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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>MHSL PLAINTIFFS' RESPONSE TO DEFENDANTS' STATE OF MONTANA, BSNF RAILWAY COMPANY, AND MARYLAND CASUALTY COMPANY'S MOTION FOR ADDITIONAL TIME TO CONDUCT DISCOVERY ON DISQUALIFICATION AND MOTION FOR LEAVE TO TAKE DEPOSITIONS OF PLAINTIFFS' COUNSEL</p> <p><i>Applicable to All Cases</i></p>
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INTRODUCTION

In recognition of the need for timely resolution, on July 26, 2018, this Court entered an *Order* requiring that any “attempt[] to remove through disqualification [Plaintiffs’ law firms] . . . must be filed by August 30, 2018.” *Order*, p. 2 (emphasis added). To facilitate a prompt resolution, on August 16, 2018, Plaintiffs’ counsel filed a *Notice of Disclosure Re: July 26, 2018, Order* (“Notice”) which attached a *Declaration of Jon L. Heberling* (“Heberling Dec.”) to enable the Court and the Defendants to evaluate the facts of Plaintiffs’ counsel’s charitable contributions and funding for a mortality study. While asserting their position that the existing

evidence supports a motion for disqualification (Motion, p. 14), Defendants did not file such a motion, did not identify the facts that would support such a motion, and did not articulate how the facts are contended to establish grounds for disqualification.¹ Rather, on August 30, 2018, three Defendants State of Montana, BNSF Railway Company (“BNSF”), and Maryland Casualty Company (collectively “Defendants”) filed a *Motion for Additional Time to Conduct Discovery on Disqualification and Motion for Leave to Take Depositions of Plaintiffs’ Counsel* (“Motion”).

In support of their *Motion*, Defendants: (a) make an evidentiary presentation purporting to call into question the veracity of Jon Heberling’s Declaration, and (b) propose to expand discovery into financial transactions and conduct between and among the CARD Foundation, the CARD Clinic, and Mount Sinai, of which Plaintiffs’ counsel would have no knowledge.

This brief will demonstrate that Defendants’ *Motion* should be denied because (a) the suggested appearances that Defendants’ evidentiary presentation purports to demonstrate are false, (b) after ample discovery opportunities, there is a clear and complete record of Plaintiffs’ counsel’s donations, and (c) the primary focus of the proposed additional discovery has no relevance to the issue of disqualification of counsel.

¹ At a minimum, due process requires that a motion be presented, that gives the respondent fair notice of the factual and legal basis therefore. The Montana Supreme Court *In re Best*, 2010 MT 59, ¶ 26, 355 Mont. 365, 229 P.3d 1201 relied on the directive of the U.S. Supreme Court “that the charge must be known before the proceedings begin to avoid laying a trap for the accused...[t]he Supreme Court held in *Ruffalo* that the absence of fair notice ‘as to the reach of the grievance procedure and the precise nature of the charges’ deprived the lawyer of procedural due process.” *Id.* at ¶26, quoting *In re Ruffalo* (1968), 390 U.S. 544, 550-52, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117. The closest Defendants get to a motion are the broad conclusory statements first made in the “Conclusion” of a motion requesting additional discovery. Motion, p. 14. These statements are neither a motion to disqualify nor a sufficient articulation of grounds for a motion to which MHSL Plaintiffs have a fair opportunity to respond.

ARGUMENT

I. Defendants' portrayal of evidence is objectively misleading.

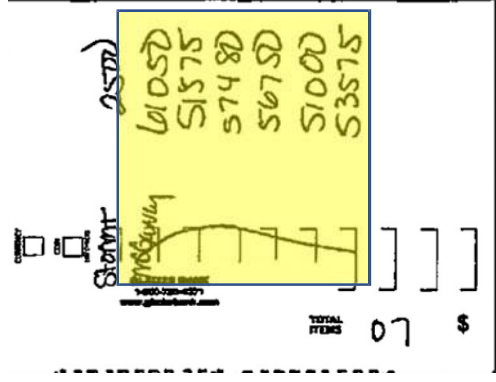
Defendants recite various alleged “revelations” as the basis for their request to conduct additional discovery and to request additional time to file their motion to disqualify. However, these “revelations” are an objectively misleading portrayal of the factual record. Below are the critical examples.

A. Defendants cropped and removed the explanatory context from the physical evidence in a way that causes a false appearance of a concealed \$330,430 donation.

In their *Motion*, Defendants allege:

“the below deposit slip appears to show a single deposit from ‘McGarvey’ to the CARD Foundation totaling \$330,430.”

Motion, p. 12. To support that allegation, Defendants insert the following cropped portion of a deposit slip into their *Motion*:



Motion, p. 13 (highlighting in *Motion*). The cropping and highlighting of the deposit slip as done in the text of Defendants’ *Motion* carries the objective effect of causing the Court to believe that MHSL paid \$330,430 to the CARD Foundation. Similarly, attorney Chad Knight’s sworn

affidavit dated August 30, 2018, (“Knight Aff.”) affirmatively directs the Court to reach the same apparent conclusion:

“A deposit slip appears to show another single deposit from ‘McGarvey’ to the CARD Foundation totaling \$330,430.”

Knight Aff., ¶ 8.

