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MONTANA SECOND JUDICIAL DISTRICT COURT,
BUTTE-SILVER BOW COUNTY

SISTER MARY JO MCDONALD; LORI MALONEY; FRITZ DAILY; BOB BROWN; DOROTHY BRADLEY; VERNON FINLEY; MAE NAN ELLINGSON; and the LEAGUE OF WOMEN VOTERS OF MONTANA, Plaintiffs, v. CHRISTI JACOBSEN, Montana Secretary of State, Defendant.	Cause No. DV-2021-120 Hon. Kurt Krueger Dept. 1 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO SUBSTITUTE JUDGE**

INTRODUCTION

Plaintiffs failed to properly serve the Attorney General as required by the Montana Rules of Civil Procedure. To circumvent this error, Plaintiffs' Objection to Defendant's Motion to Substitute Judge misstates the procedure for serving the State, and state officials, in Montana. First, Plaintiffs argue that Mont. R. Civ. P. 4(l) did not require service on the Attorney General because the Secretary of State was sued in her official, not individual, capacity. Second, Plaintiffs argue that, whether or not Rule 4(l) required service on the Attorney General, the Attorney General had sufficient notice of the case based on the Rule 5.1 notice of constitutional question.

These arguments ignore the plain language, and purpose, of the service of process rules. In any case, Plaintiffs provided the Attorney General with a notice and acknowledgment, and the Attorney General, based on Plaintiffs' representations, signed and dated the acknowledgement. *See* Segrest Decl., Ex. 1 ("We disagree with your interpretation . . . . Nevertheless, it's not productive to argue about it. I have instructed my assistant . . . to email you an acknowledgment of service. Please sign and return. Thank you."). By rule, service is "deemed complete" on the date the acknowledgment was signed. Rule 4(d)(3)(E). Plaintiffs cannot now renege on these representations based on their incorrect position that notice of a constitutional issue serves as a substitute for actual service.

ARGUMENT

I. Defendant's motion was timely filed because the time to substitute a judge runs from the completion of service in compliance with Rule 4.

A. Rule 4(l) requires service of the summons and complaint on the Attorney General to effectuate service on the State or a state officer.

Lawsuits against a state official in their official capacity are suits against the State. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (stating "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [which] is no different from a suit against the State itself") (internal quotations omitted). Rule 4(l) requires a plaintiff to serve "[t]he state . . . by delivering a copy of the summons and complaint to the attorney general and any other party prescribed by statute." The Rule further requires a plaintiff who is suing a state officer or employee in an individual capacity to "serve the state and *also* serve the officer or employee." *Id.* (emphasis added). In other words, the requirement to personally serve an individual capacity defendant, as well as the State through the Attorney General, is an additional requirement, not a

limitation.[1] Thus, whether an official is sued in an official or individual capacity, the Attorney General must be served.[2]

This interpretation furthers the purpose of Rule 4(l), namely ensuring the Attorney General is properly notified of, and able to defend as needed, all suits against the State and state officers in whatever capacity. *See, e.g.*, *Kozaczek v. N.Y. Higher Educ. Servs. Corp.*, No. 1:10-CV-107, 2011 U.S. Dist. LEXIS 12761, at **3–4 (D. Vt. Feb. 9, 2011) (stating "the purpose of requiring service upon the Attorney General's office . . . is to insure the prompt notification of the Attorney General's office of all legal actions against the state. Such service allows for the subsequent coordination and supervision of the defense by the Attorney General.") (internal quotation omitted); *Boyd v. State*, 960 So. 2d 722, 724 (Ala. 2006) (stating "[t]he purpose of [the statute requiring service on the attorney general] is to give notice of the filing of the [complaint], and protect the state and its citizens should the parties be indifferent to the outcome of the litigation") (internal quotation omitted). On the other hand, to not require service on the Attorney General when a plaintiff chooses to name a state officer in their official capacity would create a huge

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[1] *Pallister v. Blue Cross and Blue Shield of Montana, Inc.*, 2013 MT 149, 370 Mont. 335, 302 P.3d 106, has no relevance to this case because it did not involve a lawsuit against the State or a state official. *See* Doc. 13 at 3.

[2] Even if Rule 4(l) were limited to individual capacity defendants, Plaintiffs did not specify in the Complaint whether Christi Jacobsen was sued in her official or individual capacity or in both capacities. *See* Complaint, ¶ 10.

loophole and undercut the purpose of insuring "the prompt notification of the Attorney General's office of all legal actions against the state." *Kozaczek*, *4.

