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STATE OF MONTANA
Case Number: DA 23-0224

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0224

THOMAS C. WEINER, M.D.,

Plaintiff and Appellant

v.

ST. PETER'S HEALTH, a Montana Domestic Nonprofit Corporation, d/b/a St. Peter's Hospital

Defendant and Appellee.

On Appeal from Montana First Judicial District Court, Lewis & Clark County
Cause No. CDV 2022-501, Hon. Kathy Seeley, District Court Judge

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APPELLANT'S REPLY BRIEF

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INTRODUCTION

The SPH Bylaws are clear. Dr. Weiner was required to exhaust SPH's administrative remedies before resorting to formal legal action challenging the decision, the procedures used to arrive at the decision, or asserting any claim against SPH or participants in the decision. Dkt. 1, Ex. A, p. 48. Dr. Weiner filed his first amended complaint in *Weiner I* in early 2021. He did not exhaust SPH's administrative remedy requirements until January 6, 2022, four months after the deadline for further amendment.

SPH does not, and cannot, contend Dr. Weiner could have brought his "three new [*Weiner II*] causes of action" in *Weiner I* at the time he first amended his *Weiner I* complaint. *See* SPH Answer Br., p. 1. **<u>That alone is dispositive</u>**; *Weiner II* is not barred by res judicata.

Further, Judge Menahan's denial of Dr. Weiner's second motion to amend in *Weiner I* was not on the merits—an essential element of res judicata[1]—and it is

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[1] Not only was the denial not on the merits, Juge Menahan did not "find[] undue delay on the part of Weiner and prejudice to SPH[,]" he found "that allowing Weiner to amend his complaint again would cause undue delay" and "would prejudice Defendants by requiring them to either conduct additional discovery in an unreasonably short period of time or vacate the current scheduling order and trial date causing more delay." SPH. *Compare* SPH Answer Br., p. 4, *with* Dkt. 8, Ex. E. Notably, SPH argued an opposite theory of prejudice to Judge Seeley. *See* Weiner Opening Br., pp. 21–22.

not appropriate to address arguments that Judge Seeley either did not consider or denied without cross-appeal from SPH.

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The sole issue on appeal is whether Judge Seeley's decision to dismiss *Weiner II* based on res judicata was correct. It was not, and the Court should reverse and remand to re-open the courthouse doors for Dr. Weiner to challenge SPH's administrative appeal process.

ARGUMENT

I. For the purposes of res judicata, Dr. Weiner could not have brought his *Weiner II* claims in *Weiner I*.

Weiner II involves three new claims not asserted or litigated in *Weiner I*. *See* SPH Answer Br., pp. 3–4 (citing Dkt. 6, p. 4). "The doctrine of res judicata seeks to put an end to vexatious litigation; **<u>it does not seek to prevent an injured party from reaching the courthouse doors on a claim neither litigated nor litigable in the prior lawsuit between the parties</u>**." *Gahr v. Trammel*, 796 F.2d 1063, 1067 (8th Cir. 1986) (emphasis added).

This Court's analysis should end, as it begins, with the principle that res judicata only applies when a claim has been or could have been litigated in the first action. SPH has not cited a single case where res judicata operated to dismiss claims

that could not have been raised **at the time of the operative complaint** in the first action.

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SPH concedes the correct point in time for this Court to consider in determining whether Dr. Weiner could have brought his *Weiner II* claims in *Weiner I* is the date he filed his first amended complaint. SPH Answer Br., p. 20. It also tacitly concedes the *Weiner II* claims had not accrued at that time: "As the District Court agreed, Weiner was aware prior to conclusion of the peer review process that **additional claims were likely to emerge** by the conclusion of that process." *Id.*; *see also* § 27-2-102(a), MCA ("claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action[.]").

In line with courts across the country, this Court recognizes the rule that res judicata does not operate to bar claims that had not accrued at the time the first suit was filed:

> Olsen could not have technically presented the issues in the former case as he does now. Olsen's ability to enforce possessory rights to the strip of land did not accrue until the strip of land was deeded back to him pursuant to the court order effecting rescission. . . . In other words, Olsen's trespass claim did not exist as a matter of law while

> Milner held title to the strip. Moreover, Olsen was not aware of the trespass claim at the time of the first suit because he had yet to commission the survey of his property.

