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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2000 - 0222

**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.

AFFIDAVIT INSURERS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO VACATE ORDER OF DISMISSAL

COME NOW the Affidavit Insurers listed on Exhibit A attached hereto and submit this brief in opposition to Mr. Palmer's motion to vacate this Court's July 10, 2012 dismissal order. In addition to the arguments framed by Palmer's motion to vacate, Affidavit Insurers respectfully submit that the Court should consider the overall context of this motion.

Affidavit Insurers were joined as parties to this action by summons issued in 2005. Since that time, the parties have twice gone to the Montana Supreme Court for clarity on the scope of retroactivity with respect to claims "paid in full." With the decision

in *Flynn III*, 2011 MT 300, at the end of last year, our Supreme Court provided that necessary guidance. Shortly thereafter, Affidavit Insurers submitted affidavits using the form affidavit process promulgated by this Court, which contemplates a 90-day discovery period, followed by dismissal in the absence of any objection. Affidavit Insurers have followed this process, and they should now be dismissed if the Court's affidavit process is to be followed. Palmer chose not to conduct any discovery during the 90-day window, and even today, has no basis in fact to object to dismissal. Instead, Palmer seeks to indefinitely extend his ability to conduct discovery. That is not what the Court's process contemplated, nor is it fair to Affidavit Insurers, who have litigated for seven years and have provided sworn affidavits establishing their right to dismissal. The time has come to dismiss Affidavit Insurers.

Palmer cannot establish good cause to vacate the Court's dismissal order. On June 15, 2012, Affidavit Insurers requested this Court to dismiss them from this action, noting that Palmer had declined to conduct discovery within the 90-day period and had not objected to dismissal. On July 10, 2012, noting that Palmer had not responded to the *Request for Dismissal*, the Court dismissed Affidavit Insurers. In his *Motion to Vacate Order of Dismissal, and Supporting Brief* ("Motion to Vacate"), Palmer now asks the Court to vacate the order of dismissal so that he can both belatedly brief the issue of dismissal and apparently pursue discovery. Significantly, Palmer's motion does not even assert that his failure to respond to the request for dismissal was somehow justified. Rather, Palmer simply proceeds to brief his opposition to dismissal as though the Court has already ruled that its order of dismissal has been vacated and that it would consider such belated briefing. The Motion to Vacate should be denied for a host of reasons.

FACTS

Following the expiration of the 90-day discovery window and in the absence of any objections, Affidavit Insurers on June 15, 2012, requested that the Court dismiss them pursuant to the form affidavit process promulgated by the Court. Under 24.5.316 (3), A.R.M., Palmer had 10 days to respond to the motion, or until June 26. Three days after the deadline for a response passed, Palmer on June 29 requested an extension of the deadline from counsel for Affidavit Insurers, Steve Jennings. Jennings agreed to extend the deadline for an additional seven days until July 6, 2012.[1] On July 6, Palmer again contacted Jennings to request an additional extension.[2] In keeping with the collegiality of the Montana Workers' Compensation bar, Jennings agreed to another

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[1] See *Email R. Palmer to S. Jennings*, 6/29/12 (Mr. Palmer thanks Mr. Jennings for his professional courtesy in granting a seven day extension) (attached hereto)..

[2] See *Email R. Palmer to S. Jennings*, 7/6/12 (Mr. Palmer requests an additional 7 day extension) (attached hereto).

seven day extension establishing July 13, 2012, as Palmer's response deadline.[3] Palmer, however, failed to advise the Court of these agreed extensions, as he admits in his Motion to Vacate.[4]

On July 10, 2012, two weeks after the expiration of the original response deadline, and having never been advised of any extension, the Court dismissed Affidavit Insurers noting that "Petitioners have not responded to the Respondent Insurers' Request for Dismissal."[5] Distressed, Palmer contacted Jennings the next day. He explained that he had never advised the Court of the agreements to extend the deadline and asked if Jennings would oppose a motion to vacate the order of dismissal so that Mr. Palmer could brief the issue. Jennings explained that in spite of his wish to assist Palmer, he could not agree to his request consistent with his duty to his clients, who have litigated for seven years and who followed the Court's affidavit process. Accordingly, Jennings advised that he would oppose a motion to vacate as well as further briefing or discovery.

