant received an SSD award. Even if Common Fund Insurers could locate claim files with SSD offsets on superficial review, the claim files generally would not reflect how much the claimant incurred in attorney fees to obtain the SSD award. After all, the claimant would have engaged counsel for a wholly unrelated matter, and insurers would have had no reason to pry into the details of that engagement. Prior to *Flynn I*, insurers would have had no reason to even inquire into the amount of attorney fees incurred. As a result, those claimants who incurred attorneys fees to obtain SSD benefits understandably cannot be readily identified upon a superficial review of Common Fund Insurers' claim files. Indeed, Petitioners do not identify a single claimant owed *Flynn I* benefits from any Common Fund Insurer, and certainly do not allege that Common Fund Insurers know how much each claimant incurred in attorney fees to obtain a SSD award. No common fund certification could be maintained in this case as to Common Fund Insurers under the retroactive criteria set forth in *Stavenjord II.*

E. Dicta from other Common Fund Decisions Did Not Address or Overrule, and Cannot Trump, Fundamental Due Process Principles

In *Schmill*, the petitioner argued that "there is no due process requirement" in common fund cases, relying on dicta from *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, 322 Mont. 478, 97 P.3d 561, and *Murer v. State Fund* (1997), 283 Mont. 210, 942 P.2d 69 (*Murer III*). Although the case is on appeal, this Court cited with approval dicta from *Ruhd* and *Murer*, and read *Stavenjord II* to "suggest[] that the Supreme Court contemplates that when benefits are found 'retroactively' payable as the result of workers' compensation decisions, insurers must take the initiative to locate and notify claimants impacted by a decision, even if common fund fees are not to be paid." *Schmill*, Docket #441, *Findings* ¶ 17. The cases cited, however, do not address, much

less reconcile, application of the common fund doctrine with Common Fund Insurers' due process rights. Common Fund Insurers respectfully submit that dicta from common fund cases does not provide an exception to, or override, fundamental due process rights.

In *Ruhd*, the court considered an appeal involving competing common fund claimants, one of whom intervened to preserve his counsel's right to common fund attorney fees arising from *Rausch v. State Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25, which held that impairment awards should be paid immediately (instead of at retirement). The petitioner in *Ruhd* sued for the same benefit—an immediate impairment award—while the appeal in *Rausch* was pending. *Ruhd*, ¶ 7. Following the decision in *Rausch*, Liberty paid Ruhd an impairment award, but Ruhd continued to seek class action or common fund status against Liberty. *Id.* ¶ 10. The Court denied class and common fund certification, and Ruhd appealed. *Id.* On appeal, Liberty did not submit a brief, and the State Fund advocated as *amicus curiae* that common fund fees should apply equally to all workers' compensation insurers in Montana. *See Ruhd v. Liberty Northwest Ins. Corp.*, No. 03-504, *Amicus Curiae* Br. of State Fund at 3-4. The court declined to find a separate common fund in favor of Ruhd's counsel because "[t]he *Rausch* decision disposed of the questions presented by Ruhd," and the "law established by *Rausch* will not be changed by further suits." *Ruhd*, ¶¶ 22, 24. In the context of these competing common fund claims, the Court's specific holding was that the common fund created by *Rausch* includes fees culled from all claimants regardless of insurer. *Id.* ¶ 25. The Court's statement that "liability for immediate payment of impairment awards was established against all insurers" upon the decision in *Rausch* was "not necessary to the resolution of the issue before [the Court] and, therefore, was dictum." *State ex rel. Mazurek v. District Court of Twentieth Judicial Dist.*, 2000 MT 266, ¶ 13, 302 Mont. 39, ¶ 13, 22 P.3d 166, ¶ 13 ("Dictum is not binding precedent."). Indeed, the Court directed the WCC to supervise the enforcement of the common fund against the "insurers involved," not those that were not parties or involved in the case. *Ruhd*, ¶ 25 (emphasis added).

