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Identified on Schedule A hereto

FILED

MAR - 7 2013

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA SCHMILL,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Respondent/Insurer,

and

MONTANA STATE FUND,

Intervenor.

WCC No. 2001-0300

**MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR
CLARIFICATION**

ORAL ARGUMENT REQUESTED

COME NOW the insurers listed on Schedule A (hereinafter referred to collectively as Affidavit Insurers) and submit this *Motion for Reconsideration or, in the Alternative, for Clarification*. Affidavit Insurers respectfully request that the Court reconsider its recent *Order Sustaining Petitioner's Objections to Dismissing Certain Insurers* ("Order") in light of developments following briefing on this matter and the Court's own recognition that Affidavit Insurers "searched a larger date range for apportioned claims and found none." *Order* ¶ 8 (WCC # 570). Because the form affidavits promulgated by the Court and submitted by Affidavit Insurers and numerous other insurers do not reflect the specific dates used in insurers' searches, there is simply nothing to "adjust" in the affidavits. *Order* ¶ 9. Because the Court has already recognized that Affidavit Insurers' searches covered the required period and then some, Affidavit Insurers should be dismissed.

The *Order* appears to require Affidavit Insurers to adjust their affidavits out of a concern that other insurers dismissed earlier in this action may not have included in their search the time period from June 23, 2001 through April 10, 2003. Indeed, this is apparently the basis on which the Court sustained Schmill's objection. *See Order* ¶ 9. That objection was a red herring, as evidenced by Schmill's agreement – after her objections were fully briefed – to dismiss other insurers who used the same search

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methodology as Affidavit Insurers and who filed affidavits prepared from the Court's template. Affidavit Insurers thus request reconsideration and dismissal (a) because the *Order* already recognized the adequacy of the Affidavit Insurers' search methodology, and the affidavits reflect only the results of the search, not the methodology or date ranges employed, and (b) because Schmill has acted inconsistently with her own objection about consistency with the other, earlier-dismissed insurers, thereby proving that her objection was truly a red herring.

In the alternative, in the event the Court declines to reconsider the *Order*, Affidavit Insurers request a clarification as to its requirement to "adjust" the affidavits prepared using the form promulgated by the Court. This motion is supported by the following brief.

ARGUMENT

On February 11, 2013, the Court sustained Schmill's objection to the dismissal of Affidavit Insurers, and ordered as follows:

[R]ather than requiring other common fund insurers to re-search their files to encompass a broader set of dates, the Insurers subject to Schmill's objections need only adjust their affidavits accordingly. Schmill's objections are sustained and the Insurers are ordered to comply with the June 22, 2001, date for their file reviews.

For the several reasons explained below,¹ there is nothing in the affidavits that could be adjusted to reflect any additional information not already disclosed.

- I. **The Court Should Reconsider its *Order* Requiring Affidavit Insurers to Adjust Their Affidavits Because the Court Has Already Found that They Conducted an Adequate File Search.**
 - A. **The Court Already Found that Affidavit Insurers' Search Parameters Included the Dates Requested by Schmill.**

The Court has already found that Affidavit Insurers conducted an adequate and effective file review that encompassed the June 22, 2001, date on which Schmill premised her objection. In the *Order*, the Court found that "the Insurers subject to Schmill's objections have, as they pointed out, actually performed a broader search which encompassed the agreed-to start date of June 22, 2001." *Order* ¶ 9. Indeed, a new search would not reveal any *Schmill* beneficiaries because the Court determined

¹ In light of the larger date range employed by Affidavit Insurers, the *Order* finds that Affidavit Insurers' "retroactivity arguments are not relevant to their situation." *Order* ¶ 8. This Motion for Reconsideration focuses pragmatically on why Affidavit Insurers should be dismissed based on the Court's findings in the *Order*. Affidavit Insurers reserve the right to raise their retroactivity arguments in the event of appeal.

that, having found no claims using the broader search methodology, Affidavit Insurers would not find eligible claims using the more narrow methodology:

However, as the Insurers themselves point out, by using the April 10, 2003, date, they searched a larger date range for apportioned claims and found none. Therefore, they are not affected by the window for potential claims subject to the *Schmill* attorney fee lien regardless of whether the window ends on June 22, 2001, or April 10, 2003. Therefore, their retroactivity arguments are not relevant to their situation.