Palmer did not file a brief in opposition to the dismissal by the extended deadline of July 13, 2012. Instead, he waited until July 16 to file his *Motion to Vacate Order of Dismissal, and Supporting Brief* to which he attached *Petitioner's Response Brief Objecting to Request for Dismissal* as Exhibit "A" – notwithstanding the absence of leave from the Court to file the response brief.

ARGUMENT

I. PALMER'S REQUEST TO VACATE THE JULY 10 DISMISSAL ORDER MUST BE DENIED IN THE ABSENCE OF ANY LEGITIMATE BASIS FOR OBJECTION.

A. Palmer Presents No Reason to Object to Dismissal Other Than His Desire for Another Opportunity to Conduct Open-Ended Discovery and Drive Up Costs for Affidavit Insurers.

Palmer's entire argument about "issues of first impression" concerning the electronic service process in common fund cases is a red herring. Affidavit Insurers are not entitled to dismissal because of Palmer's failure to comply with the discovery deadline. Rather, Affidavit Insurers are entitled to dismissal because they followed the Court's affidavit process, and after the 90-day window to conduct discovery expired,

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[3] *Email S. Jennings to R. Palmer*, 7/6/12 (attached hereto).

[4] See *Mot. to Vacate Order of Dismissal, and Supporting Brief*, 7/17/12, at 1 ("Counsel for Petitioners, the undersigned, failed to notify the Court or to request approval of the extension.") and 2 ("The undersigned concedes that he should have notified the Court and requested approval of the parties' agreement for an extension. The dismissal here serves as a reminder for counsel to keep this Court in the loop.").

[5] WCC #679, *Order Granting Responding Insurers' Request for Dismissal*, 7/10/12.

Petitioners have no factual or legal basis to object. Indeed, even if the Court is willing to consider Palmer's brief in opposition, attached to the Motion to Vacate, Palmer presents no legitimate basis to oppose dismissal other than his desire to pursue unrestricted discovery.

Under the Court's form affidavit process, it makes no difference whether Palmer conducted discovery within the 90-day period or not. As specified in the form affidavit, the only event that can delay or deny dismissal is Palmer's objection:

> After such 90 days [to conduct discovery], if no objection is lodged by counsel for Petitioner[s], the Court will dismiss the insurer/self-insurer from this action based on the sworn statements made by me in this affidavit.[6]

Palmer did not object to dismissal after the 90 day window to conduct discovery. Indeed, even after two extensions, Palmer did not object within those extended deadlines, and never advised the Court that he had obtained extensions and would be objecting. Palmer only purported to raise an objection to dismissal in an exhibit to his Motion to Vacate, which the Court should not consider because Palmer has failed to show good cause to vacate the dismissal order and good cause to belatedly file the objection. Rather, Palmer simply attached his proposed response brief without seeking leave from the Court to do so. The purported objection to dismissal – asserted for the first time in an exhibit to the Motion to Vacate filed on June 16 – is not timely, and in any event, provides no factual or legal basis to vacate the dismissal order.

Indeed, even if the Court is willing to consider the belated objection, the only basis asserted to oppose the dismissal of all the Affidavit Insurers is that Palmer would like more time to conduct discovery. That is no reason to further delay dismissal of parties that have followed the Court's affidavit process. Palmer points out that Affidavit Insurers objected to his belated discovery,[7] and argues that they should be compelled

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[6] See WCC #390, *Form Affidavit* attached to *Memo from Court to Counsel and All Parties with Blank Affidavit,* 12/6/05.

