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IN THE SUPREME COURT OF THE STATE OF MONTANA

)	
)	Cause No. AC 17-0694
IN RE ASBESTOS LITIGATION,)	
	)	DEFENDANTS BNSF RAILWAY
	)	COMPANY AND JOHN SWING'S
	)	RESPONSE BRIEF IN OPPOSITION
	)	TO PLAINTIFFS' MOTION IN
	)	LIMINE RE: BNSF'S EXPERTS
	)	AND CROSS MOTION TO
	)	EXCLUDE PLAINTIFF'S
	)	UNTIMELY SUPPLEMENTAL
	)	EXPERT DISCLOSURE
)	
	)	<i>Applies to Barnes, et al. v. State of</i>
	)	<i>Montana, et al.</i>
)	

COMES NOW Defendants, BNSF RAILWAY COMPANY and JOHN SWING
 ("Defendants"), by and through its attorneys of Knight Nicastro, LLC, and hereby submits
 its *Response Brief in Opposition to Plaintiffs' Motion in Limine re: BNSF's Experts*.

ARGUMENT

I. BNSF's retained experts were properly and timely disclosed.

Plaintiffs assert that BNSF did not provide three of its expert reports in a timely

manner and asks that the Court preclude additional opinions and factual support offered after the deadline. *Plaintiffs' Brief*, p. 4. Montana Rule of Civil Procedure 26 requires disclosure of “**each person** whom the other party expects to call as an expert witness at trial, to state **the subject matter** on which the expert is expected to testify, and to state **the substance of the facts and opinions** to which the expert is expected to testify and a **summary of the grounds for each opinion**.” Mont. R. Civ. Pro. 26(b)(4). Thereafter, the other party may depose any person who has been identified as an expert.” Mont. R. Civ. Pro. 26(b)(4)(A)(ii).

The Court set the deadline for BNSF’s expert disclosures for October 26, 2018. In accordance with this deadline, BNSF filed its disclosures outlining the identity, subject matter, substance, and grounds of the opinions of its retained experts in detail with the caveat that BNSF was still waiting for finalized reports in three cases. *See BNSF’s Expert Disclosure*, attached as **Exhibit A**.

Dr. Brian Slomovitz was disclosed as BNSF’s expert in obstetrics and gynecology, and his disclosure properly disclosed the subject matter of his testimony (diagnosis of ovarian cancer), the substance of his opinions (that Ms. Braaten’s disease was ovarian cancer and not mesothelioma, and that she had no asbestos related disease), and a summary of the grounds for his opinions (his view of the disease progression and treatment based on his review of the medical records and pathology). In its October 26th disclosure, BNSF stated:

Dr. Slomovitz will offer the opinion in this case that while it was unfortunate Ms. Braaten suffered twice from ovarian cancer, the disease progressed at a

typical fashion and the chemotherapy plan, surgical plan and surveillance, diagnostic surveillance, and treatment surveillance, all aligned with the appropriate standard of care. Further, he will testify that a review of Ms. Braaten's records and review of Dr. Young's pathology report, indicate that she did not have mesothelioma any other asbestos related disease. Instead, Ms. Braaten suffered from translocated ovarian cancer. Her treatment for ovarian cancer was appropriate, there is no pathological correlation between her ovarian cancer and mesothelioma, and there is no evidence that an asbestos related disease played any role in her diagnosis of ovarian cancer.

BNSF Expert Disclosure, p. 9. Dr. Slomovitz's supplemental report offers no new opinions, but merely expands on the level of detail provided, detail which would otherwise be provided in a deposition. The report makes the identical conclusion to the initial disclosure, stating:

In summary, I believe with a reasonable degree of medical probability that Ms. Braaten died of widely metastatic ovarian cancer and the complications associated with such a diagnosis. She did not have mesothelioma to a reasonable degree medical probability.

Slomovitz Report, p. 4 attached as **Exhibit B**.

Similarly, for Dr. David Sicilia, BNSF's historian, substantial evidence was provided to Plaintiffs regarding his testimony in the initial disclosure, which provided his qualifications, compensation and professional position. The disclosure then identifies over two pages of text the specific subject matters of his expected testimony (Zonolite and Libby History, State of the Art Medical and Scientific Literature on Vermiculite, Asbestos Contamination in Libby, Montana, BNSF and Zonolite Shipping) and within each topic provides the substance of his opinions and a summary of the basis for those opinions. *BNSF Expert Disclosure*, p. 6-8.

Finally, for Dr. Michael Graham, BNSF's pathologist, BNSF disclosed his trial

testimony and report for Plaintiff Flores in its October 26th disclosure. BNSF filed an opposed motion for an extension for Dr. Graham's report for Plaintiff Barnes and produced that report to Plaintiffs on November 13.