Olsen v. Milner, 2012 MT 88, ¶ 25, 364 Mont. 523, 276 P.3d 934.[2]

Dr. Weiner's *Weiner II* claims "did not accrue until he had exhausted his administrative remedies." *Sherar v. Harless*, 561 F.2d 791, 794 (9th Cir. 1977). *Weiner II* is not barred by res judicata: "Res judicata does not bar a suit based on

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[2] *See also Spiegel v. Cont'l Ill. Nat'l Bank*, 790 F.2d 638, 646 (7th Cir. 1986) (second lawsuit not barred to the extent it was based on acts which occurred after first lawsuit was filed); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529 (6th Cir. 2006) ("'Simply put, [Rawe] could not have asserted a claim that [she] did not have at the time'" the complaint was filed.) (citation omitted); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369–70 (2d Cir. 1997) ("For the purposes of *res judicata*, '[t]he scope of the litigation is framed by the complaint at the time it is filed.'") (citation omitted); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008) (res judicata does not bar claims that accrue after previous suit was filed); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) ("[W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation."); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328, 75 S. Ct. 865, 868 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."); *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010) (res judicata "does not bar claims . . . that arise after the commencement of the prior action."); *Morgan v. Covington Twp.*, 648 F.3d 172, 172 (3d Cir. 2011); *Mitchell v. City of Moore*, 218 F.3d 1190, 1202–03 (10th Cir. 2000); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 (9th Cir. 1984).

claims that **accrue after** a previous suit was filed." *Potter*, 513 F.3d at 783 (emphasis added) (collecting cases); *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 n.8 (9th Cir. 2019) ("the rule in this circuit, and others, is that 'claim preclusion does not apply to claims that accrue after the filing of the operative complaint.'") (citing *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039–40 (9th Cir. 2017)); *accord Olsen*, *supra*.

With the law of res judicata against it, SPH argues—as the district court held—Dr. Weiner could have hypothetically litigated the *Weiner II* claims in *Weiner I* through a timely second amended complaint. SPH Answer Br., p. 6. The argument is flawed and has no bearing on the issue before the Court. *See Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914–15 (7th Cir. 1993) ("[P]laintiffs need not amend filings to include issues that arise **after** the original suit is lodged.") (emphasis added).[3]

Such a "rule would only invite disputes about whether plaintiffs could have amended their initial complaints to assert claims based on later-occurring incidents." *Morgan*, 648 F.3d at 178 (citing Fed. R. Civ. P. 15(a)); *see also Potter*, 513 F.3d at 783–84 (rejecting government's argument that plaintiff claims were barred

[3] It is undisputed Dr. Weiner could have filed *Weiner II* in lieu of moving to amend *Weiner I*. Instead, he moved to amend to avoid exactly what SPH now decries as improper: two lawsuits instead of one.

because "there is no legal duty to amend rather than bring a fresh suit, especially since a plaintiff has a right to amend her complaint only once without leave of court. . . . On the government's view, the judge would have to either allow the amendment, in order to prevent the bar of res judicata from cutting off the plaintiff's access to a remedy for the fresh harassment, or deny it and by doing so deny her any remedy. Neither alternative is attractive."); 18 Wright, Miller, & Cooper, Federal Practice and Procedure § 4409, at 213 (2d ed. 2002) ("Most cases rule that an action need include only the portions of the claim due at the time of commencing that action, frequently observing that the opportunity to file a supplemental complaint is not an obligation.").

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In concluding its argument about whether Dr. Weiner could have brought his *Weiner II* claims in *Weiner I*, SPH represents "[t]he District Court dismissed Weiner's attempt to circumvent the rules pertaining to the amendment of complaint[s], by filing duplicative complaints." SPH Answer, p. 22. That is not why the district court dismissed *Weiner II*. In fact, the district court "disagree[d] with [SPH's] argument that this case may be dismissed as an impermissible collateral attack on Judge Menahan's denial of leave to amend." Appendix 1, p. 3.

