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IN THE MONTANA ASBESTOS CLAIMS COURT

IN RE ASBESTOS LITIGATION,

Consolidated Cases.

Cause No. AC 17-0694

Hon. Amy Eddy

**MOTION FOR MODIFICATION OF
 JUNE 8, 2018 ORDER RE: MOTIONS TO
 QUASH PURSUANT TO M.R.CIV.P.
 54(b) AND TO RE-OPEN CARD AND
 CARD FOUNDATION RULE 30(b)(6)
 DEPOSITIONS AND BRIEF IN
 SUPPORT**

The State of Montana, BNSF Railway Company, International Paper Company, Maryland Casualty Company, Stimson Lumber Company, and Zurn Industries Inc. (collectively “Defendants”)¹, by and through counsel, pursuant to M.R.Civ.P. 54(b) move the Court for modification of the Court’s June 8, 2018, *Order Re: Motions to Quash* (“Order”). Defendants also move the Court to re-open the CARD and CARD Foundation Rule 30(b)(6) depositions.

¹ Stimson Lumber Company and Zurn Industries, Inc. were not parties to the subpoenas served on CARD Clinic and CARD Foundation, filed May 25, 2018, but join in this motion as they were parties present at the CARD Clinic and CARD Foundation Rule 30(b)(6) depositions.

In their motions to quash, CARD, CARD Foundation, and Plaintiffs argued that the Court should quash the subpoenas on the topics the Court did because the topics were overly broad, unduly burdensome, or duplicative, and on a few because the information sought was subject to privacy rights and redaction efforts made the topics unduly burdensome. However, after having prevailed in part on the motions, the Plaintiffs (and their experts, including Dr. Black from CARD) then turned around and used information during the July 24-25, 2018 hearing on Plaintiff's motion for a deferred docket from most, if not every one of the topics quashed in the *Order*. Furthermore, recently, Plaintiffs served a subpoena duces tecum upon Dr. Becker, seeking information on every document he has concerning the CARD Clinic, as well as any communications with BN, the State, Maryland Casualty, International Paper, Stimson Lumber or W.R. Grace. Plaintiffs should not be able to have it both ways; they should not on the one hand be able to use information to support their experts' opinions and to obtain discovery well beyond just for the claimants in this matter, and on the other quash the Defendants from being able to have the same information.

Defendants submit that it is consonant with justice that the *Order* be amended so that Defendants are not responsible for paying the attorneys' fees and costs incurred by the CARD Clinic and CARD Foundation for moving to quash Subpoenas on CARD Clinic and CARD Foundation, filed May 25, 2018.

Defendants also submit that it is consonant with justice that the CARD and CARD Foundation Rule 30(b)(6) depositions be re-opened so that Defendants can inquire into the quashed topics, as well as topics which were not quashed but for which CARD and CARD Foundation were not prepared to answer questions.

I. M.R. Civ. P. 54(b)

In pertinent part, M.R.Civ.P. 54(b) provides that:

MOTION FOR MODIFICATION OF JUNE 8, 2018 *ORDER RE: MOTIONS TO QUASH*
PURSUANT TO M.R.CIV.P. 54(b) AND TO RE-OPEN CARD AND CARD FOUNDATION
RULE 30(B)(6) DEPOSITIONS AND BRIEF IN SUPPORT

. . . any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

M.R.Civ.P. 54(b) applies when a district court has not yet entered a final judgment or order. *Estate of Pruyn v. Axmen Propane, Inc.*, 2009 MT 448, ¶¶ 26-34, 354 Mont. 208, 223 P.3d 845. “So long as a court has jurisdiction over an action, it should have plenary power over its interlocutory orders and should be able to revise them when it is consonant with justice so to do.” *Pruyn*, ¶ 31; *Id.*, 32-33 (order was interlocutory because final judgment as applied to all parties never entered; no monetary judgment or no notice of entry of judgment filed). No judgment nor final order has been entered in this matter. Accordingly, the Court has the plenary power to revise the *Order*.

II. ARGUMENT

The Court noted that in viewing the subpoenas, they must be viewed in the context of the litigation as a whole, not just the July 24-25, 2018 hearing. *Order*, p. 4.

The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.” *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634. Accordingly, the discovery rules are “liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage.” *Richardson*, ¶24.

Order, p. 3; *see also* M.R.Civ.P. 26(b) (parties may obtain discovery as to any relevant, non-privileged matter, but court should limit where unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive).

The topics previously quashed seek information which is relevant and calculated to lead to the discovery of admissible evidence. The topics previously quashed are not unduly burdensome, cumulative, or duplicative. The topics previously quashed will promote the ascertainment of truth and the ultimate disposition of these matters for several reasons.

First, the Plaintiffs and their experts relied on information and documents from most, if not every, topic quashed in support of Plaintiffs' motion for a deferred docket. Obviously, they believed the information in the quashed topics was relevant and not unduly burdensome, cumulative, or duplicative, or it would not have been used or served as bases for expert testimony.

Second, as the Court is aware, the State has entered tentative settlements with 382 claimants and a hearing has been set for October 3, 2018. It appears from the testimony at the July 24-25, 2018 hearing and from the 30(b)(6) depositions days before that hearing, that CARD may have withheld B-reads and possibly other medical information from the claimants' files. This information may have been for not only the 382 claimants in the State tentative settlements, but possibly for the State's two other settlements in September, 2011 and January, 2017.

All medical information for these claimants as well as any other claimant against any defendant was among the information sought in the topics quashed in the *Order*. Production of this information and the other information sought in the topics quashed in the *Order* will promote the ascertainment of truth and the ultimate disposition of these matters.