BNSF has complied with Rule 26 as the disclosures stated identity, subject matter, substance, and grounds of the opinions of its retained experts in detail as required by the Montana Rules of Civil Procedure. Rule 26 expressly requires an expert witness to supplement their report. See Mont. R. Civ. Pro. 26(e)(2). Pursuant to this rule, BNSF has disclosed the supplemental reports it received, though the initial disclosure was proper. Furthermore, BNSF offered to schedule depositions of Drs. Slomovitz, Sicilia, and Graham so that Plaintiffs may fully investigate the expert opinions and analysis BNSF intends to present at trial. To date, Plaintiffs have not taken BNSF up on the offer. See Email of November 9, 2018 from A. Nicastro to J. Mariman, N. Patrick, C. Knight, **Exhibit C**.

II. BNSF's non-retained experts need not meet any specific disclosure requirement.

Plaintiffs additionally object to the fact that BNSF has not disclosed the opinions of its non-retained expert witnesses Mel Burda and Don Cleveland pursuant to Mont. R. Civ. P., Rule 26. *Plaintiffs' Brief*, p. 4. Importantly, such a disclosure is not mandated in Montana under Rule 26. See *Norris v. Fritz*, 2012 MT 27, P20, 364 Mont. 63, 67, 270 P.3d 79, 83, 2012 Mont. LEXIS 28, *7 ("Notably, M. R. Civ. P. 26(b)(4) limits disclosure requirements to retained experts.") The M. R. Civ. P. 26(b)(4) disclosures and pre-trial depositions provide a party's only access to an adversarial, retained expert's identity and opinions. *Id.* In contrast, a non-retained expert's role in the factual scenario makes his

identity well known to both parties and his opinions more readily available. *Id.*

Both Cleveland and Burda were disclosed in BNSF's initial discovery responses as "persons that have knowledge that is generally relevant in all Plaintiffs' cases." See BNSF Discovery Responses, Resp. to Interrog. 10, May 25, 2018 (**Exhibit D**). Both men are expected to be called as witnesses to speak from their personal knowledge and experience within BNSF. As non-retained experts, BNSF need not provide a report of their opinions, and as disclosed witnesses dating back nearly six months, Plaintiffs cannot successfully exclude their testimony for failure to do so.

There can be no issue of surprise regarding these witnesses expected testimony. Don Cleveland is the Director of Industrial Hygiene for BNSF. In June of 2018, Mr. Cleveland testified in this role in a Missoula County case, *Brent Wetsch v. BNSF Railway Co.*, Cause No. DV-16-1146, involving allegations of an asbestos-related disease attributed to BNSF's work in Libby. Plaintiffs' counsel was in attendance throughout the trial as an observer and obtained a transcript of the trial. In fact, portions of the *Wetsch* trial transcript are cited in Plaintiffs' brief. See *Plaintiffs' Brief*, p. 8. Similarly, Mel Burda is a former BNSF Director of Environmental Operations. Plaintiffs' counsel is familiar with Mr. Burda, and recently cited to a prior deposition of Mr. Burda in their statement of undisputed facts filed alongside their *Motion for Partial Summary Judgment*. See *Ex. 46 to Sullivan Affidavit (10/5/2018)* (excerpt of deposition of Melvin Burda, *Moos v. BNSF Railway Co.*, DDV-06-761, Jan. 25, 2007). Plaintiffs' counsel also deposed Mr. Burda on December 6, 2016 in another Libby-related case styled *Watson v. BNSF Railway Co.*, ADV-10-0740.

Both witnesses are expected to testify consistent with their prior testimony well known to Plaintiffs' counsel.

III. Plaintiffs have suffered no prejudice.

Plaintiffs assert that they have been prejudiced by the late disclosure, warranting a restriction on the testimony of BNSF's experts. *Plaintiffs' Brief*, p. 4. In fact, BNSF's original disclosures provided clear information regarding what BNSF's retained experts would testify to. This was updated with reports slightly over 2 weeks after the October 26th date for disclosure, four months prior to trial, and before any expert depositions were taken. Plaintiffs admit that they will be able to depose BNSF's experts prior to the close of discovery. *Plaintiffs' Brief*, p. 4. The Court has additionally offered to permit expert depositions after the close of discovery in its recent order on BNSF's *Motion for Leave to Take Additional Depositions*. As a result, there is no prejudice against Plaintiffs, and certainly none that would warrant limiting the opinions of BNSF experts.