[7] Responding Insurers did indeed object to each and every discovery request. Consistent with the arguments presented in Affidavit Insurers' *Request for Dismissal*, the objection stated:

> Affidavit Insurers object to Interrogatory 1 as untimely. On or before March 8, 2012, Affidavit Insurers filed affidavits using the form prepared and promulgated by the Court for the purpose of expediting the dismissal of those insurers who had no common fund exposure. The Court's form affidavit expressly states that:
>
> > I understand that the Montana Workers' Compensation Court may allow a period of up to 90 days from the date of the filing this affidavit within which counsel for Petitioner[s] may conduct discovery and investigation for the limited purpose of proving or disproving the foregoing statement(s) made by me on behalf of [NAMED INSURER]. After such 90 days, if no objection is lodged by counsel for Petitioner[s], the Court will dismiss the

to answer the belated discovery before dismissal can even be considered. Palmer further reveals that he anticipates conducting further discovery well beyond the 90 day period:

> Depending upon the answers [to the belated discovery], some or all of these insurers may be dismissed. *Others may require follow-up discovery* to reasonably assure that all claimants receive what the law requires. For these reasons, Petitioners object to the dismissal of these insurers.[8]

Palmer apparently does not believe that the Court really meant to impose a limited 90-day window for discovery. Moreover, he has signaled that he will continue to disregard that limitation in the future. According to Palmer, if it was the intention of the Court to dismiss based on the filing of form affidavits, "it would not have made any provision for discovery."[9] In effect, because the Court gave him a 90-day window to investigate and conduct discovery into the affidavit assertions, Palmer believes that he may wholly disregard the part about 90-days and conduct discovery at his leisure without time limits. By asserting a right to conduct further discovery more than a month after the close thereof, Palmer essentially asserts a right to a discovery period that ends only upon his say so.

Palmer presents no reason why the Court should jettison the reasonable 90-day window to "conduct discovery and investigation for the limited purpose of proving or disproving the" statements in the affidavits. Moreover, Affidavit Insurers, in choosing to run the searches and execute the form affidavits, justifiably relied on the Court's enforcement of the 90-day discovery window, and would not necessarily have pursued the form affidavit process otherwise.

More importantly, even at this date, Palmer has asserted no credible basis to oppose dismissal of Affidavit Insurers. Palmer was given a generous 90 days to complete any informal investigation and discovery he desired. His failure to do so within

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> insurer/self-insurer from this action based on the sworn statements made by me in this affidavit.

See WCC #390. The 90th day following March 8, 2012 fell on June 6, 2012. As such, Flynn had until June 6, 2012 (for affidavits filed on March 8), to "conduct discovery and investigation" into the statements made by the Affidavit Insurers. He did not mail the Interrogatories, however, until June 7. Moreover, Flynn never requested an extension of the 90-day discovery window, and did not seek leave from the Court to serve them after the 90-day period to conduct discovery and investigation expired. As such, Interrogatory No. 1 is patently untimely, and no response is required from Affidavit Insurers.

Affidavit Insurers' Resps. to Flynn's 1st Discovery Requests, 6/28/12 (attached hereto).

[8] *Petitioners' Resp. Br. Objecting to Request for Dismissal*, 7/16/12, at 7 (emphasis added).

[9] *Id.*

that time period does not entitle him to ignore the 90-day period. Likewise, his failure to conduct discovery provides no basis for the Court to delay dismissal, much less vacate a dismissal order that has already been entered. The Motion to Vacate should be denied.

B. Palmer's Purported Objection to Dismissal on the Basis of "Non-Conforming Affidavits" Elevates Form Over Substance and Should Be Disregarded Because the Affidavits Bind the Insurers on Whose Behalf They Were Submitted.

Even if the Court is willing to consider the belated objection to dismissal attached as an exhibit to the Motion to Vacate, Petitioners' argument that four of the affidavits filed did not conform to the Court's affidavit process elevates form over substance. The affidavits clearly bind the insurer on whose behalf they were submitted. Palmer asserts that four affidavits do not contain language indicating that the affiant is "authorized...to bind [the insurer] by these statements."[10] Although Palmer does not identify all four of these "non-conforming" affidavits, he gives those filed at docket entries 640 and 645 as two examples. Palmer's argument fails for the following reasons.

First, as noted above, Palmer's opportunity to object to the form of an affidavit expired when he failed to object to the *Request for Dismissal* by the original response date of June 26, 2012, without advising the Court that the deadline had been extended by agreement. Alternatively, his opportunity to object expired on July 13 (the deadline under his second extension) when he failed to file any objection to dismissal by that date. Thus, his objection to the form of the affidavits is untimely and should be overruled (if even considered by the Court).

