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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' REPLY IN SUPPORT OF MOTIONS *IN LIMINE* RE: BNSF'S EXPERTS Applicable To: *Barnes, et al. v. State of Montana, et al,* Lincoln County Cause No. DV-16-111

MOTION

Plaintiffs *Motion in Limine re: BNSF Experts* is straightforward: it seeks to preclude BNSF's untimely, insufficient, and improper expert opinions. BNSF's response thereto, however, appears to include yet again a motion for reconsideration of this Court's *Order Re: (1) BNSF's Motion for Additional time to Disclose Pathology Expert; and (2) BNSF's Motion for Extension of Time for Expert Witness Rebtuttal Deadline* entered on November 14, 2018 *("Order Denying BNSF's Untimely Experts")*. This Court should not allow BNSF's back door request. The Court should enter an order *in limine* on BNSF's untimely, insufficient, and improper expert opinions as Plaintiffs requested herein.

ARGUMENT

I. BNSF's *Response* includes an attempt to have the Court reconsider its *Order Denying BNSF's Untimely Experts* and should not be countenanced.

Despite this Court granting BNSF's request for a 60-day extension, BNSF filed initial expert disclosures in this case but unilaterally withheld reports of Dr. Michael Graham (regarding Tracie Barnes' pathology), Dr. David Sicilia (historian), and Dr. Brian Slomovitz (OB-GYN)[1] and provided no disclosure for non-retained experts Mel Burda and Don Cleveland. These withheld reports are the subject, in part, of Plaintiffs' subject motion *in limine*. Also, on the extended October 26, 2018, expert disclosure deadline, BNSF filed a motion seeking an extension as it related to Dr. Graham but was silent as to the others. On the Court's November 9, 2018, rebuttal expert disclosure deadline, BNSF filed no rebuttal expert disclosures. Instead, BNSF filed a motion seeking an extension (knowing the Court would not be available to rule on any such motion before the deadline).

Thereafter, the Court entered its *Order Re: BNSF Experts* finding that:

> . . . The basis of [BNSF's *Motion for Additional Time to Disclose Pathology Expert*] is not good cause, as required by the Court's Amended Rule 16 Scheduling Order, but lack of diligence on the part of BNSF to obtain the necessary information—particularly since the request for pathology samples was not made until after the Court's original expert disclosure deadline.
>
> . . . Again, the basis of [BNSF's *Motion for Extension of Time for Expert Witness Rebuttal Report Deadline*] is not good cause, but the failure to appropriately prepare and anticipate the necessary experts. Both sides have disclosed numerous experts, and the Plaintiffs were able to comply with the rebuttal expert deadline. Considering the

[1]Dr. Sicilia and Dr. Slomovitz may offer opinions to the extent those opinions are admissible and were actually disclosed by BNSF in its *Expert Witness Disclosure*. Plaintiffs object to BNSF's untimely submission of withheld reports containing previously undisclosed opinions.

> resources of BNSF and the number of attorneys devoted to this matter, good cause does not exist to extend the deadline. The Court is mindful this is not the first case of this type the parties have prepared for trail.

Id. p. 2.

Not deterred by its willful violation of the Court's *Amended Rule 16 Scheduling Order* nor by this Court's *Order Denying BNSF's Untimely Experts,* BNSF has now served on Plaintiffs (after Plaintiffs filed the subject motion *in limine*) a cascade of additional "expert disclosures":

1. *BNSF's Supplemental Witness Disclosures* dated November 13, 2018 providing the previously withheld report of Dr. Michael Graham (regarding Tracie Barnes' pathology[2]) and Dr. Brian Slomovitz (OB-GYN who is relying on a pathology report from BNSF's expert Dr. Young dated 9 days before the initial disclosure deadline).
2. *BNSF's Rebuttal Expert Witness Disclosur*e dated November 16, 2018 providing reports of Dr. Steven Haber and Dr. Victor Roggli.[3]
3. *BNSF's Fourth Supplemental Responses to Plaintiffs Master Discovery* dated November 19, 2018 wherein BNSF first discloses the previously undisclosed

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[2] Notably this report is authored based upon the two slides BNSF admits it had all along. Again, BNSF sought an extension of time to file Dr. Graham's report based on a third slide BNSF was seeking. The Fact Dr. Graham was able to author a report on the two slides that BSNF had all along further confirms there is no excuse for BNSF's untimely disclosure of Dr. Graham's report.