To this point, Montana has held that the goal of Rule 26, M.R.Civ.P. is to eliminate surprise and to promote effective cross-examination of expert witnesses. *Hawkins v. Harney*, (2003), 314 Mont. 384, 66 P.3d 305. The initial disclosure was entirely in conformance with the requirements of Rule 26. However, even if it were not, exclusion of an expert is not appropriate where disclosure of the expert's opinion is otherwise sufficient to eliminate the possibility of surprise and to allow adequate preparation for cross-examination and rebuttal. *Scott v. E.I. Dupont De Nemours & Co.*, (1989), 240 Mont. 282, 783 P.2d 938. *See also Smith v. Butte-Silver Bow County*, 276 Mont. 329, 339-340, 916

P.2d 91, 97, 1996 Mont. LEXIS 86, *21, 53 Mont. St. Rep. 421 (“The extent of the ‘consequences’ imposed by a district court, however, should relate to the extent and nature of the actual discovery abuse and the extent of the prejudice to the opposing party which results therefrom.”)

Montana has similarly held that “refusing the testimony of an expert is an extreme sanction when the offense arises from incomplete discovery, but one which we have upheld when opposing counsel's ability to effectively cross-examine the witness has been severely limited.” *Evans v. Scanson*, 2017 MT 157, 20, 388 Mont. 69, 77-78, 396 P.3d 1284, 1291, 2017 Mont. LEXIS 352, *18 “But even a brief expert disclosure, so long as it identifies the facts and opinions to which the expert is expected to testify, can be sufficient to eliminate the possibility that opposing counsel will be surprised by the testimony or unable to adequately prepare for cross-examination.” *Id.* Similarly, “[t]he time elapsed lessens the importance of these inadequate answers.” *Scott*, 240 Mont. 282, 287; *see also*, *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, 327 Mont. 146, 112 P.3d 1018 (upholding the Court's decision to allow the testimony of an expert, who had been listed as a witness six months before trial but had not been identified as an expert witness until two weeks before trial).

In arguing to limit the opinions of BNSF's experts, Plaintiffs cite to two cases that are readily distinguishable, due to the continued discovery abuse and the existence of clear prejudice in the matters. *Plaintiffs' Brief*, p. 4. In *Seal v. Woodrow's Pharmacy*, 1999 MT 247, 296 Mont. 197, the offending party failed to meet numerous deadlines, before his experts were finally barred and his case dismissed. Initially, Seal filed his expert disclosure

in a timely manner, but at his expert's deposition, the expert indicated she could not testify at trial. *Id.* at 11. This resulted in a 6-month continuance. *Id.* Seal filed his next expert list in accordance with the new scheduling order on March 2, 1998, however, he did not include the required Rule 26 information. *Id.* at 13. The opposing party also asserted that it had not received a copy until after the March deadline. *Id.* Seal responded to a motion to compel by supplementing his disclosure on April 14, 1998, however this was again deemed deficient. *Id.* at 14. The court also found that Seal had failed to answer discovery that had been served the prior year. *Id.* 15. The District Court then granted summary judgment in part based upon Seal's continued dilatory discovery practices. *Id.* 17.

In *Nelson v. Nelson*, 2005 MT 263, 329 Mont. 85, 122 P.3d 1196, 2005 Mont. LEXIS 442, the plaintiff noticed up two physicians as experts prior to trial for a chemical exposure claim. The plaintiff's expert disclosure, however, offered only conclusory statements regarding the expert testimony. *Id.* at 30. The Court noted that neither doctor referred to a specific chemical alleged to have caused the Plaintiff's injury. *Id.* The Court noted that the disclosure did not meet the requirements of Rule 26. *Id.* Importantly, the expert disclosure was not supplemented, or cured at any point prior to trial.

Both *Nelson* and *Seal* involved parties that continued to fail to meet the requirements of Rule 26 causing prejudice. By contrast, Plaintiffs have complete expert reports and disclosures months before trial and have admitted to having time to conduct depositions prior to the close of discovery. There is no prejudice, or risk of surprise as required for barring experts in Montana. Pursuant to holdings in *Scott*, *Hawkins*, and *Smith*, restricting

the testimony of BNSF's experts would be unwarranted and an abuse of discretion.

IV. Plaintiffs' late expert disclosures should be excluded based on Plaintiffs' arguments in their motion.

While Plaintiffs have claimed prejudice from BNSF's supplemental disclosure, Plaintiffs have similarly failed to disclose their experts to BNSF as required. Though in pleadings filed with this Court Plaintiffs have represented that they timely disclosed rebuttal reports, to date Defendants have been served with no such document. To the extent the Court is persuaded by Plaintiffs to strike any of BNSF's original, supplemental, or rebuttal disclosures on a timeliness argument, such should apply with equal force to the Plaintiffs, and BNSF conditionally moves for such relief.