Second, contrary to Mr. Palmer's argument, the affidavits clearly set forth each affiant's authority to bind his or her company to the statements made therein. The affidavit filed at Docket No. 640 submitted by Twin City Fire Insurance Company states:

> In my capacity as Home Office Consultant of Twin City Fire Insurance Company, I am authorized to make the statements set forth in this affidavit on behalf of Twin City Fire Insurance Company and to bind Twin City Fire Insurance Company.[11]

The affidavits filed at Docket Nos. 644, 645, and 646[12] contain identical language. Mr. Palmer's specific objection to this language is that the final clause omits the words "by these statements" and therefore is not in verbatim conformity with the

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[10] *Petitioner's Resp. Br. Objecting to Request for Dismissal*, 7/16/12, at 6.

[11] *Affidavit*, 1/4/12 (WCC # 640).

[12] Filed by Property & Casualty Insurance Company of Hartford, Sentinel Insurance Company, Ltd., and Trumbull Insurance Company respectively.

Court's form affidavit. This argument simply raises meaningless form over substance. The above statement clearly establishes the affiant's authority to bind the company to the statements made in the affidavit. Is Palmer truly suggesting that the insurers could disavow the statements? Given the clear statement of authority set forth in the affidavit, it would be virtually impossible under the laws of agency and the principal of judicial estoppel for the insurer to disavow, or not be bound, by such statements. Indeed, as these affidavits were filed in Court by counsel on behalf of the particular Affidavit Insurers – and not on behalf of the individual affiant – the particular insurers are bound. Moreover, there is no claim by any of the relevant insurers that they are not bound by these affidavits. Palmer simply invents the possibility that the affidavits are not binding in an attempt to find fault and claw back the dismissal order. The Court should not vacate its dismissal order on such frivolity.

Thus, although the Court has no good cause to even consider the belated objection, Palmer's objection to dismissal on the basis of "non-conforming" affidavits presents no reason to vacate the dismissal order.[13]

II. PALMER'S REPEATED FAILURE TO MEET DEADLINES DOES NOT CONSTITUTE GOOD CAUSE TO WARRANT VACATUR OF THE DISMISSAL ORDER.

Petitioners' prosecution of this case has been characterized by a consistent pattern of failing to meet deadlines. As shown in Affidavit Insurers' *Request for Dismissal* (and herein), Palmer failed to conduct any discovery within the 90-day period authorized by the Court's form-affidavit process. Not only did he fail to conduct discovery within that period, he also failed to contact counsel to arrange an extension of the discovery period or to move this Court for the same. Likewise, when faced with Affidavit Insurers' Request for Dismissal, Palmer did not contact counsel to arrange for an extension until three days ***after*** his original response time expired. Failing to comply with the original extended date of July 6, Mr. Palmer sought and was granted another extension until July 13 – a deadline which he also failed to meet.

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[13] Mr. Palmer also objects to dismissal on that grounds that five of the companies dismissed have never filed affidavits and that two additional companies, while having filed affidavits, were erroneously listed as having filed them on or before March 8. Mr. Palmer is partially correct. Bituminous Casualty Corp. is the only company listed in the *Request for Dismissal* who has not filed an affidavit in Flynn. It filed an Affidavit in *Schmill* and therefore, was mistakenly listed by counsel as having filed one in *Flynn*. Counsel regrets this error and advises that there is no objection to vacating the dismissal for Bituminous Casualty Corp. Mr. Palmer is correct with respect to his allegation that two additional companies were erroneously listed as having filed affidavits by March 8. Those two companies are PPG Industries, Inc. and Connie Lee Insurance Co. who filed affidavits May 24, 2012 and April 10, 2012 respectively. Docket Nos. 669 and 657. Again, counsel regrets this error, withdraws the Request for Dismissal as to PPG Industries, Inc., and advises there are no objections to vacating the order of dismissal with respect to PPG Industries, Inc. Because the 90-day period expired, and no objection has been filed as to Connie Lee Insurance Co., the dismissal order should stand as to Connie Lee Insurance Co.

