

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Case No. DA 19-0456

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MOODYS MARKET, INC.; LIQUID ENGINEERING CORP.; STIEG RANCH, LLC; Z INC.; STORY DISTRIBUTING CO.; VINTON CONSTRUCTION; MONTANA ROOFING CONTRACTORS ASSOCIATION, INC.; ACE ROOFING, LLC; CORY SIMONS CONSTRUCTION, INC.; and NATIONAL FEDERATION OF INDEPENDENT BUSINESS,

Plaintiffs and Appellants,

vs.

MONTANA STATE FUND, MONTANA BOARD OF INVESTMENTS and  
STATE OF MONTANA,

Defendants and Appellees.

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**APPELLEE MONTANA STATE FUND'S  
RESPONSE BRIEF**

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On Appeal from the Montana Twentieth Judicial District,  
In and for the County of Lake,  
Cause No. DV-18-12; Honorable John W. Larson, Presiding

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## **STATEMENT OF THE ISSUES**

1. Whether the District Court correctly dismissed Plaintiffs' Complaint.
2. Whether the District Court abused its discretion when it denied Plaintiffs' Motion to Amend.

## **STATEMENT OF THE CASE**

Plaintiffs appeal from the District Court's Opinions and Orders Granting Defendants State Fund, State of Montana and Montana Board of Investment's (BOI) respective Motions to Dismiss, and denying Plaintiffs' Motion to Amend. Appellants' Appx. 1, 2.

On January 22, 2018, Plaintiffs filed a Verified Complaint for Declaratory Judgment against the State of Montana, State Fund and the Montana Board of Investments (BOI). D.C. Doc. 1. Plaintiffs asserted constitutional challenges to Mont. Code Ann. § 17-1-512 (Special Session 2017) on three grounds: (1) Violation of Mont. Const. Art. VIII, § 13 (Fiduciary Duty), (2) Violations of Mont. Const. Art. II, § 31 and the U.S. Const. Art. I, § 10 (Contracts clauses), and (3) Violations of Mont. Const. art. II, § 29 and U.S. Const. Fifth Amendment (Takings clause). D.C. Doc. 1 at 11-12.

On March 6, 2018, the State of Montana and BOI moved to dismiss pursuant to M.R.Civ.P. 12(b)(6). D.C. Docs. 11, 12. Briefing was complete on April 10,

2018. D.C. Docs. 16, 17. On July 3, 2018, the district court held oral argument. Doc. 20.

On August 2, 2018, State Fund filed a motion to dismiss pursuant to M.R.Civ.P. 12(b)(6). D.C. Doc. 21, 22. State Fund asserted that Plaintiffs did not allege any facts or legal theories to seek relief from State Fund. Doc. 22 at 5. Also, on August 2, 2018, Plaintiffs moved to file an Amended Complaint. D.C. Doc. 23, 24. All Defendants opposed amendment. D.C. Docs. 26, 27.

On June 17, 2019, the district court issued an Opinion and Order Granting Defendant State Fund's Motion to Dismiss and Denying Plaintiffs' Motion to Amend. Appellants' Appx. 1. On July 8, 2019, the District Court granted the State of Montana and BOI's Motion to Dismiss. Appellants' Appx. 2. Plaintiffs appealed.

### **STATEMENT OF THE FACTS**

During the 2017 Special Session, the Montana Legislature passed Senate Bill 4, which created a Management Rate Transfer. Ch. 4, Sp. L. November 2017 (effective November 24, 2017);<sup>1</sup> Mont. Code Ann. § 17-1-512 (Special Session 2017). The Management Rate Transfer statute provided:

(1) Subject to any limitations in the Montana constitution, for each calendar year, the board of investments shall transfer to the fire suppression

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<sup>1</sup> This Court takes judicial notice of legislative enactments. *MATL LLP v. Salois*, 2011 MT 126, ¶ 4, 360 Mont. 510, 255 P.3d 158.



account provided for in 76-13-150 a 3% management rate on any board of investments' investment portfolio:

- a) that has an average asset balance greater than \$1 billion; and
  - b) whose average asset balance contains sufficient funds to offset all liabilities as determined by the most recent actuarial study, including the independent actuarial report submitted to the legislature under 39-71-2363(3).
- (2) The 3% management rate applies to the average asset balance in excess of \$1 billion. The board of investments shall transfer the 3% management rate to the fire suppression account provided for in 76-13-150 on or before April 1 of the immediately following calendar year.
- (3) The state fund may not raise rates or reduce dividends to offset real or estimated losses associated with the 3% management rate transfer. (*Terminates June 30, 2019--sec. 6, Ch. 4, Sp. L. November 2017.*)

Mont. Code Ann. § 17-1-512 (Special Session 2017). The Management Rate Transfer Statute terminated on June 30, 2019. Mont. Code Ann. § 17-1-512(3) (2017); Mont. Code Ann. § 17-1-512.

