

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Fifth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: Peter Mark Tomaryn
 - a. What name do you commonly go by? Peter
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: P.O. Box 888, Dillon, MT 59725
Phone: 406-683-6106
5. Length of residence in Montana: 11 years
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
June 2005 – June 2012	[REDACTED] Dillon	MT
June 2012- Present	[REDACTED] Dillon	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Canoga Park High School	Canoga Park, CA	1963	H.S. Diploma

California State University	Northridge, CA	1969	Bachelor of Arts
California State University	Northridge, CA	1970	Master of Arts
Woodland University School of Law (now, LaVerne University)	Claremont, CA	1978	Juris Doctor

8. List any scholarships, awards, honors and citations that you have received:

Nominated for Pro-Bono attorney of the year in Montana

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

N.A.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
California State Bar	1978
United States District Court, Illinois	1992
United States District Court, Central District of California	1992
Montana State Bar	2011
United States District Court, Montana	2011

11. Indicate your present employment. (List professional partners or associates, if any.)

General Counsel, Women’s Resource Center

Law Offices of Peter M. Tomaryn, private practice

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Law Offices of Kleinberg, Morganstern, Mann And Scholnick No longer in existence	Associate	1978-1980
Law Offices of Sales & Tomaryn No longer in existence	Partner	1980-1982
Peter M. Tomaryn & Associates No longer in existence	Owner/Attorney	1982-1990
Law Offices of Tomaryn & O'Reilly Mr. Paul O'Reilly now operates the business at 21250 Hawthorne Blvd, #700 Torrance, CA 90503	Managing Partner	1990-2005
Law Offices of Peter M. Tomaryn (California only) No longer in existence	Owner/Attorney	2005-2009
Inactive status with California Bar during years of 2009-2011		
General Counsel, Women's Resource Center 221 ½ Idaho St. Dillon, MT. 59725	Attorney	2011- Present
Law Offices of Peter M. Tomaryn 221 ½ Idaho St. Dillon, MT. 59725	Attorney	2011- Present

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

During the years 2009-2011 I was employed at the Women's Resource Center as a judicial advocate for victims of physical and sexual abuse under our grant with the Montana Board of Crime Control.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

Presently I do approximately 65% Family related law including: dissolution, parenting, physical and sexual abuse, Uniform Child Custody Jurisdiction and Enforcement Act cases, protective orders, advocacy and pro bono for Montana Legal Services.

I handle civil litigation in approximately 30% of my cases including: Probate, real property disputes, easements, adverse possession, contract disputes and personal injury.

I handle about 5% of cases involving criminal matters

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I handled corporate law in California with a specialty in Self-Insured Retention programs.

I handled Municipal Law representing 4 different cities in Southern California handling general liability; police liability; firefighter liability; paramedic liability, mass transit liability and zoning liability.

I represented Insurance companies doing general liability as well as coverage interpretation. I qualified and testified as an expert in civil cases in the area of insurance coverage.

I taught Insurance Law at Woodland University School of Law including trial tactics.

16. If you specialize in any field of law, what is your specialty?

I previously specialized in Civil and Municipal Insurance and self insured retention law for liability mainly as a defendant.

Presently I have developed a specialty in family law and the Uniform Child Custody Jurisdiction Enforcement Act; however, I still consider myself having a specialty in general liability for both tort and contract law.

17. Do you regularly appear in court? Yes

What percentage of your appearance in the last five years was in:

Federal court	<u>0</u>	%
State or local courts of record	<u>90</u>	%
Administrative bodies	<u>10</u>	%
Other	<u> </u>	%

18. During the last five years, what percentage of your practice has been trial practice? 80 %

19. How frequently have you appeared in court? 10 times per month on average.

20. How frequently have you appeared at administrative hearings?
2 times per year on average.

21. What percentage of your practice involving litigation has been:

Civil	90	%
Criminal	5	%
Other	5	%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Not Applicable

23. State the number of jury trials that you have tried to conclusion in the last ten years. 5
24. State the number of non-jury trials that you have tried in the last ten years. Approximately 35
25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

1. J.B. Anderson, 310 S. Sebree, Dillon, MT 59725; 406-683-2303; Tucker v. Schaeffer; Aug/Sept 2016; Judge: Loren Tucker 406-683-3745

2. Dan Sweeney, 3475 Monroe Ave, #101, Butte, MT. 59702; 406-782-9222; Cox v. Webster; Aug. 16, 2016; Judge: Loren Tucker 406-683-3745

3. Emily Lucas, P.O. Box 8364, Missoula, MT. 59807; 406-541-414; Estate of Dingley; August 2016; Judge: Loren Tucker, 406-683-3745.

