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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' MOTION *IN LIMINE* NO. 6: BRIEF IN SUPPORT OF MOTION RE: ADMISSION INTO EVIDENCE OF THE PARTIES' EXPERT REPORTS**

Plaintiffs Rikki Held, *et al.*, by counsel, and pursuant to the Court's Modified Scheduling Order (Doc. 145), entered June 15, 2022, respectfully submit the following brief in support of their motion *in limine* requesting the Court to declare that the Parties' Expert Reports shall not be excluded from evidence pursuant to the rule against hearsay and, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence. The Expert Reports are set forth in Plaintiffs' Expert Disclosures (Doc. 222, dated September 30, 2022); Defendants' Expert Witness Disclosure (Doc. 227, dated October 31, 2022), as amended by Defendants' Supplemental Expert Witness Disclosure (Doc. 236, dated November 22, 2022) and Defendants' Second Supplemental Expert Witness Disclosure (Doc. 248, dated January 3, 2023); Defendants' Rebuttal Expert Disclosure (Doc. 242, dated December 2, 2022); and Plaintiffs' Rebuttal Expert Disclosures (Doc. 240, dated November 30, 2022) (collectively, the "Parties' Expert Reports" or "Expert Reports").

Plaintiffs' motion *in limine* seeks to raise and resolve this important issue in advance of the submittal of exhibit lists and to facilitate the parties' preparation for trial. Before ruling that all Expert Reports will be admitted, however, the Court should consider whether the parties object to admitting the opposing side's Expert Reports on any grounds other than that the Expert Reports contain hearsay. Notably, Plaintiffs have moved separately to exclude specified portions of Defendants' Expert Reports. The Court should direct counsel for the parties to meet and confer and file a joint status report indicating whether they stipulate to admission of all of the Parties' Expert Reports in evidence and, if they do not, explaining their reasons for objecting to this approach. Thus, Plaintiffs seek an order that the Parties' Expert Reports, conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence and all hearsay objections to those Expert Reports will be deemed denied.

I. APPLICABLE STANDARDS

A motion *in limine* is a "request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy." *Hunt v. K-Mart Corp.*, 1999 MT 125, ¶ 11, 294 Mont. 444, 981 P.2d 275; *see also Speaks v. Mazda Motor Corp.*, 118 F. Supp. 3d 1212, 1217 (D. Mont. 2015) (a motion *in limine* is a "procedural device[] to obtain an early and preliminary ruling on the admissibility of evidence."). The district court's authority to grant or deny a motion *in limine* "rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *City of Helena v. Lewis*, 260 Mont. 421, 425-26, 860 P.2d 698, 700 (1993) (quoting *Feller v. Fox*, 237 Mont. 150, 153, 772 P.2d 842, 844 (1989) (overruled on other grounds by *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162 P.3d 134)). "[T]he authority to grant or deny a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Daley v. Burlington N. Santa Fe Ry.*, 2018 MT 197, ¶ 7, 392 Mont. 311, 425 P.3d 669 (quoting *State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391) (alteration in original).

The "rules [that] govern the procedure in all civil actions . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." M. R. Civ. P. 1. The "spirit" of the civil rules requires "liberal disclosure" of witnesses. *Superior Enters., LLC v. Mont. Power Co.*, 2002 MT 139, ¶ 18, 310 Mont. 198, 49 P.3d 565. The underlying purposes of M. R. Civ. P. 26 are to eliminate surprise and to promote effective cross-examination of experts. *Henricksen v. State*, 2004 MT 20, ¶ 57, 319 Mont. 307, 84 P.3d 38. A court should examine the adequacy of discovery, such as an expert disclosure in light of those underlying purposes. *Hawkins v. Harney*, 2003 MT 58, ¶ 24, 314 Mont. 384, 66 P.3d 305.

M. R. Civ. P. 26(b)(4) governs expert disclosures. These disclosure requirements eliminate surprise and promote effective cross-examination of expert witnesses. *Henricksen*, ¶ 57; *Smith v. Butte–Silver Bow Cnty.*, 276 Mont. 329, 333, 916 P.2d 91, 93 (1996). Disclosure provides a party sufficient information and time to plan effectively for cross-examination and to obtain an expert to refute the adversarial expert's testimony. *Superior Enters. LLC*, ¶ 18.

