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Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PLAINTIFF

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<i>Robert Flynn and Carl Miller,</i>)	WCC No. 2000-0222
Individually and on Behalf of Others)	
Similarly Situated,)	
Petitioners,)	
v.)	PETITIONERS' REPLY BRIEF IN
)	SUPPORT OF MOTION TO VACATE
<i>Montana State Fund,</i>)	ORDER OF DISMISSAL
Respondent/Insurer,)	
)	
and)	
)	
<i>Liberty Northwest Insurance</i>)	
<i>Company,</i>)	
Intervenor.)	

* * * * *

Petitioners respectfully submit this reply brief in support of their motion to vacate the Order of dismissal dated July 10, 2012.

The Affidavit Insurers do not respond to all Petitioners' arguments. And most of the argument offered by the Affidavit Insurers is based solely on its time-computation that excludes the 3-day extension for electronic service.

The Court should address the issue of whether three days are added for purposes of computing time under Rule 6(d), M.R.Civ.P., following electronic service. The Affidavit Insurers' argument regarding the computation of time under § 24.5.303 is inapposite because that rule addresses service by mail, whereas service

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here was accomplished through the website. Further, the Affidavit Insurers offer no argument as to why this Court should not apply Rule 6(d)'s principle regarding electronic service in cases here involving electronic service through the website. The rule is sound, and does not contradict any specific rule of this Court. The electronic-service process in common fund cases is unique, and Rule 6(d) fits it well.

The Affidavit Insurers do not dispute Petitioners' argument as to three insurers. Their brief (p. 12) states "Petitioners' Motion to Vacate should be denied with respect to all insurers except Bituminous Casualty Corp., Connie Lee Insurance Company, and PPG Industries, Inc."¹

The Affidavit Insurers make a distinction between the terms "conduct" and "serve" and "complete" in relation to meeting the deadline for discovery. They also ask the Court to insert a requirement that discovery must be served 20 days prior to the expiration of the 90-day period. The Court should reject these arguments. The Court's 90-day rule makes clear that Petitioners had 90 days in which to conduct discovery, and serving the discovery within that time is sufficient to meet the deadline and constitute an "objection" for purposes of calculating the time period.

The Affidavit Insurers attempt to score points by claiming Petitioners "chide" the Court for not posting the discovery requests to the website. This is not a fair reading of Petitioners' argument. It is simply a fact of record that Petitioners submitted the discovery and the Court declined to post it. The Affidavit Insurers also claim Petitioners should have asked to have the discovery posted in advance of the deadline. They did so, by submitting it to the Court before expiration of the applicable period, assuming that 3 days are added for electronic service.

The Affidavit Insurers fail to explain why they did not use the precise form provided by the Court. Having altered the Court's form, they are not in a good position to claim that Petitioners are wrong to question this.

Regarding the issue of prejudice, the Affidavit Insurers sidestep Petitioners' argument, and instead claim that vacating the Order of Dismissal would be prejudicial. That is not the issue. The issue is whether the Affidavit Insurers were prejudiced by the 1-day delay which they claim occurred in serving discovery. If three days are not added for the electronic filing, and if therefore the discovery was


¹ It also appears, however, that the Affidavit Insurers take a different position as to Connie Lee Insurance Company at p. 7, footnote 13, of their brief.

one day late, Petitioners argument is that there is no prejudice from the alleged 1-day delay.

Both the Affidavit Insurers and Petitioners have made administrative mistakes in this complex proceeding. The Affidavit Insurers admit that some of the insurers were erroneously listed as having filed affidavits, and this led to their dismissal. Petitioners likewise admit the failure to inform the Court of the extension of time granted by the Affidavit Insurers, which led to the dismissal. There are no allegations of bad faith here. These procedural mistakes need not be dispositive of substantive rights. Further, if the Court simply applies the 3-day extension for electronic service, then Petitioners' discovery requests were timely. And the Court has broad discretion to waive such irregularities as per Rule 25.5.349.

The Order of dismissal was expressly entered without prejudice. Petitioners respectfully request that the Court vacate the Order of dismissal, grant leave for the briefing to be completed, and rule on the merits.

Dated this 1st day of August, 2012.



Rex Palmer
ATTORNEYS INC., P.C.
301 W Spruce
Missoula, MT 59802
(406) 728-4514
ATTORNEYS FOR PETITIONERS