Under M.R.Civ.P. 45(d), "[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.” See M.R.Civ.P 45(d)(1). As briefly addressed above and more fully below, Defendants submit that fees should not have been awarded against them. Additionally, in view of what happened at the July 24-25, 2018 hearing, Defendants request that the Court enter an order requiring CARD and CARD Foundation to respond to the topics quashed in the *Order* and re-opening the CARD and CARD Foundation Rule 30(b)(6) depositions, not only on the quashed topics but to the topics upon which they were not prepared to testify.

1. CARD Subpoena Duces Tecum

Of the 54 categories of documents requested in the May 25, 2018, subpoena duces tecum to CARD, the Court quashed the subpoena duces tecum on 31 of the topics. The Court found that information requested in 11 of those categories (¶¶ 1, 2, 3, 4, 5, 7, 9, 11, 12, 15 and 23) was not required to be produced because for the claimants before the Asbestos Claims Court, the information was already being produced and for persons not before the Court, the information was subject to rights of privacy and it would be unduly burdensome to require CARD to produce that information because of redaction efforts. The Court found that the information requested in the other 20 categories (¶¶ 10, 17, 22, 25, 26, 27, 30, 31, 34, 35, 36, 41, 42, 44, 45, 46, 48, 49, 51 and 52) while perhaps reasonably calculated to lead to the discovery of admissible evidence, was not required to be produced because the categories were overly broad and unduly burdensome.

For the reasons discussed below, Defendants submit the Court should amend the *Order* to not require Defendants to pay CARD and the CARD Foundation’s attorneys’ fees in moving to quash the subpoenas and subpoenas duces tecum and require CARD and CARD Foundation to produce the requested information. Also, for the reasons discussed below, Defendants move the Court for an order re-opening the CARD and CARD Foundation Rule 30(b)(6) depositions on the topics addressed below.

a. ¶¶ 1, 2, 3, 4, 5, 7, 9, 11, 12, 15 and 23 CARD Subpoena Duces Tecum

CARD and Plaintiffs led the Court to believe that the information sought in categories 1, 2, 3, 4, 5, 7, 9, 11, 12, 15 and 23 is being produced as part of the discovery process. As the Court and defendants learned, however, for claimants now before the Asbestos Court, information and documents have not been and are not being produced as part of the discovery process.

Further, for claimants not before the Court, information and documents apparently are being provided to Mt. Sinai employees and NIOSH, ATSDR, and ILO (International Labour Office) for use in decisions about grants and studies to support CARD's testing, screening and diagnoses. While CARD is using that information and Plaintiffs' experts relied upon it for their testimony at the July 24-25, 2018 hearing, the information has not been and is not being produced as part of the discovery process.

Categories 1, 2 and 11 sought all documents relating to the results of various tests, questionnaires and histories and files relating to testing, screening and diagnosing of claimants by CARD. B reads and other materials which are done for patients are not put in the patients' files and thus, have not been or are not being produced to the defendants. *See* Ex. 1 (Black Dep., 101:6-10; 102:25-103:4); *see also* July 24-25, 2018 Hearing Transcript ("Hrg. Tr."), 267:18-20. Results from peer review sessions are not kept in the patient files. *See* Ex. 1 (Black Dep., 111:13-20). CARD routinely confers with doctors at Mt. Sinai, but the notes and information for those conferences are not kept in patient files. *See* Ex. 1 (Black Dep., 114:20-115:15). CARD also has provided information, e.g., digital images, to NIOSH, ATSDR, and ILO for CARD patients. *See* Ex. 1 (Black Dep., 98:4-15). Mt. Sinai's Dr. Miller testified based on his review of documents from CARD about the "one additional type of pleural disease which we've only seen in Libby-exposed people." *July 24-25, 2018 Hrg. Tr.*, 35:12-40:3, 40:16-23, 46:1-6, 47:12-

50:1, 52:14-25. Dr. Yankelevitz based his opinions on his view of medical information for undisclosed persons allegedly exposed to asbestos in Libby about whom he participated in articles and upon which he based his opinions. *July 24-25, 2018 Hrg. Tr.*, 322:10-323:6. Dr. Yankelevitz also based his opinions on about 1500 undisclosed persons for whom he and others at Mt. Sinai had been doing readings for approximately three years. *July 24-25, 2018 Hrg. Tr.*, 323:13-328:17. This was the type of information sought in categories 1, 2 and 11. Yet, while Plaintiffs and CARD used it to support Plaintiffs' motion, it was at CARD's and Plaintiffs' urging that the Court quashed Defendants subpoena and prevented Defendants from having the same information for their and their experts' use.

Categories 3, 4, 5 and 9 relate to invoices and expenses, and payments to and from CARD for its services. That information also is not in the patient information being provided in discovery. *See Exs. 2 (Affidavit of Dale R. Cockrell, ¶ 2); 3 (Affidavit of Chad Knight ¶ 2); 4 (Affidavit of Vernon McFarland, ¶ 2).*

Category 7 relates to patient agreements, waivers and notices relating to screening, testing, and diagnoses. CARD provides information for its patients to the Mt. Sinai physicians for purposes of obtaining or complying with grants. *See Ex. 1 (Black Dep., 83:2-15, 84:3-7).* CARD also has provided information, e.g., digital images, to NIOSH, ATSDR, and ILO for CARD patients. *See Ex. 1 (Black Dep., 98:4-15).* The agreements and business records showing for whom images were and what information was provided by CARD is not produced in the discovery process. *See Exs. 2 (Affidavit of Dale R. Cockrell, ¶ 3); 3 (Affidavit of Chad Knight ¶ 3); 4 (Affidavit of Vernon McFarland, ¶ 3).*

