



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
June 03, 2021

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 11-15010-MKN
	)	Chapter 7
TIMOTHY L. BLIXSETH,	)	
	)	Date: November 13, 2020
Alleged Debtor.	)	Time: 9:30 a.m.
	)	

**ORDER ON MONTANA DEPARTMENT OF REVENUE’S  
MOTION FOR RELIEF FROM JUDGMENT<sup>1</sup>**

On November 13, 2020, the court heard the Montana Department of Revenue’s Motion for Relief From Judgment (“Relief Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND<sup>2</sup>**

On April 5, 2011 (“Petition Date”), the Montana Department of Revenue (“Montana”), joined by the Idaho State Tax Commission (“Idaho”) and the California Franchise Tax Board

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in this bankruptcy case as they appear on the case docket maintained by the Clerk of the Court. All references to “Section” are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. All textual references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All textual references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

<sup>2</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned case as well as the publicly filed documents referenced in those materials. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

1 (“California”), filed an involuntary Chapter 7 petition (“Involuntary Petition”) against Timothy  
2 L. Blixseth, Alleged Debtor, commencing the above-captioned case (“Involuntary Proceeding”).  
3 (ECF No. 1). All three petitioning creditors asserted unsecured claims for unpaid taxes owing to  
4 their respective States, with \$219,258.00 asserted by Montana, \$1,117,914.00 asserted by Idaho,  
5 and \$986,957.95 asserted by California.

6 On April 8, 2011, an Order to Show Cause Why Venue in this District is Proper and Why  
7 Transfer of Case is Not Appropriate (“OSC”) was entered, setting an initial hearing date of April  
8 22, 2011. (ECF No. 7).

9 On April 20, 2011, Idaho filed a notice of withdrawal from participation as a petitioning  
10 creditor. (ECF No. 20).

11 On April 20, 2011, the Alleged Debtor filed a response to the OSC that included a request  
12 to dismiss or abstain (“Dismissal Request”). (ECF No. 23). The Alleged Debtor’s Dismissal  
13 Request also sought monetary sanctions against the petitioning creditors under Bankruptcy Rule  
14 9011 and Section 303(i).

15 On April 20, 2011, California also filed a notice of withdrawal from participation as a  
16 petitioning creditor. (ECF No. 26).

17 On April 22, 2011, the initial hearing was held on the OSC by the assigned bankruptcy  
18 judge, Bruce A. Markell (“Judge Markell”). The OSC hearing was continued to May 18, 2011.

19 On April 27, 2011, the Alleged Debtor filed a motion under Bankruptcy Rule 9011 for  
20 sanctions to be awarded against Montana and its agents and attorneys. (ECF No. 55). The  
21 motion was set to be heard at the same time as the continued OSC hearing.

22 On May 5, 2011, a motion for relief from stay was filed by the Yellowstone Club  
23 Liquidating Trustee (“YCLT”) to allow it to proceed with various appellate matters related to  
24 separate bankruptcy proceedings arising out of the United States Bankruptcy Court for the  
25 District of Montana (“YCLT RAS Motion”). (ECF No. 82). That motion was noticed to be  
26 heard on June 7, 2011. (ECF No. 83).

27 On May 18, 2011, the continued OSC hearing was conducted. After consideration of the  
28 evidence and arguments presented, Judge Markell orally ruled that the Alleged Debtor’s

1 principal assets, consisting of intangible interests in two Nevada limited liability companies, are  
2 not located in Nevada, but at the place of the Alleged Debtor's undisputed residence in the State  
3 of Washington. As a result, the court concluded that the Involuntary Proceeding should be  
4 dismissed for lack of venue. The court also concluded that jurisdiction should be retained to  
5 consider the issuance of sanctions against the petitioning creditors and their representatives.<sup>3</sup>

6 On May 27, 2011, Judge Markell entered an "Order Dismissing Involuntary Petition  
7 Against Alleged Debtor Timothy L. Blixseth" that incorporated by reference his oral rulings  
8 issued at the OSC hearing ("First Dismissal Order"). (ECF No. 122). In light of the dismissal,  
9 the court also concluded that Alleged Debtor's Dismissal Request was moot as well as the YCLT  
10 RAS Motion. That order reserved jurisdiction over the Alleged Debtor's sanction requests and  
11 directed the filing of renewed motions.

12 On June 10, 2011, Montana appealed the First Dismissal Order to the Bankruptcy  
13 Appellate Panel for the Ninth Circuit ("BAP"). (ECF No. 146).<sup>4</sup>

14 On June 30, 2011, Judge Markell entered an order denying Montana's request for a stay  
15 pending its appeal of the First Dismissal Order. (ECF No. 186).

16 On July 19, 2011, however, the BAP entered an order granting Montana's request for a  
17 stay pending appeal of the First Dismissal Order. (ECF No. 236). Later the same day, this  
18 bankruptcy court entered an "Order Regarding Stay Pending Appeal." (ECF No. 237). That  
19 order stated, *inter alia*, that "Given the stay pending appeal issued today by the Bankruptcy  
20 Appellate Panel, all hearings in this case are hereby taken off calendar, and the parties are  
21 ordered to hold in abeyance all discovery. No new motions of any type may be filed without the  
22 prior permission of the Bankruptcy Appellate Panel confirming that its stay does not prohibit the  
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25 <sup>3</sup> A transcript of the continued OSC hearing ("OSC Transcript") was filed on May 24,  
26 2011. (ECF No. 120).

27 <sup>4</sup> In his oral ruling on the OSC, Judge Markell noted that both Idaho and California had  
28 filed withdrawals from participation in the case *nunc pro tunc* to the Petition Date, but that no  
order approving the withdrawals had been entered. See OSC Transcript at 55:7-13. The court  
also noted that Montana was the only petitioner actively participating in response to the OSC.

1 filing and prosecution of such motions. If, or when, the stay is dissolved or appropriately  
2 modified, the court will hold a status conference to assess what actions should then be taken.”

3 On December 17, 2012, a divided three-judge panel of the BAP entered an Opinion  
4 reversing the First Dismissal Order. (ECF No. 250). The majority concluded that the Alleged  
5 Debtor’s intangible interests in the two Nevada limited liability companies were located in  
6 Nevada and venue in Nevada therefore was proper. The dissent agreed with Judge Markell that  
7 the Alleged Debtor’s interest in those assets are general intangibles that are located for venue  
8 purposes at the Alleged Debtor’s place of residence in the State of Washington.