As it did below, SPH misapplies *Zisumbo v. Ogden Reg'l Med. Ctr.*, 2012 WL 4795655 (D. Utah Oct. 9, 2012), aff'd, 536 F. App'x 832 (10th Cir. 2013). The passage cited by SPH has nothing to do with claim splitting or res judicata. *Compare* SPH Answer Br., p. 21, *with Zisumbo*, at *2–3 (Section A. Consolidation).[4]

Zisumbo held the plaintiff was attempting to circumvent the rules pertaining to the amendment of complaints because the plaintiff's motion to amend *Zisumbo I* was denied, the plaintiff filed *Zisumbo II*, **and then the plaintiff moved to consolidate *Zisumbo I* and *Zisumbo II***. *Zisumbo*, at *2. Accordingly, the court denied the motion to consolidate. Dr. Weiner did not move to consolidate.

As it relates to this case, *Zisumbo* supports one conclusion, that Dr. Weiner's *Weiner II* claims are only barred if he could have brought them in *Weiner I*:[5]

> Although Plaintiff's motion to amend was denied in *Zisumbo I*, that denial alone does not prevent him from bringing his claims in a separate lawsuit. "[F]rom the standpoint of policy and logic, the fact that [a plaintiff's] motion to amend was denied on the ground of disruptiveness should have no bearing on the question of whether plaintiff should be permitted to assert such claim in a separate lawsuit." Instead, the question of whether

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[4] Claim splitting is a judicially created rule. "A claim-splitting analysis differs from a traditional res judicata analysis in that claim-splitting does not require there to be a final judgment on the merits in order for the doctrine to apply." *Zisumbo*, at *3. The district court held that Montana law does not recognize the doctrine of claim splitting without the final judgment element. Appendix 1, pp. 3–4. SPH did not appeal that decision.

[5] And if he could have, only if all elements of res judicata are met.

> Plaintiff should be allowed to bring his claims in a separate lawsuit is governed by the doctrine of claim-splitting.

Id. at *3 (quoting *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 989 (10th Cir. 2002)).

Because Dr. Weiner could not have brought his *Weiner II* claims when he first amended *Weiner I*, *Weiner II* is not barred by res judicata. The district court was incorrect and should be reversed.

II. Judge Menahan's denial of Dr. Weiner's second motion to amend was not a final judgment on the merits.

In its brief in support of its motion to dismiss *Weiner II*, SPH argued impermissible claim splitting (res judicata elements without the need for final judgment) and res judicata. Dkt. 6. The district court held that "Montana law requires final judgment on the merits before applying res judicata and offshoots of the doctrine like the rule against claim splitting," Appendix 1, p. 3, but that Judge Menahan's denial of the motion to amend constituted a final judgment on the merits of the proposed claims for the purposes of res judicata, Appendix 1, p. 9.

The district court was incorrect and should be reversed.

A. The district court incorrectly held the denial of Dr. Weiner's second motion to amend was a final judgment on the merits.

This Court has never held the denial of a motion to amend is a final judgment on the merits. *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, 366 Mont. 78,

285 P.3d 494 is distinguishable. In *Brilz*, the final judgment was the dismissal for inadequate pleading, not the denial of a motion to amend. *Id.*, ¶ 28–29.

As authority for its conclusion that the *Weiner I* court's denial of leave to amend was a judgment on the merits, SPH relies upon *Prof'l Mgmt. Assocs. v. KPMG LLP*, 345 F.3d 1030 (8th Cir. 2003), *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678 (8th Cir. 1997), and *King v. Hoover Group, Inc.*, 958 F.2d 219 (8th Cir. 1992). The Eighth Circuit cases cited by SPH are of no consequence.