Nothing in SB 4 or the Management Rate Transfer required State Fund to take any action in order to carry out the transfer. Rather, BOI was the only entity with an obligation to perform the Management Rate Transfer. Mont. Code Ann. § 17-1-512(1), (2) (Special Session 2017).

In January of 2018, Plaintiffs sought a declaratory judgment that SB 4 and its statutory enactments were unconstitutional. Appellants' Appx. 1, at 13.

Plaintiffs asked the Court to prohibit BOI from transferring funds pursuant to the Management Rate Transfer. *Id.* Plaintiffs also requested the State and BOI be ordered to return any transferred funds back to State Fund. *Id.* at 13-14. Plaintiffs

did not request any declaratory relief against State Fund, or request that the Court order State Fund to do anything. Plaintiffs admitted: “Plaintiffs are not making monetary claims against the Defendants at this time...” D.C. Doc. 1, ¶ 27.

State Fund moved to dismiss Plaintiffs’ Complaint for failure to state a claim upon which relief could be granted. D.C. Doc. 21, 22. Plaintiffs did not seek monetary relief, declaratory relief, or injunctive relief against State Fund. D.C. Doc. 22 at 4-8.

In August of 2018, Plaintiffs sought to amend their Complaint to name all of the individual State Fund Board members. D.C. Doc. 23, 24. Plaintiffs sought to add count 4: “Breach of Fiduciary Duties, Duties of Loyalty and Statutory Duties.” D.C. Doc. 24 ¶¶ 60-73. Plaintiffs proposed count 4 against all individual State Fund Board members and State Fund President Laurence Hubbard. D.C. Doc. 24, ¶ 61. Plaintiffs asserted that the individual State Fund Board members breached fiduciary duties, duties of loyalty and statutory duties, “by allowing MSF funds to be transferred to the State of Montana.” D.C. Doc. 24, ¶¶ 64, 68, 69. Plaintiffs continued to represent they did not seek damages: “Plaintiffs are not making monetary claims against the Defendants at this time...” D.C. Doc. 24, ¶ 44. However, Plaintiffs also requested “damages, including compensatory, Plaintiffs have sustained as a result of Defendants’ unlawful conduct...” *Id.* at 17, ¶ 7.

## **STANDARD OF REVIEW**

“A district court’s decision to grant a motion to dismiss under M.R.Civ.P. 12(b)(6) operates as a conclusion of law.” *Lyman Creek, LLC v. City of Bozeman*, 2019 MT 243, ¶ 8, 397 Mont. 365, 450 P.3d 872. “The determination of a party’s standing to maintain an action is a question of law that we review de novo.” *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶ 6, 389 Mont. 122, 406 P.3d 427. This Court reviews, “a district court’s conclusions of law to determine whether the trial judge's interpretation of the law is correct.” *Lyman Creek*, ¶ 8. The Montana Supreme Court will affirm a district court the reaches the correct conclusion, even if it reached that result for the wrong reason. *Wells Fargo Bank v. Talmage*, 2007 MT 45, ¶ 23, 336 Mont. 125, 152 P.3d 1275.

“We review a district court’s denial of a party’s motion for leave to amend the pleadings to determine if the district court abused its discretion.” *Peuse v. Malkuch*, 275 Mont. 221, 911 P.2d 1153, 1156, (1996).

## **SUMMARY OF THE ARGUMENT**

The District Court correctly dismissed Plaintiffs’ Complaint against State Fund Plaintiffs’ Constitutional challenges to the Management Rate Transfer were not stated against State Fund. State Fund did not pass the Management Rate Transfer. State Fund did not perform and was not required to perform any actions under the Management Rate Transfer. Plaintiffs’ Complaint did not seek any relief

from State Fund, monetary or equitable. As a result, Plaintiffs' Complaint did not State a claim against State Fund.

