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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,</p> <p><i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694</p> <p>NON-PARTIES CARD CLINIC'S AND CARD FOUNDATION'S OBJECTIONS TO AND MOTION TO QUASH SUBPOENAS</p> <p><i>MacDonald v. BNSF Railway Company,</i> Cascade County Cause No. DV-16-549</p>
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**OBJECTION & MOTION**

Pursuant to MRCP 45(d)(2)(B)(ii) and MRCP 45(d)(3), the Center for Asbestos Related Disease ("CARD") Clinic and the CARD Foundation request the Court quash the four subpoenas served on them by Asbestos Litigation Defendants. The four subpoenas require the CARD Clinic and CARD Foundation to incur significant expenses, are unduly burdensome, do not comply with the requirements of MRCP 45, do not allow a reasonable time to comply, and require the disclosure of statutorily protected materials. This motion is supported by the following points and authorities.

## **FACTUAL BACKGROUND**

### **I. The Subpoenas.**

On Monday, May 14, 2018, Defendants served the CARD Clinic with a *Subpoena Duces Tecum* and a *Subpoena to Testify at a Deposition in a Civil Action*. That same day, Defendants served the CARD Foundation with a *Subpoena Duces Tecum* and a *Subpoena to Testify at a Deposition in a Civil Action*. See Exhibits 1-4.

### **II. The CARD Clinic.**

The CARD Clinic is a 501(c)(3) organization. The CARD Clinic's primary goal is to provide specialty healthcare and screening to those affected by Libby Amphibole Asbestos. The CARD Clinic provides federally-funded screening (for which patients must meet criteria to qualify); diagnosis, disease management and treatment services; case management services; monitoring of related conditions; cancer screening; and support and counseling. The CARD Clinic's secondary goal is to assist research from around the country to gain further understanding of disease mechanisms, improve early disease and cancer detection and intervention, and develop effective health management strategies in hope of finding answers to improve health outcomes for individuals and communities. Declaration of Tracy McNew ("McNew Dec.") ¶2.

The CARD Clinic is governed by a volunteer community board of eight members. The CARD Clinic is open four days per week. The CARD Clinic employs 25 employees. McNew Dec. ¶3.

In 2017, the CARD Clinic's total budget was approximately \$3.0 million. McNew Dec. ¶4. The CARD Clinic's primary funding source is a grant from the U.S. Department of Health and Human Services (Grant #1U61TS000251-01, Grant #5NU61TS000251-02 & Grant

#5NU61TS000251-03). McNew Dec. ¶5. The grants allow the CARD Clinic to perform screenings which allow early detection of asbestos related disease and lung cancer related to the Libby asbestos exposure. The CARD Clinic is required to comply with the terms of the grant. Those requirement terms include, among other things, advertising of services and education and outreach, locally, regionally, and nationally. McNew Dec. ¶6.

Also, nineteen CARD Clinic employees have some or all of their salary attributed to and paid for by the grants. McNew Dec. ¶7. The CARD Clinic employees cannot use time funded by the grant for other purposes, such as responding to the *Subpoena Deuces Tecum* and the *Subpoena to Testify at a Deposition in a Civil Action*. As a result, there are minimal staff resources available to respond to requests for medical records and subpoenas. The CARD Clinic would likely need to hire additional staff to respond to the *Subpoena Deuces Tecum*. That would be a significant expense for the CARD Clinic. McNew Dec. ¶8.

The CARD Clinic has screened approximately 5,700 patients and actively follows approximately 7,700 patients. If CARD Clinic staff are required to devote their time to responding to the *Subpoena Deuces Tecum* and the *Subpoena to Testify at a Deposition in a Civil Action*, that will necessarily impair the CARD Clinic's ability to provide critical medical care to its patients. That presents an undue burden on the CARD Clinic and all of its patients. McNew Dec. ¶9.