The Nebraska Supreme Court analyzed these cases to determine their application to a case where the district court concluded a Florida court's denial of leave to amend was a judgment on the merits:

> In each case where the Eighth Circuit held that the denial of leave to amend was a judgment on the merits, the denial either was directly tied to the merits of the proposed amended pleading or reflected that the proposed amendments were futile because there was a prior judgment on the merits in the case. **Our research does not disclose any case in which the Eighth Circuit has concluded that the denial of leave to amend was a judgment on the merits where leave to amend was denied for reasons apart from the merits, such as timeliness**. Indeed, in *Kulinski* [*v. Medtronic Bio-Medicus, inc.*, 112 F.3d 368 (8th Cir. 1997)], where leave to amend was denied for a reason that did not reflect upon the merits, the Eighth Circuit found that the denial of leave to amend was not a judgment on the merits for purposes of res judicata. **Because in the instant case, the denial of Millennium's motion for leave to amend its second amended counterclaims was denied as untimely, *King***

<u>and its progeny do not support a finding that the Florida court's order denying leave to amend was a judgment on the merits</u>.

Millennium Labs., Inc. v. Ward, 289 Neb. 718, 728–29, 857 N.W.2d 304, 312 (2014) emphasis added).[6]

The District of Montana is in accord: "[I]n the cases finding the denial of a motion to amend to be a final judgment . . . each case's procedural posture includes an adjudication on the merits." *Save the Bull Trout v. Skipwith*, 2020 WL 2213557, at *7 (D. Mont. May 6, 2020), *report and recommendation adopted*, 2020 WL 4345324 (D. Mont. July 29, 2020); *see also Marin v. HEW, Health Care Financing Agency*, 769 F.2d 590, 593–594 (9th Cir. 1985); *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985 (9th Cir. 2005).

Dr. Weiner's motion for leave to amend was denied as untimely; it was not actually a judgment on the merits for res judicata purposes. **<u>That</u>** is Dr. Weiner's main argument. Because it is undisputed that (1) the denial of the motion to amend was not directly tied to the merits and (2) the order does not reflect that the

[6] The First Circuit has only "followed suit" with the Eighth to the extent that if leave to amend is denied as untimely and the party had an opportunity to appeal such denial (prior judgment on the merits in the case) but did not, then res judicata applies. *See* Def's Response, p. 13 (*citing Hatch v. Trail King Indus.*, 699 F.3d 38, 45 (1st Cir. 2012); *see also Hatch*, 699 F.3d at 40–41 (1st Cir. 2012).

proposed amendments were futile because there was a prior judgment on the merits in the case, the only conceivable way to convert the order into one on the merits is if it was made with prejudice. *See In Dzhanikyan v. Liberty Mut. Ins. Co.*, 2014 WL 12781773 (C.D. Cal. May 9, 2014) (finding the Ninth Circuit's holding in *Marin* to be applicable only to orders denying leave to amend *with* prejudice); *Skipwith*, at *14–17.

This issue was raised and addressed by the district court. Appendix 1, p. 8 (discussing whether Judge Menahan's denial was with prejudice).[7] Apart from incorrectly arguing the issue was not raised below, SPH responds that "it is clear the District Court considered whether the denial was with prejudice and determined it was." SPH Answer Br., p. 16. The statement belies the record:

> **Here, the Court is unable to state whether Judge Menahan's denial was intended to be with prejudice**. [*Skipwith*], at *11–12 (citing *Dzhanikyan* at *8).

Appendix 1, p. 8.

Accordingly, the district court incorrectly held Judge Menahan's denial of the motion to amend was a final judgment on the merits and, therefore, incorrectly dismissed *Weiner II* based on res judicata. *Skipwith*, at *16–17 (without finding

[7] Dr. Weiner is the party who cited *Skipwith* and *Marin*. Dkt. 8, p. 18.

dismissal is with prejudice, "under *Marin*, Plaintiff's claims are not barred by res judicata."); Weiner Opening Br., pp. 33–37.

This Court should reverse.

B. Judge Menahan's summary judgment order is not relevant.

In an attempt to escape the analysis above, SPH argues Judge Menahan's August 31, 2023, summary judgment order in *Weiner I* plays a role in this appeal: "there has now been a final judgment against Weiner [and]. . . . [w]hether Weiner had been allowed to amend *Weiner I* or bring those claims in *Weiner II*, his claims are now barred by the immunity provided under HCQIA." SPH is incorrect.