V. Dr. David Sicilia's opinions/comments regarding employment and economic development benefits due to BNSF's vermiculite activities provide necessary history and context.

Plaintiffs' motion regarding Dr. Sicilia is largely duplicative of his first motion in his separately filed *Motion in Limine re: Various Evidentiary Issues*. BNSF therefore incorporates its *Response Brief to Plaintiffs' Motion in Limine re: Various Evidentiary Issues* by reference.

Plaintiffs seek to prohibit BNSF's historian, Dr. David Sicilia to provide testimony regarding the economic impact that BNSF had on the Libby community. This evidence is clearly relevant, however, due to the issues and claims that Plaintiffs are raising. As a central theme to their case, Plaintiffs have argued that BNSF had knowledge that the processed vermiculite ore being transported contained harmful amounts of asbestos. One of the frequent citations by Plaintiffs in support of this is a 1959 economic study which

Plaintiffs mischaracterizes as evidence that BNSF was aware of a health hazard relating to asbestos contamination of the vermiculite. In Plaintiffs' complaint they stated:

In 1959 the railroad funded a geologic study of the mineral deposit which, among other things, provided that:

Fibrous amphibole asbestos, because its specific gravity is very near that of vermiculite, causes much trouble in milling the lower grade ores in which the asbestos is abundant. If a process could be perfected to make a clean separation of vermiculite and asbestos, both products would be marketable...

This and other documents unequivocally provided BNSF with notice that the Libby vermiculite was inextricably contaminated with asbestos.

Third Amended Complaint, ¶99.

In fact, this study was an economic development effort done in conjunction with Great Northern's¹ marketing department. The study had nothing to do with examining health hazards or evaluating the safety of the vermiculite concentrate product tendered to BNSF for shipment. Instead, it discussed whether there was the potential for economic development of marketable commodities.

The testimony by Dr. Sicilia is relevant to put this and other economic issues in the proper historical context. BNSF is not going to make an argument that it is such a philanthropic company that the jury should not find against it, however, BNSF is entitled to lay out the history of why it was in Libby, and what it was doing.

VI. Plaintiff's objection to Dr. Kind's opinions as derived from lack of evidence caused by BNSF's failure to conduct OSHA mandated testing is misguided.

Plaintiffs argue that their ability to calculate a quantitative exposure assessment has

¹ Great Northern is BNSF's predecessor.

been impaired by the lack of what they characterize as testing mandated by OSHA or other unidentified standards. As a result, they assert that Dr. John Kind should not be able to offer evidence of the Plaintiffs' dose exposure. *Plaintiffs' Brief*, p. 7.

As an initial matter, Plaintiffs fail to point to any OSHA standards or regulations that require such mandatory testing. OSHA was not established until 1971.² Prior to this, OSHA was not in effect, and there were obviously no OSHA testing requirements. The OSHA standard that does discuss a need for asbestos monitoring states:

(d)(2)*Initial monitoring.*

(i) Each employer who has a workplace or work operation covered by this standard, except as provided for in paragraphs (d)(2)(ii) and (d)(2)(iii) of this section, shall perform initial monitoring of employees **who are, or may reasonably be expected to be exposed to airborne concentrations at or above the TWA permissible exposure limit and/or excursion limit.**

29 CFR 1910.1001(d)(2)(i) (emphasis added).

There is no evidence that it was reasonably expected that BNSF employees were exposed to airborne concentrations at or above the permissible exposure limit. To the contrary, BNSF Industrial Hygienists have testified to having evaluated BNSF workplaces and job types throughout the BNSF system for potential health hazards, and there would be no reason to expect that a trainman, clerk, or track employee was exposed above the permissible exposure limits. To the contrary, this testing and monitoring showed otherwise. Further testing conducted at the Libby yard before any cleanup efforts also showed no meaningful asbestos exposure. *See e.g. Kind Report re: Barnes*, pp. 36-39.

² See Occupational Safety and Health Administration website, <https://www.osha.gov/osha40/timeline.html>, (last visited 16 November, 2018).

Further, the OSHA permissible exposure limit (PEL) for asbestos in the 1970s was significantly higher than it is today. In fact, OSHA originally set the PEL for asbestos at 5 f/cc, fifty times higher than the current .1 f/cc limit. Dr. Kind stated in his reports, that a person in the position of trainman or switchman was not exposed in any level that approaches PELs. *Kind Report re: Barnes*, p. 36. In fact, as Dr. Kind notes, in a series of 2001 air testing for BNSF maintenance of way workers, only 9 out of 71 tests resulted in a detection, with the highest at .092 f/cc, an amount under even the current OSHA standard. *Id.* Because of these factors, there was no reasonable expectation that BNSF employees would be exposed to asbestos above the PELs, and no OSHA mandated requirement for testing.