Defendants do not attach the actual physical document from which they cropped this image. Had they done so, the representation to the Court of what it “appears” to show would have been patently absurd. The page from which Defendants cropped the portion of the subject deposit slip is as follows:

Page: 12 of 21 Account: 29973577


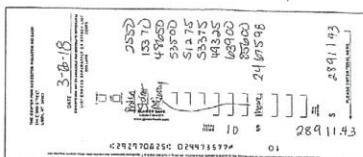
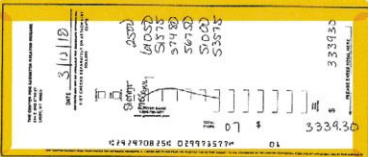
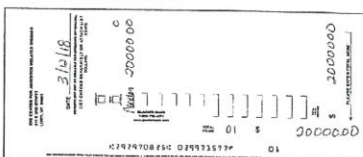

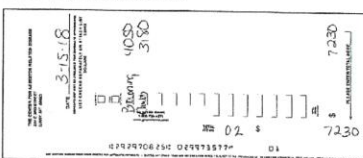
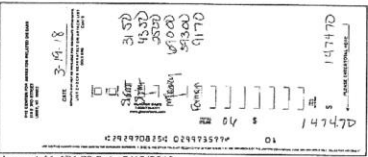

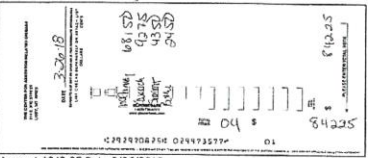
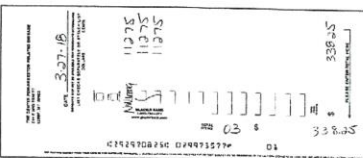
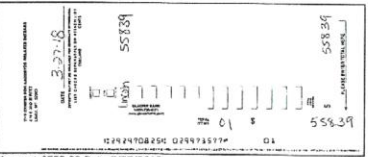
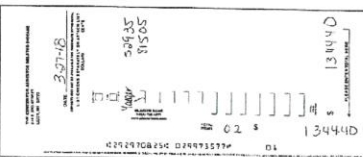
 <p>Amount \$3,570.26 Date 3/6/2018</p>	 <p>Amount \$28,911.43 Date 3/6/2018</p>
 <p>Amount \$3,339.30 Date 3/12/2018</p>	 <p>Amount \$20,000.00 Date 3/12/2018</p>
 <p>Amount \$5,098.66 Date 3/13/2018</p>	 <p>Amount \$72.30 Date 3/15/2018</p>
 <p>Amount \$1,474.70 Date 3/19/2018</p>	 <p>Amount \$4,661.83 Date 3/20/2018</p>
 <p>Amount \$842.25 Date 3/26/2018</p>	 <p>Amount \$338.25 Date 3/27/2018</p>
 <p>Amount \$558.39 Date 3/27/2018</p>	 <p>Amount \$1,344.40 Date 3/27/2018</p>

Exhibit A (CARD Clinic March 2018, Bank Statement produced by CARD Clinic to all parties on June 29, 2018) (highlighting added), p. 12. The single deposit slip selected from the physical document, before the cropping, is reproduced in its entirety:

Amount \$3,339.30 Date 3/12/2018

THE CENTER FOR ADDICTION RELATED CARE
314 E 3RD STREET
LIBERTY, MO 64015

DATE 3/12/18

DEPOSITS MAY NOT BE JAMPAKED AND MUST BE MADE IN ORDER
LIST CHECKS SEPARATELY ON ATTACHED LIST

	DOLLARS	CENTS
2500		
61050		
51575		
57480		
56750		
51000		
53575		
TOTAL ITEMS	07	
	\$	3339.30
PLEASE ENTER TOTAL HERE		

1529297082510 029973577*01

Exhibit A, p. 12, first column, second row (highlighting added).

Inexplicably cropped from the evidence that should have been presented to the Court is the following relevant information: 1) the “dollars” and “cents” column headings immediately above the numbers proposed to represent \$330,430; 2) the hand-written total of the deposits

showing a total deposit recorded of \$3,339.30 (not \$330,430); 3) the bank-generated mechanical print showing a total deposit recorded of \$3,339.30 (not \$330,430); and 4) the fact this deposit was for the CARD Clinic (which routinely supplies copies of medical records to law firms), not the CARD Foundation, as the top of the deposit slip states “The Center for Asbestos Related Disease.”

Additionally, Defendants failed to present additional documents they had received from the CARD Clinic on June 29, 2018, the same day they received the deposit slip, that confirm the \$3,314.30 payment from MHSL to the CARD Clinic was for copies of medical records. Attached hereto as **Exhibit B** is the CARD Clinic’s QuickBooks invoice and payment ledger for “McGarvey, Heberling, Sullivan & McGarvey” that the CARD Clinic produced to Defendants on June 29, 2018. The pertinent part reads as follows:

Payment	03/12/2018	28673	11100 · Medical Rec...	-535.75	6,057.05
Payment	03/12/2018	28674	11100 · Medical Rec...	-510.00	5,547.05
Payment	03/12/2018	28675	11100 · Medical Rec...	-567.50	4,979.55
Payment	03/12/2018	28676	11100 · Medical Rec...	-574.80	4,404.75
Payment	03/12/2018	28686	11100 · Medical Rec...	-515.75	3,889.00
Payment	03/12/2018	28687	11100 · Medical Rec...	-610.50	3,278.50

Exhibit B, p. 16 (red lines added). Those amounts in the red box directly correspond in reverse order to the deposit slip. Indeed, on June 29, 2018, when the CARD Clinic produced Exhibit B, Tracy McNew at the CARD Clinic stated “[t]he payments have been for production of medical records and for staff time in depositions.” See **Exhibit C**, p. 3, (June 29, 2018, letter from Tracy McNew describing documents produced).

The actual physical document (Exhibit A above) has twelve deposits slips, including the subject deposit slip. Those deposit slips show the CARD Clinic deposited checks from the “St of MT,” “Moore,” “Forman,” and others. See Exhibit A. If Exhibit A were to be construed in the objectively misleading way the Defendants assert, it would also be true that in just one month

(i.e. March 2018) the “St of MT” gave \$32,220.00 to the CARD Foundation, “Forman” (presumably on behalf of its client International Paper) gave \$9,170.00 to the CARD Foundation, and “Moore,” (presumably on behalf of its client State of Montana) gave over \$2 million (\$2,467,598.00) to the CARD Foundation.

In short, the presentation of a manipulated document and sworn affidavit in support of the contention that MHSL paid an undisclosed and concealed \$330,430 to the CARD Foundation cannot be reconciled to the facts known to Defendants and their counsel. This Court should neither countenance Defendants’ evidentiary presentation nor the *Motion* it is intended to support.