First, Dr. Weiner could not have brought his claims at the time he first amended the complaint in *Weiner I*. That is dispositive. *See* Section I, *supra*; *Skipwith*, at *8 (*Mpoyo* "holding is consistent with the principle that res judicata bars 'claims that were raised *or could have been raised* in a prior action[,]' but does not abate the requirement that all three res judicata elements must be met.").

Second, the facts here are very different than *Mpoyo*. Dr. Weiner filed his second motion to amend on February 4, 2022—nearly one year and seven months before Judge Menahan granted summary judgment and nearly one year before discovery closed. Mpoyo, on the other hand, sought leave to amend after discovery was complete, expert witness disclosures had passed, and summary judgment

motions were fully briefed. *Mpoyo*, 430 F.3d at 986. When *Mpoyo I* was already on appeal, Mpoyo filed *Mpoyo II* alleging the claims of the proposed amended complaint. *Id.* Mpoyo already had a chance to appeal the denial of the motion to amend and the summary judgment the court used to preclude *Mpoyo II*.

If the Court decides these differences are immaterial **and** that Dr. Weiner could have brought his *Weiner II* claims when he first amended *Weiner I* (dispositive issue), then the next step is to decide whether the other elements of res judicata are present when comparing *Weiner II* to *Weiner I*. *See generally Mpoyo*. Because the subject matter and the issues are not the same, the summary judgment in *Weiner I* does not bar *Weiner II*. *See* Dkt. 8, pp. 14–17, 19.[8]

Third, the Health Care Quality Improvement Act ("HCQIA") only provides immunity from claims for damages. The *Weiner II* claims for declaratory and injunctive relief are not barred by any immunity provided by HCQIA. HCQIA immunity "is immunity from damages only," *Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 35 (1st Cir. 2002), and does not shield a defendant from

[8] Other than the requirement of final judgment on the merits, the elements of res judicata were not discussed in Dr. Weiner's opening brief because the district court dismissed *Weiner II* based on Judge Menahan's denial of the motion to amend and not based on Judge Menahan's summary judgment order. Of course, if the denial of the motion to amend is the operative "judgment on the merits," then all other elements are met automatically. If the Court is inclined to consider the *Mpoyo* inquiry, comparing *Weiner II* to *Weiner I*, it should order supplemental briefing.

declaratory or injunctive relief. *See* 42 U.S.C. § 11111(a)(1) (limiting immunity to liability "in damages").

Fourth, Judge Menahan did not decide whether SPH is immune from *Weiner II*'s claim for damages. *Weiner II* challenges the administrative appeal process. HCQIA provides immunity for professional review actions. *See* Appellee's Appendix 1, 1-9–10. Judge Menahan found four professional review actions at issue in *Weiner I*: "(1) the CC's October 14, 2020 decision to summarily suspend Weiner's privileges . . . ; (2) the November 17, 2020 summary suspension of Weiner's privileges; (3) the CC's recommendation to revoke Weiner's privileges; and (4) the MEC's vote to adopt the CC's recommendation." *Id.* at 1–11.

The final action, the MEC's vote to adopt the CC's recommendation to revoke Dr. Weiner's privileges, occurred at a December 15, 2020, meeting. *Id.* at 1–6. Accordingly, the *Weiner II* claim for damages—based on the administrative appeal process—is not barred by Judge Menahan's ruling that SPH is immune from damages for peer review activities that occurred before December 15, 2020.

III. The Court should reject SPH's additional arguments.

With little confidence in the order dismissing *Weiner II*, SPH makes two additional arguments asking this Court to affirm the dismissal as "the correct result for the wrong reason." SPH argues this Court should dismiss *Weiner II* based on

laches and based on the doctrine of impermissible claim splitting. The district court did not address the first argument and denied the second. Neither is the "right" reason for dismissal.

