IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0705

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Gregory Dahl,

Petitioner,

-vs-

Montana First Judicial District Court,
Lewis & Clark County, and the Hon. Mike Menahan,

Respondents.

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Montana Rule of Appellate Procedure Rule 14(7)(a) Summary Response

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Defendant Mark Runkle, R&D Partners, LLC; and Mountain View Meadows, LLC, respectfully submit the following summary response to Plaintiff/Petitioner Gregory Dahl's petition for supervisory control. Defendant Comerica Bank & Trust, NA, Trustee of Mark & Joyce Runkle Irrevocable Generational Trust concurs and joins in this response.

I. Introduction

Montana's rather singular writ of supervisory control was created by Chief Justice Theodore Brantly in December 1900 and was rooted in the judicial shenanigans that occurred during the War of the Copper Kings in Butte. Larry Howell, *Montana's Unique Writ of Supervisory Control*, Trial Trends, Winter 2009, at 15; *see also Patrick v. State of Montana*, 2011 MT 169 ¶¶ 18-22, 361 Mont. 204, 257 P.3d 365. In his majority opinion issued in *Whiteside v. First Judicial District Court*, Chief Justice Brantly set forth the basic criteria codified in Montana's Rule of Appellate Procedure 14(3). *Id.*; 24 Mont. 539, 63 P. 395 (1900). The *Whiteside* Court noted "the supervisory power was granted to meet emergencies" and to do so by enabling this Court to supervise the district courts where the case is "exigent, no relief could be granted under the other powers of this court, and a denial of a speedy remedy would be tantamount to a denial of

justice." *Whiteside*, 24 Mont. 539. The current rule restates Chief Justice Brantly, granted only on a "case by case basis" . . . "Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate." Mont. R. App. P. 14(3).

The Petitioner/Plaintiff Greg Dahl seeks a writ of supervisory control of the district court. The asserted basis for this Court assuming supervisory jurisdiction is that the district court erred when it granted the defendants' motion to compel arbitration and denied Petitioner's motion to disqualify defendant Runkle, *et al.'s* counsel. Petitioner argues "The district court is proceeding under a mistake of law, causing a gross injustice and implicating constitutional issues of statewide importance." Pet. at 11. Petitioner is incorrect and his petition should be denied for the reasons that follow.

II. Summary of Facts and Statement of the Case

As the Court noted in its November 7, 2018, Order, the facts of this matter are generally uncontested. DA 18-0553, Order at 1. Petitioner Dahl, does however, make numerous unsupported fact allegations which must be disregarded; *e.g.*, "Runkle threatened to shoot Dahl if he didn't sign" the

2008 Operating Agreement (Pet. at 6); and, "Runkle made an unnecessary capital call, diluting Dahl's interest in R&D to less than 1%." *Id.* Dahl's quotes from the district court are not cited to the record and are not correct. *Id.* 9-10. Among others, those unsupported statements are mere allegations which will be eventually determined or denied in arbitration. In any event, with the few exceptions set out below, detailed facts are largely irrelevant to the Court's consideration of whether or not supervisory control is called for in this matter.

Petitioner argues supervisory control of the district court is necessary because the district court "is proceeding under a mistake of law, causing a gross injustice and implicating constitutional issues of statewide importance." Pet. at 11. Petitioner substantially expands the nature of the proceedings. Moreover, the plain language of the operative rule restricts application of supervisory control to matters where "urgency or emergency factors [make] the normal appeal process inadequate." Mont. R. App. P. 14(3). Petitioner has not and cannot show any urgency or emergency conditions exist in this case.

R&D Partners, LLC, the parties' subject business, was a financial failure and Petitioner Dahl's interest in R&D Partners was rendered

inoperative in 2012 as a result. Dahl nonetheless seeks remuneration and irrespective of his previous agreement that business differences would be determined in binding arbitration, filed a complaint in the district court in January 2014; however, the complaint was never served and the defendants named therein were unaware of its existence. Appendix, Ex. 1. Dahl subsequently filed and served an amended complaint in January 2016. Pet. App. A. Defendants named therein pointed out that the R&D Operating Agreement provided for arbitration of all matters "arising out of or relating to this Agreement." Pet. App. D at § 11.2.