Plaintiffs' motion is based entirely on the disputed opinions of their hired expert, Dr. Hart. This is – at best – a fact question for the jury and is not appropriate for a motion in limine. Essentially, Plaintiffs are requesting this Court to apply a sanction in this litigation based on alleged regulatory violations that are disputed by the parties. Such is not a proper motion *in limine* and it should be denied.

VII. Dr. Kind's opinions about BNSF's knowledge of vermiculite are well supported.

As part of Dr. Kind's report, he conducted an analysis of the development of knowledge of potential health impacts from community exposure in Libby. *Kind Report re: Barnes*, pp. 10-12. After a thorough analysis, Dr. Kind states that

Thus, based upon the lack of information indicating any potential for increased health risks in individuals not directly employed in the mining, milling, or expansion of Libby vermiculite, the available air sampling data

from W.R. Grace, and the information regarding the percentage of LA in the vermiculite concentrate, BNSF would not have had reason to suspect that transport of vermiculite concentrate by rail would have had the potential to result in community exposures to asbestos.

Id., p. 12.

Plaintiffs argue that this conclusion should be barred based solely on an opposing conclusion in Dr. Julie Hart's report, which BNSF disputes. *Plaintiffs' Brief*, p. 7. Importantly, the disputed statement sought to be excluded by Plaintiffs is a question of fact. Montana law holds that "[t]he general rule is that when trial is by jury, all questions of fact are to be decided by the jury and all evidence thereon is to be addressed to it." *Sportco, Inc. v. Thompson*, 247 Mont. 379, 381, 806 P.2d 1039, 1041, 1991 Mont. LEXIS 59, *4, 48 Mont. St. Rep. 236; Section 25-7-103, MCA. Simply because Dr. Hart reached a separate opinion than Dr. Kind is not enough to exclude one of the experts' opinions. If this were the case, BNSF could likewise argue that Dr. Hart's opinion should be excluded.

Plaintiffs next argue that Dr. Kind has previously testified that W.R. Grace placarded their railcars indicating that the vermiculite may contain up to 1% asbestiform tremolite. This is inaccurate. Notably, Plaintiffs do not attach Dr. Kind's report from that case. In fact, in the same report, Dr. Kind noted that there was evidence that the placarding did not actually take place, writing that, "during an interview on August 15, 2016, Mr. John Swing, the Station Agent for BN in Libby, MT from 1970-1984, stated that he was never told by WR Grace that the vermiculite concentrate contained asbestos." *Kind Report re: Watson*, p. 13, attached as **Exhibit E**.

Further, at a trial earlier this year, Dr. Kind testified to this exact issue, and stated

that there was no evidence, outside of the internal Grace memo discussed in his *Watson* report, that warning placards were ever placed on railcars:

Q. (By Mr. Bremseth) So I wanted to just make sure that everyone knew that in this prior report that you had prepared in a previous case, that you had in fact referenced the placarding that you were aware of on the boxcars that were the hopper cars, warning that the product contained asbestos

A. I reference a Grace memo related to that.

Q. But--

A. If I could finish. Whether or not those placards ever made it on the boxcars is questionable, because John Swing, the station attendant, testified said he never saw those, and also Mr. Cuffe in this case did as well.

Q. The placard that you referenced in your report stated, "Vermiculite concentrate may contain up to 1 percent asbestiform tremolite." Right?

A. That's what the placard memo language said.

Q. And you cited the placard memo dated November 16, 1983, right?

A. Yes.

Q. And in this report it's your understanding that the placards would go on the hopper cars, true?

A. That's what the intent of that memo is. Whether that actually happened or not, we don't have any evidence that it did.

Q. So the information, though, was available, at least according to that document in your prior report, that back in 1983 BNSF would have known that vermiculite, Libby amphibole vermiculite, contained asbestos.

A. They may have known that from other sources. That is an internal document with Grace. We don't know if that was ever actually circulated to BNSF or not.

Wetsch v. BNSF trial transcript (6/8/2018), pp 1196:14-1198:2, attached as **Exhibit F**

Dr. Kind's testimony regarding this issue has been consistent and based on supporting documents and depositions.

VIII. Dr. Haber's opinions regarding Tracie Barnes are proper.

Plaintiffs argue that Dr. Steven Haber should be prohibited from offering testimony regarding his assessment of Plaintiff Barnes. In support of this, Counsel for Barnes argues

that Dr. Haber failed to use magic words “reasonable degree of medical certainty” or “more likely than not” directly prior to the opinion section of his report for Plaintiff Barnes.