A. *Weiner II* is not barred by laches.

Because laches is an affirmative defense, *see* M.R.Civ.P. 8(c), SPH bears the burden of proof. *See Wareing v. Schreckendgust*, 280 Mont. 196, 211, 930 P.2d 37, 46 (1996). A party asserting laches must always show it was prejudiced **as a result** of the other party's lack of diligence. *In re Marriage of Deist*, 2003 MT 263, ¶ 17, 317 Mont. 427, 77 P.3d 525. "When a party brings a suit within the applicable statute of limitations, the defendant has the added burden of proving that extraordinary circumstances exist which requires the application of laches." *Dollar Plus Stores, Inc. v. R-Montana Assocs., L.P.*, 2009 MT 164, ¶ 32, 350 Mont. 476, 209 P.3d 216 (emphasis added) (citation omitted).

Dr. Weiner brought his claims within the statutes of limitations—promptly one month after the conclusion of the appellate review process. SPH does not argue otherwise. Yet, SPH failed to proffer evidence constituting extraordinary circumstances. SPH Answer Br., p. 23 (claiming prejudice based on having to litigate); *see also Dollar Plus*, ¶¶ 33–34. And, the elements of laches are not accounted for in the *Weiner I* court's order denying Dr. Weiner's motion to amend.

The *Weiner I* court did not even find delay: "the Court finds that allowing Weiner to amend his complaint again **would cause** undue delay." Dkt. 8, Exhibit E, p. 4 (emphasis added). Dr. Weiner did not lack diligence in asserting his rights. *See Dollar Plus*, ¶ 32 (legislature essentially defined diligence by setting the statute of limitations).

Nor did the alleged lack of diligence cause the claimed prejudice: "a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable[.]" *Kelleher v. Board of Social Work Exam'rs*, 283 Mont. 188, 191, 939 P.2d 1003, 1005 (1997). SPH did not state how the passage of time caused its claimed prejudice or rendered enforcement inequitable. If Dr. Weiner agreed to stay *Weiner I*, an offer Judge Menahan also declined, he would have asserted his new claims at the same point in time and SPH would have had to defend. SPH's argument seems to be that having two lawsuits is inefficient and will require extra cost. But Dr. Weiner was willing and attempted to join his new claims in the first lawsuit. SPH opposed the amendment when it was unable to leverage Dr. Weiner.

Additionally, laches is a fact-dependent theory not suited for resolution on a Rule 12 motion. *See, e.g.*, *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 46, 308 Mont. 265, 42 P.3d 760 (Treiweiler, J., concurring and dissenting) ("The doctrine of

laches is an equitable doctrine which is fact intensive."); James Buchwalter, 30A CJS Equity § 160 (laches is a question of fact that requires a developed record); *Advanced Cardiovascular Systems v. Scimed Life Systems*, 988 F.2d 1157, 1161 (Fed. Cir. 1993) ("The strictures of Rule 12(b)(6), wherein dismissal of the claim is based solely on the complainant's pleading, are not readily applicable to a determination of laches."); *Spiral Direct v. Basic Sports Apparel*, 151 F.Supp.3d 1268, 1280 (M.D. Fla. 2015) (laches is a "fact-intensive affirmative defense" and usually "unsuitable" for dismissal at the pleading stage, except when all of the elements can be satisfied on the face of the pleadings).

B. *Weiner II* is not barred under the doctrine of impermissible claim splitting.

SPH argues *Weiner II* should be dismissed under the doctrine of impermissible claims splitting because "*Weiner I* and *Weiner II* are essentially a single lawsuit" and Dr. Weiner should have sought leave to amend instead of filing a new action. SPH Answer Br., p. 26. That is precisely what Dr. Weiner attempted to do in *Weiner I*, and SPH opposed.

That is why SPH cites the portions of "claim splitting" cases that do not address impermissible claim splitting, but the collateral attack of a court order. *See Glitsch, Inc. v. Koch Eng'g Co.*, 216 F.3d 1382, 1386 (Fed Cir. 2000). Those cases, however, do not support the conclusion that *Weiner II* should have been dismissed.