In his two-page Motion to Vacate, Palmer offers no good cause to excuse this pattern of disregarding deadlines. Apparently presuming that the Court will vacate its dismissal order, Palmer merely states that the "dismissal here serves as a reminder to keep this Court in the loop." In considering the Motion to Vacate, the Court must determine who should bear the burden of Palmer's failure to advise the Court of two separate extensions. The burden of Palmer's failure should not fall on Affidavit Insurers, who were cooperative and amicable in responding to Palmer's requests for extensions. In an effort to maintain the collegiality of the Montana Workers' Compensation bar, Affidavit Insurers agreed to not one, but two extensions. Indeed, so collegial were Responding Insurers that they agreed to the first extension three days ***after*** Palmer had already missed the original deadline. Mr. Palmer alone must bear the burden of his failure to advise the Court of the extended deadlines.

A. The Motion to Vacate Must Be Denied Because Petitioners Did Not Even Meet Their Twice Extended Deadline of July 13.

Palmer's primary argument relies on the Court's discretion to waive irregularities and noncompliance with procedural rules under Rule 25.5.349, A.R.M. The Motion to Vacate, however, does not explain why the Court should exercise its discretion in the absence of any good cause. After two extensions, Petitioners had until July 13 to file a response to the Affidavit Insurers' *Request for Dismissal.* Notwithstanding two extensions, Petitioners did not file anything until July 16. Even then, Palmer merely attached *Petitioners' Response Brief Objecting to Request for Dismissal* as an exhibit to the Motion to Vacate, without seeking leave from the Court to file it. Palmer's argument is simply absurd. Rule 25.5.349 permits the Court to waive procedural rules "in the interest of justice." It is not in the interest of justice to vacate an order of dismissal to the detriment of a party that is accused of no wrongdoing, and in favor of a party who admittedly failed to "keep the Court in the loop" regarding extended deadlines and then missed the very deadline of which he failed to advise the Court.

Enough is enough. Even if the Court were to disregard Palmer's failure to advise it of the extended deadlines and determine that he should have had until July 13 to submit a brief in opposition to dismissal, Palmer failed to meet that deadline as he failed to meet all others. The Motion to Vacate should be denied.

B. Affidavit Insurers Will Be Prejudiced By Vacatur of the Dismissal Order and Any Re-Opening of Discovery.

In his Motion to Vacate, Palmer contends that his pattern of disregarding deadlines has not prejudiced Affidavit Insurers, who Palmer characterizes as seeking "technical forfeitures."[14] Palmer is wrong on both counts. First, Affidavit Insurers by definition would be prejudiced by the vacatur of an order ending their involvement in the case, and would be further prejudiced if forced to respond to open-ended discovery well

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[14] *Motion to Vacate Order of Dismissal, and Supporting Brief*, 7/17/12, at 2.

after the 90-day window closed. "Prejudice" is defined as "[d]amage or detriment to one's legal rights or claims." *Black's Law Dictionary* 1218 (8th ed. 2004). Affidavit Insurers have no liability in this case. They proved their absence of liability with unrebutted affidavits. Nothing could be more prejudicial to their rights than hauling Affidavit Insurers back into Court to contest their absence of liability and then subjecting them to re-opened discovery.

Second, there is no "technical forfeiture." Affidavit Insurers have submitted sworn affidavits attesting to their lack of eligible claims for adjustment in the common fund and their right to be dismissed under the Court's form affidavit process. Palmer has not asserted any legitimate objections to dismissal, and has certainly not submitted any evidence to contravene the affidavits' veracity. There is no "technical forfeiture"; rather, there is simply no liability nor any reason to believe that Affidavit Insurers may have liability.

C. The Court Need Not Consider Any So-Called "Issues of First Impression" Concerning Electronic Service in Common Fund Actions: Petitioners Had 90 Days to "Conduct" Any Discovery, Not to Serve It.

Preliminarily, Affidavit Insurers note that the Court need not even consider the arguments presented by Palmer that his discovery requests were timely under the service rules. In the absence of any legitimate objection (a request to pursue more discovery is not a legitimate basis), Affidavit Insurers are entitled to dismissal under the Court's form affidavit process.