9 On December 18, 2012, the bankruptcy court entered an Order Setting Scheduling  
10 Conference. (ECF No. 251). The order directed Montana, Idaho, California, and the Alleged  
11 Debtor to appear for a scheduling conference.

12 On January 11, 2013, after the scheduling conference was conducted, a Scheduling Order  
13 was entered. (ECF No. 256).

14 On January 18, 2013, the Alleged Debtor filed a Renewed Motion to Dismiss Involuntary  
15 Case (“Second Dismissal Motion”). (ECF No. 261). The Alleged Debtor asserted that it had  
16 more than 12 creditors and that the Involuntary Petition no longer had at least 3 petitioning  
17 creditors as required by Section 303(b)(1).

18 On January 23, 2013, pursuant to the Scheduling Order, Montana and the Alleged Debtor  
19 filed a Joint Discovery Plan regarding the Second Dismissal Motion. (ECF No. 265). That plan  
20 provided deadlines for expedited discovery to be conducted, including production of documents,  
21 deposition of witnesses, issuance of subpoenas, and the like. It further provided deadlines for the  
22 submission of witness declarations, excerpts of deposition transcripts, witness lists, exhibit lists,  
23 and trial stipulations. The Joint Discovery Plan was approved by a court order entered on  
24 January 24, 2013. (ECF No. 266).

25 On January 25, 2013, an amendment to the Joint Discovery Plan was submitted by  
26 Montana and the Alleged Debtor. (ECF No. 270). The amended Joint Discovery Plan was  
27 approved by a court order that set the trial of the Second Dismissal Motion for February 27,  
28 2013. (ECF No. 271).

1 On February 1, 2013, an order was entered vacating the hearing on the Second Dismissal  
2 Motion as well as the discovery deadlines. (ECF No. 283).

3 On March 15, 2013, the bankruptcy court entered another Order Setting Scheduling  
4 Conference. (ECF No. 294). The order directed Montana and the Alleged Debtor to appear for a  
5 scheduling conference to be held on March 25, 2013.

6 On March 22, 2013, Montana filed a motion to abate further proceedings on the Second  
7 Dismissal Motion to allow “global mediation” to be pursued. (ECF No. 297).

8 On March 25, 2013, the court conducted the scheduling conference at which time a two-  
9 day trial on the Second Dismissal Motion was set for June 13 and 14, 2013. The court directed  
10 counsel for Montana and the Alleged Debtor to submit a related scheduling order.

11 On March 28, 2013, a further amended Joint Discovery Plan was submitted by Montana  
12 and the Alleged Debtor. (ECF No. 306). The further amended Joint Discovery Plan specifically  
13 provided that the Second Dismissal Motion would “be limited to contested issues under 11  
14 U.S.C. §303(b)” and that “[d]iscovery and trial on the Motion shall be limited as such and,  
15 therefore, will not encompass contested issues under 11 U.S.C. §303(h), (i), (k) and F.R.B.P.  
16 9011.” Joint Discovery Plan at ¶3. It also scheduled a pretrial conference to be held on May 28,  
17 2013.

18 On April 2, 2013, the Alleged Debtor filed an amendment to the Second Dismissal  
19 Motion as permitted by the further amended Joint Discovery Plan. (ECF No. 309).

20 On April 9, 2013, an order was entered approving the further amended Joint Discovery  
21 Plan, including the agreed terms and deadlines specified therein. (ECF No. 313).

22 On April 17, 2013, Montana filed a notice of deposition and subpoena duces tecum with  
23 respect to the California Franchise Tax Board. (ECF No. 330).

24 On May 6, 2013, Montana filed an amended notice of deposition and subpoena duces  
25 tecum with respect to Michael J. Flynn. (ECF No. 350).

26 On May 8, 2013, Brian A. Glasser, as Trustee of the YCLT, filed a “Notice of Joinder in  
27 Involuntary Petition” pursuant to which the YCLT joined the Involuntary Petition. (ECF No.  
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1 359). YCLT asserted an unsecured claim in the amount of \$40,992,210.81, based on a judgment  
2 previously entered by the bankruptcy court in Montana.

3 On May 13, 2013, Montana filed notices of deposition and subpoena duces tecum with  
4 respect to the California Franchise Tax Board as well as with respect to the Idaho State Tax  
5 Commission. (ECF Nos. 367 and 370).

6 On May 14, 2013, the Alleged Debtor filed a notice of deposition and notice of subpoena  
7 with respect to the California Franchise Tax Board (ECF Nos. 376 and 377), as well as with  
8 respect to the Idaho State Tax Commission. (ECF Nos. 378 and 379). The following day, the  
9 Alleged Debtor filed amended notices of subpoena with respect to both entities. (ECF No. 383  
10 and 384).

11 On May 16, 2013, a Second Amended Joint Discovery Plan was submitted by Montana  
12 and the Alleged Debtor. (ECF No. 390). The amended discovery plan specifically provided that  
13 the Second Dismissal Motion would “be limited to contested issues under 11 U.S.C. §303(b)”  
14 and that “[d]iscovery and trial on the Motion shall be limited as such and, therefore, will not  
15 encompass contested issues under 11 U.S.C. §303(h), (i), (k) and F.R.B.P. 9011.” Second  
16 Amended Joint Discovery Plan at ¶3. Attached to the amendment were preliminary witness lists  
17 from both Montana and the Alleged Debtor, that included unnamed representatives from Idaho  
18 and California.

19 On May 20, 2013, the Alleged Debtor filed an amended notice of subpoena and amended  
20 notice of deposition of Todd Bailey of the California Franchise Tax Board. (ECF Nos. 400 and  
21 401).

22 On May 22, 2013, an order was entered approving the Second Amended Joint Discovery  
23 Plan. (ECF No. 413).

24 On May 28, 2013, a pretrial conference was conducted confirming the June 13 and 14,  
25 2013 trial dates.

26 On June 4, 2013, a Third Amended Joint Discovery Plan was filed. (ECF No. 465). The  
27 amended discovery plan set specific deadlines for certain depositions to be taken, as well as to  
28 exchange copies of all declarations, excerpts of deposition transcripts and exhibits to be used at

1 trial. The further amended discovery plan specifically provided that the Second Dismissal  
2 Motion would “be limited to contested issues under 11 U.S.C. §303(b)” and that “[d]iscovery  
3 and trial on the Motion shall be limited as such and, therefore, will not encompass contested  
4 issues under 11 U.S.C. §303(h), (i), (k) and F.R.B.P. 9011.” Third Amended Joint Discovery  
5 Plan at ¶3. Attached to the Third Amended Joint Discovery Plan were preliminary witness lists  
6 from both Montana and the Alleged Debtor, which included the Alleged Debtor and unnamed  
7 representatives from Idaho and California. Also included on the witness lists were individuals  
8 named Mike Flynn (“Flynn”), Spencer Marks (“Marks”), Kim Davis (“Davis”), and Pete  
9 Donnelly (“Donnelly”).