The District Court did not abuse its discretion when it denied Plaintiffs' Motion to Amend to add claims against State Fund Board members in their individual capacities for four independent reasons. First, Plaintiffs' attempt to assert claims against individual board members was futile as all board members are absolutely immune from suit under Mont. Code Ann. §§ 2-9-305(5), and 2-9-103(1). In addition, Board members cannot be liable for any alleged State Fund obligations.

Second, a declaratory judgment is not a proper cause of action. Plaintiffs sought to improperly bring tort claims under the guise of a declaratory action. Declaratory actions are not supposed to be substitutes for regular causes of action.

Third, Plaintiffs' proposed amendment did not state a legally cognizable claim involving any duty to pursue litigation. The decision to pursue or not to pursue litigation is not a breach of a fiduciary duty or any duty of loyalty to the Plaintiffs. The State Fund Board is vested with the management, powers and business judgment to determine whether or not to sue.

Fourth, Plaintiffs' alleged breaches of statutory duties are not cognizable. The statutes Plaintiffs identified did not create any duties running from individual State Fund Board members to the Plaintiffs.

## **ARGUMENT**

### **I. The District Court Correctly Dismissed Plaintiffs' Complaint Against State Fund.**

Plaintiffs' Complaint did not allege facts or a legal theory to seek relief from State Fund. Plaintiffs did not allege State Fund acted or was required to take any actions regarding the establishment of the Management Rate Transfer, or any transfer of funds pursuant to the Management Rate Transfer. In short, Plaintiffs did not state a prima facie claim against State Fund.

Plaintiffs alleged claims and sought relief from the State of Montana and the Montana Board of Investments. However, Plaintiffs did not seek declaratory or injunctive relief against State Fund. Furthermore, Plaintiffs admitted: "Plaintiffs are not making monetary claims against the Defendants at this time..." D.C. Doc. 1, ¶ 27.

Plaintiffs did not state a claim against State Fund upon which relief can be granted. For this reason alone, the Court should affirm the District Court's dismissal of Plaintiffs' entire Complaint against State Fund. If the Court agrees, the Court need not analyze or address the arguments regarding the individual claims.

#### **A. Count 1 Does Not State a Claim Against State Fund.**

Count 1 asserts that the Management Rate Transfer is unconstitutional pursuant to Mont. Const. art. VIII, § 13, Investment of Public Funds and Public Retirement System and State Compensation Insurance Fund Assets. D.C. Doc. 1,

¶¶ 28-33. Count 1 discusses the Management Rate Transfer's alleged impacts on State Fund. However, Plaintiffs did not state a cause of action against State Fund merely because it was the subject of the Management Rate Transfer.

Furthermore, even if the Court construed count 1 to assert a claim for breach of a fiduciary duty, the Complaint did not allege any act or omission by State Fund. State Fund was a bystander. The Legislature's decision to pass the Management Rate Transfer was not an alleged breach of a fiduciary duty by State Fund. BOI's obligations, imposed by the Management Rate Transfer, do not constitute a breach of any alleged fiduciary duty by State Fund. Doc. 1, ¶¶ 31-33. Even construed broadly, Plaintiffs' complaint did not state any factual basis for count 1 against State Fund. The District Court correctly concluded that count 1 should be dismissed against State Fund.

**B. Counts 2 and 3 Do Not State Claims Against State Fund.**

Counts 2 and 3 challenge the constitutionality of the Management Rate Transfer pursuant to the Contract Clause and the Taking Clause.<sup>2</sup> D.C. Doc. 1, ¶¶ 34-42. The Complaint mentions State Fund in passing, but only to discuss how the Management Rate Transfer allegedly impacts State Fund. The Complaint does not assert any facts to state a claim that State Fund engaged in any allegedly unconstitutional conduct.

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<sup>2</sup> Mont. Const. Art. II, §§ 29 and 31; U.S. Const. Art. II, § 10 and U.S. Const. Fifth Amendment.

In sum, Plaintiffs' Complaint did not state claims against or seek relief from State Fund. Even if the Court analyzes each individual claim, there are no factual allegations to support any form of relief against State Fund. The Court should affirm the District Court's dismissal of Plaintiffs' Complaint.