B. Defendants allege there is uncertainty about a \$40,000 transfer from CARD Foundation to CARD Clinic, despite their knowledge that the transfer was due to a bank error, as confirmed in a letter from the bank.

In support of their *Motion*, Defendants presented to the Court a CARD Foundation ledger showing a deposit of \$40,000 to the CARD Foundation followed by a check to the CARD Clinic in the amount of \$40,000. *Motion*, p. 8. Defendants then state, “Defendants have so far found no identifier for the source of the \$40,000 payment.” *Id.* In fact, Defendants and their counsel have had actual knowledge since at least July 10, 2018, that the payment was a bank error.

On July 10, 2018, Defense counsel questioned the CARD Foundations’ 30(b)(6) deponent, LeRoy Thom, about that very deposit:

15 Q. So I guess what I mean, though, is -- I show
16 that you have a \$40,000 deposit, and I believe we had
17 some records yesterday that showed -- or right below
18 it, actually, there's a payment to the CARD, Center
19 for Asbestos Related Disease, for \$40,000, but I mean
20 proof of the payment and what the payment was actually
21 for.

22 A. Well, the payment wasn't for anything
23 because it was an error on the part of the bank, not
24 us, so the bank made that correction.

25 Q. Okay. So this is showing now as a deposit

1 and then a payment.

2 A. Right.

3 Q. So how was that a bank error?

4 A. Because the bank, when it was deposited,

5 they put it in the wrong account.

Exhibit D (Deposition of CARD Foundation 30(b)(6) Designee LeRoy Thom), p. 17:15-18:5.

Moreover, on August 29, 2018, the day before the *Motion* was filed, the CARD Foundation produced to Defendants the following letter from the Vice President of Glacier Bank:

August 29th, 2018

To Whom It May Concern:

In regard to:

Center for Asbestos Related Disease Foundation

On 10-19-17 a deposit was made into the Foundations checking account ending #4146, the amount was for \$40,000. This deposit was in error as the appropriate deposit account would have been the Center For Asbestos Related Disease with checking account ending #3577. This deposit error was corrected on 10-23-17 when the funds were transferred out of the Foundations account and into the CARD clinic account.

This is an internal error and was corrected by Glacier Bank upon notification of the error.

If there is any questions or any further information needed please reach out to me.

Sincerely,



George Mercer
Branch Manager
Vice President
Glacier Bank
406-751-4785 (office)
406-283-1920 (cell)

Attached as **Exhibit E** is a copy of Mr. Mercer's August 29, 2018, letter and transmittal to Defendants. Defendants' failure to disclose this evidence while portraying the nonexistent \$40,000 payment to the CARD Clinic as suspicious should not be countenanced given

Defendants' knowledge that the "payment" was nothing more than a bank error. It certainly is not a demonstration of need for further discovery.

C. "Revelations" from Gail Burger's flash drives of information she took prior to her termination as CARD Foundation Executive Director are not a basis for additional discovery as Ms. Burger produced the entirety of those flash drives to BNSF's counsel on or before May 17, 2018, long before the July 9-10, 2018, CARD Clinic and CARD Foundation 30(b)(6) depositions and Ms. Burger's August 28, 2018, deposition.

Defendants cite numerous "revelations" derived from Gail Burger as a basis for their *Motion*. Some of those "revelations" relate to information contained on two flash drives Ms. Burger brought with her to the deposition. **Exhibit F** (Deposition of Gail Burger), p. 32:24-34:16 (where Ms. Burger testified the two flash drives contained CARD Foundation documents she took without CARD Foundation permission prior to her termination as the CARD Foundation Executive Director).

Ms. Burger testified that, shortly after being served on May 15, 2018, with Defendants' first subpoena of the CARD Foundation, she met with an attorney from Knight Nicastro to discuss what was on the flash drives. **Exhibit F**, p. 88:21-89:16. Ms. Burger testified she emailed some of the information on those flash drives to the attorney. *Id.*, 90:10-91:4.

On August 29, 2018, MHSL requested that BNSF's counsel produce a copy of the information BNSF had received from Ms. Burger as well as copies of any communications with Ms. Burger. *See* **Exhibit G** (email correspondence with BNSF counsel). Two days later, on August 31, 2018, BNSF produced the documents it received from Ms. Burger. *Id.* Despite MHSL's requests, BNSF has refused to produce any accompanying correspondence. *Id.* The production appears to demonstrate that BNSF had received the entirety of the two flash drives from Ms. Burger on or before May 17, 2018. *See* **Exhibit H** (screenshot of documents produced by BNSF on August 31, 2018).

Any alleged “revelations” contained in those documents (and wrongfully withheld from MHSL) cannot be fairly characterized as a newly discovered basis for needing further discovery. Having had access to the information on the two flash drives since May 17, 2018, Defendants could have asked any questions about those documents at the July 9-10, 2018, CARD Clinic and CARD Foundation depositions and at Ms. Burger’s August 28, 2018, deposition. Moreover, as the next section demonstrates, the documents on the flash drives yield nothing to support a disqualification motion.

D. Much of Gail Burger’s testimony regarding the CARD Foundation is refuted by information on the withheld flash drives.

Despite receiving the entirety of Ms. Burger’s flash drives on or before May 17, 2018, and despite the Court granting (and Plaintiffs serving) an additional discovery request for any documents Defendants received from third parties (Request for Production No. 30), BNSF withheld the contents of the flash drives from Plaintiffs’ counsel. Instead, that production occurred over three months later, on August 31, 2018, only after MHSL established in its cross examination of Ms. Burger that BNSF had those flash drives and after a further email demand was made on BNSF’s counsel. Importantly, BNSF’s withholding of those documents until after Ms. Burger’s August 28, 2018, deposition deprived Plaintiffs’ counsel of a complete and fair cross examination of Ms. Burger. As described here, much of Ms. Burger’s testimony is refuted by those very documents.