The passage from *Finjan, Inc. v. Blue Coat Systems, LLC*, cited by SPH on pg. 25, does not stand for the proposition for which it was cited. The District of California considered two arguments: (1) impermissible collateral attack of a court order denying a motion to amend and (2) impermissible claim splitting. The portion of the opinion cited by SPH addressed collateral attacks, not claim splitting. *Finjan* held a second lawsuit was not a collateral attack on the denial of a motion to amend because the order did not prohibit the filing of a subsequent suit based on the same allegations. *Finjan*, 230 F. Supp. 3d 1097, 1102 (N.D. Cal. 2017). *Finjan* went on to assess the motion to dismiss based on res judicata/claim splitting and dismissed some claims but not others. *Id.* at 1102–06. Res judicata did "not bar claims that could not have been asserted in the prior lawsuit because the acts of infringement had not yet occurred at that time." *Id.* at 1104; *see also Adobe Sys. v. Wowza Media Sys., LLC*, 72 F. Supp. 3d 989, 995 (N.D. Cal. 2014) (res judicata does not apply to claims party attempted to "add to the litigation claims that had accrued following the submission of the infringement contentions.").

Zisumbo also does not stand for the proposition for which it was cited. To argue impermissible claim splitting, SPH quotes portions of *Zisumbo* addressing whether a plaintiff whose motion to amend was denied could consolidate a later filed complaint. SPH Answer Br., pp. 25–26 (full paragraph citing *Zisumbo*, at *3).

SPH's attempt to conflate the issues is unavailing. After denying the motion to consolidate, *Zisumbo* stated the denial of the motion to amend had no bearing on whether a party could file a separate lawsuit and went on to analyze the case under the doctrine of "claim splitting," clearly showing the inquiries are not part and parcel. 2012 WL 4795655, at *3 (citations and quotations omitted). *Zisumbo* denied a motion to consolidate as a collateral attack and dismissed portions of the second lawsuit based on "claim splitting." *Id.* at *4–6.[9]

Like *Finjan* and *Zisumbo*, the district court "disagree[d] with Defendant's argument that this case may be dismissed as an impermissible collateral attack on Judge Menahan's denial of leave to amend" and went on to address claim splitting and res judicata. Dkt. 11, p. 3.

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The doctrine of claim splitting is essentially res judicata without the need for final judgment. In addressing the claim splitting argument, the *Weiner II* court agreed with Dr. Weiner that "Montana law requires a final judgment on the merits before applying offshoots of the doctrine like the rule against claims splitting," and

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[9] SPH similarly misapplied *Finjan* and *Zisumbo* below, which Dr. Weiner pointed out in his response. Dkt. 6, pp. 6–7; Dkt. 8, pp. 8–9

held it would "not apply res judicata principle without first finding a final judgment." Appendix 1, pp. 3–4. SPH did not cross-appeal that decision.

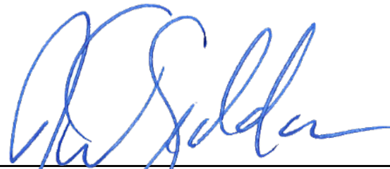
This Court's precedent does not recognize the federal doctrine of claim splitting. *See* Appendix 1, pp. 3–4; Dkt. 8, pp. 7–11. Even if it did, the doctrine is inapplicable because Dr. Weiner could not have brought his *Weiner II* claims when he first amended *Weiner I*. That is dispositive.[10]

CONCLUSION

Based on the foregoing and the reasoning set forth in his opening brief, Dr. Weiner respectfully requests this Court to reverse and remand.

Respectfully submitted this 14th day of November, 2023.

GOETZ, GEDDES & GARDNER, P.C.



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[10] If the Court decides claim splitting is viable in Montana and that Dr. Weiner could have brought his *Weiner II* claims in *Weiner I*, then it should order supplemental briefing on the other elements.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following, by the means designated below, this 14th day of November, 2023.

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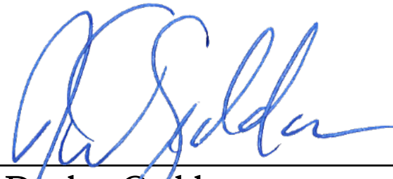
I certify, pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, that this brief is proportionately spaced, printed in 14-point Equity Text A (a Roman-style, non-script) type-face, is double-spaced (except that footnotes, quoted and indented material are single spaced); and is not more than 5,000 words (4,993 words), excluding the Caption, Table of Contents, Table of Authorities, the Certificate of Service and this Certificate of Compliance.



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