Order ¶ 8.

Under the circumstances, no utility would be served by the filing of another round of adjusted affidavits. If claims eligible for *Schmill* common fund benefits were not found using broader search parameters, no claims will result from narrower criteria. "It is axiomatic that 'neither law nor equity require useless acts.'" *Rohlf's v. Klemenhagen, LLC*, 2009 MT 40, ¶ 40, 354 Mont. 133, 227 P.3d 42 (Morris, J., concurring) (quoting *Stockman Bank of Mont. v. Mon-Kota, Inc.*, 2008 MT 74, ¶ 41, 342 Mont. 115, 180 P.3d 1115) (recognizing that "[d]uplicative filing is an unwelcome burden which should not be required unless necessary").

B. Subsequent to Briefing Her Objections, Schmill Agreed that Other Insurers Using the Same Search Methodology Should Be Dismissed.

Reconsideration of the *Order* in this case is particularly warranted given the Court's expressed concern about potentially forcing previously-dismissed insurers to "re-search their files for *Schmill* claims between June 22, 2001 and April 10, 2003." *Order* ¶ 9. After briefing was completed on *Schmill*'s objections, *Schmill* agreed that two other insurers who used the exact same search methodology should be dismissed.

On April 10, 2012, Dairyland Insurance Company ("Dairyland") and Sentry Indemnity Company (sold to Connie Lee Insurance Company 12/17/1987) ("Sentry") submitted affidavits asserting that they had no claimants meeting the Court's criteria.² On June 29, 2012, *Schmill* served discovery on these two insurers. Dairyland and Sentry responded as follows to *Schmill*'s discovery requests:

INTERROGATORY NO. 1: Did you have any Montana occupational disease claims form July 1, 1987, up to and including June 22, 2001?

ANSWER No.

² *Affidavit Dairyland insurance Company, 4/4/12 (WCC # 523).*

INTERROGATORY NO. 2: When you state in your affidavit of April 10, 2012, in this case that "Sentry Indemnity Co. [and Dairyland] does not have any Montana Claims," [what] period of time are you referencing?

ANSWER: From July 1, 1987, through April 10, 2003.³

On the basis of these responses, which clearly indicate that both Dairyland and Sentry used April 10, 2003, as the end date for their search, Schmill advised the Court that she had no objection to their dismissal, stating:

The following is a list of the insurers we agree to dismiss from the common fund claim in regard to the *Schmill* matter based upon their representation in the Affidavits filed with the Court and discovery answers that they did not have any Montana occupational disease claims during the time period July 1, 1987 through April 10, 2003.

Dairyland Ins. Co.
Sentry Indemnity Co./ Sold to Connie Lee Ins. Co.⁴

On July 26, 2012, the Court dismissed Dairyland and Sentry.⁵

Significantly, these two insurers were the only insurers upon whom Schmill served discovery. Had she served this same discovery on any of the Affidavit Insurers, she would have received identical responses because, as shown above, Affidavit Insurers used the same search parameters: from July 1, 1987 to April 10, 2003.⁶ By agreeing to dismiss Dairyland and Sentry, Schmill recognized that the broader search parameters used by Dairyland, Sentry, and Affidavit Insurers present no obstacle to dismissal.

³ *Sentry Insurance Company's Responses to Petitioner's First Discovery Requests, 7/16/12; Dairyland Insurance Company's Responses to Petitioner's First Discovery Requests, 7/16/12.*

⁴ *Letters from L. Wallace to J. Poole, 7/18/12 (WCC #s 559 & 560).*

⁵ *Order of Dismissal, 7/26/12 (WCC # 561).*

⁶ Both Schmill's discovery requests to Dairyland and Sentry as well as her letters agreeing to their dismissal were served well after the March 8, 2012, hearing in which she identified her objection to the use of April 10, 2003, as a parameter in determining which claims were excluded from the common fund by virtue of the scope of retroactivity. Thus, her agreement to dismiss Dairyland and Sentry was made well **AFTER** she had acquired knowledge of their search methodology. It appears that Schmill initially objected based on a lack of uniformity in search methodology among insurers that have filed affidavits, but later recognized that those objections are meritless when she agreed to the dismissal of Dairyland and Sentry. In any event, sustaining Schmill's objections under these circumstances would only foster the inconsistency on which she premised her objection in the first place.