First, Ms. Burger testified that she believed the CARD Foundation was laundering money² for the CARD Clinic. Defendants advance this characterization as a “revelation” in their

² While Ms. Burger and Defendants use the pejorative connotation of the phrase “money laundering” to discuss transfers between the CARD Clinic and CARD Foundations, both of which are non-profits, there is no evidence of improper transfers of money. Rather, the CARD

Motion. Motion, p. 8. What Ms. Burger characterizes as “money laundering” is substantively indistinguishable from what she did as a board member of the Cabinet Peaks Medical Center Auxiliary: collect donations and transfer money to the non-profit Cabinet Peaks Medical Center (“CPMC”). Attached hereto as **Exhibit I** is a newspaper article from the withheld flash drive of a picture of Ms. Burger, as a member of the CMPC Auxiliary Board of Directors, presenting a check to non-profit CMPC, noting the Auxiliary has raised over \$90,000 since 2003 for CPMC.

Second, to support their *Motion*, Defendants point to Ms. Burger’s testimony that it is not typical for a 501(c)(3) hospital to set up a separate 501(c)(3) foundation for fundraising. Motion, p. 8. The non-profit CPMC has its own non-profit CPMC Foundation, a separate non-profit entity. See **Exhibit J**, pp. 1-11 (Secretary of State details for CPMC and CPMC Foundation). Montana hospitals that are 501(c)(3) entities routinely set up separate 501(c)(3) foundations for fundraising. In addition to CPMC and the CARD Clinic, the following are all Montana non-profit hospitals and clinics with separate non-profit foundations:

1. Mountainview Medical Center/Mountain View Medical Center Foundation (White Sulphur Springs)
2. North Valley Hospital/North Valley Hospital Foundation (Whitefish)
3. Kalispell Regional Medical Center/Kalispell Regional Healthcare Foundation (Kalispell)
4. Holy Rosary Healthcare/Holy Rosary Healthcare Foundation (Miles City)
5. Community Medical Center/Foundation for Community Health (Missoula)
6. Providence Health & Services/Providence Montana Health Foundation (Missoula)
7. Northern Rockies Medical Center/Rockies Healthcare Foundation (Cut Bank)
8. Frances Mahon Deaconess Hospital/Frances Mahon Deaconess Hospital Foundation (Glasgow)
9. Glendive Medical Center/Glendive Medical Center Foundation (Glendive)
10. Benefis Health System/Benefis Health System Foundation (Great Falls)
11. Marcus Daly Memorial Hospital/Daly Hospital Foundation (Hamilton)

Foundation was fully empowered and authorized to give any money it received to the CARD Clinic. At most, Ms. Burger’s testimony suggests that better records of transfer decisions could have been maintained as non-profit best practices.

12. Ruby Valley Hospital/Ruby Valley Hospital Foundation (Sheridan)
13. Missoula Community Health Services (previously known as Mineral County Hospital)/Mineral County Medical Foundation (Superior)

See **Exhibit J**, pp. 12-74 (Secretary of State details for each non-profit hospital and its non-profit foundation). There is no basis to describe any of these foundations' transfers to the hospitals they support as "money laundering."

Third, Defendants put forth testimony from Ms. Burger that "[t]he CARD Foundation was not operated independently of the CARD Clinic." Motion, p. 7. Likewise, Defendants put forth testimony from Ms. Burger to urge the contention that "the intended purpose of the Foundation was to provide an indirect means by which the Clinic could accept improper payments from lawyers." *Id.* That too is refuted by information contained on Ms. Burger's withheld flash drives. Specifically, on one flash drive was an audio recording of a September 5, 2015, CARD Foundation Board of Directors meeting in which Ms. Burger describes to the CARD Foundation Board how she explains to donors the difference between the CARD Clinic and the CARD Foundation:

My response to them [potential donors] is the CARD Foundation is separate from CARD Clinic. We are not federally funded. We raise our own funding. And then with our funding we then assist the CARD Clinic in purchasing items or doing upgrades when we can there. So trying to show the difference between the two. And then I've got the 'why should we give you money because the newspaper story came out.' And, again, I just reiterate the difference and that we are a supporting arm of the CARD Clinic and that we are technically separate. And so the money you see Clinic getting in the paper is not us, we don't have that money, we have our own operating expenses and our own budgets and everything. And that we do Big Sky Bash and I explain, you know, what we do, and that we support CARD Clinic. So now we are starting to get some money in for those.

* * *

But I do explain that what we do is to fund projects that are not funded by that [federal grant], whether its equipment, whether its office upgrades, different things like that.

Audio of CARD Foundation Board of Directors September 2, 2015, Meeting, time stamp 12:57 to 13:57 and 15:56 to 16:19 (bracketing and emphasis added). This recording, which took place prior to Ms. Burger being dismissed from her position as Executive Director at the CARD Foundation, directly refutes her deposition testimony, though Plaintiffs' counsel was deprived of the cross-examination opportunity by BNSF's withholding of this discovery.

E. All information, including that provided by Ms. Burger, confirms the payments made by Jon Heberling and MHSL are as stated in MHSL's *Notice*.

All information, including that provided by Ms. Burger, confirms the payments as stated in MHSL's *Notice*. Defendants and BNSF attorney Chad Knight take issue with a CARD Foundation tax return for donations made in 2014, "which reports Heberling paid \$40,000 to CARD [Foundation] in 2014." Motion, p. 12, Exhibit M; Knight Aff., ¶ 8. Defendants state "Mr. Heberling contends that he contributed \$5,000 to CARD in 2014." *Id.* As is apparent from the checks attached to the *Notice*, Mr. Heberling wrote a check on December 30, 2014, to the CARD Foundation that was deposited on February 24, 2015. Notice, Exhibit E (Heberling Dec.), Exhibit 1, p. 3. As such, the CARD Foundation's receipt of those funds was not reported on a 2014 tax return, but on its 2015 return.