Categories 15 and 23 relate to prescribing and ordering of patients' tests and purchases of testing, screening, and diagnosis equipment. Documents showing how decisions are made about

the B-reads which are not in patient files, and which and what equipment to purchase, is not being produced as part of the discovery process. *See Exs. 2 (Affidavit of Dale R. Cockrell, ¶ 4); 3 (Affidavit of Chad Knight ¶ 4); 4 (Affidavit of Vernon McFarland, ¶ 4).*

In sum, while Plaintiffs and CARD represented that for the persons before this Court, the information in these 11 categories has been produced to Defendants in the discovery process, such is not the case. Further, Plaintiffs' experts relied on testing of persons not before this Court but prevented Defendants from having their experts review the same information.

b. ¶¶ 10, 17, 22, 25, 26, 27, 30, 31, 34, 35, 36, 41, 42, 44, 45, 46, 48, 49, 51 and 52

Category 10 relates to CARD advertisements. CARD has advertised around the nation and now advertises regionally. *July 24-25, 2018 Hrg. Tr.*, 189:14-22 (Black). The advertising is part of CARD's grant. *July 24-25, 2018 Hrg. Tr.*, 190:4-19. This information too should be readily available to CARD and not overly burdensome to produce.

Category 17 relates to calendars and date books. Dr. Black in particular has held himself out to be a full adjunct professor in the pulmonary medicine department at Mt. Sinai and on the medical staff at Mt. Sinai. *See July 24-25, 2018 Hrg. Tr.*, 30:3-9; *see also* Ex. 1 (Black Dep. 79:7-9). It should be little effort for CARD to locate records showing when this purported appointment occurred and when Dr. Black performs the purported adjunct professor activities.

Category 22 relates to files about how tests are performed. This information too should be readily available to CARD. It may also be in the files CARD has not provided to the Defendants.

Category 25 relates to information CARD has provided for civil or criminal actions against Grace. CARD's Dr. Whitehouse testified at and produced information in the Grace criminal trial and bankruptcy. *See Ex. 5 (U.S.A. v. W.R. Grace, et al., U.S. District Court for*

District of Montana, CR05-07-M-DWM (March 4, 2009 Tr., Vol. 7, pp. 1448, 1559:10); Ex. 6 (*U.S.A. v. W.R. Grace, et al.*, U.S. District Court for District of Montana, CR05-07-M-DWM (April 21, 2009 Order); Ex. 7 (*In re: W.R. Grace & Co, et al.*, U.S. Bankruptcy Court for the District of Delaware, Case NO. 01-1139 (JKF), June 5, 2006 Protective Order Relating to Production of Medical Records). This information too should be readily available to CARD. Additionally, CARD will have already done the work to redact patient information.

Categories 27, 34 and 35 relate to information produced to Congress relating to asbestos exposure in Libby or ARD and information about CARD's "lamellar pleural thickening"/"Libby Disease"/"Libby Amphibole Asbestos". CARD's Dr. Black demonstrated CARD is knowledgeable about such information as he testified about the Affordable Care Act – "the Libby provision." *July 24-25 Hrg. Tr.*, 187-14-24. Given Dr. Black's knowledge about that Act, any information CARD has on this topic too should be readily available to CARD. Similarly, as discussed above, given Dr. Black's testimony about his work with Mt. Sinai, NIOSH, ATSDR and ILO as well as Mt. Sinai's Dr. Miller's testimony, this information should be readily available to CARD. *See July 24-25, Hrg. Tr.*, 36:2-5 (Dr. Miller).

Category 30 relates to information CARD has received from persons about information provided for the Grace criminal or civil matters, Congress, or other sources. Logically, this information would be kept with the information CARD provided to these sources. As such, it too should be readily available to CARD.

Category 36 relates to the relationship between CARD and the CARD Foundation. As plaintiffs recently demonstrated, this information too should be readily available to CARD. *See Notice of Disclosure Re: July 26, 2018 Order*, dated August 16, 2018, p. 1-2. In light of the Court's July 26, 2018 *Order*, and the testimony about the financial contributions of plaintiffs'

counsel to the CARD Foundation which were then transferred to CARD, this information is particularly relevant to the credibility of CARD witnesses.

Categories 41, 44 and 45 relate to CARD fundraising activities and community involvement on CARD boards. In light of the Court's July 26, 2018 *Order*, and the testimony about the financial contributions of plaintiffs' counsel to the CARD Foundation which were then transferred to CARD, this information is particularly relevant to the credibility of CARD witnesses.

Category 42 relates to CARD's procedures and policies relating to patient record keeping and documentation. Given that CARD separates patient medical information, e.g., B read reports which are not kept in patient files, CARD should have information about how and why this medical information is separated and not provided to defendants.

Category 46 relates to the Grace Libby Medical Plan. Mr. Thom was knowledgeable about how that program came to be. *See Ex. 8* (Thom Dep., 36:14-25, 38:3-10). Given Mr. Thom's testimony, any CARD information about that plan should be readily available. Because that program pays for medical treatment related to ARD, the information in CARD's possession may well relate to the diagnosis and treatment which depending upon what is in the file, may go to both liability and damages.