Although Petitioner eventually agreed the parties were bound to arbitrate, there has not been any progress with arbitration due to Dahl's failure to perform his obligations in a timely manner. For instance, after considerable delay, the parties were working on rules of arbitration and had agreed by February 2017, that arbitration would take place in Helena in accord with the 2008 Operating Agreement and would be conducted by a single arbitrator, retired district court Judge Jeffrey Sherlock. Appendix. Ex. 2. Afterward, however, Dahl did not respond again until May 2017 when he suddenly stated that he had "recognized a conflict" with Judge Sherlock and insisted he be recused. Appendix, Ex. 3. Dahl refused to

identify the basis for the alleged conflict and since the decision was previously agreed to by all three counsel and parties, including Judge Sherlock, the defendants refused Dahl's demand. *Id.* Judge Sherlock had been chosen as a single arbitrator based upon trust in his considerable skill and temperament as a judge and defendants simply did not want to replace him for no reason. *Id.*

After another considerable hiatus on Dahl's part, in March 2018, Dahl unilaterally filed a notice of arbitration with AAA in direct contravention of the 2008 Operating Agreement. Appendix, Ex, 4. For the first time, Dahl claimed the 2008 Operating Agreement was void for duress. Appendix, Ex. 5. Defendants were accordingly forced to file the subject declaratory judgment action to affirm the 2008 Operating Agreement and to compel arbitration in order to get the matter back on track as agreed. After the declaratory judgment action was fully briefed, Dahl then "discovered" the alleged conflict of interest of Runkle, *et al.'s* counsel and filed a motion to disqualify in June 2018.

The district court ruled in August 2018 that Runkle's declaratory judgement action was well taken and ordered that the provisions of the 2008 Operating Agreement governed arbitration. Pet. App. G (ADV 2014-

255, Aug. 27, 2018, Order on Mot. to Compel at 3:11). The district court held that in light of the fact Dahl had filed a complaint alleging breach of the 2008 Agreement, he was estopped from subsequently claiming it was not valid. *Id.* at 3:7.

In a separate order the district court denied Dahl's motion to disqualify counsel. Pet. App. E (ADV 2014-255, Aug. 22, 2018, Order on Mot. to Disqualify). Therein, the district noted the obvious fact that counsel for Defendants Runkle and R&D Partners had never represented Dahl. *Id.* at 3:12. Thereafter, Dahl directly and prematurely appealed both orders to this Court. Dahl's appeal was dismissed by this Court thereafter based upon its finding that neither order was a final order for purposes of appeal. DA 18-0553. The Court's finding that the matter is not final was appropriate in that appointment of an arbitrator is pending at the district court. Although the district court agreed that Judge Jeffrey Sherlock would be selected, the parties have not so moved and the district court has not made a formal appointment.

Dahl then filed the instant petition for supervisory control. Dahl argues under the provisions of Montana Rule of Appellate Procedure 14(3) that supervisory control is justified and necessary in this case.

III. Response

Supervisory control here is clearly not warranted for a number of reasons including the fact that the requirement of an emergency or urgent situation is absent as is obvious from the chronology listed above. The complaint was filed in 2014 and was not even served. An amended complaint was filed and served over two years later. And as also noted above, Dahl was presumably aware, and certainly should have been aware of any conflicts and the alleged duress with respect to the 2008 Operating Agreement at the time of filing the complaints, but he did not raise any of those issues until much later and then did so incrementally. In summary, Dahl has failed to honor his obligations and has failed to prosecute his case for over four years due entirely to his own actions or lack of action – there is plainly no exigent circumstance.