4. Nathan Wagner, Datsopoulos, MacDonald & Lind, 201 W. Main St, #201, Missoula, MT 59802; Best of The West v. Northwest National & Rule Realty; Oct. 3-10, 2016; Judge: Kathy Seeley, 406-447-8209

5. Robert Phillips, Garlington, Lohn & Robinson, 350 Ryman, Missoula, MT 59807; 406-523-2500; Best of the West v. Northwest National & Rule Realty; Oct 3-10, 2016; Judge: Kathy Seeley, 406-447-8209

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have appeared 3 times before an Administrative Law Judge on issues of the Child Support Enforcement Division.

I appeared 1 time in an Administrative hearing for unemployment insurance benefits.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

I have given seminars on Insurance Law principles to law students and insurance adjusters at various times in the 1980's and 1990's. The law students were at Woodland University and the adjusters were at various insurance adjusting agencies for which I was providing services as one of their insurance defense panel attorneys. These included: General Adjustment Bureau; Crawford and Co.; Russo Adjusting Co.; RTD adjusting Co.; and Hertz Adjusting Co.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

California Bar Association- 1978 thru the present (with an inactive status from 2009-2011)
Montana Bar Association- 2011 thru the present
American Bar Association- Presently inactive

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Rotary Club of Dillon
Elks Club of Dillon
YMCA Board of Directors
Women's Resource Center Board of Directors

30. Have you ever run for or held public office? If so, provide the details.

No

31. Explain your philosophy of public involvement and practice of giving your time to community service.

I believe every member of a community, not just elected or appointed officials should find some way to contribute to their community. Everyone has a talent to offer; everyone can help their neighbor or an institution in the community. Recognizing that not everyone will contribute it is incumbent on people who feel comfortable to step up and do as much as they can. I consider it a privilege to live in a community (Dillon) where there is so much giving to help others and to advance our businesses and institutions. Those of us who do give time should encourage others to experience the joy and satisfaction of giving to our community. It will pay you back in multiples of the time you gave.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

Real Property Development- Owned and developed several building projects including: a 4 unit condominium project (1982), renovation and leasing of a 3 story office building for attorneys (1995); renovation of an historical building (2011) and renovation (not yet completed) of a motel project for low income housing.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I am a director of the Women's Resource Center in Dillon and would resign upon appointment.

I am the managing member of the Grasshopper Creek, LLC and would resign upon appointment

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

I have received compensation along with my wife who is also a member of Grasshopper Creek LLC, the entity that we established to do real estate investments, for the sale of two properties owned by Grasshopper Creek LLC. It accounted for approximately 25 % of our income during the years of the sales.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? Yes

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I do all of my own research and writing of legal documents, pleadings, and briefs.

I have an active practice which involves researching legal issues on a very consistent basis.

I have been a subscriber of Lexus-Nexus since moving to Montana even before I was a member of the Montana Bar and use its services on an almost daily basis.

No one other than me does my research; I do all my own writing, formatting and collating of my legal documents. I have no assistants, secretary or clerks.

In the past five years I have submitted no less than 100 legal documents to the Court including: pleadings, motions, summary judgments, trial briefs and appeals.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I draft all my own documents including, but not limited to pleadings, motions, trial briefs, analyses, opinion letters and appeals

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

48. What percentage of your practice for the last five years has involved research and legal writing?
90 %

49. Are you competent in the use of Westlaw and/or Lexis?

Yes

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

All outdoor activities including: skiing, hiking, hunting and backpacking.

I also do taxidermy (licensed), stained glass making and home and building remodeling.

I enjoy reading, cooking and visiting with friends. I most enjoy spending time with my wife in all of these activities (she also is licensed in taxidermy).

51. Describe the jobs that you have held during your lifetime.

Worked as a gas jockey and mechanic for my father's gas station. (High school and college years)

Drove a school bus while going to college. (3 years)

Was a tour leader in Europe for 3 years including the communist bloc countries.

Teacher at a private school for physically handicapped children. (2 years)

Insurance Adjuster while going to law school at an evening program. (Four years.)

Associate Attorney. (2 years)

Managing partner and owner of an approximately 35 person law firm. (approx. 20 years)

Law school professor of Insurance Law. (2 years)

Advocate for physically, mentally and sexually abused persons. (4 years)

General Counsel for Women's Resource Center in Dillon. (5 years)

Private practice attorney in Dillon, MT. (5 years)

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I perform approximately 30-40 hours of pro bono work per month at the Women's Resource Center and for Montana Legal Services Association.