Plaintiffs identified certain phrases that it maintains do not meet the standard for expert testimony, specifically pointing to Dr. Haber’s 1st and 2nd opinion. *See Plaintiffs’ Brief*, p. 10. These paragraphs of Dr. Haber’s report stated:

- 1) While there are radiographic findings that could be consistent with asbestos-related pleural disease and asbestosis, the visible year-to-year progression is uncharacteristic of asbestosis in the absence of intense occupational asbestos exposure, and would suggest an alternative diagnosis (ATS 2004).
- 2) Mr. Barnes has clinical findings that would suggest underlying rheumatoid arthritis, including radiographic changes and possible subcutaneous and pulmonary nodules. Rheumatoid arthritis is strongly associated with radiographic findings that can be indistinguishable from asbestos-related disease, including pleural plaquing, diffuse pleural thickening, and interstitial fibrosis. He worked for 6 years with exposure to silica dust, which is known to increase the risk for RA.

Haber Report re: Barnes, pp. 4-5, attached as **Exhibit G**. Plaintiffs additionally take issue with Dr. Haber’s use of the terms, “would be most likely”, “dubious”, and “would likely”. *See Plaintiffs’ Brief*, p. 9; *Haber Report*, pp. 4-5.

In *Dallas v. Burlington N.*, 212 Mont. 514, 689 P.2d 273, 1984 Mont. LEXIS 1059 the Court explained that “[o]ur evidentiary standards are satisfied if medical testimony is based upon an opinion that it is 'more likely than not.'" *Id.* at 523. Since then, the Court has adhered to the proposition that "a medical expert's opinion is admissible if it is based on an opinion that it is 'more likely than not.'" *Butler v. Domin*, 2000 MT 312, ¶13, 302 Mont. 452, 15 P.3d 1189 (quoting *Dallas*, 212 Mont. at 523, 689 P.2d at 277). The "more likely than not" standard assures that the expert testimony or opinion "does not represent mere

conjecture, but rather is sufficiently probative to be reliable." *State v. Vernes*, 2006 MT 32, ¶ 18, 331 Mont. 129, 130 P.3d 169(citing *Dallas*, 212 Mont. at 523, 689 P.2d at 277). Under this rule, Dr. Haber's use of the terms, "would be most likely", "dubious", and "would likely," by their common definitions, would fall within the "more likely than not" rule without additional analysis. In fact, "most likely" reaches a higher degree of certainty than "more likely than not."

Importantly, Montana law is clear that there are no "magic words" to qualify expert testimony. See *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, P37, 367 Mont. 21, 33, 289 P.3d 131, 140, 2012 Mont. LEXIS 333, *24 ("we must not let scrutiny of an expert's phrasing cloud the substantive appraisal of their testimony. It is well-noted that doctors are not lawyers and imposing strict legal terminology requirements improperly places form over substance."); *Miller v. Natl. Cabinet Co.*, 8 N.Y.2d 277, 168 N.E.2d 811, 813, 204 N.Y.S.2d 129 (1960)) ("the probative force of the opinion 'is not to be defeated by semantics if it is reasonably apparent that the doctor intends to signify a probability supported by some rational basis.'") Similarly, in *Stordahl v. Rush Implement Company* (1966), 148 Mont. 13, 417 P.2d 95, Montana determined that there is no particular standard of strictness required so long as it is "determined that [the] testimony encompasses a reasonable degree of medical [testimony]." ³ 417 P.2d at 99.

Plaintiffs appear to argue that Dr. Haber's opinions nos. 1 and 2 are "conjecture" and therefore not admissible. *Plaintiffs' Brief*, p. 10. Importantly, Plaintiff Barnes, not

³ This case predated *Dallas*, and the switch to the "more likely than not" standard.

BNSF, has the burden of proof to establish that he has an asbestos-related disease caused by asbestos exposure due to BNSF's negligence. Dr. Haber, as BNSF's expert, is entirely within his purview as an expert to say that Plaintiff Barnes' contention is not reliable and does not meet the American Thoracic Society's (ATS) diagnostic criteria. ATS requires for a valid asbestos-related disease diagnosis the exclusion of alternative plausible causes by differential diagnosis.⁴ This Court adopted these criteria in its September 13, 2018 as "represent[ing] the reliable standard of care for diagnosing nonmalignant asbestos related disease." Dr. Haber's opinions nos. 1 and 2 establish that other plausible causes exist that explain Plaintiff's non-malignant condition. Pursuant to ATS, these causes exclude attributing Mr. Barnes' condition to asbestos exposure. *Haber Report*, pp. 4-5. These opinions are supported by Dr. Haber's quantitative findings based on his review of chest imaging, medical records, discovery responses and Plaintiff Barnes' deposition. *Id.* at pp. 1-4. The fact that Dr. Haber used the term "would suggest" in his differential diagnosis does suggest conjecture in light of the ATS Criteria and the substantial factual basis for the opinions. In fact, in a similar Montana case, *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, P39, 367 Mont. 21, 34, 289 P.3d 131, 141, 2012 Mont. LEXIS 333, *26, the court held that "Dr. Joseph's use of "speculate" or "suspicion" does not defeat the probative value of his opinion."