Nearly all of the CARD Clinic's non-grant allocated employee time has already been largely consumed by the need to respond to medical records requests associated with pending civil litigation matters. In that regard, the CARD Clinic's copy machines and printers are already being used to the point it is already burdening the CARD Clinic's ability to function. Additionally, the CARD Clinic would likely need to purchase additional equipment to respond to the *Subpoena Deuces Tecum*. That would be a significant expense for the CARD Clinic. McNew Dec. ¶10.

Even if the *Subpoena Deuces Tecum* was reduced to only require the production of the patient files for the CARD Clinic's patients who are appearing before the Asbestos Claims Court, it would take at least four or more months to complete that production. That estimate contemplates pulling CARD Clinic employees from other valuable CARD Clinic work they are doing on behalf of the CARD Clinic's patients. That estimate is also based on current staffing and current staff availability. The CARD Clinic would likely need to purchase additional equipment as well. McNew Dec. ¶11.

To the extent the *Subpoena Deuces Tecum* requires the production of electronically stored information, the CARD Clinic would need to hire a person to collect that information as the CARD Clinic's current IT person is already at capacity. That would be a significant expense for the CARD Clinic. McNew Dec. ¶12.

Finally, and most importantly, the *Subpoena Deuces Tecum* and *Subpoena to Testify at a Deposition in a Civil Action* compel the CARD Clinic to disclose patient protected information as they seek documents and information about all of the CARD Clinic's patients, regardless of whether they are parties to this action or not. The CARD Clinic cannot improperly disclose patients' health information as the subpoenas demand. McNew Dec. ¶13.

### **III. The CARD Foundation.**

The CARD Foundation is a separate 501(c)(3) organization. It was created as a mechanism to receive private donations for the CARD Clinic. McNew Dec. ¶14. In 2017, the CARD Foundation raised approximately \$13,000 for the CARD Clinic. McNew Dec. ¶15. The CARD Foundation is operated by a volunteer board. It does not have any employees. McNew Dec. ¶16.

If the CARD Foundation is required to respond to the *Subpoena Deuces Tecum* and

*Subpoena to Testify at a Deposition in a Civil Action* the CARD Foundation must hire person(s) to complete that effort as the CARD Foundation has no employees. That effort would be a significant expense for the CARD Foundation, particularly in light of the fact the CARD Foundation only netted approximately \$13,000 in 2017. McNew Dec. ¶17.

Also, in light of the fact the CARD Foundation only contributed about 0.4% to the CARD Clinic's total \$3.0 million budget in 2017, responding to the *Subpoena Deuces Tecum* and *Subpoena to Testify at a Deposition in a Civil Action* is incredibly burdensome. McNew Dec. ¶18.

### **LEGAL ARGUMENT**

This Court should quash the subpoenas because they require CARD to incur significant expenses, are unduly burdensome, do not comply with the requirements of MRCP 45, do not allow a reasonable time to comply, and require the disclosure of statutorily-protected materials.

#### **I. The Subpoenas Require the CARD Clinic and CARD Foundation to incur Significant Expenses and are Unduly Burdensome.**

The CARD Clinic and the CARD Foundation, nonparties to this matter, request that the Court protect them from the subpoenas because they require the CARD Clinic and CARD Foundation to incur significant expenses to comply with the subpoenas. MRCP 45(d) provides

##### **(2) Command to Produce Materials or Permit Inspection.**

\* \* \*

**(B) Objections. *A person commanded to produce designated materials or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the designated materials or to inspecting the premises -- or to producing electronically-stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:***

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) *These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expenses resulting from compliance.*

MRCP 45(d)(3)(A) (emphasis added). Additionally, MRCP 45(d)(3)(A)(i) states “[o]n timely motion, the issuing court *must quash or modify* a subpoena that subjects a person to undue burden.” MRCP 45(d)(3)(A)(iv) (emphasis added).

The CARD Clinic would likely need to hire additional staff, including an additional IT person, to respond to the *Subpoena Duces Tecum*. McNew Dec. ¶¶8, 12. Additionally, the CARD Clinic would likely need to purchase additional equipment to respond to the *Subpoena Duces Tecum*. Both would be a significant expense for the CARD Clinic. McNew Dec. ¶¶8, 10. More importantly, existing staff would need to be pulled from their current duties related to providing critical medical care to its patients. That presents an undue burden on the CARD Clinic and all of its patients. McNew Dec. ¶9.