## **II. The District Court Did Not Abuse Its Discretion When It Denied Plaintiffs' Motion to Amend.**

On August 2, 2018, Plaintiffs sought to Amend their Complaint. The Complaint was nearly identical to Plaintiffs' original Complaint. Counts 1-3 did not state claims for the same reason as explained above.

Plaintiffs proposed to add a fourth count: "Breach of Fiduciary Duties, Duties of Loyalty, and Statutory Duties." D.C. Doc. 24 ¶¶ 60-73. Plaintiffs proposed to assert this claim against the individual State Fund Board members. *Id.* ¶¶ 62, 66, 69. Plaintiffs asserted that the individual State Fund Board members had breached their respective alleged duties by "allowing MSF funds to be transferred to the State of Montana." *Id.* ¶¶ 62, 66, 70.

The District Court did not abuse its discretion when it denied Plaintiffs' Motion to Amend for four independent reasons. First, State Fund Board members are absolutely immune. Second, a declaratory judgment is an improper cause of action. Third, Plaintiffs' proposed amendment did not state a legally cognizable claim involving any duty to pursue litigation. Fourth, Plaintiffs' alleged breaches of statutory duties are not cognizable.

**A. All Board Members are Absolutely Immune from Claims for Breaches of Fiduciary Duty, Breaches of the Duty of Loyalty and Statutory Duties.**

All State Fund Board members are absolutely immune from Plaintiffs' proposed count 4. First, Board members are immune pursuant to Mont. Code Ann. § 2-9-305(5). Second, Board members are immune pursuant to Mont. Code Ann. § 2-9-103(1). Third, Board members are immune pursuant to Mont. Code Ann. § 39-71-2318.

The applicability of any one of these immunities rendered Plaintiffs' proposed amendment futile. A court does not abuse its discretion to deny a motion to amend where an amendment is futile or legally insufficient. *Reier Broad. Co. v. Montana State Univ.-Bozeman*, 2005 MT 240, ¶ 12, 328 Mont. 471, 121 P.3d 549. As a result, the Court should affirm the District Court's denial of Plaintiffs' Motion to Amend.

**1. State Fund Board Members are Immune Under Mont. Code Ann. § 2-9-305(5).**

All State Fund Board members are immune from suit for allegedly acting in the course and scope of employment. Mont. Code Ann. § 2-9-305 provides:

In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment...



Mont. Code Ann. § 2-9-305(5). The plain language of Mont. Code Ann. § 2-9-305(5) provides a government employee is immune from liability when her employer acknowledges the conduct occurred in the course and scope of employment. *Germann v. Stephens*, 2006 MT 130, ¶ 43-44, 332 Mont. 303; 137 P.3d 545 (applying immunity to both claims for damages and claims for declaratory relief). State Fund Board members are “employees” for the purposes of the Montana Tort Claims Act. Mont. Code Ann. § 2-9-101(2)(a).

The conduct upon which Plaintiffs have brought their claims for breach of the duty of loyalty or fiduciary duty arose out of the course and scope of the individual State Fund Board members’ service, or employment, as members of the State Fund Board. Pursuant to Mont. Code Ann. § 2-9-305(5), all individually named State Fund Board members are “immune from liability.” The only proper defendant is State Fund. As a result, it would be futile or legally insufficient to allow Plaintiffs to amend the complaint to name individual State Fund Board members. *See German*, 2006 MT 130, ¶ 44 (awarding attorney fees against Plaintiff who named individual public employees). The District Court should be affirmed for this reason alone.

**2. State Fund Board Members are Immune Under Mont. Code Ann. § 2-9-103(1).**

Montana provides absolute immunity to public employees who rely on statutes that are later declared unconstitutional:

If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which the individuals or governmental entity would not have been liable if the law had been valid.

Mont. Code Ann. § 2-9-103(1). This is akin to a State law version of qualified immunity. *See Tschida v. Motl*, 250 F. Supp. 3d 709, 712 (D. Mont. 2017).