Categories 48, 49 and 52 relate to CARD's screening programs and CARD's work with the ATSDR. Dr. Black testified that CARD uses screening to determine low-risk and high-risk populations. *See Ex. 1* (Black Dep. 18:24-19:8). Dr. Black also testified that CARD participated in setting up the ATSDR screening program. *See Ex. 1* (Black Dep. 66:24-67:9). Dr. Black also testified about CARD's screening process for its work in obtaining and complying with ATSDR grants. *See Ex. 1* (Black Dep. 99:16-23). Within the last two weeks, CARD has produced its list

of patients screened and the particular diagnoses for each patient. *See* Ex. 2 (*Affidavit of Dale R. Cockrell*, ¶ 5). The patients are identified by a number rather than name. *See* Ex. 2 (*Affidavit of Dale R. Cockrell*, ¶ 5). This is some of the information that should have been provided in response to these topics as Plaintiffs’ experts testified about their ability to diagnose “lamellar pleural thickening” was in part based upon what they learned from being able to review and “read” tests for those persons. Given CARD’s knowledge of the screening programs and CARD’s work setting up a program with ATSDR, this information too should be readily available to CARD. And because the CARD screening spreadsheet has already been produced without identification of parties, it was no burden for CARD to produce it. Finally, to the extent any of the claimants before this court are included in the screening database, they should be identified on the CARD screening spreadsheet and their medical information produced.

Category 51 relates to CARD price lists. Ms. St. Jean testified about CARD pricing and write-offs. *See* Ex. 9 (St. Jean Dep. 27:19-28:12). Price lists showing the coding for the medical services provided will shed light on actual diagnoses. *See* Ex. 9 (St. Jean Dep. 24:23-24, 25:12-14). Ms. St. Jean testified about medical billing codes for which CARD charges. Documents concerning how or when CARD decides to charge patients should be readily available.

2. CARD Subpoena to Testify

The Court quashed topics 3, 8, 9, 10, 14, 16, 17, 19, 26, 27, 29, 30, 32, 33, 36, 41, 43-52, and 54 of the CARD subpoena to testify on the bases that those topics were overly broad, unduly burdensome and could be better sought through other sources. In light of the testimony from the CARD Clinic and CARD Foundation Rule 30(b)(6) depositions and testimony at the July 24-25, 2018 hearing, defendants submit that those topics are not overly broad, unduly burdensome and could not be better sought through other sources.

Categories 8, 9, 10, 17 and 20 sought information related to the ILO and ATS and HRCT and CT scans. CARD has provided and determined what information to provide to the ILO for CARD patients. *See Ex. 1 (Black Dep., 98:4-15)*. How, for what purpose, and the bases upon which those decisions are made for information provided to ILO can easily be provided by CARD's Dr. Black – he is the one who makes those decisions. Moreover, at the July 24-25, 2018 hearing, Dr. Black testified CARD applies at least some ILO standards and definitions and he is very aware of the ILO. *See July 24-25, 2018, Hrg. Tr., 218-22-219:4, 264:17-18*. Dr. Black testified extensively about how CARD purportedly complies with ATS criteria. *See for example July 24-25, 2018, Hrg. Tr., 201:9-12; 266:6-13*. Dr. Black testified about the use of HRCT. *See for example July 24-25, 2018, Hrg. Tr., 285:1-11*. Given plaintiffs' reliance upon CARD's knowledge, through Dr. Black, of ILO standards and definitions, ATS criteria, and use of HRCT and CT scans for use in their motion for a deferred docket, these topics were not overly broad and unduly burdensome and could not be sought through a better source.

Categories 14 and 15 related to eligibility for federal benefits and the Medicare pilot program. CARD's Dr. Black demonstrated CARD is knowledgeable about eligibility for federal benefits as he testified about the "Libby Provision" of the Affordable Care Act. *July 24-25 Hrg. Tr., 187-14-24*. One focus of the July 24-25, 2018 hearing was information about CARD's "lamellar pleural thickening"/"Libby Disease"/"Libby Amphibole Asbestos" and CARD was the one on the cutting edge of that novel diagnosis. *July 24-25 Hrg. Tr., 83:17-18*. Given Dr. Black's knowledge about that Act, any information CARD has on this topic too should be readily available to CARD. Given plaintiffs' reliance upon these topics in support of their motion for a deferred docket, these topics were not overly broad and unduly burdensome and could not be sought through a better source.

Category 19 relates to CARD advertisements. CARD has advertised around the nation and now advertises regionally. *July 24-25 Hrg. Tr.*, 192:16-21. This information too should be readily available to CARD.

Categories 26 and 27 relate to CARD's finances and fundraising. Considering the Court's July 26, 2018 *Order* and the testimony about the financial contributions of plaintiffs' counsel to the CARD Foundation which were apparently anticipated and in fact were then transferred to CARD, this information is not overly broad and unduly burdensome; it is relevant to the testimony of CARD witnesses.

Category 30 relates to medical books and publications inside CARD. As noted in the Court's order, CARD's sole purpose relates to ARD. Thus, books and publications on that topic are not overly broad. Given the challenges to how CARD makes diagnoses, this topic is not overly broad. Further, because CARD should have this information on hand, the topic is not overly broad.

Categories 32, 33 and 54 relate to the CARD Clinic Volunteer Community Board and CARD's communications with Cabinet Peaks and other medical providers about ARD findings and diagnoses. CARD readily has information on the identity of those persons and its minutes, if any. Dr. Becker testified about concerns he had as a radiologist practicing in Libby for nearly 30 years with CARD's diagnoses. *July 24-25, 2018 Hrg. Tr.*, 473:13-474:2, 474:13-17. Dr. Becker testified about one meeting in 2005 with Dr. Whitehouse and Dr. Black in which they asked if he would alter the way he read films. *July 24-25, 2018 Hrg. Tr.*, 477:9-15. Dr. Becker testified he felt CARD was overdiagnosing. *July 24-25, 2018 Hrg. Tr.*, 479:1-4. Records of CARD's Community Board may shed light on whether others had the same concerns as Dr. Becker and thus, shed light on CARD's diagnoses. Given the challenges to how CARD makes diagnoses,

this topic is not overly broad. Further, because CARD should have this information on hand, the topic is not overly burdensome.