Petitioner Dahl similarly fails to make a case that this matter is "causing a gross injustice and implicating constitutional issues of statewide importance." Mont. R. App. P. 14(3). The only argument Dahl presents in support of constitutional issues is the completely unremarkable fact that this Court has a "constitutional mandate to fashion and interpret the Rules of Professional Conduct." Pet. at 12. Although Dahl's observation is correct

on its face, he does not present a persuasive argument that meets the necessary threshold for supervisory control that this case presents "constitutional issues of statewide importance."

Dahl argues on two fronts that supervisory control is warranted: first, Dahl alleges this Court must assume jurisdiction based upon his assertion that counsel for defendants Runkle and R&D Partners has an impermissible conflict of interest; second, Dahl alleges the 2008 Operating Agreement is void for duress. Pet. at 11, 17. Both arguments lack legal merit with respect to the supervisory control analysis.

A. Supervisory Control is not warranted based upon Dahl's allegation that counsel is conflicted.

Dahl misapprehends the legal basis and procedure for seeking disqualification of counsel. In its opinion in *Schuff v. A.T. Klemens & Son*, this Court held that disciplinary actions for unprofessional conduct arising from a conflict of interest may only be accomplished by this Court or its designee Commission on Practice. 2000 MT 357, ¶ 33. Petitioner has not filed a complaint with the Commission and does not request disciplinary action from this Court. Consequently, Petitioner's argument that the district court ought to have reviewed the alleged conflict through the lens of Montana's Rules of Professional Conduct and its failure to "address and

apply" the same is not legally cognizable because that analysis and decision is entirely the province of this Court. *Id*; Pet. at 13.

It is true that a district court may require an attorney to withdraw if it determines that a conflict of interest exists such that the opposing party suffers legal prejudice. *Schuff* at ¶ 36. As such, the appropriate scope of review is whether the district court's orders impermissibly prejudice Dahl to the extent that supervisory control must be exercised. The decision of the district court is made irrespective of a perceived violation of the Rules of Professional Conduct, which as noted is the exclusive purview of this Court. *Id*. at ¶ 33. And as this Court noted in *Schuff*, "At the very least, it can be argued that counsel . . . failed to observe the Rules of Professional Conduct by not promptly reporting the alleged violation to the Commission on Practice. *See* Rule 8.3(a), M.R.Pro.C. (requiring lawyers to report rule violations)." In light of the severe prejudice alleged by Dahl, "it would seem that a reasonable course of action would include the timely observance of Rule 8.3's mandate." *See Schuff* at ¶ 51.

Addressed in the correct context, Petitioner's relevant conflict of interest arguments are threefold:

1. Petitioner will suffer legal prejudice because of counsel's previous representation of him personally (Pet. at 13);

2. Petitioner will suffer prejudice because of counsel's representation of R&D when he was an officer of the business (*id.* at 13-14); and

3. Petitioner will suffer prejudice because of counsel's concurrent representation of R&D while he is a current member (*id.* at 15).

Petitioner Dahl's arguments are addressed in order:

1. Counsel for R&D did not at any time represent Petitioner Dahl as an individual.

Dahl's initial argument fails because counsel for Runkle, *et al.* has never represented Dahl. Although Dahl raises this issue briefly, he does not and cannot provide any evidence in support. It is not this Court's duty to fashion Dahl's argument. *See In re Marriage of McMahon*, 2002 MT 198, ¶ 6, 311 Mont. 175, 53 P.3d 1266 ("This Court has repeatedly held that we will not consider unsupported issues or arguments."). The district court confirmed the lack of any evidence that Dahl was represented by counsel for Runkle. Pet. App. E, Order at 3:16. It follows that Dahl's unsupported argument concerning individual representation does not survive the requisite prejudice requirement necessary for the exercise of supervisory control.

