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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,  <i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694  NON-PARTIES CARD CLINIC'S AND CARD FOUNDATION'S REPLY RE: COSTS  <i>Applicable to All Cases</i></p>
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In the hearing the Court held with attorneys in this matter on Wednesday, October 3, 2018, the Court requested undersigned counsel to reply to Defendant's filing regarding CARD Clinic and CARD Foundation's Notice regarding costs and fees.

First, in response to the Court's specific inquiry, counsel are not providing pro bono services to CARD Clinic and CARD Foundation. Counsel's agreement with CARD Clinic and CARD Foundation provides:

Attorneys shall provide legal services to Client for \$415 per hour, but shall attempt to recover fees pursuant to court order.

Second, Defendants assert that "CARD Clinic and CARD Foundation made a number of misrepresentations and withheld information to prevail on many of the topics in their motion to

quash. The CARD Clinic and CARD Foundation, through the plaintiffs' [sic] in this matter, then used that information at the July 24-25, 2018, hearing while at the same time depriving Defendants of that very information," citing to the Court's Order of September 26, 2018 at page 2. Defendants' Response at 3. CARD Clinic and CARD Foundation are not aware of any misrepresentations they made in moving to quash Defendants' subpoenas, nor do Defendants identify any of the alleged misrepresentations in CARD Clinic and CARD Foundation's motion to quash. Moreover, CARD Clinic and CARD Foundation are not aware of any information they withheld in their motion to quash. To the extent any "withholding" refers to outside reads, CARD Clinic historically did not provide outside reads in response to medical record requests because those outside reads are not used for any clinical purpose at CARD Clinic and had not been kept in patient files. CARD Clinic has never represented otherwise. Pursuant to the Court's directive, CARD Clinic is providing the outside reads for those patients who are involved in the litigation before this Court, and is also placing copies of the outside reads in patient files so that future medical records request responses sent by the CARD Clinic will include the outside reads.

Third, Defendants assert that the CARD Clinic and CARD Foundation Rule 30(b)(6) deponents were inadequately prepared, and Defendants therefore have the right to seek fees. Defendants' Response at 3. However, as CARD Clinic and CARD Foundation stated in their response to Defendants' motion to reconsider, the deponents were adequately prepared. CARD's Second Response to Defendants' Motion for Reconsideration, pp. 5-8. More importantly, the Court never ruled that the deponents were inadequately prepared. The Court ordered that CARD Clinic and CARD Foundation had to respond to new topics in the subpoena duces tecum and that Rule 30(b)(6) depositions would be re-opened for the new topics. The Court did not re-open the depositions on the topics already deposed upon, thus the Court rejected Defendants' arguments

that the deponents were inadequately prepared. This is not any basis for Defendants to claim they are entitled to attorney fees.

Fourth, Defendants argue that the Court should not award fees to CARD Clinic and CARD Foundation. Defendants' Response at 2-3, and if the Court awards fees, the fees should total no more than \$10,665.50, which was the amount of fees that accrued between May 22 and June 5, 2018. Defendants correctly assert that CARD Clinic and CARD Foundation attorney fees and costs accruing after June 5, 2018 were not associated with quashing the original and amended subpoenas, but rather in coordinating responses to the subpoenas, prepping and attending depositions, and responding to subsequent motions that sought to completely reopen those subpoenas in their entirety. For the following reasons, the Court should nonetheless award all of CARD Clinic and CARD Foundation's attorney fees and costs, not just the \$10,665.50 accrued by June 5, 2018.

MRCP 45 provides two avenues for how persons subject to subpoena can be protected from the costs of compliance: discretionary sanctions under Rule 45(d)(1) and mandatory cost-shifting under Rule 45(d)(2)(B)(ii). MRCP 45(d)(1) provides for the protection of persons upon whom a subpoena is served, and requires the court to provide sanctions of lost earnings and attorney fees when the issuing party fails to avoid imposing undue burden or expense in responding to the subpoena. MRCP 45(d)(2)(B)(ii), in contrast, provides that the court must protect the persons upon whom a subpoena is served from significant expenses resulting from compliance. While the Montana Supreme Court has not directly addressed the question, federal courts have considered the similarly-worded provisions of federal Rule 45 and determined that when a non-party's costs of responding to a subpoena are "significant," the court must order the issuing party to pay the costs. *See, e.g., Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1184-86 (9<sup>th</sup> Cir. 2013). Here, CARD

Clinic and CARD Foundation's costs are "significant," and include the costs of having staff members gather documents and sit for depositions, and also include retaining an attorney to guide responses to the various subpoenas for production of material items, including documents, and depositions.

By seeking documents and depositions on a broad array of subjects, Defendants placed an undue burden on the CARD Clinic or CARD Foundation. Because health care providers like CARD Clinic keep detailed records of the medical records they provide pursuant to HIPAA, the original subpoenas from Defendants asking for protected patient information on persons that CARD Clinic staff knew were not plaintiffs in the litigation before this Court alarmed CARD staff to the point where they sought services from an attorney. Moreover, CARD Clinic and CARD Foundation sought legal guidance on obtaining relief from the time and expense of responding to what they considered to be vexatious subpoenas.