[3] BNSF's expert Dr. Roggli attempts to rebut the report authored by Dr. Ron Dodson who analyzed tissue of Plaintiff Gerrie Flores. Telling of BNSF's lack of diligence in preparing rebuttal reports is the fact that on Monday, November 12, 2018, Plaintiffs' counsel received an email from BNSF's counsel seeking to confirm whether additional tissue samples regarding Plaintiff Gerrie Flores were available, presumably so BNSF could do further testing of her tissue for a rebuttal report. However, that request came 3 days after the rebuttal expert witness disclosure and 17 days after Plaintiffs disclosed that they conducted testing of that tissue (that fact was timely disclosed on October 26, 2018 in Plaintiffs' expert Dr. Ron Dodson's report).

opinions held by "non-retained experts" Mel Burda and Don Cleveland. Additionally, BNSF discloses expert testimony for the first time from Jeff Gruber, a long-time Libby history teacher, "pertaining to the history of the mine and the railroad" (presumably in anticipation that the Court will strike as untimely the allegedly forthcoming report of historian Dr. Sicilia. Not surprisingly, BNSF attempts to offer a Trojan horse, continually calling its Fourth Response to Plaintiffs' Interrogatory No. 1 a "disclosure."

4. *BNSF's Supplemental Rebuttal Expert Witness Disclosur*e dated November 26, 2018 providing reports of Dr. John Kind, Dr. Heather Avens, Dr. Robert Young, and Dr. Brian Slomovitz. As is clear from the face of those untimely "rebuttal" reports, they attempt to rebut not only Plaintiffs October 26, 2018 initial expert disclosures but also Plaintiffs' November 9, 2018 rebuttal expert disclosures, which of course defeats the fairness of simultaneous disclosures.

It is clear BNSF is attempting to insert into this case previously undisclosed expert opinions through improper and untimely avenues. The simple fact is that there was a proper avenue to disclose expert witnesses—through the Court's *Amended Rule 16 Scheduling Order*. Motions for reconsideration do not exist under Montana law. *Horton v. Horton,* 2007 MT 181, ¶ 7, 338 Mont. 236, 165 P.3d 1076. This Court should not reconsider its appropriately entered *Order Denying BNSF's Untimely Experts*.

Plaintiffs' subject motion *in limine* appropriately seeks to exclude the untimely reports of Dr. Michael Graham, Dr. David Sicilia, Dr. Brian Slomovitz, Mel Burda and Don Cleveland. Since that motion *in limine* was filed, BNSF has brazenly made additional untimely expert disclosures as outlined above. In light of that fact as well as the rationale behind the Court's *Order*

Denying BNSF's Untimely Experts, Plaintiffs respectfully request the Court's order *in limine* extend to those additional untimely expert disclosures. So that the record is clear for the trial court in this case, Plaintiffs ask that the Court take the additional step of striking the above untimely and expert opinions.

BNSF also provides three additional arguments regarding their untimely expert witness disclosures. Those will be addressed in turn.

A. BNSF's claim that Plaintiffs are not prejudiced by BNSF's untimely disclosures rings hollow.

BNSF claims Plaintiffs are not prejudiced by BNSF's untimely disclosure of experts. This Court's scheduling orders called for simultaneous disclosures of expert witnesses and simultaneous disclosures of rebuttal expert witnesses. BNSF has now had the benefit of seeing Plaintiffs rebuttal disclosures prior to BNSF issuing a single rebuttal disclosure. Not surprisingly, BNSF's untimely rebuttal disclosures rebut not only Plaintiffs' initial expert disclosures but also Plaintiffs' rebuttal expert disclosures. This obviously prejudices Plaintiffs as Plaintiffs are not afforded the same opportunity. Moreover, even if Plaintiffs were afforded the same opportunity, Plaintiffs ability to submit sur-rebuttal disclosures to BNSF's rebuttal disclosures is limited by the fact that many of Plaintiffs' experts are academics with limited availability, a fact made known to BNSF. Moreover, this case is scheduled for trial in March 2019. Time is indeed of the essence, and Plaintiffs need to focus time and energy on trial preparation, not coordination of yet a third round of expert reports.