⁴ Am J Respir Crit Care Med Vol 170. pp 691–715, 2004
(<https://www.atsjournals.org/doi/pdf/10.1164/rccm.200310-1436ST>)

Finally, Plaintiffs have the opportunity to depose Dr. Haber regarding his report in the coming weeks and further determine the full basis for his opinions, dispelling any claims that Dr. Haber's opinions are vague or unclear.

IX. Tracey Coenen's opinions regarding CARD funding is an appropriate subject of expert testimony.

Plaintiffs assert that Ms. Tracey Coenen should not be permitted to testify regarding CARD Funding due to the purported irrelevant nature of the testimony. In support of this, Plaintiffs cite to their separately filed motion in limine. *See Plaintiffs' Brief*, p. 10. Defendants incorporate their *Response to Plaintiffs' Motion in Limine re: CARD's Finances and Relationships with Attorneys* here by reference.

It appears that the only separate issue raised in this motion in limine is whether Ms. Coenen is qualified as an expert. Mont. R. Evid. 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Plaintiffs assert that Ms. Coenen is not an expert as "she simply summarizes amounts contained in financial documents." *Plaintiffs' Brief*, pp. 10-11. This is an incredibly simplistic description of Ms. Coenen's profession. Ms. Coenen is a forensic accountant and CPA. As she explains in her report, she "performed a detailed analysis of the bank statements, checks, deposit slips, and QuickBook reconciliation reports in order to determine source and uses of funds." *Coenen Report*, p. 2, attached as **Exhibit H** While the end result of this in-depth analysis may just be 'summarizing amounts contained in

financial documents’ Ms. Coenen’s testimony clearly requires specialized knowledge to produce.

Notably, Plaintiffs cite to no case law holding that forensic accountants, such as Ms. Coenen, are not qualified to be experts. In fact, the opposite is true, as Montana has previously qualified multiple forensic accountants as experts, due to their specialized knowledge and expertise. *See e.g. D.R. Four Beat Alliance, LLC v. Sierra Prod. Co.*, 2009 MT 319, P16, 352 Mont. 435, 441, 218 P.3d 827, 832, 2009 Mont. LEXIS 467, *13; *State v. McMaster*, 2008 MT 268, P51, 345 Mont. 172, 185, 190 P.3d 302, 311, 2008 Mont. LEXIS 417, *27.

X. BNSF experts are not offering legal conclusions or legal standards.

Plaintiffs argue, without citation, that Defendants’ toxicologist, Dr. Kind, “opines on the standard to prove legal causation.” *Plaintiffs’ Brief*, p. 11. Dr. Kind does not make any legal conclusions. Instead, Dr. Kind, in his report, discusses the science and literature that is accepted in the scientific community to establish causation between an exposure and illness. Dr. Kind breaks this up into discussions of general causation (whether the substance in question is capable of causing a particular condition in the general population at some specified dose) and specific causation (whether a known or alleged exposure an individual may have received was the most likely cause of the injuries or disease that individual has). *Kind Report re: Barnes*, p. 17. Dr. Kind then conducts an analysis of the individual Plaintiff’s cumulative level of exposure and evaluates that exposure according to the literature. *See e.g. id.* p. 36-39.

Plaintiffs cite to no case law barring toxicologists from testifying to causation. In fact, case law holds, as a general principle, that a toxicologist can testify to causation. On point is the 9th Circuit case, *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124-25 (9th Cir. 1994). In *Hopkins*, the Ninth Circuit held that a toxicologist's opinion regarding causation was admissible under *Daubert* because the toxicologist testified “that his opinion was based on his experience as a toxicologist, his review of medical records and Dow studies, and his general scientific knowledge of silicone's ability to cause immune disorders as established by animal studies and biophysical data.” *Id.* at 1125; *See also Roberts v. United States*, 316 F.2d 489 (3d Cir. 1963) (holding that a toxicologist, who had extensive experience in researching the chemicals involved, was competent to testify in support of plaintiff's theory that defendant's chemicals had caused plaintiff's injuries, even though toxicologist was not a medical doctor); *Dawsey v. Olin Corp.*, 782 F.2d 1254 (5th Cir. 1986) (Ph.D. in biochemistry with experience in researching the effects of phosgene on animals was competent to testify on effects of phosgene on humans); *Backes v. Valspar Corp.*, 783 F.2d 77, 79 (7th Cir. 1986) (discussing cases in which courts permitted toxicologists to testify about the effects of poisonous substances on human health even though they did not possess a medical degree); *Hagen v. Dow Chem.*, 1992 Mont. Dist. LEXIS 427, *4 (5th Judicial District) (toxicologist testified that on a more probable than not basis, that the concentration of agricultural chemicals the plaintiff's fish could have been exposed to was too low to have been responsible for their death.)