10 On June 6, 2013, an order was entered approving the Third Amended Joint Discovery  
11 Plan. (ECF No. 472).

12 On June 11, 2013, counsel for the Alleged Debtor and counsel for Montana filed a Joint  
13 Statement of Evidentiary Objections and Responses Thereto (“Joint Evidentiary Objections”).  
14 (ECF No. 490). Among other items, the Alleged Debtor and Montana objected to their  
15 respective designations and counter-designations of the deposition testimony of Patrick Fox,  
16 (California Franchise Tax Board Representative) Laura Shuck, Joel Silverman, Dan Bucks, and a  
17 representative of the Idaho State Tax Commission. See Joint Evidentiary Objections at Tables 8,  
18 9, 10, 11, 12, 13, 14, and 15.

19 On June 13 and June 14, 2013, Judge Markell conducted a trial on the Second Dismissal  
20 Motion at which testimony was presented by multiple witnesses and more than 200 exhibits were  
21 offered into evidence.<sup>5</sup> After the conclusion of the trial, the court scheduled closing arguments  
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23 <sup>5</sup> Transcripts of the trial on the Second Dismissal Motion (“Trial Transcripts”) were filed  
24 on June 20 and 21, 2013. (ECF Nos. 496, 497, 498, 499, and 504). The Trial Transcripts  
25 include the live trial testimony of the Alleged Debtor, Flynn, Marks, Donnelly, and Davis, as  
26 well as individuals named Jerry Keller (“Keller”) and Thomas Morrison (“Morrison”). Flynn  
27 testified as an attorney that consulted with the Alleged Debtor’s representatives who had  
28 negotiated settlements with Idaho and California. Marks, Donnelly, Davis, and Keller testified  
as current or former employees with the Montana Department of Revenue. Direct testimony  
declarations from Flynn, Marks, Donnelly, Davis, and Keller were admitted into evidence,  
subject to the court’s subsequent rulings on the Joint Evidentiary Objections. The Alleged  
Debtor, Flynn, Marks, Donnelly, Davis, and Keller were subject to cross-examination at trial.

1 for July 5, 2013, with final evidentiary rulings to be issued prior to submission of post-trial  
2 briefs.

3 On July 2, 2013, Judge Markell entered omnibus rulings on the parties' evidentiary  
4 objections raised before and during trial, including those set forth in the Joint Evidentiary  
5 Objections ("Omnibus Evidentiary Rulings"). (ECF No. 512).

6 On July 3, 2013, post-trial closing briefs were filed by the Alleged Debtor and by  
7 Montana. (ECF Nos. 515 and 516).

8 On July 5, 2013, closing arguments were presented by counsel and the Second Dismissal  
9 Motion was taken under submission.<sup>6</sup>

10 On July 10, 2013, Judge Markell entered an "Order Granting Motion to Dismiss  
11 Involuntary Case" ("Second Dismissal Order"). (ECF No. 528). The court found that the  
12 Alleged Debtor had at least 12 creditors as of the date of the Involuntary Petition and concluded  
13 that the petition therefore must be supported by at least 3 qualifying creditors under Section  
14 303(b)(1). See Second Dismissal Order at 5:9 to 9:2. The court further held that if any amount  
15 of a petitioning creditor's claim is subject to a bona fide dispute, the creditor is disqualified from  
16 filing or joining in an involuntary petition under Section 303(b). Id. at 9:3 to 14:2. Based on the  
17 evidence presented, Judge Markell found that Idaho's claim was subject to bona fide dispute  
18 because its acceptance of a discounted settlement inferred the petitioning creditor's own  
19 concerns about the Alleged Debtor's liability. Id. at 14:4-15. The court also found that  
20 California's claim was subject to bona fide dispute because the settlement of its claim required  
21 the existence of a good faith dispute to serve as consideration for an enforceable settlement  
22 agreement. Id. at 14:16 to 15:3. Judge Markell concluded that because the claims of both Idaho  
23 and California were subject to bona fide dispute, both were disqualified as petitioning creditors.  
24 Id. at 15:4-6. The court further concluded that YCLT qualified as a creditor that joined in the

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26 Morrison was offered by Montana as a percipient witness and as an expert witness, but the court  
27 sustained the Alleged Debtor's objection to his testimony in both capacities.

28 <sup>6</sup> A transcript of the closing arguments on the Second Dismissal Motion was filed on July  
8, 2013. (ECF No. 525).



1 petition under Section 303(c) notwithstanding a possible contingency or dispute as to its claim.  
2 Id. at 15:7 to 16:8. Finally, Judge Markell found that at least part of Montana’s claim was  
3 subject to bona fide dispute as to liability and amount, thereby disqualifying Montana from being  
4 a petitioning creditor. Id. at 16:9 to 17:12. Because the Involuntary Petition was not filed or  
5 joined by at least 3 qualifying creditors as required by Section 303(b), Judge Markell concluded  
6 that the requirements for involuntary bankruptcy relief had not been met and therefore granted  
7 the Second Dismissal Motion.<sup>7</sup>

8 On July 22, 2013, Montana filed a notice of appeal with respect to the Second Dismissal  
9 Order. (ECF No. 541).

10 On July 23, 2013, the Alleged Debtor filed an election to have the appeal heard by the  
11 United States District Court for the District of Nevada (“USDC”) rather than the BAP. (ECF No.  
12 549). As a result of that election, Montana’s appeal of the Second Dismissal Order was  
13 transferred to the USDC, assigned to Judge Jennifer Dorsey (“USDC Judge Dorsey”), and  
14 denominated Case No. 2:13-cv-01324-JAD (“USDC Appeal”).<sup>8</sup> (USDC ECF No. 4).<sup>9</sup>

15 On July 24, 2013, the Alleged Debtor filed “Timothy L. Blixseth’s Motion for Judgment  
16 and for Costs and Fees Pursuant to 11 U.S.C. §§105 and 303(i)(1)” pursuant to which the  
17 Alleged Debtor requested sanctions against Montana and the YCLT (“303(i)(1) Motion”). (ECF  
18 No. 554).