The Montana Supreme Court "has, on a number of occasions, affirmed the authority of a district court to exclude expert testimony." *Nelson v. Nelson*, 2005 MT 263, ¶ 32, 329 Mont. 85, 93, 122 P.3d 1196, 1202 (citing *Seal v. Woodrows Pharmacy,* 1999 MT 247, 296 Mont. 197, 988

P.2d 1230 (excluding expert opinions offered in violation of the District Court's scheduling order and Rule 26(b)(4)(A)(i), M.R.Civ.P.)). BNSF is a seasoned and sophisticated corporate litigant with an established "pattern of practice that relies on misconduct to prevail in court." *See Anderson v. BNSF*, 2015 MT 240, ¶¶ 84-87, 380 Mont. 319, 354 P.3d 1248 (Wheat, J., concurring) (citing *Spotted Horse v. BNSF*, 2015 MT 148, ¶¶ 23-27, 379 Mont. 314, 350 P. 3d 52).

BNSF's experts should be limited to those opinions which have been timely disclosed. Plaintiffs respectfully request the Court enter an order *in limine* precluding additional opinions offered after the already extended expert disclosure deadline and rebuttal expert disclosure deadline.

B. BNSF misapplies Mont. R. Civ. P. 26's duty to supplement expert disclosures.

BNSF appears to argue it can file unlimited supplemental disclosures of its expert reports. Response, p. 4. As evidenced above, BNSF is simply using alleged discovery "supplements" as a mechanism to disclose opinions that were required to have been disclosed initially or in rebuttal. The duty to supplement relates to disclosure of experts in response to an interrogatory. Mont. R. Civ. P. 26(e)(2) provides:

> Expert Witness. For an expert whose opinion is produced in response to an interrogatory served under Rule 26(b)(4), the party's duty to supplement extends both to information included in the response and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time of the preparation and submission of the pretrial order to the court.

"A party must supplement or correct the expert disclosure statement when the party learns that "in some material respect" the information given in the expert's statement "is incomplete or incorrect" and the updated information has not otherwise been disclosed to the other party during the

discovery process." *Wheaton v. Bradford*, 2013 MT 121, ¶ 22, 370 Mont. 93, 300 P.3d 1162. "Information is 'incomplete or incorrect' in 'some material respect' if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation." *Id.*, ¶ 22. Here, BNSF's supplements are not because the expert's information was "incomplete or incorrect" but rather because there was no information disclosed to begin with. BNSF's attempted tactic of "supplementing" to disclose opinions for the first time is not proper.

Likewise, BNSF seems to imply (Response, p. 4) that depositions of experts can cure inadequate disclosures. There is nothing requiring Plaintiffs to take depositions of BNSF's experts to discover opinions that were not disclosed. Plaintiffs are within their rights to ask the trial court to limit BNSF's experts to the opinions timely disclosed, which is what Plaintiffs seek from this Court in an order *in limine*.

C. BNSF misapplies the non-retained expert disclosure requirements.

BNSF contends that no disclosure of non-retained experts is required. Response, p. 4. That is not supported by Montana law. The very case cited by BNSF, *Norris v. Fritz*, 2012 MT 27, 364 Mont. 63, 270 P.3d 79, refutes that contention. *Norris* holds "[a]bsent an express rule, we must review the pre-trial circumstances to determine whether sufficient notice existed of the non-retained expert's identity and any opinions to be offered by the non-retained expert to prevent unfair surprise." *Id.*, ¶ 32. "[T]he opposing party should have adequate notice of the non-retained expert's testimony in order to be admissible." *Id.*

Contrary to these disclosure requirements, here BNSF simply disclosed the non-retained expert's name and address. BNSF admits that it provided no description of their testimony during the course of discovery but rather identified them as "persons that have knowledge that is generally

relevant in all Plaintiffs' cases." Response, p. 5. Plaintiffs efforts preceding this case (i.e. taking a deposition of Mr. Burda) and outside of the context of this case (such as observing portions of the *Wetsch* trial or obtaining a transcript) cannot alleviate BNSF's duty to provide "sufficient notice" of the non-expert's opinions in this case. BNSF's failure to provide notice of any opinions for non-retained experts Don Cleveland and Mel Burda does not meet the non-retained expert disclosure requirements under Montana law.