If the CARD Foundation is required to respond to the *Subpoena Duces Tecum* and *Subpoena to Testify at a Deposition in a Civil Action*, the CARD Foundation must hire person(s) to complete that effort, as the CARD Foundation has no employees. That effort would be a significant expense for the CARD Foundation, particularly in light of the fact the CARD Foundation only raised approximately \$13,000, or about 0.4% of the CARD Clinic’s overall budget, in 2017. McNew Dec. ¶¶17, 18.

Pursuant to MRCP 45(d)(2)(B)(ii), the CARD Clinic and the CARD Foundation request the Court protect them from the subpoenas as they will cause the CARD Clinic and the CARD Foundation to incur significant expenses. Additionally, the CARD Clinic and the CARD

Foundation request the Court quash or modify the subpoenas *deuces tecum* pursuant to MRCP 45(d)(3)(A)(iv) because they are unduly burdensome.

## **II. The Subpoenas Do Not Meet the Mandatory Requirements of MRCP 45.**

The subpoenas must comply with MRCP 45(a)(4), which requires:

A party or an attorney responsible for the issuance and service of a subpoena seeking health care information, as defined by Title 50, Chapter 16, shall comply with the provisions of Title 50, Chapter 16.

MRCP 45(a)(4). MCA §50-16-812(2) requires:

Service of compulsory process or discovery requests upon a health care provider *must be accompanied by a written certification*, signed by the person seeking to obtain health care information or by the person's authorized representative, identifying at least one subsection of 50-16-811 under which compulsory process or discovery is being sought. . .

MCA §50-16-812(2) (emphasis added). The subpoenas served on the CARD Clinic do not have any such written certification. *See* Exhibits 1-4.

Additionally, all of the subpoenas served on the CARD Clinic and the CARD Foundation fail to comply with MRCP 45(a)(1)(A), which requires:

(A) Requirements -- In General. Every subpoena must:

\* \* \*

(iv) set out the text of Rule 45(d) and (e).

MRCP 45(a)(1)(A). None of the subpoenas set out the text of MRCP 45(e) as required. MRCP 45(a)(1)(A); *see* Exhibits 1-4.

Because the subpoenas do not comply with the mandatory minimum requirements of MRCP 45(a), the Court must quash the subpoenas.

### III. The Subpoenas *Deuces Tecum* Do Not Allow the CARD Clinic and CARD Foundation a Reasonable Time to Comply.

The subpoenas *deuces tecum* seek every document in the CARD Clinic and the CARD Foundation and compel that production in less than 30 days after the subpoenas were served. MRCP 45(d)(3)(A)(i) states “[o]n timely motion, the issuing court ***must quash or modify*** a subpoena that fails to allow a reasonable time to comply . . .” MRCP 45(d)(3)(A)(i) (emphasis added). Even if the subpoena *deuces tecum* served on the CARD Clinic was reduced to require only the production of the patient files for the CARD Clinic’s patients who are appearing before the Asbestos Claims Court, it would take four or more months to make that production. McNew Dec. ¶11. Compelling the CARD Clinic and CARD Foundation to fully comply with the subpoenas by June 11, 2018, is not reasonable. The CARD Clinic and the CARD Foundation request the Court quash or modify the subpoenas *deuces tecum* pursuant to MRCP 45(d)(3)(A)(i).

### IV. The Subpoenas Demand the Disclosure of Patient Confidential Information.

The subpoena *deuces tecum* served on the CARD Clinic seeks every patient file from the CARD Clinic for its nearly 20-year existence. MRCP 45(d)(3)(A) provides “[o]n timely motion, the issuing court ***must quash or modify*** a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies . . .” MRCP 45(d)(3)(A)(iii) (emphasis added).

The subpoena *deuces tecum* served on the CARD Clinic seeks:

All files, including but not limited to ***patient files***, relating to testing, screening, or diagnosing of any person, including ***but not limited to*** the persons listed on Attachment B.