Category 35 related to the relationship between Mt. Sinai and CARD. It was obvious from the July 24-25, 2018 hearing that CARD is well aware of that relationship. Moreover, two of plaintiffs' experts were Mt. Sinai physicians who testified they worked closely with CARD. *See July 24-25, 2018 Hrg. Tr.*, (testimony of Drs. Miller and Yankelevitz). Given the plaintiffs' reliance upon this testimony and relationship, this topic was neither overly broad nor unduly burdensome.

Category 36 relates to CARD newsletters. Given Mr. Thom's testimony that at least some funding for one of CARD's studies (one by Dr. Whitehouse) came through the CARD Foundation and his lack of knowledge about how other funds are raised, information in newsletters may shed light on how funds are raised and the relationship with not only plaintiff's counsel, but also Drs. Whitehouse and Black. Similarly, communications between the CARD Clinic and Foundation on those topics may also shed light on how funds are raised and the relationships with plaintiff's counsel and Drs. Whitehouse and Black.

Categories 41, and 43-46 all relate to different programs in which CARD is or may be involved. The Libby Medical Plan, which early on funded CARD, was discussed at the July 24-25, 2018 hearing. *July 24-25, 2018 Hrg. Tr.*, 252:8-253:7. Mr. Thom was knowledgeable about the Grace Libby Medical Plan and how it came to be. *See Ex. 8* (Thom Dep., 36:14-25, 38:3-10). Those programs pay for medical treatment related to ARD and in part establish criteria for benefits. CARD's knowledge about its involvement with those programs as well as the programs in Categories 41, 44, and 45 may go to both liability and damages. CARD has been involved with the Medicare Pilot Program. *See Ex. 12* (CARD Rule 30(b)(6) Depo. Ex. 1).

CARD's knowledge and involvement in these programs is neither overly broad nor unduly burdensome.

Categories 47 and 50 relate to the CARD database and ATSDR. As discussed at the hearing, CARD relies upon that database as foundation for its opinions concerning its novel lamellar pleural thickening diagnoses. *See July 24-25, 2018 Hrg. Tr.*, 119:12-17 (Dr. Weill discussing CARD's work with the ATSDR database); 165:8:23, 167:6-14 (Dr. Weill responding to questions from plaintiffs' counsel about the ATSDR and CARD databases); *see also* Ex. 1 (Black Dep., 88:12-19 (CARD database may have information from EPA database)); Ex. 1 (Black Dep., 102:25-103:14 (CARD database has B reads)); Ex. 11 (CARD Rule 30(b)(6) Depo. Ex. 14 (Black co-author with ATSDR, EPA). CARD has its own database protocol. *See* Ex. 14 (CARD Rule 30(b)(6) Depo. Ex. 3). CARD's knowledge about what it has in its databases and how CARD either uses or decides not to use that information in making diagnoses and compliance with the ATS criteria is neither overly broad nor unduly burdensome.

Categories 48, 49, and 51 relate to CARD's communications with the CARD Foundation, Dr. Whitehouse, ATSDR, and Montana and Idaho universities. CARD Foundation is a money raising mechanism for CARD. Dr. Whitehouse received at least some funding by plaintiffs' counsel through the Foundation. CARD's Drs. Black and Whitehouse have co-authored at least one article about ARD from asbestos exposure in and around Libby. *See* Ex. 13 (CARD Rule 30(b)(6) Depo. Ex. 12). For the same reasons as discussed above, given the financial relationship between plaintiffs' counsel and CARD, through the Foundation, this information can be restricted to how and what monies are raised, from whom and how they are dispersed. This information is neither overly broad nor unduly burdensome.

Category 52 relates to CARD's funding through federal grants. Ms. McNew testified about CARD's involvement with ATSDR and screening grants, that CARD has the ability to track funds from those grants, protocol set up under the grants for diagnoses and tracking patients' ARD, use of B reads, and CARD's annual funding through the grants. Ex. 15 (McNew Dep., 17:24-18:6, 20:2-8, 29:7-25, 31:1-12, 35:20-36:9). Given the amount of funding CARD receives through those grants, whether it can meet the criteria to keep the funding coming relates to liability and CARD's credibility. This information is neither overly broad nor unduly burdensome.

Given Plaintiffs' reliance and the fact that most of these topics were at issue during the July 24-25, 2018 hearing, these topics were not overly broad or unduly burdensome. Because of CARD's involvement in these topics, CARD is the best source of information about its involvement in these topics.

3. CARD Foundation Subpoena Duces Tecum/Subpoena to Testify

Except for Categories 4 and 5, the Court quashed all other categories of the Subpoena Duces Tecum/Subpoena to Testify² on the bases that they were irrelevant and did not appear to be reasonably calculated to lead to the discovery of admissible evidence. Given the testimony at the July 24-25, 2018, Defendants submit that the quashed categories do appear to be reasonably calculated to lead to the discovery of admissible evidence.

During the deposition of Leroy Thom, the individual the CARD Foundation designated to speak to categories 4 and 5, Mr. Thom acknowledged he had done nothing to prepare for the deposition except looked at some documents about dates and the Asbestos Related Healthcare

² The categories in the two subpoenas are the same.