To the extent that the Court is willing to take up the issue, Petitioners' entire argument about whether its discovery requests were timely served hinges on the Court's affidavit process. The Court drafted affidavits did not permit Palmer 90 days to "serve" discovery. Rather, the affidavits permitted him 90 days to "conduct" discovery. The Court's form affidavit is clear on this point:

> I understand that the Montana Workers' Compensation Court may allow a period of **up to 90 days** from the date of filing this affidavit within which counsel for Petitioner[s] may **conduct discovery and investigation** for the limited purpose of proving or disproving the foregoing statement(s) made by me on behalf of [NAMED INSURER].[15]

Thus, Palmer had 90 days to complete discovery and not 90 days to "serve" discovery requests. As a result, Palmer was required to submit his discovery requests with sufficient time left in the discovery period to ensure that responses would be due before the end of the 90 days. Palmer conducted no discovery or investigation until

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[15] See WCC #390, *Form Affidavit* attached to *Memo From Court to Counsel and All Parties With Blank Affidavit,* 12/6/05 (emphasis added); See also *Affidavits*, 3/7/12, ¶ 5 (WCC #s 635 – 665).

mailing interrogatories to Affidavit Insurers on June 7 after the 90-day period closed. However, in order to complete discovery before the 90th day (when any window to "conduct discovery" closed), Palmer was required to serve his discovery requests at least 20 days prior to the close of the discovery period so as to give Affidavit Insurers time to respond within the 20 day period for responding to discovery.[16] Any claims of confusion should be met with skepticism: as Palmer concedes, "This Court has often reminded the parties about the '90-day window to conduct discover with the parties filing Affidavits.'"[17] Thus, Palmer's argument about the computation of the 90 days under the Court's electronic service process is a red herring, and provides no basis to vacate the dismissal order. It is also erroneous.

1. The Applicable Rules of this Court Did Not Allow Petitioners an Additional Three Days to Serve Discovery Requests.

Even if the Court were to rule that the affidavits permitted Palmer 90 days to "serve" discovery (as opposed to completing discovery), Palmer errs in asserting that Rule 6(d) of the Montana Rules of Civil Procedure gave him an additional three days to serve his discovery requests, or in effect 93 days to "serve" as opposed to "conduct" discovery. Rule 6(d) is not applicable. Rather, in the Workers' Compensation Court, service and computation of time is controlled by § 24.5.303, A.R.M. because it is the more specific authority controlling procedure.[18] That rule allows a party to add three days to the relevant deadline ***only if it is responding to a pleading served by mail.*** [19]

The affidavits at issue were served via the Court's website. Significantly, the Court has already determined that service via the website is not service by mail. Indeed, it has taken the unusual step of repeatedly advising all common fund counsel of this determination in weekly emails.

> This is a reminder that ***service in the common fund matters is not effected by mail, but via the website***. Please be sure you are checking the link set forth below for filing of documents. Petitioners'

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[16] Had Mr. Palmer made a good faith effort to even come close to this 20 day window, and served discovery on say, the 18th day prior to the close of discovery, the Court would likely have granted him a discovery extension for good cause shown. Of course, Mr. Palmer did not make any such efforts. Nor did he make any effort to contact Affidavit Insurers' counsel or the Court to request an extension.

[17] *Petitioner's Resp. Br. Objecting to Request for Dismissal*, 7/16/12, at 2.

[18] See *State v. Brendal*, 2009 MT 236, ¶ 27, 351 Mont. 395, ¶ 27, 213 P.3d 448, ¶ 27 ("when a general statute conflicts with a more specific statute, the more specific statute controls.") (citations omitted).