Murer similarly provides no support for an argument that a global common fund gives rise to an after-the-fact judgment enforcement action against an industry of defendants. The Montana Supreme Court held in *Murer III* that this Court erred when it failed to award claimants reasonable attorney fees from the common fund created after State Fund was "able to determine, with certainty, the number of absent claimants involved and the amount of money to which each individual claimant [was] entitled." *Murer III*, 283 Mont. at 223, 942 P.2d at 77. *Murer* involved only one insurer, State Fund, and this Court had expressly rejected the idea of a sprawling industry class of defendants, stating:

> This Court has found no authority and petitioners cite none which would permit an unknown number of class members, yet to be identified to blindly sue an unknown number of defendants. In essence, the way in which the pleadings are drafted creates not only a class of petitioners but also a "class of defendants." . . . [T]he plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings.

Murer I (1993), 257 Mont. 434, 437-38, 849 P.2d 1036, 1038.

Significantly, the court did not hold in either *Ruhd*, *Murer,* or *Stavenjord II* that it could exercise jurisdiction over all insurers in the state and order them to immediately scour their records over the past two decades to identify and pay potential beneficiaries – nor could it if the insurers had not been named as parties and served with a summons prior to the entry of judgment. While the decisions in *Rausch* and *Murer* recognized a "vested right" to benefits, *see Murer III*, 283 Mont. at 223, 942 P.2d at 77, it remains the obligation of the claimants to identify themselves and prove their entitlements under *Schmill I*. *Rausch*, *Ruhd*, and *Murer* did not purport to revise this fundamental rule. Moreover, the "vesting" of benefits by judicial decision is no different than any other right to benefits that "vests" upon workplace injury. The claimant must still prove entitlement to benefits. If the parties disagree as to whether the claim is truly vested or as to the amount, then mediation is required before a petition may be filed with this Court. *Ruhd* and *Murer* neither purport to alter that process nor create any exception to due process requirements. Fundamental due process rights and decades of precedent should not be cast aside on the basis of dicta that does not even squarely address due process rights.

II. BECAUSE PETITIONERS LACK STANDING, THEY PRESENT NO REAL CASE OR CONTROVERSY AS REQUIRED TO AFFORD THE COURT WITH SUBJECT MATTER JURISDICTION

A. The Court Lacks Subject Matter Jurisdiction to Adjudicate a Claim that Does Not Present an Actual Case or Controversy

Under the Montana Constitution, the courts of this state are not empowered to hear cases that do not present actual cases or controversies. Analyzing Article VII, Section 4 of the Montana Constitution, the Montana Supreme Court has recognized that:

> The constitutional provision in Article VII, Section 4 of the Montana Constitution which extends original jurisdiction of a district court to "cases at law and in equity," has been interpreted as embodying the same limitations as those imposed on federal courts by the Article 3, "case or controversy" provision of the United States Constitution.

Seubert v. Seubert, 2000 MT 241, ¶ 17, 301 Mont. 382, ¶ 17, 13 P.3d 365, ¶ 17 (citations omitted). Moreover, the absence of an actual case or controversy leaves the court without subject matter jurisdiction. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005).

B. Without Standing, There is No Actual Case or Controversy

In the absence of a petitioner with standing, there is no actual case or controversy. As succinctly stated by the Ninth Circuit:

> A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit.

Cetacean Community v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) (citations omitted). The concept is rooted in both federal and Montana jurisprudence. In the words of the Montana Supreme Court:

> the concept of standing arises from ... the doctrine of constitutional limitations drawn from the "cases and controversies" definition of federal judicial power in Article III of the United States Constitution and the "cases at law and in equity" definition of state judicial power in Article VII, Section 4, Montana Constitution.

Missoula City-County Air Pollution Control Bd. v. Board of Environmental Review (1997), 282 Mont. 255, 260, 937 P.2d 463, 466.

The "irreducible constitutional minimum" required by Article III consists of an injury in fact that is fairly traceable to the defendants' conduct and that can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish standing, Petitioners must allege and show they have personally been injured by Common Fund Insurers, "not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Olson v. Dep't of Revenue* (1986), 223 Mont. 464, 470, 726 P.2d 1162, 1166. Absent a showing of a genuine case or controversy with Common Fund Insurers, Petitioners may not seek relief on behalf of themselves or any other member of the purported class of *Flynn I* beneficiaries. *See id.* The law is well settled. A petitioner without standing does not present an actual case or controversy, and thus, the Court lacks subject matter jurisdiction over Petitioners' common fund claim against Common Fund Insurers.