“[S]tatutes are presumed constitutional absent proof beyond a reasonable doubt to the contrary.” *Elliott v. Montana Dep’t of Revenue*, 2006 MT 267, ¶ 11, 334 Mont. 195, 146 P.3d 741. This is, in part, because the Legislature exercises its constitutional power when it enacts a statute. *Id.* ¶ 14. Therefore, Mont. Code Ann. § 2-9-103(1) provides absolute immunity to individual State actors who carry out the law as enacted by the legislature.

When a Court analyzes Mont. Code Ann. § 2-9-103(1) it may assume, *arguendo*, the challenged statute is unconstitutional because the Board members and Mr. Hubbard, as state actors, are protected from liability irrespective of the

constitutionality of the statute. *Ross v. City of Great Falls*, 1998 MT 276, ¶ 30, 291 Mont. 377, 967 P.2d 1103. Given that the constitutionality of the challenged statute is meaningless, the Court need not determine the constitutionality and should conclude State Fund board members are immune without addressing constitutional issues.

Based on Mont. Code Ann. § 2-9-103, members of the Montana State Fund Board are immune from any alleged action or inaction in the face of the Management Rate Transfer. The individual State Fund Board members were faced with presumptively valid legislation. Even assuming the Management Rate Transfer is unconstitutional, the Individual Board members (and State Fund itself) are immune based on the decision to defer to the Legislature's exercise of its constitutional authority to enact laws. *State ex rel. Dept. of Justice v. Dist. Court*, 172 Mont. 88, 560 P.2d 1328 (1976) (recognizing individual employee immunities extend to state and state agencies); *Elliott*, 2006 MT 267, ¶ 14.

Based on Mont. Code Ann. § 2-9-103(1), Plaintiffs cannot assert proposed count 4 against individual State Fund Board members (or State Fund). Amendment would be futile or legally insufficient. The District Court's denial of Plaintiffs' Motion to Amend should be affirmed for this reason alone.

### **3. Individual Board Members Cannot Be Liable for State Fund's Obligations.**

State Fund Board members also have individual immunity from alleged obligations of State Fund. “The members of the board, the executive director, and employees of the state fund are not liable personally, either jointly or severally, for any debt or obligation created or incurred by the state fund.” Mont. Code Ann. § 39-71-2318. Plaintiffs seek damages for State Fund’s alleged breach of an “obligation” to contest the Management Rate Fee. D.C. Doc. 24, ¶ 40; Proposed Prayer for Relief, ¶ 7. None of the individual State Fund Board members can be liable for breach of such an alleged obligation. Mont. Code Ann. § 39-71-2318. As a result, Plaintiffs’ proposed count 4 is futile or legally insufficient. The District Court should be affirmed for this reason alone.

#### **B. A Declaratory Action is Improper Against Individual Board Members.**

It is improper to seek declaratory relief where there is an adequate alternative cause of action. Plaintiffs’ request for declaratory relief against individual board members was futile for this reason alone. This Court has explained that even if a request for declaratory relief survives threshold jurisdictional defects, a court has discretion to decline jurisdiction:

First, even though all of the necessary elements of jurisdiction exist, the district court is not required to exercise that jurisdiction. Secondly, a motion to dismiss a declaratory judgment rests with the sound discretion of the district court.

*Murray v. Motl*, 2015 MT 216, ¶ 12, 380 Mont. 162, 354 P.3d 197; *see Empire Fire & Marine Ins. Co. v. Goodman*, 147 Mont. 396, 399, 412 P.2d 569, 571 (1966) (“The Uniform Declaratory Judgments Act grants an authority -- not a command. It gives the court the necessary competency to make a declaration of rights, but it imposes no duty to do so.”).

A request for declaratory relief should not be disguised as a substitute for regular causes of action for damages:

The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined. *However, it is not the true purpose of the declaratory judgment to provide a substitute for other regular actions.*

*Murray*, 2015 MT 216, ¶ 11 (emphasis added), *quoting In re Dewar*, 169 Mont. 437, 444, 548 P.2d 149, 153-54 (1976). A declaratory action is improper where a party has “an adequate alternative remedy available,” such as another cause of action authorized by law. *Id.* ¶ 15.

Plaintiffs seek a declaratory judgment that individual State Fund Board members breached alleged fiduciary duties, duties of loyalty and statutory duties. D.C. Doc 24, Prayer for Relief, ¶ 2. Plaintiffs seek compensatory damages for these alleged breaches. *Id.*, Prayer for Relief, ¶ 7. For whatever reason, Plaintiffs attempted to use a declaratory judgment action as a substitute for other adequate

alternative actions. This was improper and was a sufficient basis to deny a motion to amend. The District Court should be affirmed for this reason alone.