[19] § 24.5.303(3), A.R.M. ("Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a notice or other paper upon the party ***and the notice or paper is served by mail***, three days shall be added to the prescribed period). (emphasis added).)

counsel, please note the 90-day window to conduct discovery with the parties filing Affidavits.[20]

The affidavits here were filed and served via the Court's website, and, as repeatedly stated in Ms. Poole's emails, service via the common fund website is not service by mail. Accordingly, Palmer was not entitled to an additional three days under § 24.5.303(3), A.R.M. because the notices or papers to which he was responding (i.e., the affidavits) were not served by mail. Notwithstanding his effort to invoke Rule 6(d), Palmer recognizes that the affidavits "were deemed served on th[eir] filing dates for purposes of calculating the response time."[21] Counting forward from March 8 reveals that the 90th day following March 8 fell on June 6. Mr. Palmer did not mail his discovery request to counsel for Affidavit Insurers until June 7.[22] Thus, even if Palmer would have been allowed 90 days to "serve" (rather than "conduct") discovery his discovery requests were one day late because he was not entitled to the three day period for mailing.[23] .

2. Palmer's Attempt to Serve Discovery By Sending it to the Court for Filing on June 6 Cannot Be Considered the Date of Service.

Alternatively, Palmer relies on a theory that his initial attempt to serve discovery requests via the Court's common fund website on June 6, 2012 rendered his discovery requests timely. Palmer argues that "[a]lthough the Court declined to formally post the discovery requests to the website, the Petitioners' [later] service by mail should be deemed sufficient for purposes of calculating the response time here." [24] Palmer again seems to be arguing that the Court should overlook his cavalier disregard of rules and deadlines. Section 24.5.323(5), A.R.M. could not be clearer: "Interrogatories and answers thereto shall not be filed except by leave of court."

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[20] *Email J. Poole to WCC Schmill Distribution 2001-0300*, 10/31/11, 11/9/11, 11/16/11, 11/21/11, 11/29/11, 12/6/11, 12/13/11, 12/28/11, 1/3/12, 1/13/12, 1/17/12, 2/24/12, 3/30/12, 5/11/12, 6/1/12 (emphasis added).

[21] *Petitioners' Resp. Br. Objecting to Request for Dismissal*, 7/16/12, at 3-4 (noting the affidavits "were filed and posted on the Court's website on the respective days they were served. This is the Court-prescribed method for service in common fund actions. It is undisputed that the Petitioners were deemed served on those filing dates for purposes of calculating the response time").

[22] See *Letter R. Palmer to S. Jennings*, 6/7/12.

[23] Palmers' June 7, discovery requests were one day late with respect to the insurers that filed affidavits on March 8. Palmers' discovery requests were two days lalte fore the remaining Affidavit Insurers that file affidavits on March 7.

[24] *Petitioner's Response Brief Objecting to Request for Dismissal*, 7/16/12, p. 5.

There is no dispute that Palmer did not seek or obtain leave of Court before attempting to file and serve his interrogatories through the Court's website. And the Court's clerk enforced § 24.5.323(5) by refusing to file discovery on the docket. As such, Palmer's argument chiding the Court for its refusal to post the discovery requests as inconsistent with the purpose of service by website[25] should fall on deaf ears. Had he desired to serve discovery by filing it on the electronic docket, he should have asked in advance. He did not.

Whether the Court's decision to post the discovery requests on the website was consistent with the purpose of service by website or not, it did not post the discovery requests on June 6 (or any other date). Thus, Affidavit Insurers were not served with any discovery requests via the website (or any other means) on June 6. The discovery requests were mailed by Palmer on July 7, and thus were not served within the 90 day discovery period. Without retroactively bending the rules, the Court may not use June 6 as the date of service "for purposes of calculating the response time" in order to "deem" Palmer's discovery requests timely. In any event, however, in the absence of any good cause to vacate the dismissal order, the Motion to Vacate should be denied.

III. CONCLUSION

For the reasons discussed above, Petitioners' Motion to Vacate should be denied with respect to all insurers except Bituminous Casualty Corp., Connie Lee Insurance Company, and PPG Industries, Inc.