For donations the CARD Foundation received in 2014, those would be reported in the 2014 tax return. Again, this is apparent from the checks attached to the *Notice*. Jon Heberling made a \$10,000 donation to the CARD Foundation on December 18, 2013, that was deposited by the CARD Foundation on January 15, 2014. Notice, Exhibit E (Heberling Dec.), Exhibit 1, p. 2. Likewise, MHSL made a \$30,000 donation to the CARD Foundation on July 21, 2014, that was deposited by the CARD Foundation on August 5, 2014. Notice, Exhibit E (Heberling Dec.), Exhibit 2, p. 1. As such, Jon Heberling and his firm MHSL gave a total of \$40,000 to the CARD Foundation in 2014, consistent with the CARD Foundation's 2014 tax return.

Contrary to Defendants' allegation and BNSF's counsel's sworn affidavit that Ms. Burger recalled a \$20,000 check from MHSL (Motion, p. 8, Knight Aff. ¶ 8), Ms. Burger actually testified that, "It was 10 thousand -- 10 or 20 thousand. I'm not real clear on it . . ." Exhibit F, 23:21-24:14 (emphasis added). She later clarified she believed that donation was from Jon Heberling or his trust, not MHSL as Defendants allege. *Id.*, 76:7-77:23. Defendants make the assertion in their *Motion* that there was no \$20,000 payment listed in the *Notice*. Motion, p. 8, fn. 1. The reason is because the *Notice* accurately discloses the \$10,000 donation to the CARD Foundation by Jon Heberling through the Flathead Community Foundation on a check dated January 11, 2016. Notice, Exhibit E (Heberling Dec.), Exhibit 1, p. 4. There simply is no \$20,000 payment other than in the mistaken interpretation of Ms. Burger's "not real clear" recollection. It is also noteworthy that Defendants omit the fact that Ms. Burger testified that she contacted the donor to determine the donor's intent with respect to that donation. Exhibit F, 77:10-23. Ms. Burger testified the donor responded, "That check was intended for CARD Foundation to keep the foundation going." *Id.* (emphasis added). She further testified:

Q. Okay. So is it your testimony that with
4 respect to the donations the CARD Foundation received
5 from attorneys, that to your knowledge it was the
6 intent of those attorneys that the money go to the
7 foundation?
8 A. That is the intent I believe, yes.

Id., 95:3-8.

The only other payment that Defendants contend requires further discovery relates to Defendants' assertion and BNSF counsel's sworn affidavit that MHSL donated \$330,430 to the CARD Clinic, as supported by the "appearance" caused by Defendants' cropped image.

F. Defendants' recitation of testimony does not support their contentions.

Defendants make various contentions that are not supported by the testimony they cite. While not an exhaustive list, Plaintiffs highlight here two examples.

1. Defendants tell the Court that Ms. Burger "believes other similar [CARD passthrough] payments followed from Mr. Heberling through a foundation set up by Mr. Heberling." Motion, p. 9 citing Gail Burger's deposition page 70:6-14. The testimony merely confirms that some of the money fully described in the *Notice* was donated by Jon Heberling through the Flathead Community Foundation. Notice, ¶ 6, Exhibit E (Heberling Dec.), Exhibit 1, p. 4. Ms. Burger's testimony is wholly consistent with the donation Jon Heberling made to the CARD Foundation through the Flathead Community Foundation. *Id.* Ms. Burger's testimony identified no "other" donations than those described in the *Notice*.

2. Defendants allege "Clinic and Foundation money was comingled." Motion, p. 7. However, there is no evidence that the respective entities' funds were held other than in their respective separate bank accounts. The only example provided of what Ms. Burger labeled "comingling" was the payment of a CARD Clinic bill for a newspaper ad with CARD Foundation funds instead of CARD Clinic funds. Exhibit F, 19:24-20:10.

G. Dr. Black's deposition testimony in an unrelated case should be taken in context: it occurred after this Court had preliminarily quashed Defendants' Subpoena *Deuces Tecum* on the CARD Clinic and shortly before the CARD Clinic filed its Motion to Quash Defendants' Subpoena *Deuces Tecum*.

Defendants state, "At a deposition taken on May 25, 2018, Dr. Black initially denied under oath that the plaintiff attorneys had funded any studies." Motion, p. 3 (citing its Ex. B, Deposition of Brad Black, 95:23-96:4). Defendants exclude Dr. Black's contemporaneous clarification that "we have not published a paper on that [mortality study] yet, and that's the only reason I hesitated, because I thought, well, I don't want to be dishonest and say no because of

that -- this particular paper.” Motion, Ex. B, 101:21-24. Dr. Black then acknowledged the CARD Foundation did receive a \$30,000 donation from MHSL for the unpublished mortality study. Motion, Ex. B, 104:1-5.

Defendants also take issue with Dr. Black’s apparent reluctance to answer certain questions in the May 25, 2018, deposition. Motion pp. 3-4. That deposition was conducted by BNSF’s attorney Chad Knight in a non-Asbestos Claims Court case after this Court offered its preliminary opinions on May 15, 2018, quashing portions of Defendants’ subpoenas of the CARD Clinic. That deposition was just four days before the CARD Clinic filed its motion on May 29, 2018, to quash the subpoena.³ In the deposition, the plaintiff’s attorney (Bremseth Law Firm) raised relevance objections and asked to get the judge on the phone, but Mr. Knight refused to suspend the deposition. Motion, Ex. B, 97:8-24. As can be seen from the transcript, Dr. Black was reluctant to testify about topics the Court preliminarily quashed and that the CARD Clinic later sought to quash. Specifically, Dr. Black testified:

12 A. If you want to call the judge and she tells
13 me or whoever it is tells me I have to, then fine, but
14 I really don't want to go any farther with this.

Motion, Ex. B, 98:12-14. In response, Mr. Knight advised Dr. Black:

7 Now, if you want to try to walk away from
8 this deposition, I can't stop you, but I can tell you
9 that I will take it up with the judge, and I will be
10 asking the judge to be compensated for coming right
11 back out here, and we have a trial starting in about a
12 week. So we will do that.