**C. The State Fund Board's Decision to Pursue or Not Pursue a Lawsuit was not a Breach of a Fiduciary Duty or Duty of Loyalty.**

Even if the Court assumed, *arguendo*, individual State Fund Board members could be sued in their individual capacities, the decision to not pursue litigation is not a breach of a fiduciary duty or duty of loyalty owed to the Plaintiffs. D.C. Doc. 24, ¶ 40. Plaintiffs must plead a *prima facie* case, including articulating a legally-cognizable claim upon which relief can be granted. They have not identified a duty, owed to Plaintiffs, obligating any individual State Fund Board Member to pursue litigation against the State of Montana regarding the Management Rate Transfer. As a result, Plaintiffs have failed to state a legal claim. Proposed count 4 is futile or legally insufficient.

Moreover, the decision to pursue or not pursue litigation rests with the State Fund Board. “The management and control of the state fund is vested in the board, subject to the statutory limitations imposed by this part.” Mont. Code Ann. § 39-71-2315(1). “The board is vested with full power, authority, and jurisdiction over the state fund except that the board may not dissolve or liquidate the state fund.” Mont. Code Ann. § 39-71-2315(2). The Board’s management authority and powers include the power to “sue and be sued.” Mont. Code Ann. § 39-71-2316(1)(b).

This is further supported by the business judgment rule. “The United States Supreme Court has described the Business Judgment Rule as a ‘deferential’ common law principle applicable in most states that implements ‘the basic principle of corporate governance that the decisions of a corporation—including *the decision to initiate litigation*—should be made by the board of directors or the majority of shareholders.’” *In re Tarczyński*, 2015 WL 728410, at \*7 (B.A.P. 9th Cir. Feb. 19, 2015), *dismissed*, 675 F. App’x 744 (9th Cir. 2017) (*citing Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (emphasis added); *see Ski Roundtop ex rel. Ski Yellowstone v. Hall*, 202 Mont. 260, 273, 658 P.2d 1071, 1078 (1983) (acknowledging existence of business judgment rule in Montana).

The decision to pursue or not pursue litigation rests with the State Fund Board, as an exercise of its managerial authority and powers. Plaintiffs do not identify any legal duty, owed to them, that would divest the State Fund Board of its discretion to direct litigation on behalf of State Fund. Plaintiffs’ theories are even more attenuated as they allege liability against the individual Board members.

In sum, Plaintiffs’ proposed count 4 fails to state a legal claim against individual State Fund Board members for the decision not to pursue litigation. This proposed amendment is futile or legally insufficient. The District Court should be affirmed for this reason alone.

**D. Plaintiffs' Alleged Breaches of Statutory Duties are Non-Cognizable and Amendment was Futile.**

Plaintiffs cite a number of statutes that State Fund Board members allegedly breached. Doc. 24, ¶¶ 69-70. However, they do not allege facts to support a claim for breach under any of these statutes, and the statutes themselves do not establish any duty owed to Plaintiffs.

Mont. Code Ann. § 39-71-2315 does not provide a basis for an alleged breach of a statutory duty. This statute confirms the State Fund Board's power and authority in the management and control of State Fund. Mont. Code Ann. § 39-71-2315(1), (2). It places a limitation on bond issuance. Mont. Code Ann. § 39-71-2315(3). It sets forth guidelines for the State Fund's annual business plan. Mont. Code Ann. § 39-71-2315(4-6). It also addresses in-house guidelines for procurement of insurance-related services. Mont. Code Ann. § 39-71-2315(7). Nothing in this statute provides a legal basis for Plaintiffs to assert statutory breach claims against individual State Fund Board members.

Likewise, Mont. Code Ann. § 39-71-2320 does not provide a basis for an alleged breach of a statutory duty. This statute defines the property of state fund. It provides the Management Rate Transfer is excepted from the definition of property. It does not create duties or obligations of individual Board members. Nothing in this statute provides a legal basis for Plaintiffs to assert proposed count 4 against State Fund Board Members.