Moreover, Schmill's agreement to dismiss Dairyland and Sentry occurred *after* her objection to the dismissal of Affidavit Insurers had been fully briefed. Thus, the Court entered the *Order* without the express knowledge that Schmill had agreed to the dismissal of other companies that used an identical search methodology as that employed by Affidavit Insurers. Reconsideration is warranted.

The bottom line is that Affidavit Insurers have conducted an effective search for *Schmill* claimants and found none. Schmill was permitted to conduct discovery for 90 days in which she learned the precise search method used, and she agreed to dismiss two insurers using the same search method as Affidavit Insurers. There is no reason to further prolong this litigation by requiring Affidavit Insurers to file another round of affidavits that would not reveal any additional information. See *Stockman Bank of Mont. v. Mon-Kota, Inc.*, 2008 MT 74, ¶ 41, 342 Mont. 115, 180 P.3d 1115) (recognizing that “[d]uplicative filing is an unwelcome burden which should not be required unless necessary”).

II. The Court Should Reconsider Its Order Requiring Affidavit Insurers to Adjust Their Affidavits Because the Court's Pre-Formatted Affidavit Template Does Not Require A Recitation of Search Methodology.

Affidavit Insurers filled out and filed the pre-formatted affidavit promulgated by the Court as a means of expediting the dismissal of insurers with no eligible *Schmill* claims. The form affidavit does not ask or require the insurer to recite its search parameters or methodology. The affidavit simply provides a series of optional boxes to check that indicate the insurer's reason for requesting dismissal. The first option states that the insurer never wrote workers' compensation policies in Montana. The second option states that the insurer never had any Montana claims. The third option states that the insurer “has no claimants meeting the Court's criteria in this matter as set forth in the summons.” The fourth option states that the insurer was in liquidation at the time it received the summons.

The affidavit does not describe the methodology used to determine that the insurer had “no claimants meeting the Court's criteria.” No reference is made to any relevant dates, categories or classes the insurer culled in order to review its files for *Schmill* beneficiaries. There is no box to check on the pre-formatted affidavit that indicates the insurer complied with the June 22, 2001, date. Thus, to the extent the Court's order requires Affidavit Insurers to file a second pre-formatted affidavit, and because Affidavit Insurers have already conducted an adequate search that found no *Schmill* claimants, any newly filed pre-formatted affidavit would be substantively identical to the affidavit already filed.

Of course, to the extent the Court's order may be interpreted to require Affidavit Insurers to depart from the pre-formatted language by adding a description of the search methodology, or to state that Affidavit Insurers complied with the June 22, 2001, date, that exercise would still not yield any claimants eligible for *Schmill* common fund benefits. Nor would it provide Schmill with any information that she does not already

have. Affidavit Insurers respectfully request that the Court reconsider its order, overrule Schmill's objection, and dismiss Affidavit Insurers.

III. The Court Should Reconsider the Order Because There Is No Risk That Other Insurers Would Have to Re-Search or Re-File Affidavits to Conform to Affidavit Insurers' Search Method.

Having found that Affidavit Insurers' search parameters were actually broader than necessary, the Court appears to have sustained Schmill's objection that if the Court were to overrule her objection, other insurers who have previously filed affidavits would be forced to conduct another search to comply with the methodology employed by Affidavit Insurers. See *Order* ¶ 9. Schmill argued:

If the Court were to adopt the date of April 10, 2003, as proposed by Mr. Jennings, all of the hundreds of insurers who have filed affidavits with the Court would have to go back and re-search their records for *Schmill* claims between June 22, 2001, and April 10, 2003.⁷ Certainly, this represents a greater burden on the hundreds of insurers who have already submitted affidavits in this case than it does for Mr. Jennings' clients to go back and properly search their files using the date of June 22, 2001.⁸

The Court appears to have accepted Schmill's argument in an effort to standardize the search methodology using what it perceived as the earlier affidavit-filers' search method as the standard.