2. Counsel's *de minimus* relationship with R&D Partners does not legally prejudice Petitioner Dahl.

There is no legal prejudice to the Petitioner that arises from the facts

of this issue. Legal prejudice is "A condition that, if shown by a party, will usually defeat the opposing party's action." BLACK'S LAW DICTIONARY 3738 (8th ed. 2004). Dahl fails to identify any such prejudice. Dahl bases his argument solely in terms of two unsupported statements: First, counsel "had access to and can use protected attorney-client information gathered from Dahl during his representation of R&D and its members to defend against Dahl's claims." Pet. at ¶ 17. "Second, the arbitration will be tainted by the conflict and the outcome may not be subject to appeal." *Id.*

Dahl does not identify any "protected attorney-client information" so his second "basis" for a conflict, that the arbitration will be tainted is unpersuasive at the outset. Dahl cannot supply any evidence for the claimed conflict because the claim is specious, counsel for Runkle did not represent R&D Partners or Dahl at anytime. There is simply not any such "confidential information" in the context of Montana Rule of Professional Conduct that is prejudicial to Dahl available to counsel, or for that matter to Dahl.

While it is true that counsel for Runkle was a partner at Gough, Shanahan, Johnson & Waterman, PLLP ("GSJ&W"), simultaneously with Tim Fox who did represent R&D, counsel did not participate in that

representation. Recognizing the fact that were that condition the *status quo* at this time, which it is not, a potential Rule 1.10 conflict could exist, the correct legal calculus is whether or not the district court correctly determined legal prejudice to Dahl resulted thereby. *Schuff v. A.T. Klemens & Son*, 2000 MT 357 at ¶ 36. The district court did not find in Dahl's favor, holding that there is no evidence that either of the parties possesses information not possessed by the other. Pet. App. E at 3:12.

Moreover, Tim Fox was elected Attorney General in November 2012; and Dahl had previously resigned from R&D, also in 2012. Pet. at 6. Dahl served defendants Runkle, *et al.* with the amended complaint in June 2016, well after the fact of the alleged conflict. Pet. App. A. Indeed, GSJ&W wrapped up the partnership and ceased providing legal services at the end of December 2015, prior to service of Dahl's amended complaint. There is simply no basis to find a prejudicial conflict. *Id.*

The parties have communicated since service of the amended complaint with no mention whatever of any perceived conflict of interest. The first mention of the alleged conflict occurred in a April 3, 2018, letter to counsel from Dahl's attorney, nearly two years after service of the complaint and six years after Dahl's disassociation with R&D. Appendix. at

Ex. 7. In light of Dahl's representations regarding the conflict, it is unlikely that he first recognized the issue that long after the fact.

Moreover, there is no information in the R&D file that is available to Runkle's counsel that varies in any degree from the information available to Dahl. Pet. App. E, Order at 3:20. All of the information in the file is discoverable and consists entirely of mundane corporate records. Dahl has been provided with a copy of the entire R&D Partner's file from GSJ&W's archives. Notably absent therein is any evidence in support of Dahl's claims concerning counsel's alleged conflict or of any legal prejudice to Dahl.

3. Petitioner is not a member of R&D Partners, has not been involved with the affairs of R&D since 2012, and cannot claim counsel is concurrently representing R&D while he is a member.

R&D Partners is a financial failure and exists on life-support solely through the efforts of Runkle. During its decline, the business relationship of the partners, Runkle and Dahl, deteriorated to the point that Dahl withdrew from R&D Partners in 2012 and has not been a member since. DA 18-0553, Nov. 7, 2018, Order at 1; Pet. at 6. Dahl's interest in R&D was functionally diluted to zero in 2012 by virtue of his refusal to participate in a capital call. Pet. at 6. Dahl's actual percentage interest in R&D Partners

is 0.00003571 – a nominal mathematical rounding error; his share is effectively zero from a financial and operational perspective. Dahl has not been involved with R&D since as a result of his refusal to respond to the financial distress of R&D through the capital call and his resignation from the business. Pet. at 6.

The practical result is that Dahl has not been a member of R&D during the pendency of his amended complaint or counsel's representation of R&D thereafter. *Id.* As a matter of fact, the reason Dahl commenced this legal action because his interest in R&D had been foreclosed. *See generally* Appendix at Ex. 2. In summary, Dahl has not and cannot provide support for an interest in R&D such that a conflict of interest is created which causes him legal prejudice.