Mont. Code Ann. § 39-71-2321 does not provide a basis for an alleged breach of a statutory duty. This statute addresses what monies are deposited in the State Fund. It does not create duties or obligations of the Board or individual Board Members.

Mont. Code Ann. § 39-71-2322 does not provide a basis for an alleged breach of a statutory duty. This statute provides that State Fund money is held in trust. Nothing in this statute provides a legal basis for Plaintiffs to assert statutory breach claims against individual State Fund Board members.

Plaintiffs' conclusory cites to the foregoing statutes, with no supporting factual allegations, are insufficient to state prima facie claims for breaches of any statutory duties by any individual State Fund Board member. As a result, Plaintiffs' proposed Amendment, regarding alleged statutory violations, is futile or insufficient. The Court can be affirmed for this independent reason.

### **III. Plaintiffs' Arguments About Dividends are Irrelevant to State Fund.**

Plaintiffs make allegations and arguments regarding State Fund's issuance of a dividend in 2018. Appellants' Br. at 15-27. All of these references to dividends concern Plaintiffs' alleged standing to bring constitutional challenges. Plaintiffs do not argue these allegations gave rise to a claim against State fund. As a result, the District Court correctly dismissed Plaintiffs' Complaint against State Fund and denied Plaintiffs' Motion to Amend.

**A. Plaintiffs' Allegations of Dividend Reductions Are Not Relevant to Any Claims Against State Fund.**

Plaintiffs' claims about dividends relate to Plaintiffs' claims of standing. State Fund has not made any argument regarding standing. As a result, Plaintiffs' claims about dividends are not relevant to State Fund. The District Court correctly recognized this and disregarded Plaintiffs' extrinsic evidence when it granted State Fund's Motion to Dismiss and denied Plaintiffs' Motion to Amend.

Neither Plaintiffs' Complaint, nor Plaintiffs' Proposed Amended Complaint alleged any facts or claims against State Fund, or individual State Fund Board members related to dividends. On the contrary, Plaintiffs Complaint only concerned the constitutionality of the Management Transfer Fee: "[t]his action seeks a declaratory ruling declaring newly enacted statutes and statutory amendments unconstitutional and to permanently enjoin their enforcement and authorization..." Doc. 1, ¶ 5. Likewise, Plaintiffs proposed Amended Complaint only concerned the constitutionality of the Management Transfer Fee: "[t]his action seeks a ruling declaring newly enacted statutes and statutory amendments unconstitutional and to permanently enjoin their enforcement and authorization..." Doc. 24, ¶ 21. As established above, Plaintiffs cannot assert constitutional claims against State Fund. In short, Plaintiffs' pleadings did not assert claims based on dividends and Plaintiffs' allegations are irrelevant to State Fund.

Plaintiffs' lawsuit concerned a constitutional challenge for which State Fund cannot grant any form of relief, irrespective of Plaintiffs' allegations regarding dividends. Plaintiffs' proposed amendment was still a constitutional challenge for which State Fund Could not grant any form of relief. As a result, Plaintiffs' allegations about dividends are irrelevant to any claims or proposed claims against State Fund. As a result, the District Court correctly disregarded Plaintiffs' extrinsic arguments and evidence when it granted State Fund's Motion to Dismiss.

**B. State Fund Did Not Reduce Dividends.**

Even if the Court considered Plaintiffs' allegations about dividends, Plaintiffs' evidence established that State Fund did not reduce dividends. Plaintiffs presented selective excerpts of the State Fund Board meeting to make an inaccurate claim that State Fund reduced dividends on September 20, 2018. Appellants' Br. at 21. However, the complete record undercuts Plaintiffs' claims.

On September 20, 2018, State Fund held a Board Meeting and unanimously declared a dividend of approximately \$40 million for 2018. Doc. 38, Ex. A at 17. The Board was aware of and discussed its legal obligation to not reduce the declared dividend based on the Management Transfer Fee. *Id* at 15; Mont. Code Ann. § 17-1-512(3) (2017). State Fund President Laurence Hubbard explained the proposed \$40 million dividend was identical to the 2017 dividend:

It is the same dividend as last year and so on its face the board of directors would not be reducing dividends compared to last year's certainly or any

prior year, because that was a watershed high level of dividend declaration, and would be on its face in compliance with the legislative mandate but I also recommend a \$40 million dividend based on prudent financial management of Montana State Fund.