II. Dr. David Sicilia's opinions/comments regarding employment and economic development benefits due to BNSF's vermiculite activities.

BNSF does not dispute that it disclosed that Dr. David Sicilia will testify about employment generated by BNSF's activities as well as "enormous economic benefits" to the community related thereto. For reasons explained in Section 1 of the separately filed *Motion in Limine Re: Various Evidentiary Issues* (which seeks exclusion of "Golden Rule" evidence and argument regarding economic development, employment, etc. resulting from BNSF's activities), such comments are inadmissible. Such opinions, evidence and arguments improperly appeal to the passions of the jury, present a danger of unfair prejudice, may confuse the issues, and may mislead the jury. *Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶¶ 30-31, 392 Mont. 311, 425 P.3d 669; Mont. R. Evid. Rule 403. BNSF's arguments that such evidence provides "historical context" and that BNSF is "entitled to lay out the history of what it was in Libby, and what it is doing" (Response p. 10), is no more than a veiled attempt to introduce this improper evidence and argument.

BNSF's argument on this issue hinges on Plaintiffs reference to a 1959 economic development report authored by BNSF's predecessor. However, Plaintiffs reference to that report is not for the economic benefit alleged therein but to show BNSF had knowledge that the vermiculite it was shipping contained asbestos. There is nothing improper about Plaintiffs use of

that 1959 report to establish notice of the asbestos hazard. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding statements/evidence regarding BNSF's economic benefit to the community of Libby.[4]

III. Dr. Kind's opinions derived from lack of evidence caused by BNSF's failure to conduct OSHA mandated testing.

Despite their knowledge of asbestos in the Libby Railyard dating back to at least the 1950's, BNSF failed to conduct any testing for asbestos required by OSHA and other safety standards until the EPA mandated cleanup and sampling efforts beginning in 2001. Citing to the later adopted provision in OSHA 29 CFR 1910.1001(d)(2)(i), BNSF claims it was not required to do testing because, it argues, it did not "reasonably expect" workers to be exposed to airborne concentrations at or above the acceptable limits. (Response, p. 11) However, BNSF completely ignores the initially adopted provisions in OSHA, which required:

> (f) Monitoring - (1) Initial Determinations. Within 6 months of the publication of this section, **every employer shall cause every place of employment where asbestos fibers are released to be monitored to determine whether** every employee's exposure is below the PEL.

29 C.F.R. §§ 1910.93a(f) (1972), *recodified as* 29 C.F.R. § 1910.1001 (1975) (emphasis added). This monitoring was clearly mandatory, and was not contingent on whether BNSF "reasonably expected" the mandated testing would determine exposure levels below the Permissible Exposure Limit (PEL). Moreover, BNSF was required to include both personal and environmental asbestos air sampling. *Id.*

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[4] The import of such an order is further demonstrated by BNSF's contemporary activities in Libby, including its recent "certification" of the Kootenai Business Park. "The value of the certification…is the exposure provided by BNSF Railway's marketing and business development resources, which are 'credible and knowledgeable sources for national industry looking for new rail-served locations.'' *See* Western News article of August 10, 2018, "BNSF Certifies Port Authority Business Park," attached as **Exhibit 1**.

OHSA also contains "Caution Label" requirements, requiring that labels be affixed to all raw materials and other products containing asbestos fibers. 29 C.F.R. § 1910.1001(j)(4). They also required employers to provide comprehensive medical examinations and follow up annual examinations to employees who have worked in an occupation exposed to airborne concentrations of asbestos fibers (no requirement that exposure exceed the PEL) 29 C.F.R. § 1910.93a(j)(3).[5] . Instead, BNSF actively worked to avoid and ignore OSHA. *See e.g.* **Exhibit 2** - 2/6/1975 BNSF correspondence discussing requirements of posting OSHA Act posters in BNSF facilities and declining to comply by recommending "no change be made in present BN policy," and that "we do not post the notice unless we get a lot of OSHA inspectors on the property. The thought here is that this poster may encourage more employees to write to OSHA on complaints. This has my concurrence."). BNSF's representations that BNSF contemporaneously evaluated the workplaces "throughout the system, and there would be no reason to expect" exposure to asbestos in Libby is completely without support.[6]