³ Plaintiffs’ *Motion to Quash CARD Subpoenas* was filed on May 25, 2018. This Court found Plaintiffs had standing to file that motion because the medical records sought in Defendants’ subpoenas “impact[ed] the rights of the Plaintiffs.” June 8, 2018, Order, p. 7. Despite Defendants’ allegation that Plaintiffs’ counsel made an “aggressive” opposition to the subpoenas (Motion, p. 5), this Court granted in part Plaintiffs’ Motion to Quash and granted in part Non-Parties CARD Clinic and CARD Foundation’s Objections to and Motion to Quash Subpoenas.

Motion, Ex. B, 99:7-12. Dr. Black then proceeded to answer Mr. Knight's questions. Preservation of a court-sanctioned limitation on the scope of discovery is not a lack of candor.

II. Additional discovery is not supported by the factual record and not related to any issues regarding attorney disqualification.

A. Continued discovery of Non-Parties CARD Clinic and CARD Foundation.

Defendants claim additional discovery is needed from the CARD Clinic and CARD Foundation. However, since the initial June 29, 2018, production by the CARD Clinic and CARD Foundation and the subsequent July 9-10, 2018, 30(b)(6) depositions, the only additional documents Defendants have requested of the CARD Clinic and CARD Foundation are those contained in BNSF's August 17, 2018, letter. Motion, Exhibit K. In response to BNSF's conferral letter, on August 24, 2018, the CARD Clinic and CARD Foundation produced all of the documents requested. The only documents not produced were the CARD Clinic's individual patient files and some of the CARD Clinic's financial records and its electronic QuickBooks. The CARD Clinic had previously produced on June 29, 2018, its bank statements from 2015 to the present, P&L from 2008 to present, tax returns and audits 2011 to present. Attached hereto as **Exhibit K** is the August 24, 2018, letter from Tracy McNew that accompanied the August 24, 2018, production.⁴

⁴ To date, non-party CARD Clinic has produced over 32,000 pages of documents, which include CARD Clinic bank statements from 2015 to the present, P&L from 2008 to present, tax returns and audits 2011 to present, PFT logs and calibrations, training certificates, resumes, employee records, B Reader and CT protocols and scoring, payments received from Plaintiffs' attorneys, communications with EPA, Grace Libby Medical Plan documents, Long Distance Screening Program documents, Short-Term Cancer Screening Program documents, Asbestos Screening Program documents, peer review documents, various videos, peer reviewed journal articles, deidentified B Reads for all patients screened, a related database, B Reader contracts, PowerPoint presentations, patient education materials, etc. Likewise, to date, non-party CARD Foundation has produced nearly 1,000 pages of documents, which include tax returns 2010

Defendants claim they need complete financial records for the non-party CARD Clinic since its formation in 2003. Motion, pp. 9-10. However, there is no basis to make that request. The only money the CARD Clinic has received from lawyers currently representing patients was for medical records and staff time in depositions. *See* Exhibit C, p. 3; Notice, ¶ 2, Exhibit B; Notice ¶ 10, Exhibit F, p. 22:6-11. Also, the CARD Clinic financial records previously produced confirm MHSL's only payments to the CARD Clinic were for copies of medical records and staff time in depositions.

The CARD Clinic's August 24, 2018, production also included deidentified B Reads. Defendants take issue with the fact the CARD Clinic does not routinely keep B Reads⁵ of x-rays in the patients' file. Conversely, the reports generated by outside readers reviewing CTs⁶ as part of Mount Sinai's lung cancer screening program are part of the patients' files. **Exhibit L** (Deposition of CARD Clinic 30(b)(6) designee Tracy McNew), p. 90:24-91:24. Defendants claim they need to conduct "discovery further into how these documents came to be withheld by

through 2017, bank statements 2010 to present, a complete electronic version of the CARD Foundation's QuickBooks, Board of Director minutes, documents of attorney donations, letter templates, etc. Finally, the CARD Clinic and CARD Foundation made 30(b)(6) witnesses available for 2 days on July 9-10, 2018, and Dr. Black testified for over two hours at the July 24-25, 2018, hearing before this Court.

⁵ The Court heard ample evidence at the July 24-25, 2018, hearing that B Reads are outside reads of x-rays and that x-rays are not good at showing pleural thickening. Transcript, July 24-25, 2018, Asbestos Claims Court Hearing, p. 44:17-19; 108:2-4 (Dr. Albert Miller); 268:2-14 (Dr. Brad Black); 328:2-17 (Dr. David Yakelevitz); 329:1-4.

⁶ CTs are better at showing pleural thickening. Transcript, July 24-25, 2018, Asbestos Claims Court Hearing, p. 329:9-17 (Dr. David Yakelevitz); 127:6-16 (Defense expert Dr. David Weill, subpleural fat is easier to see on a CT than an x-ray); 448:3-450:15 (Defense expert Dr. David Godwin, CTs are good at distinguishing pleural thickening from subpleural fat). Thus, there is simply no relevance of B Reads of x-rays to the issue of disqualification.

CARD and whether plaintiff attorneys directed or were aware of their concealment.” Motion, p. 6.

No such discovery is needed. Defendants have been aware since July 9, 2018, that the CARD Clinic kept the outcomes of the B reads in a separate patient deidentified database as part of the CARD Clinic’s grant reporting and kept the actual B Reads in an IT office, but not in the patient file. Exhibit L, p. 56:22-58:16; 96:20-98:2.⁷ Defendants had ample opportunity to discover with Ms. McNew how the B reads were kept at the CARD Clinic and how they were produced in response to a records release. *Id.*, pp. 2-4. To the point, none of this has any relevance to a motion to disqualify.