Doc. 35, Ex. 1 at 3:07:18; Doc. 38, Ex. A at 16.

The Board acknowledged that the current year's net operating income was less than the previous year's result:

“So, in considering a dividend this year, as I indicated the State Fund's Board should consider current financial results, you have the second quarter financials within your book and that indicates that at least at current second quarter estimates net operating income before dividend would be approximately \$9.7 million, much less than \$50 million last year but certainly still a positive gain with current projections. And that would, when you include that SB4 was an expense that was incurred by MSF, that would move the reserve to equity ratio to about 1.7 to 1 just status quo. If the board did nothing before dividend.”

Doc. 35, Ex. 1 at 3:04:24; Doc. 38, Ex. A at 16. The Board recognized the proposed \$40 million dividend would result in a net operating loss for the year, but determined, in its discretion, this was the prudent course. *Id.*; Mont. Code Ann. § 39-71-2323. Before voting, Board Chair Lance Zanto confirmed that the Board's declaration of a \$40 million dividend was without consideration of any of the monies taken as a result of the Management Fee Transfer. *Id.* at 17. Contrary to Plaintiffs' out-of-context representation, the Board was unanimous in its decision to declare a \$40 million dividend, matched the previous year's dividend, and did not consider the Management Rate Transfer.

**C. The Board Did Not Injure Policy Holders When It Declared the Dividend.**

Even if the Court considered Plaintiffs' extrinsic evidence, Plaintiffs' evidence establishes State Fund did not injure policy holders when it declared a dividend equal to the prior year's dividend. In order to ensure that the Management Rate Transfer did not harm policy holders, the Montana Legislature put a statutory protection in place: "The state fund may not raise rates *or reduce dividends* to offset real or estimated losses associated with the 3% management rate transfer." Mont. Code Ann. § 17-1-512(3) (emphasis added). This statute provides the limited circumstances where the Management Rate Transfer's impact on a declared dividend could arguably constitute an alleged injury. Based on the plain language, the Legislature declared there is no alleged harm so long as the Board does not "reduce dividends" to offset the Management Rate Transfer.

The Board did not "reduce dividends to offset real or estimated losses associated with the 3% management rate transfer." The 2018 declared dividend was identical to the 2017 declared dividend. Moreover, the dividend did not "offset real or estimated losses." Just the opposite, the Board used existing equity to match the 2017 declared dividend. Doc. 35, Ex. 1 at 3:04:24; Doc. 38, Ex. A at 16.

Despite Plaintiffs' reliance on a single statement by Board Chair Zanto, the objective facts are to the contrary. The Board, unanimously declared a \$40 million dividend identical to the 2017 declared dividend. The Board unanimously

confirmed the dividend did not take the Management Rate Transfer into account. The Board did not “reduce” the dividend, let alone reduce the dividend to “offset real or estimated losses.” The Board complied with Mont. Code Ann. § 17-1-512(3).

In sum, even if the Court considered Plaintiffs’ extrinsic evidence, it did not state any claim against State Fund. The undisputed objective evidence established that State Fund did not reduce dividends. As a result, the District Court did not abuse its discretion when it denied Plaintiffs’ Motion to Amend.

### **CONCLUSION**

The Court Should affirm the District Court’s dismissal of Plaintiffs’ Complaint and denial of Plaintiffs’ Motion to Amend. Plaintiffs’ Complaint did not state any claims against State Fund. Plaintiffs did not seek any relief from State Fund. Plaintiffs’ Proposed Amended Complaint suffered from the same deficiencies as Plaintiffs’ original Complaint. In addition, Plaintiffs cannot name the individual State Fund Board members. As a result, the District Court was correct to dismiss Plaintiffs’ Complaint and deny Plaintiffs’ proposed amendment.

The Court should affirm the District Court.

Dated this 13 day of February, 2020

By /s/ Andres Haladay

Andres Haladay

Drake Law Firm

*Attorney for Appellee Montana State Fund*

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellee Montana State Fund's Response Brief, is double spaced, is a proportionately spaced 14 point Times New Roman, typeface, and contains 5,581 words.

/s/ *Andres Haladay*

Drake Law Firm

## **CERTIFICATE OF SERVICE**

I, Andres Nicholas Haladay, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-13-2020:

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