Project (“ARHCP”). *See* Ex. 8 (Thom Dep., 9:4-15, 35:20-21). None of the documents he reviewed were produced. *See* Ex. 8 (Thom Dep., 9:13-15).

Although designated to testify about categories 4 and 5, Mr. Thom knew nothing about deposits to CARD Foundation or how monies were dispersed from the foundation. *See* Ex. 8 (Thom Dep., 24:21-25:7). Mr. Thom acknowledged that based on the information provided in response to the subpoena duces tecum, there was no way to determine what deposits came from plaintiffs’ attorneys and which did not. *See* Ex. 8 (Thom Dep., 26:8-19). Mr. Thom largely pointed to other Foundation members who would have knowledge about the CARD Foundation working with plaintiffs’ attorneys and fundraising. *See* Ex. 8 (Thom Dep., 24:21-25:2, 28:20-29:11). Mr. Thom testified that money was transferred from the CARD Foundation to CARD. *See* Ex. 8 (Thom Dep., 16:19-17:10, 22:2-8, 27:8-15). CARD Foundation is the arm of the CARD Clinic to raise funds. *See* Ex. 8 (Thom Dep., 30:18-23). Mr. Thom testified that at least on one occasion the McGarvey Heberling firm gave money to the CARD Foundation for a study by Dr. Whitehouse which the Foundation then transferred to the CARD Clinic. *See* Ex. 8 (Thom Dep., 26:20-27:16).

Categories 1, 10, 15, and 16 are related to CARD Foundation’s structure and how it keeps and retains records. Categories 3, 5, 7, 8, 9, 13, 14 relate to funding for studies, communications with plaintiffs’ counsel, finances, and fundraising. Category 11 relates to medical books and publications inside the CARD Foundation. Given Mr. Thom’s testimony that others within CARD Foundation would have the answers about how deposits are recorded and disbursements made, documents showing who and when and what persons held different positions is relevant and appears to be reasonably calculated to lead to the discovery of admissible evidence because it will or might identify who can testify about funding by or contributions from plaintiffs’

counsel. Similarly, information about who pays for or the source for funding of those materials is relevant and appears to be reasonably calculated to lead to the discovery of admissible evidence because it will or might identify who can testify about funding by or contributions from plaintiffs' counsel.

Category 12 relates to communications between the CARD Foundation and EPA. Dr. Black is a member of the CARD Foundation. *See July 24-25 Hrg. Tr.*, 259:24-25. Dr. Black has had direct communications with the EPA about how to characterize exposure to asbestos. *See Ex. 10 (MacDonald, et al. Deposition Exhibit 16)*. Given that many of the CARD diagnoses rely on Dr. Black's opinions, his communications with the EPA, if done through the CARD Foundation, are relevant and appear to be reasonably calculated to lead to the discovery of admissible evidence because one of the three ATS criteria relates to exposures and ruling out exposures. *See July 24-25 Hrg. Tr.*, 15:13-16 (all parties agree ATS criteria are the relevant criteria), 58:17-23 (causation as documented by occupational and environmental history), 59:4-6 (exclusion of alternative plausible findings).

Categories 17, 18, 19, and 20 relate to the Foundation newsletters, CARD Clinic and Drs. Whitehouse and Black. Mr. Thom did not speak to Dr. Black about his communications with the Foundation except for who was going to be present for the depositions and Dr. Whitehouse being salaried or on contract; he only spoke with Dr. Whitehouse to prepare for his deposition as the CARD Foundation representative. *See Ex. 8 (Thom Dep., 9:22-24, 21:17-23)*. Mr. Thom's discussion with Dr. Black was only about whether he was salaried or contracted. *Id.*, 10:7-10. CARD Foundation is the arm of the CARD Clinic to raise funds. *See Ex. 8 (Thom Dep., 30:18-23)*. This information is relevant and appears to be reasonably calculated to lead to the discovery of admissible evidence. Given Mr. Thom's testimony that at least some funding for one of

CARD's studies (one by Dr. Whitehouse) came through the CARD Foundation and his lack of knowledge about how other funds are raised, information in newsletters may shed light on how funds are raised and the relationship with not only plaintiff's counsel, but also Drs. Whitehouse and Black. Similarly, communications between the CARD Clinic and Foundation on those topics may also shed light on how funds are raised and the relationships with plaintiff's counsel and Drs. Whitehouse and Black.

4. Re-opening of the CARD and CARD Foundation Rule 30(b)(6) Depositions

Of the 29 topics for which the Court previously required CARD to provide a deponent, the deponent was not prepared or educated to testify on 23 of the designated topics.³ Similarly, on neither of the two required topics for which the Court previously required the CARD Foundation to provide a deponent, was the representative adequately prepared or educated to testify. Therefore, in addition to re-opening the CARD and CARD Foundation Rule 30(b)(6) depositions to respond to questions concerning the previously quashed topics, Defendants also request the Court to enter an order re-opening the CARD and CARD Foundation Rule 30(b)(6) topics not quashed.