Most of the services involve family law issues, physical and sexual abuse issues, child abuse issues, landlord/ tenant abuse issues and parenting and dissolution.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

Watching the Watergate hearings made me want to be a lawyer. I was influenced by how the system "worked" by how well-prepared lawyers shaped the future of our government and how ultimately "justice" was done even at the highest levels of government. I was influenced by the proven concept that no one is above the law. I came to believe that everyone deserves the justice that the facts reveal: rich, poor, powerful or simple. Our system works when the people behind it "work"; that is my philosophy and how I try to uphold the profession I chose 38 years ago.

I was also influenced by an attorney named Charley O'Reilly, the only trial attorney in California to win back to back "trial attorney of the year" awards He was my teacher and mentor. He taught me that every cause needs an advocate, no matter how big or small the case is. He was known for having taken on the Church of Scientology in the 1990's and successfully prosecuting them even though the Court had to appoint a body guard to protect against the numerous death threats he received. He

received a verdict of 40 million dollars and never collected a penny, but stood for the principles I admire most in our legal system: tenacity, purpose, steadfast devotion to the cause, the client and justice. If he were still alive he would tell you that he never cared about the 40 million dollars.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

Judicial temperament meaning that you are a person willing to listen to both sides of an argument without regard to a predetermined mind set and without unnecessarily interfering with the process because of a personal mind set.

Having a well balanced breadth of legal experience, as well as life experience so that you have the ability to be open minded in hearing any viewpoint being advanced in your courtroom.

Setting an example in your work ethic that shows a background of dedication to the legal profession not just for those able to pay but for everyone who needs the services of a professional to fight for their cause.

Having been a courtroom litigator who knows the proper demeanor in advancing legal causes on behalf of a client, who understands the ethical standards in the difference between fiercely representing a client and at the same time upholding the judicial standards of being an officer of the court.

A compassionate person who can still mete out justice with a measured tone, without regard to passion, public pressure or a view towards appeasing any interest group or organization.

Willing to do the legal research to fully brief any issue or statutory law when any question exists as to the positions of the adverse parties and when the constitutional rights of any person is at stake.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Research, Research and more Research. All legal precedent when being considered for a “flexible” change should be researched, mainly in Montana, but where appropriate in other jurisdictions including Federal jurisdictions. If there is any question about the applicability of the present law and an argument that a different standard should be applied it is incumbent on the court, and the parties, to do a plethora of legal research to see if there is any veracity to allowing for “flexibility” in a new approach. Just because a legal standard is long standing does not mean it is not susceptible to “change”; but for the very reasons that it is long standing as a body of precedent, means it deserves to be carefully and thoroughly examined before applying a new standard. The law is ever evolving and it should be flexible to change with the times, but the underpinnings for such change must be rooted in sound legal principles, not for political expediency or for self-serving interests.

The District Court, while not being afraid to advance flexibility should do so only in situations that appear necessary for the administration of justice; the Legislature and the Supreme Court are the more appropriate avenues for making changes in existing or needed additions to the body of law in Montana.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

I believe that the totality of my legal career and life experiences, including my education and career choices outside of law have given me a unique perspective as a fair minded, yet decisive individual who can fairly judge, mediate and arbitrate matters involving our legal system and those persons who are navigating their way through that system.

I believe that everyone needs to be treated fairly, justly, and harshly when appropriate. I believe that I am that kind of person.

I believe that I could give back to the legal system and this community the knowledge that I have acquired in 38 years of dedicated legal practice. I also want to be a judge for all persons regardless of their financial or societal place in life. I was a tough litigator; I will be a tough upholder of the standards of our laws and hold everyone in the legal system to these standards.

57. What items or events in your career have distinguished you or of which you are most proud?

Although I did not win I was nominated for the Neil Haight Pro Bono Attorney of the year award in Montana several years ago.

I was appointed to help serve on a panel to argue, pro bono, for a very important case before the California Appellate/Supreme Court involving an issue of the adoption of two twin Native American children where the parents were arguing a violation of the Federal law known as the Indian Child Welfare Act. The case made the cover of people magazine.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I am 70 years old. Some might choose to hold that against me. As Ronald Reagan said during his debate with Walter Mondale "I don't want age to be unfairly used in this election so I won't hold my opponents youth against him." Seriously, please consider there will be 3 U.S. Supreme Court Justices who will be in their 80's next year; 4 if Antonin Scalia were still on the court. So while it is something for the committee to consider I do not believe it should be *the* deciding factor.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

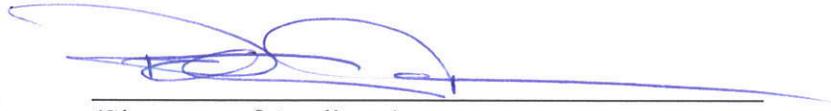
I believe that this committee will be in a better position to make this evaluation; my comments would be self-serving at best and I let my previous answers in this application speak to the committee's decision.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 5th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

10/31/16

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Monday, October 31, 2016.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

WRITING SAMPLE

Note: This is a sample of a Response to a Summary Judgment Motion.