XI. Plaintiff's motion regarding alleged disparaging comments by expert witnesses regarding opposing expert witnesses does not identify a single disparaging comment.

Plaintiffs argue that expert witnesses should be precluded from "commenting on the truth or accuracy of the other expert's report, the other expert's qualifications, etc." *Plaintiffs' Brief*, p. 11. In support of this, they point only to an order from a Montana federal district court case. *Id.* This order states:

Dr. Denny Lee will be allowed to provide testimony as to his own work, what he did, and what his own work discloses. Neither he nor any other witness may comment upon the accuracy or lack of accuracy of testimony given by another witness.

See Ex. B to Plaintiffs' Brief, p. 2.

This order comes with no context as to the reason for the ruling, whether it be discovery related or in response to discussion of a specific statement by Dr. Lee. Montana law provides that "[a]s a general rule ... expert testimony evaluating the credibility of witnesses is not admissible." *In re Renewal of the Teaching Certificate of Thompson*, 893 P.2d 301, 306, 1995 Mont. LEXIS 46, *15, 270 Mont. 419, 52 Mont. St. Rep. 200.

Montana law further states that whether a "witness is an expert is a question of admissibility within the discretion of the trial court, but the degree of the expert's qualifications goes to the weight of the evidence and is a question for the jury." *Wacker v. Park Rural Elec. Coop.*, 239 Mont. 500, 501-02, 783 P.2d 360, 361 (1989). "The expert's qualifications and testimony then are open for attack through the traditional and appropriate methods: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Comm'r of Political Practices for Mont. v.*

Wittich, 2017 MT 210, P51, 388 Mont. 347, 364, 400 P.3d 735, 748, 2017 Mont. LEXIS 544, *33, 2017 WL 3612350 (emphasis added). Further “[expert] [d]isclosure provides a party sufficient information and time, therefore, to plan effectively for cross-examination and to obtain an expert to refute the adversarial expert's testimony.” *Norris v. Fritz*, 2012 MT 27, P19, 364 Mont. 63, 67, 270 P.3d 79, 82-83, 2012 Mont. LEXIS 28, *7. In a similar vein, Montana adopted a holding from the 4th Circuit, stating:

Absolute certainty of result or unanimity of scientific opinion is not required for admissibility. 'Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants, to name just a few of the legions expert witnesses.' Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation.

Barmeyer v. Montana Power Co., 202 Mont. 185, 193-194, 657 P.2d 594, 598, 1983 Mont. LEXIS 598, *8-9 (citing with approval to *United States v. Baller* (4th Cir. 1975), 519 F.2d 463, 466, cert. den. 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391).

Courts outside of Montana have similarly permitted experts to critique the opposing expert's opinions. *See e.g., Deutsch v. Novartis Pharms. Corp.*, 768 F. Supp. 2d 420, 481, 2011 U.S. Dist. LEXIS 22755, *176 ("In general, expert opinions which assess or critique another expert's substantive testimony are relevant, but opinions which attack an expert's credibility (e.g., testimony that an expert is lying) are not.")

In addition to disputing an expert's findings, it is likewise permissible for an expert to comment on qualifications, or lack thereof, and the importance of such. In this case, for

example, diagnoses which will be relied upon by Plaintiffs at trial were conducted by the CARD Clinic. It is proper testimony for BNSF's medical expert to discuss the advantages of training and experience that a pulmonologist and b-reader have in interpreting chest imaging and making diagnoses related to asbestos exposure. The fact that Dr. Black, the head of the CARD Clinic, is a pediatrician does not prohibit BNSF from putting on this evidence. *See e.g. In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 202 (S.D.N.Y. 2009). ("[T]he fact that a physician is not a specialist in the field in which he is giving expert opinion does not affect the admissibility of the opinion, but rather the weight the jury may place on it.")

The above discussion merely recites Montana law on this topic generally. BNSF fully intends to comply with this and all rules of evidence. In this motion, Plaintiffs fail to cite a single purported statement by a defense expert that they contend is improper. A vague and general motion *in limine* merely asking the court to enforce the rules of evidence is not proper and should be denied.

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Respectfully submitted,

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