Therefore, rather than requiring other common fund insurers to re-search their files to encompass a broader set of dates, the Insurers subject to Schmill's objections need only adjust their affidavits accordingly. Schmill's objections are sustained and the Insurers are ordered to comply with the June 22, 2001, date for their file reviews. *Order* ¶ 9.

Affidavit Insurers respectfully assert that the Court erred in accepting Schmill's argument. Schmill's argument and objection was a red herring for several reasons.

⁷ Schmill's argument that the other insurers would have to search their claims files for "Schmill claims between June 22, 2001, and April 10, 2003," is a tacit admission that the Affidavit Insurers' search, which encompassed *Schmill* claims between June 22, 2001, and April 10, 2003, was broader than necessary. That tacit admission is only amplified by Schmill's agreement to dismiss Dairyland and Sentry, who used the same search methodology as Affidavit Insurers.

⁸ *Petitioner's Objection to Dismissing Certain Insurers*, 4/19/12, at 3 (WCC # 526).

First, Schmill has not asserted that the other insurers' search methodology was inadequate. Thus, while Affidavit Insurers conducted a broader search than necessary, the other insurers' search was also adequate. In other words, the other insurers met the minimum standard while Affidavit Insurers went beyond what was required for an effective search. Even with a broader search than necessary, Affidavit Insurers found no claimants eligible for *Schmill* common fund benefits. Accordingly, there is simply no reason for the other insurers to conduct a second search or to amend their affidavits in the absence of any objection to their searches or affidavits. Schmill's argument that these "hundreds" of insurers could be compelled to "re-search their records" to comply with Affidavit Insurers' methodology – when their searches are not even alleged to have been inadequate – cannot be taken seriously.

Second, because the Court's pre-formatted affidavit template does not seek any details concerning search parameters, compelling Affidavit Insurers for the sake of standardization to adjust their affidavits to indicate compliance with a June 22, 2001, date, would have the opposite effect. It would introduce even less standardization and more variation among insurers. The docket would reflect, according to Schmill, "hundreds" of insurers that filed the Court's form affidavit, and then "adjusted" non-standardized affidavits for the 57 Affidavit Insurers. In other words, requiring Affidavit Insurers to file adjusted affidavits with more detail about search parameters would ironically interject the same inconsistency on which Schmill premised her objection. If Affidavit Insurers are required to depart from the Court's form affidavit and file an affidavit expressly setting forth the search technique and/or dates used, is the Court going to require earlier affidavit filers also to submit an adjusted and similarly detailed affidavit? Does the 2005 affidavit form promulgated by the Court have any continued vitality or effect?

Third, and perhaps most importantly, the objection itself elevates form over substance. Affidavit Insurers have already searched their files, found no eligible *Schmill* claims, and then submitted their affidavits on the form promulgated by the Court. The Court has already recognized that Affidavit Insurers' searches were effective, if overbroad. The affidavits are substantively accurate, and even if the Court were to order some form of "adjustments," that will not change the fact Affidavit Insurers simply do not have any claims eligible for *Schmill* common fund benefits. Affidavit Insurers respectfully request that the Court reconsider its *Order*, overrule Schmill's objection, and enter an order dismissing the 57 Affidavit Insurers from this action.

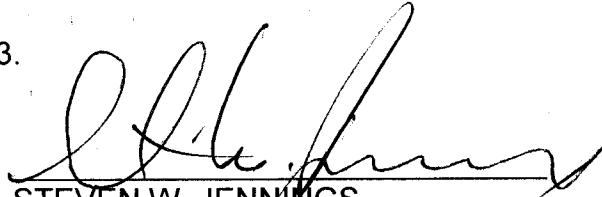
III. In the Event the Court Declines to Reconsider the Order, Affidavit Insurers Request Clarification as to What the Order Requires by Way of Adjustment to the Affidavits.