**The original document is 20 pages in length. It has been modified to provide
a sample up to the ten-page limit.**

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221 ½ S. Idaho
2 P.O. Box 888
3 Dillon, MT. 59725
4 Telephone: (406) 925-2153
5 Email address: tomarynlaw@gmail.com

6 Attorney for Plaintiff

7
8 **MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY**

9
10 **CAUSE NO. CDV-2012-205**

11 **BEST OF THE WEST PROPERTIES, INC.**
12 A Montana Corporation,

13 Plaintiff/Counter Defendant

14 v.

15 **NORTHWEST NATIONAL REAL**
16 **ESTATE, LLC.,** A Montana Limited Liability
17 Company; **RULE REALTY, LLC** , A Montana
18 Limited Liability Company, **SCOTT JOYNER,**
19 an individual; **LARRY RULE,** an individual,
20 **Does 1-100**

21 Defendants/Counter Claimants

22 **NORTHWEST NATIONAL REAL ESTATE**
23 **LLC,**

24 Third Party Plaintiff,

25 v.

26 **CORINNE WELBORN,**

27 Third Party Defendant
28

PLAINTIFF BEST OF THE WEST PROPERTIES INC.'S AND CORINNE WELBORN'S BRIEF IN SUPPORT OF RESPONSE TO NORTHWEST NATIONAL AND SCOTT JOYNER'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS REQUEST THAT SUMMARY JUDGMENT BE GRANTED IN FAVOR OF BEST OF THE WEST AND CORINNE WELBORN

DEPT. 3
THE HONORABLE KATHY SEELEY

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INTRODUCTION AND STATEMENT OF UNDISPUTED FACTS

Best of the West Properties Inc. (BOTW) is a real estate company owned and operated by Corinne Welborn (Welborn). *See Welborn Aff.* ¶ 3. Ms. Welborn has been operating BOTW in Dillon, Montana for the past 14 years. *See Welborn Aff.* ¶ 3. In and around June of 2009 BOTW became an “affiliate” of Northwest National Real Estate, LLC (NWN). *See Joyner Dec.* ¶4. Defendant Larry Rule (Rule) was a previous owner of NWN. *See Welborn Aff.* ¶ 6. The current sole member/owner of NWN is Scott Joyner (Joyner). *See Rule Depo. p. 56, l. 23.; p.80, l. 11.*

Rule was a Regional Vice President of NWN whose role was to recruit new affiliates for NWN. *See Rule Depo. P. 76 l. 8-14;* Rule received a signing fee and thereafter received 10% of any fee paid by that new affiliate. *See Rule Depo. P. 87, l. 13-17.*

Rule recruited Welborn and BOTW as an affiliate and was instrumental in the preparation of the documents to accomplish signing BOTW. *See Welborn Aff.* ¶¶ 9, 10, 11, 12. Included in the documentation establishing the Independent Marketing Agreement between NWN and BOTW was a geographic exclusivity that gave BOTW a contractual right to be the “sole affiliate” in Dillon, MT and the surrounding 60 miles. *See Ex 1 to Joyner Dec.* This “sole affiliation” provision came about because Welborn was concerned that since Rule had been in the real estate business since 1969 in Dillon, and since he was the principal operating/founder of NWN since 1996 that he would reopen an office in Dillon and compete with BOTW. *See Welborn Aff.* ¶¶ 9, 10, 11, 12. Rule assured Welborn that this would never happen and offered an exclusivity clause to cement the deal making her the “sole affilitate” for so long as she was in good standing. *See Welborn Aff.* ¶¶ 9, 10, 11, 12.

As a result of these negotiations Rule talked with Joyner who drafted an amendment to the standard marketing agreement attached as “Schedule B” which set forth the good standing language. *See Welborn Aff.* ¶¶10, 12.

1 The parties also negotiated an addendum to the agreement which excluded certain listings
2 from any marketing fee BOTW had prior to joining NWN. *See Welborn Aff. Ex. "B"*.