A corporate entity has an affirmative duty to educate and prepare designated witnesses under Rule 30(b)(6). *Pioneer Drive, LLC v. Nissan Diesel America, Inc.* 262 F.R.D. 552, 558; *see also Barnard Pipeline, Inc. v. Travelers Property Cas. Co. of America*, 2014 WL 1774813 *1, (D.Mont. 2014); *Martin v. Willow Creek Sewer Dist.*, 2013 WL 12251724 * 1 (Mont. 18th Jud. Dist., 2013) (absence of Montana case law on issue of corporate duty under Rule 30(b)(6), court looks to federal law). Producing documents is not a substitute for providing an educated deponent. *Pioneer Drive*, 262 F.R.D. at 559. A sanction for failure to produce an adequately

³ Defendants do not request re-opening the CARD deposition on CARD subpoena to testify topics 1, 2, 5, 6, 7 or 34.

prepared Rule 30(b)(6) deponent is to require the entity to re-designate an adequately prepared witness at the entity's expense. *Martin*, 2013 WL 12251724 at 2, citing *Great Amer. Ins. Co. of New York v. Vegas Const. Co., Inc.*, 251 F.R.D. 534, 542-43 (D. Nev. 2008); *see also Pioneer Drive*, 262 F.R.D. at 559-60 (courts may treat failure to produce adequately prepared witness as tantamount to nonappearance meriting imposition of sanctions).

CARD designated Kerensa Hanley to testify concerning topic 4 (CARD participation in studies and research activities). Exhibit 16 (Hanley Dep., 8:21-25, 12:21-13;3). She could not speak in detail about past research activities or studies nor was she sure who participants were in studies or who funded research activities and studies. *Id.*, 14:20-15:2, 16:11-17:8, 17:12-15, 18:11-20:1. She was not prepared to testify about how much money came from a grant given to CARD or how it was used. *Id.*, 44:19-45:1. She was not prepared to testify about how CARD is compensated for its participation in research studies. *Id.*, 46:24-47:3. She summed up her testimony by saying that she was told that if she did not have a lot of knowledge on the MASSA, LANDIS, and CHIEFS studies, just say so; she later acknowledged other persons probably had had knowledge about those studies. *Id.*, 86:4-24.

CARD designated Kayla Friss to testify concerning topic 15 (CARD Clinic assistance to patients applying for state or federal benefits on an asbestos-related disease diagnosis). Exhibit 17 (Friss Depo. 8:12-16). The only thing Ms. Friss was prepared to testify on that topic is paperwork she was given. *Id.*, 10:8-18. She was only prepared to answer any questions about what happens at CARD for the two months she had been with CARD, i.e., she could not answer any questions about what has occurred at the CARD Clinic prior to May, 2018. *Id.*, 11:5-15. Other than her two managers, she met with no one else to prepare for her portion of the deposition. *Id.*, 11:21-23.

CARD designated Tracy McNew to testify on topics 11, 12, 22, 25, 28, 35, 38, and 53. The only person Ms. McNew spoke to prepare for her deposition was CARD's attorney. Exhibit 15 (McNew Dep. 10:1-3, 10:15-17). Ms. McNew did not review any documents to prepare to testify at her deposition. *Id.*, 10:7-12. Ms. McNew could only guess about what information existed to allow her to answer questions on these topics. Specifically:

With CT scoring (topic 11), Ms. McNew testified the information to answer some questions was available in Quickbooks had she looked; other questions about criteria used in reviewing CT scans she could not answer. *Id.*, 26:10-19, 26:23-25. She testified that regarding quality assurance and quality control programs (topic 12), she did not know if CARD had a program in place to ensure proper patient diagnoses are achieved. *Id.*, 29:7-17. She was uncertain about the status of funding (topic 22), e.g., grants, although she could have found it. *Id.*, 37:25-39:5. She could not testify about communications with attorneys (topic 25) who got on a CARD list of attorneys specializing in Libby cases. *Id.*, 40:9-41:5. On CARD medical record retention (topic 28), while she knew that CARD did not keep patients' B reads in their files, she was not certain how to identify them because they are somehow supposedly "deidentified." *Id.*, 56:22-57:9.⁴ With topic 35, although designated to speak on that topic, Ms. McNew said Dr. Black was the best one to answer questions on that topic. *Id.*, 17:10-18:6. She could not testify about the relationship with Mt. Sinai (topic 35) e.g., grants, although she could have figured it out. *Id.*, 47:24-48:16, 53:12-16. On topic 38 (CARD's screening program), Ms. McNew did not know what percentage of CARD's revenues came from that program versus treating ARD patients, how a change in patient numbers would affect any funding under the approximately \$2.5 million screening grant, or how Defendants could obtain B-reads kept in a

⁴ This testimony is odd to say the least, since CARD recently produced the B-reads (in redacted form).
MOTION FOR MODIFICATION OF JUNE 8, 2018 *ORDER RE: MOTIONS TO QUASH*
PURSUANT TO M.R.CIV.P. 54(b) AND TO RE-OPEN CARD AND CARD FOUNDATION
RULE 30(B)(6) DEPOSITIONS AND BRIEF IN SUPPORT

screening database and not put in patient files. *Id.*, 46:1-25, 56:22-57:9. On topic 53 (external peer review), Ms. McNew did not know whether CARD kept any notes or letters to physicians, nor was she sure who from CARD participated in the external peer reviews; she asked no one about that topic. *Id.*, 80:22-81:7, 81:11-13, 84:9-15.

CARD designated Ms. St. Jean to testify about topics 24 and 39 (money received from plaintiffs' counsel and CARD's price list). Ex. 9 (St. Jean Dep., 8:4-11). She did not know how records were kept of who is sending donations; she did not know how money which is sent to the CARD Foundation comes back to CARD. *Id.*, 11:25-12:10. She was not prepared to testify about payments, consideration, or remuneration CARD receives from law firms. *Id.*, 12:11-18. She did not have any idea about CARD's policy on donations. *Id.*, 12:19-21. She testified that while CARD has a price list, she did not know how the costs were developed for the list, other than possible Medicare Relative Value Units or may be for some work performed corresponding to particular CPT codes. *Id.*, 24:9-25:19.