C. Petitioners Lack Standing When They Have No Personal Stake in the Outcome of the Litigation

Applying the holdings of *Olson* and *Lujan*, Petitioners lack standing if they cannot demonstrate a personal injury traceable to Common Fund Insurers' alleged misconduct. *See also In re Paternity of Vainio* (1997), 284 Mont. 229, 235, 943 P.2d 1282, 1286 ("A party has no standing when there is no personal stake in the outcome of the controversy. The mere fact that a person is entitled to bring an action under a given statute is insufficient to establish standing; the party must allege some past, present or threatened injury which would be alleviated by successfully maintaining the action."). The United States Supreme Court has tied the standing requirement directly to the Constitution:

> The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Allen v. Wright, 468 U.S. 737, 751 (1984); *see also Lujan*, 504 U.S. at 560-61 ("irreducible constitutional minimum"). The result is clear: if Petitioners do not have a personal stake in the outcome of their claim against Common Fund Insurers, i.e. a personal injury traceable to the Common Fund Insurers' alleged misconduct likely to be redressed by the relief requested, they lack standing and therefore fail to present the actual case or controversy necessary for the court to exercise subject matter jurisdiction over the claim against Common Fund Insurers.

D. Because Petitioners Have Been Paid their Benefits Following *Flynn I*, They Have No Stake in the Outcome of a Claim Against Common Fund Insurers, and Therefore Do Not Present an Actual Case or Controversy for the Court to Adjudicate

Petitioners do not and cannot allege a personal injury traceable to Common Fund Insurers' conduct, let alone one that could be redressed by the relief requested. Presumably, Petitioners have already been paid in full any benefits owed to them by State Fund after *Flynn I* was decided. Not only do Petitioners fail to allege a personal injury traceable to Common Fund Insurers, they cannot demonstrate any benefits currently owed to them by any insurer. Their common fund claims against Common Fund Insurers should be dismissed with prejudice.

III. THIS ACTION MUST BE DISMISSED ON JURISDICTIONAL GROUNDS BECAUSE PETITIONERS HAVE NOT FULFILLED THEIR STATUTORY DUTY TO MEDIATE WITH COMMON FUND INSURERS BEFORE SUMMONING THEM AS PARTY RESPONDENTS

Even if the constitutional requirements of due process and standing could be disregarded, this Court should dismiss Petitioners' claims against Common Fund Insurers because they have not mediated and satisfied statutory jurisdictional requirements. *See* § 39-71-2401, MCA, *et seq.* Mediation is statutorily required before a party may petition this Court:

> A dispute concerning benefits arising under this chapter ... must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

§ 39-71-2401, MCA. *See also* § 39-71-2408, MCA ("Except as otherwise provided, in a dispute arising under this chapter, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation

process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.").

Applying this statutory requirement, the Montana Supreme Court has unequivocally held that the failure to mediate deprives this Court of jurisdiction:

> As § 39-71-2408(1), MCA, states, mediation is mandatory under the Workers' Compensation Act before a party can even petition the Workers' Compensation Court for relief. In addition, the Workers' Compensation Court does not have jurisdiction during the pendency of a statutorily-mandated mediation, given that a claimant may only petition the Workers' Compensation Court "after satisfying dispute resolution requirements otherwise provided" in the Workers' Compensation Act-such as mandatory mediation.

Preston v. Transportation Ins. Co., 2004 MT 339, ¶ 36, 324 Mont. 225, ¶ 36, 102 P.3d 527, ¶ 36 (emphasis added). Consistent with *Preston*, this Court has held that "[m]ediation of a claim for benefits is a jurisdictional prerequisite. The requirement extends to 'any issue' the claimant wishes to litigate." *Peterson v. Montana Schools Group Ins. Authority*, WCC No. 2005-1295, 2005 MTWCC 30, ¶ 12 (citations omitted).

Petitioners have never mediated their claims against Common Fund Insurers. And there can be no dispute that Petitioners' claims to common fund benefits and attorney fees fall within the purview of the mediation statutes. The "common fund entitlements" that Petitioners seek to recover on others' behalf are benefits arising under the Workers' Compensation Act, and counsel's attorney fee lien is derived exclusively from those benefits. Thus, mediation is legislatively mandated by § 39-71-2401, MCA, *et seq.*, and the Court lacks jurisdiction until this statutory prerequisite is fulfilled. *Preston*, ¶ 36; *Peterson*, ¶ 12. This Court should not hesitate to rule that the global common fund doctrine does not override statutory mediation requirements and trump precedent. Absent compliance with the mediation statutes, the Court lacks jurisdiction to adjudicate Petitioners' common fund claims.