3 From the inception of the contract up through the breach of the contract BOTW remained,
4 according to Joyner, "one of the best" affiliates out of 22-25 NWN affiliates and in 2010 was the
5 "number one" affiliate. *See Joyner Depo. p. 106, l. 10-13.*

6 On November 30, 2011 Rule approached Welborn and advised her he was opening as an
7 affiliate of NWN and proposed a scheme to help lower their marketing and advertising costs. *See*
8 *Welborn Aff. ¶ 23.* Welborn did not agree to any contractual relationship with Rule and did not agree
9 to waive her rights to her "sole affiliate" exclusivity clause. *See Welborn Aff. ¶ 25.* Rule claims that
10 Welborn agreed to an "oral contract" with him and acknowledges that there is no writing to any
11 agreement subscribed by Welborn. *See Rule Depo. p. 132, l. 21-25; p. 133, l. 1-3.*

12 Joyner acknowledges that he signed an Independent Marketing Agreement with Rule Realty,
13 LLC. allowing Rule to open an affiliate office of NWN in Dillon, MT. *See Joyner Dec ¶15.* Joyner
14 has testified that he only allowed Rule Realty, LLC. to open an office because he had a phone
15 conversation with Welborn on December 1, 2011 and she acknowledged to him that she, indeed, had
16 made this agreement with Rule. *See Joyner Depo. p. 83 l. 8-12.* Welborn denies that this phone
17 conversation took place. *See Welborn Aff. ¶28.* At the time of the alleged phone call Welborn was
18 showing property in Wisdom, MT (over 60 miles away). *See Welborn Aff. ¶ 28 ; White Aff. Exhibit*
19 "C".

20 Rule and NWN now claim in their respective summary judgment motions that the reason
21 why Rule was allowed to open an affiliate office in Dillon was that BOTW has not paid 28
22 transactions totaling \$14,273.50 which Joyner attaches to his affidavit as "Exhibit 2". *See Joyner*
23 *Dec. ¶ 16 and ex. 2.* Joyner's declaration in support of this summary judgment motion concludes:
24 ".....At the time Rule Realty became an affiliate with NWN, BOTW owed unpaid Marketing Fees
25 to NWN for 32 (sic) unreported transactions in the amount of \$14,274.00.....[and] "as a result,
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27
28

1 *BOTW was not in good standing under Schedule B of the Marketing Agreement, and was not entitled*
2 *to invoke the “sole affiliate” provision. See Joyner Dec. ¶ 16. (Joyner in his affidavit later goes on to*
3 *report that there were 28 unpaid fees and lists them with the amount of \$14,273.50 in Exhibit 2*
4 *attached to his affidavit) unreported transactions in the amount of \$14,274.00. See Joyner Dec. ¶24*
5 *and exhibit 2. Welborn presents proof in her attached affidavit that, in fact, BOTW paid or had an*
6 *exception for every one of the 28 marketing fees listed in Joyner’s declaration submitted to this*
7 *Court under the penalty of perjury and adopted by Rule’s motion. See Welborn Aff. ¶29.*

9 **2.**

10 **SUMMARY JUDGMENT STANDARD**

11 It is true that the party moving for summary judgment has the burden of establishing the
12 absence of any genuine issue of material fact, and the party opposing the motion must supply
13 evidence supporting the existence of a genuine issue of material fact. *Pretty on Top v. City of Hardin*
14 *(1979), 182 Mont. 311, 315, 597 P.2d 58, 60.* However, the procedure is never to be a substitute for
15 trial if a factual controversy exists. *Reaves v. Reinbold, (1980) 189 Mont. 284, 288, 615 P.2d 896,*
16 *898.*

17 Summary Judgment motions are clearly not favored. *Reaves v. Reinbold, supra.* If there is
18 any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v.*
19 *Swingley, (1983) 206 Mont. 306, 670 P.2d 1386.*

20 Disputed facts are material if they involve the elements of the cause of action or defense at
21 issue to an extent that necessitates resolution of the issue by a trier of fact. *State Med. Oxygen v.*
22 *American Med. Oxygen (1994) 267 Mont. 340, 344, 883 P.2d 1241, 1243.* All reasonable inferences
23 should be drawn in favor of the party opposing summary judgment. *Howard v. Conlin Furniture No*
24 *2, Inc. (1995) 272 Mont. 433, 901 P.2d 116.*

25 The threshold for denial of a summary judgment is low. *Denny Driscoll Boys Home v. State,*
26 *(1987) 227 Mont. 177, 179, 737 P.2d 1150, 1151.*