The import of Plaintiffs' motion is manifest through BNSF's attempt to use expert John Kind's opinion that "specified dose[s]" must be applied to Plaintiffs' exposures in order to be

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[5]BNSF's argument fails for the additional reasons explained in Section 5 of the separately filed *Motion in Limine Re: Various Evidentiary Issues*.

[6]The record is replete of any asbestos sampling or monitoring in Libby prior to the EPA mandated clean-up in 2001 and BNSF's Industrial Hygienist during the relevant periods actually testified that he never visited Libby and had no familiarity with the vermiculite operations. (*See* e.g., 1/24/2007 Deposition of Larry Liukonen, pp. 38-46 attached hereto as **Exhibit 3**). Moreover, when sampling was performed during those clean-up efforts in the Railyard and River Loading Facility more than a decade after active vermiculite mining, it still demonstrated asbestos concentrations in soil ranging up to 2-5% asbestos, and that disturbance activities in these areas generate up to 7-14 f/cc of airborne asbestos (up to 150,000 times the EPA reference concentration and among the highest, if not the highest, levels measured in any outdoor Libby clean-up operations). *See* cleanup documents cited in the Expert Report of Julie Hart, ¶¶ 42, 92.

credible. This must not be allowed: The inability to calculate the very "dose" and a "quantitative exposure assessment" that Kind advances has been undermined by BNSF's failure to conduct any contemporaneous testing, as was clearly required by OSHA. Accordingly, Plaintiffs respectfully request the Court enter an order *in limine* precluding BNSF from benefitting from its failure to perform the mandated asbestos testing and preclude statements, evidence, and opinions, such as those proposed to be offered by Dr. Kind.

IV. Dr. Kind's opinions about BNSF's knowledge of vermiculite.

BNSF does not dispute that its expert Dr. Kind intends to opine that, "BNSF would not have reason to suspect that transport of vermiculite concentrate by rail would have had the potential to result in community exposures to asbestos." The purpose of the subject motion *in limine* is to preclude that testimony because it is the presentation of false testimony, as confirmed by Dr. Kind's previously authored September 16, 2016, report. That report noted "placards placed on the vermiculite concentrate railcars by the W.R. Grace loading personnel, which state 'Vermiculite concentrate may contain up to 1.0% Asbestiform Tremolite.'" BNSF's Response, Exhibit E.

The sole basis BNSF cites to refute its notice of asbestos in the vermiculite is Dr. Kind's reference in that same September 16, 2016, report to an interview of BNSF's managing agent in Libby, Defendant John Swing, wherein Mr. Swing stated he was never told by W.R. Grace about the presence of asbestos in the vermiculite. Aside from being self-serving, it is refuted by the fact that John Swing, has testified that as part of his job duties he would tour Grace's facilities, including the mine, and when asked if he saw the asbestos warning signs during his tours he testified that "I probably did, but I don't remember." (Sullivan 2nd Aff., Ex. 81-Excerpts of John Swing's 9/13/16 deposition, for convenience attached hereto as **Exhibit 4**). Similarly, BNSF Conductor Bruce Carrier testified that when he first saw a placard on the Grace vermiculite cars warning that the vermiculite

loaded cars *contained asbestos*, he removed the placard and brought it to a meeting attended by John Swing to address his safety concerns. (Depo. Bruce Carrier 29:9-30:17 (June 28, 2016.), attached hereto as **Exhibit 5**). John Swing does not deny this meeting occurred to discuss the concerns raised by asbestos warning placard, and concedes that Bruce Carrier would not make it up. **Exhibit 4** (Depo. John Swing 103:4-104:21 (Sept. 13, 2016)).