Ex. 1, CARD Clinic SDT, Att. A ¶II(2) (emphasis added). “[P]erson” is defined in the subpoena *duces tecum* as “any person which you have rendered services to of for at any time . . .” Ex. 1, CARD Clinic SDT, Att. A ¶I(2). MCA §50-16-811(a)-(j) identifies the limited circumstances in



which health care information is discoverable in response to a subpoena. None of those limited circumstances are present when applying that law to the CARD Clinic's patients who are not before the Court, therefore the subpoena improperly seeks protected patient information. It would be improper for the CARD Clinic to disclose patients' health information as the subpoena demands. McNew Dec. ¶13. The CARD Clinic and the CARD Foundation request the Court quash or modify the subpoenas *deuces tecum* pursuant to MRCP 45(d)(3)(A)(iii).

**V. The CARD Clinic and the CARD Foundation Request Their Attorney Fees Incurred in Seeking to Quash or Limit Defendants' Subpoenas.**

The CARD Clinic and the CARD Foundation request the Court award them their lost earnings and reasonable attorney fees in objecting to and in seeking to quash or modify the four subpoenas served by Defendants. MRCP 45(d)(1) provides:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney fees – on a party or attorney who fails to comply.

MRCP 45(d)(1). The subpoenas seek production of 75 different types of documents and compel MRCP (30)(b)(6) deposition testimony on 77 different topics. Also, the subpoenas blatantly and improperly seek patient protected information not subject to disclosure. Defendants took no reasonable steps to avoid imposing an undue burden on the CARD Clinic and the CARD Foundation. As a result, the CARD Clinic and the CARD Foundation were required to retain an attorney to object to and to seek to quash the subpoenas. Pursuant to MRCP 45(d)(1), the CARD Clinic and CARD Foundation request the Court award the CARD Clinic and CARD Foundation their attorney fees incurred in objecting to and seeking to quash or modify the subpoenas.

**VI. To the Extent Depositions Are Allowed to Proceed, The CARD Clinic and the CARD Foundation Request Modifications to the Proposed Depositions.**

If the Court allows the depositions of the CARD Clinic and/or the CARD Foundation to proceed, the CARD Clinic and the CARD Foundation request that the Court order any depositions to occur on Friday, June 29, 2018 because the CARD Clinic Medical Director/CEO is not available on Thursday, June 28, 2018, the date designated in the subpoenas. Also, due to the medical needs of CARD counsel's family, the CARD Clinic and the CARD Foundation request that any depositions occur in Kalispell. Moreover, the strong likelihood of the necessity of judicial intervention in any deposition is another significant factor that militates that any depositions take place in Kalispell. Based on the questioning of CARD Clinic Medical Director/CEO Brad Black by these same Defendants' counsel during a deposition on May 25, 2018, the CARD Clinic and CARD Foundation have reasonable basis to believe that judicial intervention will be required at the proposed June 29, 2018 depositions. The CARD Clinic and the CARD Foundation also request that the Court or a court-appointed special master be available in Kalispell on June 29, 2018 to resolve deposition issues that will almost certainly arise on June 29, 2018. The CARD Clinic and the CARD Foundation further suggest that any depositions be ordered to take place at the Flathead County Courthouse in order to accommodate expected judicial oversight. Finally, pursuant to MRCP 30(d)(1), the CARD Clinic and the CARD Foundation request that the Court order that any such depositions be limited to a combined total of seven hours.

**CONCLUSION**

Pursuant to MRCP 45(d)(2)(B)(ii) and MRCP 45(d)(3), the CARD Clinic and the CARD Foundation request the Court quash, or at a minimum significantly modify, the four subpoenas served on them by Defendants. Additionally, the CARD Clinic and CARD Foundation request

the Court award the CARD Clinic and CARD Foundation their attorney fees incurred in objecting to and seeking to quash or modify the subpoenas.

Respectfully submitted this 29<sup>th</sup> day of May, 2018.

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## **CERTIFICATE OF SERVICE**

I, Timothy M. Bechtold, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 05-29-2018:

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Dated: 05-29-2018