B. Supervisory Control is not warranted based upon Dahl's allegations that the 2008 Operating Agreement is improper or the product of duress.

Dahl's argument that this Court must exercise supervisory control over the district court's order compelling arbitration is not persuasive and should be denied. The Court has previously held that district court orders compelling arbitration are valid contracts and must be enforced. "[A]greements to arbitrate generally represent valid and enforceable

contracts under Montana law." *Day v. CTA, Inc.*, 2014 MT 119, ¶ 8, 375 Mont. 79, 324 P.3d 1205.

The U.S. Supreme Court recently clarified its stance on arbitrability and not only reaffirmed the fact that an arbitrability clause is enforceable as a matter of contract, but additionally held that questions of arbitrability are to be determined by the arbitrator. *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.,* Slip Op. Jan. 8, 2019, S.Ct. No. 17-1272. It follows unavoidably that Petitioner's alleged contract issues should be decided by the arbitrator as a matter of settled law. Since the district court's order does nothing more than point that out, Dahl cannot claim any particular legal prejudice prior to event submitting the questions to arbitration.

Petitioner nonetheless argues that this Court should exercise supervisory control and presumably determine the question in contravention of the existing laws of Montana and the United States based upon his unsupported allegations of duress. Pet. at 18-19. Petitioner argues on both fronts that the issues he raises implicate the exigency and constitutional provisions of Montana Rule of Appellate Procedure 14(3).

Petitioner's argument is unpersuasive. Although the district court did not base its decision on the timing of Petitioner's challenge, it was pointed

out to Petitioner as well as the district court that his cause of action with respect to the 2008 Operating Agreement is plainly foreclosed by the statute of limitation. Appendix, Ex. 6 at 6. The statute of limitation to challenge a written agreement is eight years. Mont. Code Ann. § 27-2-202. The challenged 2008 Operating Agreement was executed on March 31, 2008. The statue of limitation barring a challenge would have run on March 31, 2016, well before the time Dahl raised the issue. Dahl did not challenge the agreement in either of his complaints; Dahl first challenged the contract on or about March 13, 2018, nearly two years past expiration of the statute. Appendix, Ex. 5. Dahl's cause of action regarding the agreement is plainly time-barred.

Additionally, Dahl's claims fail for lack of support. As the district court held, both of Dahl's filed complaints refer to the operating agreements as support for the complaint and make no reference whatever to any deficiency, duress, or illegalities in either. Pet. App., Ex. A & G at 3; Appendix, Ex. 1. Dahl may not now claim duress or any other deficiency.

As a final note, Dahl entered into an ancillary agreement with the defendants to arbitrate pursuant to the terms of the 2008 Operating Agreement, in Helena, Montana, with one arbitrator, and agreed on retired

district court Judge Jeffrey Sherlock to serve as arbitrator. Moreover, Judge Sherlock agreed to do so. Appendix, Ex. 2. Dahl may not now breach that agreement for no reason whatever.

V. Conclusion

Petitioner fails to make a case that this Court should exercise the extraordinary remedy of supervisory control. None of Petitioner's claims are exigent; and all of Petitioner's claims should be decided in arbitration as previously agreed to by the Parties. The Court should accordingly dismiss the petition as not appropriate for supervisory control.

Respectfully submitted and dated this 22nd day of January 2019.

TOOLE & FEEBACK, PLLC

/s/ *KD Feeback*

Attorneys for Defendant Mark Runkle, *et al.*

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Certificate of Compliance

The undersigned certifies that in accord with Montana Rule of Appellate Procedure 16, this brief is drafted with proportionately spaced 14 point font, double spaced, roman, non-script text, and excluding the certificate of compliance contains 3,462 words as calculated by Word Perfect software.

/s/ *KD Feeback*

Certificate of Service

The undersigned certifies that a copy of the foregoing was served on the following on the 22nd day of January 2019 by electronic service via the Court's E-File system or conventional filing as appropriate.

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CERTIFICATE OF SERVICE

I, KD D Feeback, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 01-22-2019:

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