Here, Plaintiffs failed to properly serve the State because they did not provide service of process on the Attorney General. Rule 4(d) provides only two means to effectuate service of process: (1) serving the summons and complaint together in person (Rule 4(d)(2)); or (2) serving the summons and complaint together by mail along with "two copies of a notice and acknowledgment conforming substantially to form 18-A" (Rule 4(d)(3)). Plaintiffs' service of a Rule 5.1 notice of constitutional challenge on the Attorney General did not meet these requirements and thus did not complete service. *See Mt. W. Bank v. Glacier Kitchens*, 2012 MT 132, ¶ 16, 365 Mont. 276, 281 P.3d 600 ("[K]nowledge of the action is not a substitute for valid service.").[3]

B. In any case, under Rule 4(d)(3)(E) service is complete on the date Defendant signed the acknowledgment.

After counsel for the State notified Plaintiffs' counsel of the lack of proper service on the Attorney General, Plaintiffs sent the State a notice and acknowledgment, which counsel for the State signed. Segrest Decl., Ex. 1. To avoid argument, Plaintiffs accepted the Attorney General's acknowledgment of

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[3] Opposing counsel are experienced trial attorneys and sue the State frequently. *See, e.g., Brown v. Gianforte*, 2021 MT 149, 404 Mont. 269, 488 P.3d 548; *Barrett, et al., v. Montana*, DV-21-581 B (1st Jud. Dist.). They know how to properly serve the State.

service, dated July 7, 2021, even though they did not agree with the State's position that service had not been effectuated. *Id.*; Doc. 11; Doc. 13 at 3 (acknowledgment of service "has now been accomplished").

Under Rule 4(d)(3)(E), service is "deemed complete on the date" the acknowledgment is signed. Because the time to substitute a judge runs from the completion of service "in compliance with" Rule 4, Mont. Code Ann. § 3-1-804(1)(a), the State had 30 days from the signing of the acknowledgment, or until August 6, 2021, to file a motion to substitute. The State filed the motion to substitute on July 16, 2021, well within the thirty-day timeline. Defendant's motion is timely.

Accordingly, this Court should find that the Attorney General was properly served on July 7, 2021, and that the motion to substitute was timely filed.

II. Notice of a constitutional challenge under Rule 5.1 is not a substitute for valid service of process.

Under Rule 5.1, "[a] party . . . challenging the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it." The party must "serve the notice and paper on the state attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose." *Id.* As noted above, however, Rule 4 service of

process is effectuated by delivering a copy of the complaint *and* the summons "in person" or "by mail," which requires a notice and acknowledgment conforming with Form 18-A. Mont. R. Civ. P. 4(d)(2)-(3). The purpose of Rule 5.1 is to provide notice to the Attorney General in the event he wishes to intervene in a challenge to the constitutionality of a state statute. *See* Rule 5.1(b). It is not a substitute for the requirements of Rule 4.

Plaintiffs' reliance on *Eisenhart v. Puffer*, 2008 MT 58, 341 Mont. 508, 178 P.3d 139, is misplaced. In that case, defense counsel refused to accept service, despite repeated efforts by the Plaintiff. *Id.* ¶ 19. Defendants made no argument that the attempted service was procedurally deficient. Here, however, Plaintiffs did not even attempt to follow the Rule 4 requirement to serve the Attorney General until defense counsel offered to "quickly sign a notice and acknowledgment to facilitate service." Segrest Decl., Ex. 1. Importantly, "[s]ervice is flawed if the mandates of M. R. Civ. P. 4 . . . are not *strictly* followed, *even where* a defendant has actual notice of the summons and complaint; knowledge of the action *is not a substitute for valid service.*" *Mt. W. Bank,* ¶ 16 (internal quotation and quotation marks omitted) (emphasis added).

Plaintiffs cannot rely on a notice filed under Rule 5.1 to escape the mandates of Rule 4. The clock did not begin ticking on a motion to substitute until service was "completed in compliance with M. R. Civ. P. 4," regardless of

whether the Attorney General had notice of the action. Mont. Code Ann. § 3-1-804(1)(a).

CONCLUSION

For the reasons provided above, the Attorney General respectfully requests this Court find the motion to substitute was timely filed and grant that motion.

DATED the 23rd day of July, 2021.

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By: _____
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CERTIFICATE OF SERVICE

I certify a true and correct copy of the foregoing was delivered by email to the following:

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Date: July 23, 2021

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