19 On August 5, 2013, the Alleged Debtor filed a cross appeal of the Second Dismissal  
20 Order “with respect to the Bankruptcy Court’s ruling regarding the claim of” the YCLT. (ECF  
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22 <sup>7</sup> Judge Markell having found that the Alleged Debtor had 12 or more creditors, Section  
23 303(b)(2) would not have applied to permit YCLT alone to file an involuntary petition, even if  
its claim was not subject to bona fide dispute as to liability or amount.

24 <sup>8</sup> Where necessary, “USDC ECF No.” will be used in this Order to identify documents  
25 filed in the USDC Appeal.

26 <sup>9</sup> Excerpts of the record on appeal were filed with the USDC on August 21, 2014  
27 (“USDC Record”). (USDC ECF No. 58). Copies of the declarations of certain witnesses who  
28 testified at trial, see note 5, supra, were included in the USDC Record. (USDC ECF No. 58-11,  
MER01439 to MER01476). Copies of the exhibits admitted at trial also were included in the  
USDC Record.

1 Nos. 566 and 568). On that same day, an election was filed to have the cross appeal heard by the  
2 USDC. (ECF No. 569).

3 On August 7, 2013, the cross appeal was referred to the USDC. (ECF No. 575).

4 On August 9, 2013, Montana filed in the bankruptcy court a “Petitioning Creditor  
5 Montana Department of Revenue’s Motion for Stay Pending Appeal” (“Stay Motion”). (ECF  
6 No. 583).

7 On August 15, 2013, the Alleged Debtor filed an objection to the Stay Motion (ECF No.  
8 592) and a supplemental objection on August 30, 2013 (ECF No. 612).

9 On September 6, 2013, Montana filed a reply in support of the Stay Motion. (ECF No.  
10 621).

11 On September 13, 2013, the Bankruptcy Judge William T. Thurman (“Judge Thurman”)  
12 presided over a hearing on the Stay Motion. At the conclusion of the parties’ arguments, Judge  
13 Thurman issued his oral findings of fact and conclusions of law granting the Stay Motion in light  
14 of, among other reasons, the “irreparable harm” that Montana could suffer if the Alleged Debtor  
15 was allowed to continue seeking discovery of privileged material in furtherance of the 303(i)(1)  
16 Motion.<sup>10</sup>

17 On September 20, 2013, Judge Thurman entered an “Order Granting a Stay of  
18 Proceedings Pending Appeal” (“Stay Order”) pursuant to which he stayed “all 11 U.S.C. § 303(i)  
19 and other post-dismissal proceedings against Montana, pending final resolution of the appeals by  
20 Montana and Mr. Blixseth” of the Second Dismissal Order. (ECF No. 635). The Stay Order  
21 does not expressly reference the Alleged Debtor’s cross-appeal or otherwise mention the YCLT.

22 On October 2, 2013, the Alleged Debtor filed “Timothy L. Blixseth’s Motion Pursuant to  
23 Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) to Amend Order Granting a Stay of Proceedings  
24 Pending Appeal” (“Reconsideration Motion”). (ECF No. 638). By the Reconsideration Motion,  
25 the Alleged Debtor asked the bankruptcy court to lift the stay and authorize him to continue  
26 prosecuting the 303(i)(1) Motion, including authorizing him to continue conducting discovery.

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28 <sup>10</sup> A transcript of the hearing before Judge Thurman was filed on September 18, 2013.  
(ECF No. 631).

1 On October 23, 2013, Montana filed an objection to the Reconsideration Motion. (ECF  
2 No. 648).

3 On October 30, 2013, the Alleged Debtor filed a reply in support of the Reconsideration  
4 Motion. (ECF No. 651).

5 On November 6, 2013, Judge Thurman presided over a hearing on the Reconsideration  
6 Motion. At the conclusion of the parties' arguments, Judge Thurman issued his oral findings of  
7 fact and conclusions of law denying the Reconsideration Motion.

8 On November 12, 2013, Judge Thurman incorporated his oral findings of fact and  
9 conclusions of law made at the November 6 hearing into an order denying the Reconsideration  
10 Motion ("Reconsideration Order"). (ECF No. 653).

11 On April 19, 2017, approximately three and a half years after Judge Thurman's entry of  
12 the Reconsideration Order, the Alleged Debtor filed a motion in the bankruptcy court seeking a  
13 variety of relief, including to lift the Stay Order previously entered in the case, to enter sanctions  
14 against Montana for various alleged misconduct, and for a protective order ("Sanctions  
15 Motion"). (ECF No. 673). On the same date, the Alleged Debtor filed a separate motion in the  
16 bankruptcy court requesting the YCLT successor trustee to show cause whether he has preserved  
17 or destroyed evidence ("OSC Motion"). (ECF No. 674).

18 On September 12, 2017, the court heard the Alleged Debtor's Sanctions Motion as well  
19 as his OSC Motion, and took them under submission.

20 On December 15, 2017, USDC Judge Dorsey, entered her decision affirming the Second  
21 Dismissal Order ("USDC Decision"). (USDC ECF No. 87). The USDC agreed that the Alleged  
22 Debtor had more than 11 creditors and that there were not at least three qualifying creditors.  
23 USDC Judge Dorsey therefore affirmed the Second Dismissal Order.

24 On December 20, 2017, the bankruptcy court entered an order denying the Sanctions  
25 Motion. (ECF No. 728). On the same date, the bankruptcy court entered an order denying the  
26 OSC Motion. (ECF No. 730).

1 On January 11, 2018, Montana appealed the USDC Decision to the United States Court  
2 of Appeals for the Ninth Circuit (“Ninth Circuit”).<sup>11</sup> (USDC ECF No. 88).

3 On March 6, 2018, YCLT filed a notice of withdrawal from participation as a petitioning  
4 creditor in the Involuntary Proceeding. (ECF No. 737).