B. Discovery of Non-Party Mount Sinai.

Defendants allege, and BNSF’s counsel affies, that “Defendants just recently learned that from 2015 to 2018, \$115,000 was funneled from CARD to Mount Sinai.” Motion, p. 10, Knight Aff., ¶ 3. However, all parties learned at the July 9, 2018, Rule 30(b)(6) deposition of CARD Clinic designee Tracy McNew that the CARD Clinic pays Mount Sinai \$100 per CT read for the cost of reads as part of Mount Sinai’s lung cancer screening program. Exhibit L, p. 48:25-52:3; 66:15-67:2. All parties learned at the July 24-25, 2018, hearing that Mount Sinai doctors have reviewed approximately 1,500 CTs as part of that program. Transcript (July 24-25, 2018, Asbestos Claims Court Hearing), p. 323:13-25. Based on the July testimony, a projection of the 1,500 CTs at \$100 per CT is \$150,000, which fully discloses what Defense counsel characterizes as “funneling.”

⁷ ATSDR dictates the use of B Readers and the screening protocol under the CARD Clinic’s funding. Exhibit L, p. 56:17-57:17. The CARD Clinic’s treatment of the B Reads as funding-related database information, as opposed to patient-related care information, is reasonable given that the x-rays are all superseded by much more accurate CT scans.

Defendants have already conducted ample discovery regarding Mount Sinai. In the July 9-10, 2018, Rule 30(b)(6) deposition of CARD Clinic designees Tracy McNew and Dr. Brad Black, Defendants inquired into:

1. the compensation the CARD Clinic pays per CT read;
2. how the CARD Clinic's relationship with Mount Sinai began;
3. Mount Sinai's role in the CARD Clinic research advisory group;
4. CARD Clinic's prior research projects with Mount Sinai including funding thereof and compensation to the CARD Clinic resulting therefrom;
5. CARD Clinic publications with Mount Sinai;
6. ongoing ties between Mount Sinai and CARD Clinic;
7. agreements between Mount Sinai and CARD Clinic;
8. any training Mount Sinai provided to the CARD Clinic;
9. CARD Clinic referrals to Mount Sinai;
10. Mount Sinai's grant applications;
11. Mount Sinai's lung cancer screening program;
12. CARD Clinic's transfer of records to Mount Sinai as part of that program;
13. the fact that reports received from Mount Sinai as part of the lung cancer program are kept in the CARD Clinic's patient's files;
14. the organizations (Mount Sinai and University of Wisconsin) associated with the CT readers;
15. Dr. Black's role as an adjunct professor at Mount Sinai;
16. Dr. Black's presentations to Mount Sinai as part of his Grand Rounds; and
17. Dr. Black's personal relationships with doctors at Mount Sinai.

Exhibit L, 15:12-18, 38:23-39:5; 47:1-52:13; 53: 9-11; 55:24-56:1; 63:24-65:4; 66:15-67:2; 88:6-89:16; 90:24-91:23; 99:12-25; **Exhibit M** (Deposition of CARD Clinic 30(b)(6) designee Dr. Brad Black), p. 53:4-54:5; 79:5-84:17. Again, multiple Defense counsel had ample opportunity to inquire into these topics. *See* Exhibit M, pp. 2-3.

Defendants fail to articulate how additional discovery could relate to a motion to disqualify Plaintiffs' counsel. In their *Motion*, Defendants state they "are pursuing discovery into the [non-party] Selikoff Group at Mount Sinai and the doctors that make up the group" including subpoenas and depositions. *Motion*, p. 10. That discovery is not justified and has no bearing on the disqualification issue.

C. Discovery of Non-Parties LeRoy Thom and/or Montana Machine & Fabrication.

Defendants take issue with a \$1,500 payment LeRoy Thom received from the CARD Foundation as well as \$15,000 his company, Montana Machine & Fabrication, received from the CARD Foundation. Defendants do not articulate how those payments or future discovery of non-parties related thereto will have any bearing on the disqualification issue. Nevertheless, all parties received documents evidencing these payments on June 29, 2018. Mr. Thom was deposed in this matter on July 10, 2018, as a 30(b)(6) designee of both the CARD Clinic and CARD Foundation. Had any of the multiple Defense counsel present truly wanted to inquire into this matter further, they could have done so.

Moreover, Gail Burger, who met with BNSF's counsel on or before May 17, 2018, testified about LeRoy Thom. She testified she stayed as the Executive Director of the CARD Foundation as long as she did because of LeRoy Thom. Exhibit F, p. 85:17-86:24. She believed he was a good CARD Foundation board member, is honest, would not be involved in doing anything improper for the CARD Foundation, and that if he were aware of anything improper with the CARD Foundation he would do the right thing. *Id.* She believed his sworn testimony would be truthful and accurate. *Id.* Further discovery regarding Mr. Thom and/or his company Montana Machine & Fabrication is unwarranted and has no bearing on the disqualification issue.

D. Discovery of other non-party non-profits.

In their *Motion*, Defendants state they need discovery about three non-party non-profits (with respective formation dates as stated by Defendants): 1) Libby Area Technical Assistance Group, Inc. (LATAG) formed in December 6, 2002; 2) Lincoln County Asbestos Victims Relief Organization (LCAVRO) formed October 1998; and 3) Asbestos Related Health Care Project, Inc. (ARHCP) formed in March 2002. *Motion*, pp. 10-11. As their justification, Defendants allege, and BNSF's counsel affies, they need "further investigation into these other non-profits

and why these non-profits along with the CARD Foundation were set up when the CARD Clinic is already a non-profit with the capacity to raise its own money.” Motion, p. 11; Knight Aff., ¶ 5. Notably, both LCAVRO and ARHCP were created prior to the CARD Clinic becoming a non-profit on November 1, 2002. **Exhibit N** (Secretary of State details CARD Clinic). Thus, the stated basis for discovery of these non-profits is without merit. Moreover, a simple internet search reveals these three non-party non-profits have missions different from that of the CARD Clinic.⁸ Finally, as explained in Section I.D. above, Defendants’ use of the testimony of Gail Burger to support their request (Motion, p. 11) is refuted by Ms. Burger’s own conduct as discovered on the flash drives, which BNSF withheld, and refuted by the numerous Montana non-profit hospitals and clinics that have separate non-profit foundations. *See* Exhibit J.