IV. REQUIRING COMMON FUND INSURERS TO IDENTIFY AND SOLICIT CLAIMS FROM POTENTIAL *FLYNN I* BENEFICIARIES WOULD IMPERMISSIBLY REVERSE THE BURDEN OF PROOF

Even if the Court were to ignore Common Fund Insurers' due process rights and assume that it has jurisdiction over Petitioners' claims, common fund precedent does not compel Common Fund Insurers to launch a review of claims stretching back to 1974 to identify potential beneficiaries and then pay them retroactive benefits. The Court has recognized a "global lien"; it did not purport to reverse the burden of proof and require Common Fund Insurers to prove an absence of liability, or alternatively, to identify and solicit claims.

It is well-settled that Petitioners bear the burden to prove their claims. "Beyond question, the general rule is that the burden of proof in civil cases lies on the party who

substantially asserts the affirmative of the issue . . . ." *Lilienthal's Tobacco v. U.S.*, 97 U.S. 237, 266 (1877). Just as the United States Supreme Court has allocated the burden of proof to petitioners, so does Montana law. Montana law provides that "in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence . . . ." § 26-1-403, MCA. Consistent with the statute, the Montana Supreme Court has affirmed that workers' compensation claimants bear the burden to prove entitlement to the benefits they seek. *Snyder v. Anaconda Co.* (1988), 231 Mont. 198, 202, 757 P.2d 740, 742 ("The claimant bears the burden of showing an entitlement to benefits under the Workers' Compensation Act.") (citations omitted); *see also Briney v. Pacific Employers Ins. Co.* (1997), 283 Mont. 346, 351, 942 P.2d 81, 84 ("The Workers' Compensation Court correctly concluded that the claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence") (citations omitted).

As applied to this case, it is the potential beneficiaries of *Flynn I* that must prove the affirmative – i.e., that they are entitled to the benefits they seek. This Court's prior ruling that additional benefits arising from *Flynn I* are retroactively applicable does not alter these fundamental principles. The burden remains on potential beneficiaries of *Flynn I* to assert, and prove, their claims to such benefits. The Court's ruling goes no farther; it recognizes a global lien on such benefits, if and when a claimant pursues and receives them. Insurers have no duty to solicit workers' compensation claims:

> [T]he duty is upon the claimant to file his claim, not upon the insurer to solicit claims. The Workmen's Compensation Act has not changed the principle that he who asserts a right has the burden of proof or the burden of proceeding.

Ricks v. Teslow Consolidated (1973), 162 Mont. 469, 483, 512 P.2d 1304, 1312.

The "global common fund doctrine" provides no basis to upset this longstanding rule or to overturn binding precedent. Thus, to the extent that potential *Flynn I* beneficiaries are covered under policies written by Common Fund Insurers, and such persons desire to pursue a claim for retroactive benefits under *Flynn I*,[5] they must step forward and assert their claims. Moreover, were Petitioners to have standing or capacity as a class representative to enforce common fund entitlements on behalf of others (without any order certifying the class or Petitioners as adequate

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[5] Significantly, as a matter of law it cannot be assumed that potential *Flynn I* beneficiaries even wish to claim or pursue retroactive benefits. People are presumed to know the law, which includes *Flynn I*. *See Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 28, 308 Mont. 265, ¶ 28, 42 P.3d 760, ¶ 28. Moreover, this Court has consistently held that workers cannot be compelled to pursue workers' compensation claims. *See Boyne, USA v. Behr*, 1998 MTWCC 56, WCC No. 9806-7992 (dismissing petition by insurer seeking a determination of whether claimant could waive her right to benefits); *see also State Fund v. Noonkester*, 2004 MTWCC 61, WCC No. 2002-0493, *Decision and Order Regarding Jurisdiction*, ¶ 15 ("[A] worker cannot be compelled to seek workers' compensation benefits.") (citations omitted), *aff'd,* 2006 MT 169, 332 Mont. 528, 140 P.3d 466. Thus, even assuming that some potential *Flynn I* beneficiaries were covered by Common Fund Insurers, no legal or factual grounds exist to compel them to assert such a claim, through Petitioners or otherwise.