5 On November 26, 2019, the Ninth Circuit entered its Opinion affirming in part and  
6 remanding in part to the bankruptcy court (“Circuit Opinion”). See State of Montana  
7 Department of Revenue v. Blixseth, 942 F.3d 1179 (9th Cir. 2019). Agreeing with Judge  
8 Markell and USDC Judge Dorsey, the circuit panel held that “a creditor whose claim is the  
9 subject of a bona fide dispute as to amount lacks standing to serve as a petitioning creditor under  
10 §303(b)(1) even if a portion of the claim amount is undisputed.” Id. at 1186. The circuit panel  
11 also agreed that “on the petition date, the vast majority of [Montana’s] claim remained disputed.  
12 As a result, [Montana’s] claim was the subject of a bona fide dispute as to amount.” Id. at 1187.  
13 The panel’s decision then concluded as follows: “[Montana] also disputes whether Idaho,  
14 California, and [YCLT]’s claims may sustain the petition individually or in combination. We  
15 do not reach these issues because all other petitioning creditors have withdrawn their  
16 participation in the underlying bankruptcy proceeding. Instead, we remand for the bankruptcy  
17 court to determine whether this matter should be dismissed for want of prosecution consistent  
18 with 11 U.S.C. § 303(j)(3).” Id. (Emphasis added.)

19 On January 6, 2020, the Ninth Circuit entered its order denying the Alleged Debtor’s  
20 petition for rehearing. (9th ECF No. 52).

21 On January 14, 2020, the Ninth Circuit entered its mandate. (9th ECF No. 53).

22 On February 19, 2020, the USDC entered the “Order on Mandate,” wherein the matter  
23 was remanded back to the bankruptcy court for “further proceedings consistent with the Ninth  
24 Circuit’s instructions.” (USDC ECF No. 94).

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28 <sup>11</sup> Where necessary, “9th ECF No.” will be used in this Order to identify documents filed  
in the proceedings before the Ninth Circuit.

1 On August 10, 2020, the Alleged Debtor filed and served a request for a status  
2 conference and noticed the matter to be heard by the bankruptcy court on September 16, 2020.  
3 (ECF Nos. 757 and 758).

4 On September 11, 2020, Montana filed and served a “Position Paper.” (ECF No. 764).

5 On September 16, 2020, counsel for the Alleged Debtor and counsel for Montana  
6 appeared at the status conference at which time the bankruptcy court set deadlines for both  
7 parties to file motions in accordance with the instructions from the Ninth Circuit. The motions  
8 were ordered to be heard concurrently on November 13, 2020.<sup>12</sup>

9 On October 9, 2020, Montana filed and served the instant Relief Motion along with a  
10 memorandum in support thereof (“Montana Brief”). (ECF Nos. 770 and 771). As directed at the  
11 prior status conference, the Relief Motion was scheduled to be heard on November 13, 2020.

12 On October 9, 2020, the Alleged Debtor filed and served a 303(j) Motion. (ECF No.  
13 772). The 303(j) Motion was scheduled to be heard concurrently with the Relief Motion.

14 On October 14, 2020, the Alleged Debtor also filed and served a Motion to Strike  
15 Montana Department of Revenue’s Motion for Relief from Judgment (“Strike Motion”). (ECF  
16 Nos. 774 and 775). The Strike Motion also was scheduled to be heard concurrently with the  
17 Relief Motion and the 303(j) Motion.

18 On October 30, 2020, an opposition to the 303(j) Motion was filed by Montana. (ECF  
19 No. 783).

20 On October 30, 2020, an opposition to the Relief Motion was filed by the Alleged Debtor  
21 (“Relief Opposition”). (ECF No. 785).

22 On October 30, 2020, an opposition to the Strike Motion was filed by Montana. (ECF  
23 No. 784).

24 On November 6, 2020, a reply in support of the Relief Motion was filed by Montana  
25 (“Relief Reply”). (ECF No. 786).

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27 <sup>12</sup> An order incorporating the briefing and hearing schedule was entered on October 15,  
28 2020. (ECF No. 776). Notice of entry of the order was served on all creditors and parties in  
interest. (ECF No. 778).

1 On November 6, 2020, an omnibus reply in support of the Strike Motion as well as the  
2 303(j) Motion was filed by the Alleged Debtor. (ECF No. 787).

3 On November 13, 2020, the concurrent hearing was conducted on the Relief Motion,  
4 Strike Motion, and 303(j) Motion.<sup>13</sup>

### 5 DISCUSSION

6 Montana brings the instant Relief Motion under Civil Rule 60(b)(6), seeking to vacate the  
7 Second Dismissal Order. See Montana Brief at ¶ 5. Civil Rule 60 applies in bankruptcy  
8 proceedings pursuant to Bankruptcy Rule 9024. Civil Rule 60(b)(6) is preceded by five other  
9 specific reasons to relieve a party from a prior judgment. See FED.R.CIV. P. 60(b)(1, 2, 3, 4, and  
10 5).<sup>14</sup> Civil Rule 60(c) provides that relief sought for the first three reasons must be sought no  
11 more than one year after entry of the subject judgment, and for the last three reasons, relief must  
12 be sought “within a reasonable time.” See FED.R.CIV.P. 60(c)(1).<sup>15</sup> Civil Rule 60(b)(6) then  
13 provides that relief from a prior judgment may be granted for “any other reason that justifies  
14 relief.” FED.R.CIV.P. 60(b)(6). In light of this express language, it is well established that relief  
15 under Civil Rule 60(b)(6) must be based on some ground that would not be encompassed by  
16 Civil Rules 60(b)(1, 2, 3, 4, or 5). See Lyon v. August S.P.A., 252 F.3d 1078, 1088 (9th Cir.  
17 2001); Molloy v. Wilson, 878 F.2d 313, 316 (9th Cir. 1989); Pineda v. Gipson, 2020 WL  
18 1892459, at \*1 n.2 (E.D. Cal. Apr. 16, 2020). See also Liljeberg v. Health Services Acquisition  
19 Corp., 486 U.S. 847, 863 n.11 (1988)(“Rather, ‘extraordinary circumstances’ are required to

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21  
22 <sup>13</sup> The Strike Motion and the 303(j) Motion are the subject of separate orders entered  
contemporaneously herewith.

23 <sup>14</sup> In sequence, those five other reasons are: “(1) mistake, inadvertence, surprise, or  
24 excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have  
25 been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously  
26 called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the  
27 judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an  
earlier judgment that has been reversed or vacated; or applying it prospectively is no longer  
equitable...”

28 <sup>15</sup> In this instance, the Second Dismissal Order was entered on July 10, 2013, and  
Montana filed its current Relief Motion on October 9, 2020. More than seven years have passed.