As shown above, the filing of adjusted affidavits by Affidavit Insurers would only further clog a long docket. No new substantive information would be conveyed. New affidavits would either be substantively identical copies of the originals, or, to the extent the Court would require new language indicating compliance with the June 22, 2001, date, those new affidavits would not provide any new information and would introduce inconsistencies in the form affidavit process.

In the event that the Court declines to reconsider its *Order*, Affidavit Insurers respectfully seek clarification as to how their affidavits may be adjusted, particularly if consistency with the "hundreds" of other insurers' form affidavits is the goal served. Affidavit Insurers doubt that the Court would require them to perform such meaningless actions, but also do not see how the affidavits may be adjusted under the circumstances in order to meet the spirit or letter of the Court's *Order*. Accordingly, in the event the Court declines to reconsider its *Order Sustaining Petitioner's Objections to Dismissing Certain Insurers* and overrule Schmill's objection, Affidavit Insurers respectfully request that the Court clarify its order and describe the action expected from Affidavit Insurers to comply with the *Order Sustaining Petitioner's Objections to Dismissing Certain Insurers* and obtain dismissal from this litigation.

Affidavit Insurers respectfully request a hearing on this motion.

Dated this 6th day of March 2013.



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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 6th day of March 2013:

- U.S. Mail
- FedEx
- Hand-Delivery
- Facsimile
- Email

Ms. Laurie Wallace
Bothe & Lauridsen, P.C.
P. O. Box 2020
Columbia Falls, MT 59912



STEVEN W. JENNINGS

SCHEDULE A
LIST OF AFFIDAVIT INSURERS

1. American Alternative Insurance Company
2. American Reinsurance Company
3. Bituminous Casualty Corporation
4. Bituminous Fire & Marine Insurance Company
5. Centre Insurance Company
6. Clarendon National Insurance Company
7. Fairfield Insurance Company
8. Farmers Insurance Exchange
9. Genesis Underwriting Management on behalf of Genesis Insurance Company
10. Great American Alliance Insurance Company
11. Great American Assurance Company
12. Great American Insurance Company.
13. Great American Insurance Company of New York
14. Great American Spirit Insurance Company
15. Greenwich Insurance Company
16. Hartford Accident and Indemnity Company
17. Hartford Casualty Insurance Company
18. Hartford Fire Insurance Company
19. Hartford Insurance Company of the Midwest
20. Hartford Underwriters Insurance Company
21. Middlesex Insurance Company
22. Montana Health Network Workers' Compensation Insurance Trust
23. Petroleum Casualty Company
24. Property & Casualty Insurance Company of Hartford
25. Republic Indemnity
26. Republic Indemnity of California
27. Sentinel Insurance Company, LTD
28. Sentry Insurance A Mutual Company
29. Sentry Select Insurance Company
30. Stillwater Mining Company
31. Truck Insurance Exchange
32. Trumbull Insurance Company
33. Twin City Fire Insurance Company
34. Universal Underwriters Insurance Company
35. XL Specialty Insurance Company
36. American Guarantee & Liability Insurance Company
37. American Zurich Insurance Company
38. Assurance Company of America
39. Chubb Indemnity Insurance Company
40. Chubb National Insurance Company
41. Executive Risk Indemnity, Inc.
42. Federal Insurance Company
43. Great Northern Insurance Company

44. Pacific Indemnity Company
45. Quadrant Indemnity Company
46. Colonial American Casualty & Surety
47. Everest National Insurance Company
48. Fidelity & Deposit Company of Maryland
49. General Reinsurance Corporation, as Successor to Named Insurer Northstar Reinsurance Corporation
50. Maryland Casualty Company
51. Mid Century Insurance Company.
52. Northern Insurance Company
53. Old Republic Insurance Company
54. PPG Industries, Inc.
55. Zurich American Insurance Company, as Successor to Valiant Insurance Company
56. Zurich American Insurance Company
57. Zurich American Insurance Company of Illinois