The Court's original order partially quashing Defendants' subpoenas allowed Defendants discovery of the CARD Foundation on two categories of documents and testimony, and discovery of the CARD Clinic on 24 categories of documents and 29 topics of testimony. Thereafter, Defendants moved this Court to allow production and depositions on every document requested and topic identified in their subpoenas. The CARD Clinic and CARD Foundation had to defend that second attack as well, during which it incurred further attorney fees and costs totaling \$6727.39. The Court's Order of September 26, 2018 allows Defendants one additional category of discovery of the CARD Foundation and 16 additional categories of discovery of the CARD Clinic, but not all topics and documents as Defendants requested. In sum, the Court has ruled that CARD Foundation must respond to three of 21 categories, and CARD Clinic must respond to 40 of 54 categories sought by Defendants. Moreover, the Court has limited the scope of the original topics

to exclude those CARD Clinic patients who are not a party to litigation before this Court. This extensive truncation of the subpoenas warrants payment of the reasonable costs, including attorney fees, sought by CARD Clinic and CARD Foundation that this Court may award under Rule 45(d)(1) and (d)(2)(B)(ii). CARD Clinic and CARD Foundation attorney fees and costs are itemized for the Court's review. The attorneys' time was not excessive and was necessary for responding to the various subpoenas and motions directed at CARD Clinic and CARD Foundation.

Importantly, by May 17, 2018, Defendant BNSF already had obtained from Gail Burger and had in its possession a significant majority of the documents they subpoenaed from the CARD Foundation on June 1, 2018. The whole process of responding to Defendants' subpoena duces tecum to the CARD Foundation and the whole process of deposing a 30(b)(6) designee of the CARD Foundation was a frivolity Defendant BNSF played upon the Court and the CARD Foundation, since Gail Burger had already given CARD Foundation's records to Defendant BNSF and conferred with BNSF's counsel. This alone militates for an award of fees and costs to CARD under Rule 45(d)(1). *See Legal Voices*, 738 F.3d at 1185.

As was later revealed in subsequent motions and other discovery, Defendants' purpose in issuing subpoenas to CARD Clinic and CARD Foundation was to undermine the Clinic and Foundation, call into question their legitimacy, and ultimately to close them down, as evidenced by the fact that it appears counsel for Defendant International Paper filed a report with the FBI regarding the CARD Clinic. *See* CARD Motion for Relief from Order, Exhibit 1, p. "Becker\_Corr 00335." The subpoenas were "served for the purpose of annoying and harassment and not really for the purpose of getting information." *See Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814 (9<sup>th</sup> Cir. 2003). This merits an award of attorney fees and costs. *Id.*

Fifth, the Court originally ruled, pursuant to MRCP 45(d)(3)(C)(ii), that Defendants needed to pay CARD Clinic and CARD Foundation for the reasonable costs in responding to the subpoenas. Defendants argue that the only costs they for which they should be responsible total \$6707.17 for scanning, postage, and photocopying at \$0.15 per page.<sup>1</sup> Defendants' Response at 5. Significant staff time continues to be required to identify previously de-identified outside reads for patients who are also claimants before this Court and to place those outside reads in their respective medical charts. Because the reads are received by CARD Clinic many months after CARD Clinic determines a patient's diagnosis, CARD Clinic has not considered the outside reads as part of the patients' medical records. Rather, CARD Clinic keeps the outside reads solely for ATSDR grant purposes. Requiring CARD Clinic to manage its records differently than it has done historically has caused an additional and continued expense on the CARD Clinic which should be reimbursed.

Defendants also object to paying for the deponents' time for the Rule 30(b)(6) depositions. Defendants' Response at 4. CARD Clinic and CARD Foundation have asked Defendants to pay for deponents' time variously, from \$600 per hour for Dr. Brad Black, \$300 per hour for other health care providers, to \$200 per hour for associated staff. These are reasonable amounts to pay for depositions, which involve more than simply showing up and answering questions. CARD Clinic deponents prepared for their depositions by gathering documents, going through records, and consulting other staff people; the enhanced rate for actual deposition time takes into account the extra time these persons spent outside of the actual deposition. Six hundred dollars per hour

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<sup>1</sup> It is not surprising Defendants concede this cost as the CARD Clinic only charged for 8470 pages of documents at \$0.15 per page. The CARD Clinic produced 32,000 pages of documents and CARD Foundation produced 1,000 pages of documents. To the extent those 32,000 CARD Clinic pages are medical records, MCA §50-16-514 allows the CARD Clinic to charge up to \$0.50 per page, over three times the \$0.15 cost of copies charged by the CARD Clinic.

for a medical doctor is well within the reasonable range for a deposition, as is \$300 per hour for respiratory therapists. CARD Foundation deponent LeRoy Thom, though not employed by CARD Clinic or CARD Foundation, had to take time away from his normal job to prepare and sit for the deposition. Two hundred dollars per hour of actual deposition time for him is reasonable.

Finally, given Defendants' delay in paying any costs to CARD Clinic or CARD Foundation, even those costs to which they do not object, CARD Clinic and CARD Foundation ask the Court to assess interest on the unpaid amounts at 10% per annum from the dates CARD Clinic and CARD Foundation served notice of the various amounts due. In sum, CARD Clinic and CARD Foundation ask this Court to order Defendants to pay the following to CARD Clinic and CARD Foundation within 14 days, and to order Defendants to pay CARD Clinic's continuing costs of responding to the subpoenas:

CARD Clinic 30(b)(6) depositions:	\$4149.56
CARD Clinic SDT response (to date):	\$5234.65
CARD Foundation 30(b)(6) depositions:	\$200.00
CARD Foundation SDT response:	\$263.00
CARD attorney fees & costs (Thueson):	\$4792.06
CARD attorney fees & costs (Bechtold):	\$60,203.23

Respectfully submitted this 9<sup>th</sup> day of October, 2018.

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