CARD designated Leroy Thom to testify about topics 21, 23, 55, and 56 (CARD involvement with Grace litigation and bankruptcy, relationship with plaintiffs' counsel, relationship with the Asbestos Health Care Project, communications with Drs. Black and Whitehouse). Ex. 8, (Thom Dep., 7:10-8:6) The CARD Foundation designated Mr. Thom to testify about topics 4 and 5 (relationship and payments from lawyers) of the subpoena to the Foundation. The only documents Mr. Thom looked at to prepare for his deposition was some notes from the past, none of which were produced to the defendants. *Id.*, 9:4-15.

Mr. Thom had no idea about CARD's involvement in Grace litigation or bankruptcy (topic 21 CARD). Ex. 8, 38:15-23. Although he knew about a few donations from plaintiffs' counsel, he did not review any Foundation records for payments or donations from plaintiffs'

counsel (topic 23 (CARD) and topics 4 and 4 (CARD Foundation). *Id.*, 14:24-15:11. When pointed to particular deposits, Mr. Thom acknowledged he would have to guess where they came from and that he was not prepared to testify about what monies were received by the CARD Foundation from plaintiffs' attorneys. *Id.*, 23:7-26:19. On topic 55 (CARD's communications with Dr. Black, CARD subpoena) and topics 4 and 5 (relationship and payments from plaintiffs' lawyers, CARD Foundation), he did not ask Dr. Black about any relationship CARD had with plaintiffs' counsel, and his discussions with Dr. Black were limited to how the hearing was going to take place and whether Dr. Whitehouse was salaried and contracted. *Id.*, 15:12-18, 21:16-23. On topic 56 (CARD's relationship with Dr. Whitehouse), the only thing he knew was what he discussed with Dr. Whitehouse, i.e., whether Dr. Whitehouse was paid on salary or on contract. *Id.*, 9:22-10:10.

CARD designated Dusti Thompson to testify on topic 18 (identification of CARD's referral sources). Ex. 18 (Thompson Dep., 8:17-20). While she knew about several referral sources, she did not investigate nor was she able to testify about whether non-CARD physicians referred any patients to CARD. *Id.*, 13:16-25. This is relevant, because as the Court is aware, during the July 24-25, 2018 hearing, Dr. Becker testified about his relationship with CARD. *July 24-25 Hrg. Tr.*, 477:9-15. There may be information in CARD's files about other physicians having the same concerns with CARD.

In sum, CARD failed to prepare and educate representatives who could testify about topics 1, 11, 12, 18, 22, 23, 24, 25, 28, 35, 38, 53, 55, and 56 of the CARD subpoena to testify. The CARD Foundation failed to prepare and educate representatives who could testify about topics 4 and 5 of the CARD Foundation subpoena to testify.

III. CONCLUSION

While Plaintiffs and CARD led the Court to believe much of the requested information was being produced to Defendants, that was not correct. Further, Plaintiffs and their experts from CARD and Mt. Sinai based their opinions and testimony at the July 24-25, 2018 hearing on medical testing and information not shared with the Defendants. Without little doubt, Plaintiffs knew well in advance of the motions to quash, they would be relying on that evidence. Defendants should have been given the same opportunity to examine that same evidence and offer expert testimony about it.

The information requested from CARD Foundation is part and parcel of attempting to determine the relationship – the full relationship – between CARD, CARD Foundation and plaintiffs' counsel. CARD, CARD Foundation and plaintiffs' counsel knew that relationship at the time they filed the motions to quash.

As mentioned above, recently, the McGarvey, Heberling, Sullivan & Lacey, P.C. claimants served a subpoena duces tecum upon Dr. Stephen Becker seeking information on every document he has concerning the CARD Clinic, as well as any communications with BN, the State, Maryland Casualty, International Paper, Stimson Lumber or W.R. Grace. *See Affidavit of Dale R. Cockrell*, ¶ 5. That subpoena duces tecum as with the subpoenas to CARD and CARD Foundation must be viewed in the context of the litigation as a whole, not just the July 24-25, 2018 hearing. *Order*, p. 4. The information requested by Defendants in the topics quashed in the subpoenas and subpoenas duces tecum is relevant or may lead to the discovery of admissible evidence on both liability and damages. This information may be important on whether the October 3, 2018 tentative settlement approval hearing should be moved. Pursuant to M.R.Civ.P. 45(d), the Court may decide whether to award Defendants their attorney fees.

Accordingly, Defendants respectfully move the Court to:

1. amend the *Order* to not require the State, BN, IP, and MCC to pay CARD and CARD Foundations' attorneys' fees in moving to quash the subpoenas to testify and subpoenas duces tecum;
2. amend the *Order* to order CARD and CARD Foundation to respond to the topics previously quashed in the *Order*; and
3. enter an order re-opening the CARD and CARD Foundation Rule 30(b)(6) depositions on the previously quashed topics discussed above and the topics upon which the CARD and CARD Foundation representatives were not adequately prepared to answer questions.

Defendants have discussed this motion with counsel for CARD and CARD Foundation, the MHSL claimants, and the Kovacich Snipes, P.C. ("KS") claimants. Defendants advise the Court that the Court that CARD, CARD Foundation, MHSL claimants and KS claimants reserve the right to object to this motion.

Respectfully submitted this 4th day of September, 2018.

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Electronically signed by Anna Arvidson on behalf of Dale R. Cockrell
Dated: 09-04-2018