BNSF's continued misrepresentation that their railcars carrying the vermiculite were not posted with asbestos warnings is inexplicable given the overwhelming evidence to the contrary including, among other things, W.R. Grace's federal filings with the EPA, first hand sworn testimony of both railroad employees (e.g. Bruce Carrier) and W.R. Grace workers whose job it was to attach the warnings to railcars (*see e.g.* several deposition cites of W.R. Grace workers attached as **Exhibit 6**), correspondence between W.R. Grace and customers complaining about receiving railcars of vermiculite concentrate placarded with the warnings, and W.R. Grace memoranda documenting the fact. There is no reasonable dispute regarding the asbestos warnings placed on BNSF's vermiculite railcars. Moreover, this is far from the only source of notice BNSF received of the asbestos in the vermiculite concentrate it was hauling into and out of Libby.[7] As one example, former BNSF Director of Industrial Hygiene James Shea confirmed under oath that the "Bulletin 12" geology report funded by BNSF communicated to the railroad that 1) "current milling technologies were unable to separate

[7]As noted in the Expert Report of Dr. Julie Hart, ¶¶ 62-72, among other notice, BNSF received MSDS for the vermiculite concentrate noting its asbestos content and propensity to produce airborne asbestos fibers, funded several studies of the geologic and economic potential of the vermiculite mine evidencing the asbestos contamination, and BNSF's Geology Department, and its Mineral Research and Development Department separately visited the mine to sample the mineral deposit.

the asbestos from the vermiculite," and 2) that the railroad was aware there was "amphibole material in the vermiculite product." (Sullivan 2nd Aff., Ex. 78 - 1/26/2007 Deposition of James Shea, pp. 99-100; Sullivan 2nd Aff., Ex. 71 - Hart Report at ¶69.).

In sum, BNSF should not be allowed to use Dr. Kind to argue BNSF had no reason to be aware of hazards associated with the vermiculite and that there were no warnings that the vermiculite might contain asbestos. That testimony is false, presents a danger of unfair prejudice, confuses the issues, and will mislead the jury. Mont. R. Evid. Rules 402, 403. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

V. Dr. Haber's "opinions" regarding Tracie Barnes.

BNSF does not dispute that its expert Dr. Steven Haber's opinions 1 and 2 are vague. Those opinions are:

> **Opinion:** With regard to Mr. Barnes, I make the following findings and opinions:
> 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.

Opinions based on conjecture are not admissible. *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 41, 365 Mont. 405, 282 P.3d 687 ("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.'").

BNSF contends that Plaintiffs can depose Dr. Haber "to determine the full basis for his opinions." However, Mont. R. Civ. P. 26 requires that BNSF disclose the "substance of the . . . opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[8] This disclosure requirement is not alleviated by the fact Plaintiffs are permitted to take a deposition under Mont. R. Civ. P. 26, nor does it shift a burden to Plaintiffs to actually take that deposition. Plaintiffs respectfully request the Court enter an order *in limine* precluding Dr. Haber's conjecture.

VI. Tracey Coenen's "opinions" regarding CARD funding.

BNSF does not dispute that the sole subject of BNSF's expert Tracy Coenen's anticipated testimony is funds flowing between CARD and irrelevant entities. Should the Court grant Plaintiffs' separate *Motion in Limine Re: CARD's Finances and Relationships with Attorneys,* Ms. Coenen's testimony would thereby be rendered inadmissible and the issue of the subject motion *in limine* need not be resolved.

If the Court reaches this motion *in limine*, then Plaintiffs do not dispute Ms. Coenen has qualifications to offer expert opinions in other cases. Rather, Plaintiffs contend no expert opinion is needed in this case for the matters upon which Ms. Coenen has been disclosed. She simply summarized amounts contained in financial documents. Pursuant to Mont. R. Evid. 702, there is no need to assist the trier of fact in understanding that summary. As such, Plaintiffs respectfully request the Court enter an order *in limine* precluding Ms. Coenen's testimony.

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[8] This disclosure was mandated by the Court's Amended Scheduling Order of 8/29/18 at ¶ 2.