1 Opposing party BOTW will easily demonstrate that the basis for moving parties' motion, to
2 wit: failure of BOTW to pay marketing fees thus leading to forfeiture of its "sole affiliate" status is
3 clearly false and deceptive. In point of fact the evidence is so clearly in favor of BOTW that it is
4 urged in this hearing that the Court consider granting summary judgment in favor of BOTW
5 pursuant to the facts, law and argument BOTW will put forward in this opposition.
6

7 **3.**
8 **THE COURT CAN GRANT SUMMARY JUDGMENT**
9 **WHERE APPROPRIATE EVEN IF NO FORMAL**
10 **CROSS MOTION HAS BEEN FILED**

11 The Montana Supreme Court in the case of *Hereford v. Hereford*, (1979), 183 Mont. 104,
12 598 P.2d 600 stated the following rule of law upon which this Court can rely:

13 "By the great weight of authority no formal cross-motion is necessary
14 for a court to enter summary judgment. The invocation of the power
15 of a court to render summary judgment in favor of the moving party gives
16 the court power to render summary judgment for his adversary provided
17 that case warrants that result. However, the court must be very careful
18 that the original movant had a full and fair opportunity to meet the
19 proposition, that there is no genuine issue of material fact and the other
20 party is entitled to judgment as a matter of law. 6 Moore's Federal Practice,
21 para. 56.12, pp. 56-331 and 56-334.

22 See also the First Judicial District Court case of *Burlington Northern Railroad v. State of*
23 *Montana*, (1992) Cause No. ADV-91-1885.

24 At the appropriate place in this Brief BOTW and Welborn will be urging the Court to invoke
25 its powers, as set forth above, to grant summary judgment in their favor.

26 **4.**
27 **THE DECLARATION AND SUPPORTING EXHIBITS OF**
28 **SCOTT JOYNER ARE REplete WITH MISREPRESENTATIONS**
AND FALSEHOODS

29 **A. Joyner did not provide this Court with the complete contract between NWN and**
30 **BOTW**
31 Joyner's declaration at paragraph 4 states, in pertinent part: "A true and accurate copy the
32 Marketing Agreement, including Schedule A and Schedule B of the Marketing Agreement, is
33 submitted with this Declaration as Exhibit 1" (emphasis added). Joyner attaches exhibit

1 2 to his declaration to give a detailed list of all fees purportedly “unreported and owed [to]
2 Northwest National.” In Joyner’s Declaration he states at paragraph 16:

3 “At the time Rule Realty became an Affiliate with Northwest National,
4 BOTW owed unpaid Marketing Fees to Northwest National for
5 32 (sic) unreported transactions in the amount of \$14,274, not including
penalties and interest.”

6 Later at paragraph 24 of the Declaration of Joyner he states there were “28 unreported
7 transactions and Exhibit 2 attached to his Declaration lists 28 transactions totaling \$14,273.50.
8 It would appear that the recitation at paragraph 16 of “32 unreported transactions” is actually 28
9 unreported transactions.

10 This is the thrust of the basis for NWN’s motion for summary judgment, to wit: BOTW owes
11 unpaid fees for 28 transactions pursuant to the Marketing Agreement represented to this Court to be
12 “a true and correct copy” of the agreement and on that basis BOTW was not in good standing and
13 her “sole affiliate” clause rendered unenforceable. Not so.
14

15 Mr. Joyner failed to provide this Court a pertinent and controlling part of the “Independent
16 Contractor Agreement” signed by Scott Joyner and Corinne Welborn specifically referencing
17 paragraph [section] 5 of the Agreement (the same paragraph used by Joyner in paragraphs 6&7 of
18 his Declaration to explain why BOTW owes the fees listed in Exhibits 2 & 3.)
19

20 This addendum to the Agreement, signed by the parties, specifically excludes certain
21 properties from the Agreement and states, in pertinent part: “The Gross Receipts earned on these
22 transactions will NOT (emphasis in document) be subject to Paragraph 5- Gross Receipts of the
23 Independent Contractor Agreement.
24

25 Said addendum to the Agreement should have been provided by Joyner to make his statement
26 that he was providing this Court with a “true and accurate” copy of the Marketing Agreement
27 truthful. This addendum is attached to the Affidavit of Corinne Welborn as Exhibit “B”.
28

1 The facts are that when comparing the properties that were excluded from a marketing fee
2 with the Joyner Exhibit 2 which purports to represent to this Court the “unpaid marketing fees”, it
3 clearly shows that Joyner listed properties that were contractually excluded.
4

5 **5.**

6 **THE UNDISPUTED FACTS SHOW THAT BOTW DOES NOT**
7 **OWE MARKETING FEES AS CLAIMED BY MOVING PARTY**
8 **AND, IPSO FACTO, WAS, IN FACT, IN GOOD STANDING;**
9 **MOVING PARTY’S MOTION MUST BE DENIED**

10 The authorities are uniform in the standards for denying a motion for summary judgment as
11 stated in the case of *Corporate Air v. Edwards Jet Ctr*, (2008, 345 Mont. 336, 347, 190 P.3d 111:

12 “All reasonable inferences which may be drawn from the offered evidence
13 must be drawn in favor of the party opposing summary judgment.”