1 bring the motion within the ‘other reason’ language and to prevent clause (6) from being used to  
2 circumvent the 1-year limitation period that applies to clause (1). This logic, of course, extends  
3 beyond clause (1) and suggests that clause (6) and clauses (1) through (5) are mutually  
4 exclusive.”); Sattler v. Russell (In re Sattler), 2020 WL 2897257, at \*5 (B.A.P. 9th Cir. June 1,  
5 2020). The burden of establishing “other reasons that justify relief” lies with the moving party.  
6 See Community Dental Services v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002). Ordinarily, this  
7 requires proof of extraordinary circumstances that prevented a litigant from seeking earlier, more  
8 timely relief. See United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.  
9 1993). Where there is delay in seeking relief, fault or lack of fault by the moving party should be  
10 considered. See Pioneer Inv. Services v. Brunswick Assoc., 507 U.S. 380, 393-94 (1993).  
11 Extraordinary circumstances do not exist where the moving party made a deliberate litigation  
12 choice and subsequently sought relief from that choice. See Ackermann v. United States, 340  
13 U.S. 193, 198 (1950); Afoa v. China Airlines, Ltd., 817 Fed.Appx. 369, 371 (9th Cir. 2020). In  
14 that situation, the party should not be provided relief under Civil Rule 60(b)(6). See United  
15 States v. Wyle (In re Pacific Far East Lines, Inc.), 889 F.2d 242, 250 (9th Cir. 1989).

16 Montana maintains that relief from the Second Dismissal Order is appropriate under Civil  
17 Rule 60(b)(6) because Judge Markell erred in finding that the California and Idaho claims are  
18 subject to bona fide dispute. See Montana Brief at 6:5 to 9:4. Attached to its brief are copies of  
19 five exhibits.<sup>16</sup> Exhibit “A” is a copy of portions of the Alleged Debtor’s California Nonresident  
20 or Part-Year Resident Income Tax Return 2007. Exhibit “C” is a copy of a settlement agreement  
21 dated April 18, 2011, between the Alleged Debtor and the California Franchise Tax Board, that  
22 includes California’s withdrawal of its participation in this involuntary bankruptcy proceeding  
23 and the Alleged Debtor’s release of any claims under Section 303(i). Exhibit “E” is a copy of a  
24 “Settlement Agreement Summary” dated April 18, 2011, apparently prepared by the Idaho State  
25 Tax Commission. Exhibit “B” is a copy of excerpts from the second day transcript of the trial  
26  
27

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28 <sup>16</sup> None of the copies are authenticated under FRE 901, but all appear to have been  
submitted as part of the record of the USDC Appeal.

1 conducted by Judge Markell. Exhibit “D” is a copy of excerpts from the first day transcript of  
2 the trial before Judge Markell.

3 In response, the Alleged Debtor argues that Montana’s request for relief under Civil Rule  
4 60(b)(6) is barred by the law of the case doctrine. See Relief Opposition at 4:4 to 7:17, citing,  
5 e.g., Milgard Tempering v. Salas Corp. of Am., 902 F.2d 703, 715 (9th Cir. 1990). Additionally,  
6 the Alleged Debtor maintains that Montana has failed to demonstrate exceptional circumstances  
7 under Civil Rule 60(b)(6) sufficient to vacate the Second Dismissal Order. Id. at 9:12 to 13:2.  
8 Finally, the Alleged Debtor argues that Montana lacks constitutional standing to bring the Relief  
9 Motion. Id. at 13:4 to 14:22.

10 In reply, Montana maintains that application of the law of the case doctrine is  
11 discretionary, see Relief Reply at 2:18 to 4:19, citing, e.g., Arizona v. California, 460 U.S. 605,  
12 618 (1983), that extraordinary circumstances exist under Civil Rule 60(b)(6), see Relief Reply at  
13 4:21 to 7:12, and that it has standing to bring the instant Relief Motion. Id. at 7:14-22. No  
14 additional exhibits or materials accompanies Montana’s reply.

15 The court has considered the written and oral arguments of counsel, along with the  
16 exhibits offered in support of the request, and the record of these lengthy proceedings. The court  
17 concludes that Montana has failed to meet its burden of demonstrating extraordinary  
18 circumstances entitling it to relief under Civil Rule 60(b)(6). Several reasons lead to this  
19 conclusion.

20 First, there are no grounds for relief from the Second Dismissal Order based on the  
21 evidence. Civil Rule 60(b)(6) does not provide a “do over.” A party’s mere dissatisfaction with  
22 a trial court ruling does not constitute extraordinary circumstances under Civil Rule 60(b)(6).  
23 See Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338, 1341 (9th Cir. 1981). The  
24 Second Dismissal Motion was filed on January 18, 2013. Trial commenced on June 13, 2013.  
25 Montana and the Alleged Debtor engaged in extensive discovery prior to the trial. Depositions  
26 were scheduled and/or taken of multiple individuals, including representatives of tax authorities  
27 for Montana, Idaho, and California, as well as the Alleged Debtor’s tax consultant and other  
28 professionals. Document subpoenas were issued to multiple entities, including tax authorities for



1 Idaho and California, as well as the Alleged Debtor's professionals. The discovery was taken  
2 pursuant to multiple discovery plans agreed to by the litigants and approved by the bankruptcy  
3 court. Multiple witnesses testified at trial and hundreds of exhibits were admitted into evidence.  
4 Portions of the designated excerpts of the deposition transcripts of witnesses who did not testify  
5 at trial, including from the Idaho and California tax authorities, were offered and admitted into  
6 evidence.

7 The evidentiary exhibits on which Montana now seeks relief are the same as those  
8 presented to Judge Markell. Exhibits "A," "C," and "E" are merely copies of some of the same  
9 items presented and considered previously. More important, the transcripts of the two-day trial  
10 before Judge Markell reflect that the same exhibits were the subject of or could have been the  
11 subject of live witness testimony presented in open court. All of the trial witnesses provided  
12 direct testimony and all of them were subject to cross-examination. Deposition excerpts of the  
13 witnesses who did not testify at the trial were admitted into evidence. Whatever persuasive value  
14 may have been provided by the exhibits could have been explored through the live witness and  
15 deposition testimony offered at trial. Montana has provided no evidence by declaration,  
16 affidavit, or otherwise, suggesting a defect in any of the testimony or exhibits presented at trial,  
17 or in the opportunity to present evidence at trial.<sup>17</sup> In short, Judge Markell's factual  
18 determinations were based on an evidentiary record fully presented by Montana and the Alleged  
19 Debtor.