VII. BNSF experts offering legal conclusions or legal standards.

BNSF does not dispute it has disclosed Dr. John Kind to offer opinions on the applicable causation standard, which Dr. Kind claims requires that both specific and general causation be proven. Dr. Kind is mistaken regarding the legal causation required here. Where there are allegations that the acts of more than one person combined to produce a single harm, each of the multiple acts or omissions is a cause of the harm if it was a substantial factor in bringing about the harm. *See Busta v. Columbus Hospital Corporation* (1996), 276 Mont. 342, 371, 916 P.2d 122, 139–40. Dr. Kind's proposed testimony impermissibly instructs the jury on the applicable legal standard, is inconsistent with Montana's legal causation standard, and is likely to confuse the jury. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

VIII. Disparaging comments by expert witnesses regarding opposing expert witnesses.

From experience in prior litigation with BNSF, BNSF and their experts have made disparaging comments regarding Plaintiffs' experts or other witnesses, including commenting on the truth or accuracy of the other expert's report, the other expert's qualifications, etc. BNSF does not dispute Montana law precludes BNSF's experts from attacking an expert's credibility. Response, p. 22. Thus, Plaintiffs respectfully request the Court enter an order *in limine* precluding such statements.

IX. BNSF's "Cross Motion" Should be Denied.

Finally, BNSF's response to the subject motion *in limine* contains a "cross motion" seeking to strike *Plaintiffs Rebuttal Expert Disclosures.* (Response, p. 8) In short, BNSF claims that if the Court does not vacate its *Order Denying BNSF's Untimely Experts*, the Court should

preclude *Plaintiffs' Rebuttal Expert Disclosures* because BNSF was not technically served with *Plaintiffs' Rebuttal Expert Disclosures*.

This Court's *Amended Rule 16 Scheduling Order* dated August 29, 2018 requires that expert disclosures "must be furnished to all opposing parties and filed with the Court." *Plaintiffs Initial Expert Disclosures* were timely filed with the Court and served on BNSF through the Court's electronic service system. *BNSF's Initial Expert Disclosures* were not filed with the Court. Instead BNSF filed a *Notice of Service* with the Court. In any event, Plaintiffs did not seek to strike BNSF's Initial Expert Disclosures on the basis of that technical failure to file.

At issue here, *Plaintiffs Rebuttal Expert Disclosures* were timely filed with the Court and as such were publicly available. BNSF downloaded copies of those disclosures. That is evident from the opposition BNSF filed on November 16, 2018 to Plaintiffs' *Motion in Limine re: CARD Clinic.* BNSF attached as exhibits to that opposition Plaintiffs' rebuttal disclosures, which on their face clearly show they were downloaded from the electronic docket for this case. *See* **Exhibit 7** – *BNSF's Response to Plaintiffs' Motion in Limine re: CARD Clinic*, Exhibits 19-21 (Plaintiffs rebuttal expert reports from Dr. Michael, Dr. Marshall, and Dr. Colella).

Instead, BNSF raises a technicality, it claims it was not served.[9] Again, *Plaintiffs Rebuttal Expert Disclosures* were publicly available and were in fact downloaded by BNSF. Nevertheless, Plaintiffs learned through BNSF's response to the subject motion *in limine* that

[9] There have been multiple instances where a party has not technically been served in this case, yet that party has not used that lack of service to void the timely filing. Thus, Plaintiffs responded to discovery requests that BNSF did not serve on Plaintiffs. The State attended depositions of which BSNF did not serve them notice.

BNSF was not served with that disclosure through the Court's electronic service system due to an unintentional clerical error on Plaintiffs' part—in the electronic filing process we did not check the box for service on BNSF. Immediately upon learning that error Plaintiffs emailed copies of *Plaintiffs Rebuttal Expert Disclosures* to BNSF (which it already had).

In sum, Plaintiffs filed *Plaintiffs Rebuttal Expert Disclosures* with the Court as required and they were publicly available. Although BSNF was not technically served with a copy at that time due to an unintentional clerical error, BNSF had copies of those *Plaintiffs Rebuttal Expert Disclosures*. That is a stark contrast to BNSF conscious choice not to timely file initial expert reports and to fail to file a single rebuttal opinion. BNSF's "cross motion" should be denied. This Court's *Order Denying BNSF's Untimely Experts* was appropriately entered.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court enter an order *in limine* as provided herein.

Respectfully submitted this 30th day of November, 2018.

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: /s/ Jinnifer J. Mariman
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Dated: 11-30-2018