14 In the case at bar, NWN’s sole basis for summary judgment is that BOTW was not in “good
15 standing”. In fact, they so stated this explicitly in their brief under “DISCUSSION” part C. where
16 they captioned:

17 **“Because BOTW was not in ‘good standing’ under the Marketing Agreement, all of
18 BOTW’s claims fail.”**

19 The only basis put forth for why BOTW was not in “good standing” is again offered by the
20 explicit language in moving party’s brief under: “DISCUSSION” part B. where they captioned:

21 **“BOTW was not in ‘good standing’ at the time Northwest National agreed to allow Rule
22 Realty to become an Affiliate in Dillon, Montana.”**

23 The evidence and explanation offered to support this caption clearly establishes
24 NWN’s admission that the *sole* reason they advance in their motion for BOTW not being in “good
25 standing” is in their failure to pay marketing fees pursuant to the Marketing Agreement. To this end
26 they proffered to the Court the following:

27 “The undisputed facts demonstrate that BOTW failed to pay \$14,273.50 in Marketing
28 fees, plus penalties and interest, owed to Northwest National at the time Northwest
National allegedly breached the ‘sole affiliate’ provision. (Spreadsheet submitted
with Joyner Declaration as Exhibit 3). As a result, BOTW was not in good standing

1 and could not invoke the benefit of the 'sole affiliate' provision of the Marketing
2 Agreement." (Northwest National and Scott Joyner's Brief in Support of Summary
Judgement, Pages 9 & 10).

3 Clearly NWN is relying on their claim that BOTW failed to pay marketing fees in the amount
4 of \$14,273.50 to invoke a violation of the "sole affiliate" "good standing" provision in justification
5 for their allowing Larry Rule to open an office as a NWN affiliate in Dillon, Montana. See Scott
6 Joyner's Declaration, paragraphs 16 & 17:
7

8 16. "At the time Rule Realty became an Affiliate with Northwest National, BOTW owed
unpaid Marketing Fees to Northwest National for 32 (sic) unreported transactions in the
9 amount of \$14,274, not including penalties and interest."

10 17. "As a result, BOTW was not in good standing under Schedule B of the Marketing
Agreement, and was not entitled to invoke the 'sole affiliate' provision."

11 6.

12 **THE CLEAR THRUST OF NWN'S MOTION**
13 **IS THE FAILURE TO PAY THE MARKETING FEES**
14 **OF \$14,273.50; THE REFERENCES TO PAYING PAST**
15 **THE 5 DAY REQUIREMENT CANNOT LEGALLY SUPPORT**
16 **A FORFEITURE OF THE 'SOLE AFFILIATE' PROVISION**

17 NWN specifically points to the failure to pay \$14,273.50 as support for allowing Larry Rule
to open an office as an affiliate of NWN. They cite this mantra numerous times in their Brief.

18 Obviously, if in fact, BOTW failed to pay the marketing fees they have listed on Exhibit 2 of the
19 Joyner Declaration they, *ipso facto* also failed to pay within the 5 day provision; it's a *non-sequitur*.

20 What NWN is trying to do is hedge their bet. Since the Court will not buy the failure to pay
21 \$14,273.50 as the basis that BOTW was not in "good standing" (because, in fact, they did account
22 for all marketing fees) they'll fall back on the 5 day provision in an attempt to still prove that BOTW
23 was not in "good standing". They must fail in this secondary argument for three distinct legal
24 principles applicable to the case at bar: 1) waiver 2) time of the essence and 3) forfeiture
25

26 **A. WAIVER: NWN clearly waived Section 5 in the Marketing Agreement (the**
27 **provision requiring payment within 5 days) continuously from the outset of**
28 **the agreement until its eventual breach by NWN.**

Joyner as sole member and manager of Northwest National made the knowing and informed

1 decision to never invoke the rule requiring payment of marketing fees within 5 days pursuant to
2 Section 5 of the Marketing Agreement affiliation provision of BOTW's agreement. NWN never
3 invoked the penalty or interest available under Section 5. Most importantly Joyner has admitted,
4 under oath, that he made a conscious decision not to invoke the late payment provision and Joyner
5 advised BOTW, both expressly and by his actions that it was alright if they paid late.
6

7 There is no waiver saving clause in the Marketing Agreement.

8 BOTW will demonstrate to this Court the plethora of information clearly showing NWN's
9 waiver of the five (5) day payment clause of the contract.