20 Second, there are no grounds for relief from the Second Dismissal Order based on the  
21 facts. There is no dispute that Idaho filed its notice of withdrawal from participation on April 20,  
22 2011, i.e., less than three weeks after the Involuntary Petition was filed. There is no dispute that  
23 California also filed its notice of withdrawal from participation on April 20, 2011, i.e., less than  
24 three weeks after the Involuntary Petition was filed. There is no dispute that Idaho entered into a  
25

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26 <sup>17</sup> The Alleged Debtor characterizes Montana's request as being a time-barred "newly  
27 discovered evidence" argument under Civil Rule 60(b)(2) that is not supported by any newly  
28 discovered evidence. See Relief Opposition at 7:19-21 and 8:18-25. While the characterization  
is somewhat comical, it apparently is intended to suggest that Montana has not met its burden of  
proof or persuasion.

1 settlement with the Alleged Debtor on April 18, 2011. There is no dispute that a Settlement  
2 Agreement Summary dated April 18, 2011, was prepared by the Idaho tax authority after the  
3 Involuntary Petition was filed. See Exhibit “E” to Montana Brief. There also is no dispute that a  
4 “Settlement and Closing Agreement” dated April 18, 2011, between the Idaho State Tax  
5 Commission and the Alleged Debtor (“Idaho Agreement”) also was included in the evidentiary  
6 record before Judge Markell. See USDC Record, Attachment 6, Appendix MER, Tabs 31-47, at  
7 MER 01030-01031. There is no dispute that the California Franchise Tax Board and the Alleged  
8 Debtor also entered into an Agreement dated April 18, 2011, to settle their disputes (“California  
9 Agreement”). See Exhibit “C” to Relief Motion. See also USDC Record, Attachment 4,  
10 Appendix MER, Tabs 17-24, at MER 00821-00824. There is no dispute that the agreement  
11 between California and the Alleged Debtor was included in the evidentiary record before Judge  
12 Markell. There is no dispute the settlement with Idaho included a discount of the tax liability  
13 originally asserted by Idaho in the Involuntary Petition. There is no dispute that the settlement  
14 with California included the following recital: “FTB contends that, as of April 18, 2011,  
15 Blixseth owes FTB \$992,300.99 related to the 2007 tax year and that the current per diem  
16 amount on this obligation is \$108.75. Blixseth disputes this amount contending that he is owed a  
17 substantial refund from FTB, which he is prepared to litigate in the appropriate forum. Blixseth  
18 also contends that he has other claims against FTB.”

19       There is no dispute that both of the settlement agreements contained language to limit the  
20 Alleged Debtor’s pursuit of claims resulting from the commencement of the Involuntary  
21 Proceeding. See Idaho Agreement at ¶ 4 (stating that “nor shall any suit, action, or proceeding  
22 for determination, assessment, collection, refund or credit or any other claim be brought by either  
23 party.”); California Agreement at ¶ 7 (specifically waiving rights including under Section  
24 303(i)). No witnesses at trial disputed the contents of any of these documents, nor did their  
25 testimony persuade Judge Markell that there was no dispute as to the Alleged Debtor’s tax  
26 obligations. Moreover, Montana has offered no evidence in support of the Relief Motion to  
27 undermine the factual findings on which Judge Markell reached his conclusions.

28

1 Third, there are no grounds for relief from the Second Dismissal Order based on the law.  
2 On the facts established by the evidence presented, Judge Markell concluded that the claims of  
3 both Idaho and California were subject to bona fide dispute. While Montana offered and  
4 continues to offer alternative interpretations of the evidence, it is well established that a  
5 factfinder's choice between alternatives cannot be clearly erroneous. See Branch Banking and  
6 Trust Co. v. Shapiro (In re R&S St. Rose Lenders, LLC), 756 Fed.Appx. 731, 733 (9th Cir.  
7 2019). Montana references nothing in the trial record – live witness testimony or deposition  
8 excerpts from representatives of Idaho or California, or documentary exhibits – that prohibited  
9 Judge Markell from concluding that both Idaho and California settled because their claims were  
10 subject to dispute as a matter of law. Additionally, Montana offers nothing in the way of new  
11 evidence that would not be untimely under Civil Rule 60(c), to suggest that Idaho and California  
12 actually settled undisputed tax claims. Montana has provided no basis to conclude that Judge  
13 Markell misinterpreted or misapplied the applicable law to the evidence admitted and the facts  
14 established by the record.

15 Fourth, there can be no dispute that the Alleged Debtor did not voluntarily seek relief  
16 from this bankruptcy court. Rather, the Involuntary Petition was voluntarily filed by Montana,  
17 Idaho and California. Petitioners who attempt to place individuals or entities into involuntary  
18 bankruptcy do so at their own peril. Section 303(b) imposes eligibility requirements on creditors  
19 who seek to involuntarily subject a debtor to the bankruptcy process. The purpose of the  
20 eligibility requirements is “to prevent creditors from using the threat of an involuntary petition to  
21 bully an alleged debtor into settling a speculative or validly disputed debt.” See Circuit Opinion,  
22 942 F.3d at 1183, quoting Chi. Title Ins. Co. v. Seko Inv., Inc. (In re Seko Inv., Inc.), 156 F.3d  
23 1005, 1007-08 (9th Cir. 1998). Section 303(h)(1) reinforces those eligibility requirements in  
24 contested involuntary proceedings. See, e.g., In re EB Holdings II, Inc., 589 B.R. 704, 722-26  
25 (Bankr. D. Nev. 2017).<sup>18</sup> Section 303(i) exposes creditors to significant consequences if they  
26

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27 <sup>18</sup> Under the joint discovery plans approved by Judge Markell, resolution of the Second  
28 Dismissal Motion was limited to contested issues under Section 303(b) and did not address any  
issues under Sections 303(h) or 303(i).

1 improvidently subject a debtor to an involuntary bankruptcy proceeding. See generally 2  
2 COLLIER ON BANKRUPTCY ¶ 303.33 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020).

3 In this instance, Montana and its co-petitioners voluntarily initiated involuntary  
4 bankruptcy proceedings against the Alleged Debtor. Montana cites no authority prohibiting any  
5 petitioning creditor, including even Montana, from acknowledging its claims to be disputed and  
6 settling with an alleged debtor, including the Alleged Debtor in this case. Montana cites no  
7 authority prohibiting a creditor from settling its disputed claims by including a release of an  
8 alleged debtor's rights to pursue relief under Section 303(i). Montana cites no agreement  
9 amongst the petitioning creditors - enforceable or not - that prevented any of them, including  
10 Montana, from settling their claims against the Alleged Debtor and withdrawing from  
11 participation in the involuntary proceeding. Similarly, Montana cites no authority prohibiting a  
12 later joining creditor under Section 303(c), such as YCLT, from later withdrawing from further  
13 participation. Montana cites no authority – persuasive or otherwise - suggesting that  
14 extraordinary circumstances under Civil Rule 60(b)(6) have been found in an involuntary case  
15 where the last petitioner standing is left “holding the bag” by its former co-petitioners.