WHEREFORE, Responding Insurers respectfully request this Court to enter an order denying Petitioner's Motion to Vacate and Objections to Dismissal with respect to the following companies:

> American Alternative Ins. Corp.; American Re-Insurance Co.; Bituminous Fire & Marine Ins. Co.; Old Republic Security Assurance Co.; Centre Ins. Co.; Clarendon National Ins. Co.; Truck Ins. Exchange; Farmers Ins. Exchange; Great American Ins. Co.; Great American Ins. Co. of NY; Great American Assurance Co.; Great American Alliance Ins. Co.; Great American Spirit Ins. Co.; Republic Indemnity of America; Hartford Accident & Indemnity Co.; Hartford Casualty Ins. Co.; Hartford Ins. Co. of the Midwest; Hartford Underwriters Ins. Co.; Property & Casualty Ins. Co. of Hartford; Sentinel Ins. Co. Ltd.; Twin City Fire Ins. Co.; Trumbull Ins. Co.; Petroleum Casualty Co.; Sentry Ins. Mutual Co.; Sentry Select Ins. Co.; Middlesex Ins. Co.; Fairfield Ins. Co.; Universal Underwriters Group; XL

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[25] *Id.* ("Service through the Court's website is an efficient means of service, given the number of parties involved. With this process in place, it would not be practical to require parties to serve discovery requests and responses on every party individually by mail."). Curiously, Palmer apparently had no problem in serving the discovery requests by mail the very next day.

Ins. America, Inc.; XL Ins. Co. of New York; XL Reinsurance America; XL Specialty Ins. Co.; Greenwich Ins. Co.; and Markel Ins. Co.

Dated this 27th day of July 2012.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 27th day of July 2012.

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[ ] FedEx
[ ] Hand-Delivery
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Attorney for Petitioner in *Schmill*

STEVEN W. JENNINGS
Attorney for Responding Affidavit Insurers

EXHIBIT A

Responding Affidavit Insurers

- American Alternative Ins. Corp.
- American Re-Insurance Co.
- Bituminous Fire & Marine Ins. Co.
- Old Republic Security Assurance Co.
- Centre Ins. Co.
- Clarendon National Ins. Co.
- Truck Ins. Exchange
- Farmers Insurance Exchange
- Great American Ins. Co.
- Great American Ins. Co. of NY
- Great American Assurance Co.
- Great American Alliance Ins. Co.
- Great American Spirit Ins. Co.
- Republic Indemnity of America
- Hartford Accident & Indemnity Co.
- Hartford Casualty Ins. Co.
- Hartford Ins. Co. of the Midwest
- Hartford Underwriters Ins. Co.
- Property & Casualty Ins. Co. of Hartford
- Sentinel Ins. Co. Ltd.
- Twin City Fire Ins. Co.
- Trumbull Ins. Co.
- Petroleum Casualty Co.
- Sentry Ins. Mutual Co.
- Sentry Select Ins. Co.
- Middlesex Ins. Co.
- Fairfield Ins. Co
- Universal Underwriters Group
- XL Ins. America, Inc.
- XL Ins. Co. of New York
- XL Reinsurance. America
- XL Specialty Ins. Co.
- Greenwich Ins. Co.
- Markel Ins. Co.

Email R. Palmer to S. Jennings,
6/29/12

Steve W. Jennings

From: Attorneys Inc., P.C. [attorneysinc@montana.com]
Sent: Friday, June 29, 2012 4:17 PM
To: Steve W. Jennings
Subject: Flynn/Miller; your request for dismissal

Dear Steve:

I am writing to thank you for your professional courtesy in granting me an additional 7 days within which to file my brief in opposition to your Request for Dismissal. Thanks.

Have a good weekend.

Rex Palmer

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ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514 (phone)
(406) 728-5601 (fax)
attorneysinc@montana.com
www.montana.com/attorney

Email R. Palmer to S. Jennings, 7/6/12

Steve W. Jennings

From: Steve W. Jennings
Sent: Friday, July 06, 2012 1:52 PM
To: 'Attorneys Inc., P.C.'
Subject: RE: Flynn/Miller

Take til next Friday if you want.

-----Original Message-----
From: Attorneys Inc., P.C. [mailto:attorneysinc@montana.com]
Sent: Friday, July 06, 2012 1:51 PM
To: Steve W. Jennings
Subject: Flynn/Miller

Steve:

I am trying to finish my response to your Motion to Dismiss, but some other demands are draining my time. If I cannot get finished, would it be okay with you if I file on Monday?

Please let me know.

Sincerely,

Rex Palmer

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