10 The deposition testimony of Scott Joyner makes it exceedingly clear he was aware of late
11 payments by BOTW/Welborn on a consistent basis over the entire time of her contract:

12 Q. What percentage of the time, when you received a payment from Best of the West, was it
13 beyond the time period specified in the contract or the agreement?

14 A. I don't know exactly, but I'm going to say over 50 percent of the time.
(P. 104; L. 13-17)

15 Q. (By Mr. Tomaryn) You had concerns about Corinne's business with respect to paying you
16 for, it sounds to me like, a good year running up to the agreement with Rule Realty. Is that
correct?

17 A. Well, she consistently was paying late anyway; yes.
(P.120; L.12-17)

18 Q. And when you received a late payment from her, what was your normal course of
19 business in how you handled a late payment?

20 A. I knew that Corinne was having a hard time and sales weren't going well. You asked me
21 what my normal course of business was, so I'm answering.

22 Larry Rule was the Regional Vice President of NWN (Larry Rule deposition, page 76, lines
23 8-14. He recruited BOTW as an affiliate of NWN in his capacity as Regional Vice President. (Larry
24 Rule deposition, page 92, lines 14-17) As such his testimony is relevant on the issue of waiver.

25 Q. During the two-and-a-half, approximately two-and-a-half years that Best of The West was
26 an affiliate, before you became an affiliate, and at the end of November in 2011, were there
27 any problems that you were aware of that Northwest National was having with Best of The
West that you discussed with Scott Joyner?

28 A. Yes.

Q. And what were those problems?

A. Corinne not paying on time.

1 (Larry Rule Deposition, page 102, lines 13-22, Exhibit "I" to Welborn Affidavit)

2 In the Montana Supreme Court case of *Pipe Industry Insurance Fund Trust of Local 41 v.*
3 *Consolidated Pipe Trades Trust of Montana, (1988) 233 Mont. 162; 760 P.2d 711* the court set
4 down the following law applicable to the actions of NWN and Scott Joyner:

5 "A party may waive the benefit of a contract. Waiver means that a person is precluded
6 from asserting a right, a claim or privilege because he has previously knowingly,
7 voluntarily and intentionally given up that right, claim or privilege."

8 "Waiver must be a voluntary act and implies a knowing choice by a person to give up
9 something of value or forego a right or advantage which he might have demanded and
10 insisted upon. It only involves the conduct of the party against whom the waiver is
11 asserted and consideration is not necessary for the doctrine to apply, nor need there be a
12 detriment or harm to the party claiming the waiver."

13 Clearly Joyner admits he was aware of NWN's right to the 5 day payment rule in the Marketing
14 Agreement, *by his own choice*, he chose never to enforce the provision.

15 A waiver may be founded upon express written statements, oral express statements *or acts or*
16 *conduct which induce the belief that the intention and purpose is to waive. Northwestern Fire &*
17 *Marine Insurance Company v. Pollard, 74 Mont. 142, 238 P. 594.*

18 The interaction and behavior of Joyner clearly manifested to BOTW that strict compliance
19 was not necessary and Joyner expressed his reason for clearly, unequivocally, and intentionally not
20 requiring strict compliance so as to avoid a forfeiture of her "sole affiliate" provision:

21 Q. Did you ever send her [Welborn] a letter telling her, in fact, you are in default on the
22 exclusivity portion of your contract and I will no longer honor it?

23 A. If I wanted to lose an office for Northwest National, that would be the best way in the
24 World to do it, so, of course not.

25 (Scott Joyner deposition, page 130, lines 19-24 Exhibit "J" to Welborn Affidavit)

26 language from *Lewiston Miller Construction Co. Inc. v. Gary Martin, (2011) 363 Mont. 208,*
27 *2011 MT 325* is instructive:

28 "In a basic sense, the concept of 'waiver' as an excuse for nonperformance is an
equitable doctrine, designed to prevent the waiving party from lulling another into
a belief that strict compliance with a contractual duty will not be required, and then
either suing for noncompliance or demanding compliance for the purpose of avoiding
the transaction."