E. Defendants’ request to depose Plaintiffs’ counsel.

Defendants seek depositions of Plaintiffs’ law firms’ principals. Despite the Court’s *Order* being entered on July 26, 2018, Defendants did not request any such deposition of Jon Heberling or a 30(b)(6) designee of MHSL until their request as contained in their *Motion*, filed on the August 30, 2018, deadline for filing any motion to disqualify. There was ample time for Defendants to request any such deposition. Defendants noticed the deposition of Gail Burger on August 17, 2018, and conducted her deposition on August 28, 2018. Moreover, Defendant BNSF and their counsel have been aware of the fact Plaintiffs’ counsel have donated to the

⁸ LATAG was formed to be a citizen voice to ensure the clean-up of the Libby Amphibole contamination was comprehensive and timely. *See* <http://www.latag.org/index.php/about-latag/bylaws> LCAVRO was created as an informational resource and to assist in advocating for individuals suffering from asbestos disease. *See* **Exhibit O** (LCAVRO Articles of Incorporation). ARHCP’s primary purpose was: “[t]o provide medical benefits as the health care project provided for in the consent decree involving U.S. Environmental Protection Agency and W.R. Grace & Co., and for other charitable healthcare purposes.” *See* https://projects.propublica.org/nonprofits/download-filing?path=2004_02_EO%2F47-0904209_990_200312.pdf

CARD Foundation since at least June 15, 2016. Motion, Exhibit A (Deposition of Dr. Alan Whitehouse, taken by the former law firm of BNSF's current attorneys Chad Knight, Anthony Nicastro, Nadia Patrick and Steve Williams). For them to claim two years later that they need additional time to take depositions of Plaintiffs' law firms' principals rings hollow.

F. The apparent purpose behind Defendants' requested discovery.

In their *Motion*, Defendants state they intend to seek discovery unrelated to the issue of attorney disqualification. Specifically:

Defendants are by separate motion requesting the Court to reconsider its ruling quashing certain topics in the CARD subpoenas in light of these revelations. Among those topics is discovery into CARD's relationships with providers, disclosures related to Medicare payments, including Medicare 855 or 855a enrollment forms, Electronic Data Interchange and Electronic Funds Transfer forms for Medicare enrolled providers, and other records reflecting the stated medical bases for Plaintiffs' enrollment in Medicare benefits through CARD.

Motion, p. 13; *see also* Knight Aff., ¶ 9.

It appears Defendants are using their *Motion* for other strategic purposes, not for discovery on any issues relevant to this *Motion*, but as a vehicle to seek unlimited discovery of the CARD Clinic with the hopes of developing other avenues and venues to attack the CARD Clinic.⁹ None of this is relevant to the issue of disqualification.

CONCLUSION

Counsels' responsibilities of candor, integrity and fair representation of evidence to the Court are viewed by Plaintiffs' counsel to be duties of the highest order and essential to the integrity of the judicial system. Consistent with these duties, the attorneys for MHSL Plaintiffs

⁹ The manifest irrelevance of these subject areas to the disqualification issue may raise a concern of abuse of process.

provided the Court a *Notice* with attached *Declaration* containing a candid and accurate disclosure of the facts of Jon Heberling's charitable contributions to the CARD Foundation and his firm's donation to the CARD Foundation for a mortality study. This was done because: (a) the potential that these payments might arguendo support a disputed inference of bias by Dr. Black, and (b) the need for a candid and clear record regarding adherence to the Montana Rules of Professional Conduct.

Defendants' *Motion*, in contrast, crops and omits evidence necessary to the Court's accurate understanding of the record. Further, it lacks a showing that additional discovery, particularly of transactions between the CARD Clinic, the CARD Foundation and/or Mount Sinai--of which Plaintiffs' counsel would have no knowledge--is likely to be relevant to any grounds for disqualification of Plaintiffs' counsel.¹⁰

In any case in which Dr. Black's initial diagnosis is a material issue or in which his testimony is offered,¹¹ Defendants will have ample opportunity in discovery to develop evidence to support an inference of witness bias. The Court should not allow, however, the Libby Plaintiffs to suffer detriment to their access to the judicial system by reason of unwarranted expenditure of the Court's and counsels' time and resources on Defendants proposed exploration of a collateral issue where their asserted basis is an offering of evidence that is demonstrably not what Defendants purport it to be.

¹⁰ Such disqualification motion depends exclusively upon the interpretation of the charitable contributions given to the CARD Foundation, the record of which is complete and undisputed.

¹¹ In that regard, it should be noted that MHSL will not be calling Dr. Black to testify in any of MHSL Plaintiffs' current lead cases and MHSL does not anticipate calling Dr. Black to testify in any future lead cases.

The Defendants' evidentiary presentation is objectively misleading, which raises the question of intent of Defendants and their counsel. Should the Court find that the evidentiary presentation was intended to mislead, the Court may apply the "forfeiture by wrongdoing" doctrine,¹² by which a legal position or right may be forfeited by reason of wrongful manipulation of the evidence. Such a finding would provide additional grounds (along with (a) the unrefuted evidence of the Heberling Declaration and (b) Defendant's failure to file a disqualification motion within the time frame set by the Court's July 26, 2018, Order) to deny Defendant's *Motion* for additional discovery and time.

There being no demonstration of a relevant issue needing further discovery and Defendants having made no attempt to satisfy the disqualification standard or the time limitation ordered by the Court, Defendants' *Motion* should be denied.

Respectfully submitted this 10th day of September, 2018.

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¹² A ruling of forfeiture of a legal position by reason of wrongful manipulation of the evidence is inherent in the Court's judicial power. This rule of equity has been applied in multiple contexts, including incorporation in Montana Rule of Evidence 804(a) ("due to the procurement or wrongdoing of the proponent") and even as grounds for the forfeiture of the Constitutional right of confrontation. See *State v. Sanchez*, 2008 MT 27, ¶ 39, 341 Mont. 240, 177 P.3d 444, citing *Davis v. Washington*, 547 U.S. 813, 833 (Forfeiture by wrongdoing is an "equitable doctrine" supporting the result that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.").

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