16 Fifth, the law of the case doctrine is applicable in this matter. The doctrine applies in  
17 bankruptcy proceedings. See Kipperman v. Federal Deposit Insurance Corporation (In re  
18 Commercial Money Center, Inc.), 392 B.R. 814, 832-33 (B.A.P. 9th Cir. 2008). In Stacy v.  
19 Colvin, 825 F.3d 563 (9th Cir. 2016), the circuit panel observed:

20 The law of the case doctrine generally prohibits a court from  
21 considering an issue that has already been decided by that same  
22 court or a higher court in the same case...The doctrine is concerned  
23 primarily with efficiency, and should not be applied when the  
24 evidence on remand is substantially different, when the controlling  
25 law has changed, or when applying the doctrine would be unjust...A  
26 district court's discretionary decision to apply the law of the case  
27 doctrine is reviewed for an abuse of discretion...

28 Id. at 567 (citations omitted). In this involuntary bankruptcy case, Judge Markell specifically  
determined that Montana, Idaho, and California were disqualified as petitioning creditors  
because their claims were subject to bona fide dispute. USDC Judge Dorsey affirmed that  
determination with respect to Montana and California, but did not reach the determination with

1 respect to Idaho because there were an insufficient number of creditors regardless of Idaho's or  
2 YCLT's eligibility. See USDC Decision at 29:15 to 30:6. The Ninth Circuit affirmed the  
3 determination that Montana's claim is subject to bona fide dispute and did not address the  
4 eligibility of Idaho, California or YCLT, because they had withdrawn from participation in the  
5 involuntary proceeding and were not parties to the appeal. See Circuit Opinion, 942 F.3d at  
6 1187. On remand, there is no different evidence presented, nor has the record been reopened.  
7 The interpretations of Section 303(b) by the Ninth Circuit, the USDC, and the bankruptcy court  
8 have not changed, nor have they been overturned. No extraordinary circumstances have been  
9 demonstrated. Thus, as it currently stands, Judge Markell's ruling that the claims of Idaho and  
10 California were subject to bona fide dispute remains the law of this involuntary bankruptcy case.

11 Sixth, whatever standing Montana has to seek relief from the Second Dismissal Order  
12 that specifically determined its ineligibility under Section 303(b), and which may expose it to the  
13 Alleged Debtor's claim under Section 303(i), it appears that Montana has no standing to assert  
14 factual and legal challenges that might have been raised by Idaho and California. Even though  
15 Idaho and California unilaterally withdrew from further participation in the Involuntary  
16 Proceeding, and did not appear at the trial of the Second Dismissal Motion, testimony and  
17 documentary evidence from both Idaho and California were presented and considered at trial.  
18 The eligibility of Idaho and California under Section 303(b) was fully litigated. Even though the  
19 determinations made in the Second Dismissal Order are binding on Idaho and California, neither  
20 Idaho nor California appealed those determinations to the Ninth Circuit. Those determinations  
21 were not disturbed on appeal and Montana should not have standing to assert the rights of Idaho  
22 and California, as aggrieved parties if at all, to challenge the findings made in the Second  
23 Dismissal Order.

24 Finally, the "rule of mandate" also applies in bankruptcy proceedings. See, e.g., Barton  
25 Properties v. Blaskey (In re Blaskey), 2016 WL 4191775, at \*5 (B.A.P. 9th Cir. Aug. 8, 2016)  
26 (bankruptcy court on remand correctly applied the mandate of the Bankruptcy Appellate Panel  
27 on prior appeal). The rule of mandate applies to an appellate decision rendered in the same  
28 proceeding. The Ninth Circuit has explained that

1 A district court that has received the mandate of an appellate court  
2 cannot vary or examine that mandate for any purpose other than  
3 executing it...At the same time, the rule of mandate allows a lower  
4 court to decide anything not foreclosed by the mandate...A district  
5 court is limited by our remand when the scope of the remand is  
6 clear...Violation of the rule of mandate is a jurisdictional error...

7 Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012) (citations omitted, emphasis  
8 added). See also Stacy v. Colvin, 825 F.3d at 567-568. As previously mentioned, the Ninth  
9 Circuit affirmed the Second Dismissal Order and expressly stated: “We remand for the  
10 bankruptcy court to determine whether th is matter should be dismissed for want of prosecution  
11 consistent with 11 U.S.C. § 303(j).” In response to the remand, Montana initially suggests that  
12 the Ninth Circuit’s mandate does not foreclose it from seeking relief from the Second Dismissal  
13 Order. See Montana Brief at 9:7-13. Thereafter, Montana describes its basis for seeking relief  
14 as follows:

15 As MDOR has explained, a clearly erroneous finding of fact is, by  
16 definition, an abuse of discretion...All of the evidence in this case  
17 proves that there was no bona fide dispute about Blixseth’s liability  
18 to California and Idaho.

19 Id. at 9:20-23. In its appeals to the USDC and the Ninth Circuit, Montana had every opportunity  
20 to demonstrate that Judge Markell’s findings were clearly erroneous, but it did not prevail.  
21 Instead of addressing whether dismissal is appropriate under Section 303(j), Montana seeks to  
22 overturn Judge Markell’s factual findings. In essence, Montana is asking this bankruptcy court  
23 to apply an appellate standard of review to its factual determinations that were the basis for  
24 Montana’s prior unsuccessful appeals. While Montana’s unusual request might not be  
25 foreclosed by the mandate, its Relief Motion is not the subject of the Ninth Circuit’s remand. In  
26 essence, only Montana’s approach is extraordinary, but the circumstances regarding the entry  
27 and enforcement of the Second Dismissal Order are not.

28 Based on the foregoing, the court concludes that Montana has failed to meet its burden of  
establishing that relief from the Second Dismissal Order is warranted under Civil Rule 60(b)(6).

**IT IS THEREFORE ORDERED** that the Montana Department of Revenue’s Motion  
for Relief From Judgment, Docket No. 770, be, and the same hereby is, **DENIED**.

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