II. BACKGROUND ON THE PARTIES' EXPERT DISCLOSURES

In accordance with this Court's Modified Scheduling Order, the parties served and filed the Parties' Expert Reports as follows: Plaintiffs' Expert Disclosures (Doc. 222, dated September 30, 2022); Defendants' Expert Witness Disclosure (Doc. 227, dated October 31, 2022), as amended by Defendants' Supplemental Expert Witness Disclosure (Doc. 236, dated November 22, 2022) and Defendants' Second Supplemental Expert Witness Disclosure (Doc. 248, dated January 3, 2023); Defendants' Rebuttal Expert Disclosure (Doc. 242, dated December 2, 2022); and Plaintiffs' Rebuttal Expert Disclosures (Doc. 240, dated November 30, 2022).[1]

In addition, both sides have already indicated through their proposed exhibit lists that they wish to offer their expert materials in evidence. *See* Defendants' Amended Exhibit List (Doc. 257, dated January 11, 2023). Each expert was deposed as to that expert's initial expert report and rebuttal expert report. Trial in this matter is set for June 12-23, 2023, with each side estimated to have thirty hours to present its case and defense. *See* Plaintiffs' Motion *in Limine* No. 1: Brief in Support of Motion Re: Management of Trial Time, filed herewith.

III. ARGUMENT

The Court should declare the Parties' Expert Reports will not be excluded from evidence as hearsay for several reasons, set forth below. These reasons are especially relevant here, where

[1] Expert reports were not prepared or served for any of the hybrid experts disclosed by Defendants.

there will be a bench trial, and the Court can allow the Expert Reports into evidence subject to ruling on objections made by counsel for the parties.

A. Admission of the Expert Reports Will Educate the Court.

First, the purposes of admitting the Expert Reports into evidence are to streamline the presentation of evidence and to educate the Court about who an expert is and what the expert will discuss on the stand. Given the limited time available to both parties to present testimony, an expert's report will comprise most of the expert's direct testimony. In addition, admitting the Parties' Expert Reports in advance of trial will assist the Court in preparing for the trial. Finally, the residual exception to the rule against hearsay permits the Court wide discretion to admit the Parties' Expert Reports.[2] This exception applies because the statements and opinions contained within the Parties' Expert Reports are corroborated by sufficient guarantees of trustworthiness and are more probative on the points for which they are offered than any other evidence.

The proposed witness testimony for this bench trial falls into three categories: (1) expert witness testimony; (2) fact witness testimony; and (3) opinion testimony by "hybrid" witnesses. Given the witness lists exchanged during discovery, the bulk of the testimony will be provided by expert witnesses. Plaintiffs understand expert reports often contain inadmissible hearsay. While Rule 703 of the Montana Rules of Evidence authorizes experts to present opinions based on inadmissible facts or data, the inadmissible information contained in expert reports is not automatically admissible by extension. M.R. Evid. 703 provides:

> Basis of opinion testimony by experts: The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular

[2] M.R. Evid. 803. Hearsay exceptions: availability of declarant immaterial. "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

> field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

M.R. Evid. 703.

Under the Federal Rules of Evidence, a court may decide to admit the materials upon which an expert relies "to assist the factfinder in assessing the basis of the expert's testimony." Stephen A. Saltzburg et al., 1 Federal Rules of Evidence Manual § 703.02[4] (12th ed. 2021); *see Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) ("Rule 703 [] permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion." (quoting *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984))); *see also Matter of C.K.*, 2017 MT 69, ¶ 18, 387 Mont. 127, 391 P.3d 735 ("Rule 703 thus contemplates that a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming the expert's opinion and the information is of a type reasonably relied upon by experts in the field of expertise.") (citing *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶¶ 38-39, 362 Mont. 53, 261 P.3d 984).

Where, as here, the Court sits as the finder of fact, the typical concerns contemplated by rules of inadmissibility are diminished because "it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose." *Williams v. Illinois*, 567 U.S. 50, 69 (2012) (plurality opinion); *see Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam) ("In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."); *U.S. v. Duran-Colon*, 252 F. App'x. 420, 423 (2d Cir. 2007) ("In the context of a bench trial such as that conducted in this case, however, the factfinder knows the purpose for which evidence is admitted and is presumed to rest his verdict on the proper inferences to be drawn from such

evidence."). Courts therefore sometimes admit expert reports in evidence in bench trials, even if the admissibility of such reports "might be a closer question in the context of a jury trial," because where there is no jury, "there is no risk of tainting the trial by exposing a jury to unreliable evidence." *DL v. D.C.*, 109 F. Supp. 3d 12, 32 (D.D.C. 2015) (quotation marks omitted); *see Floyd v. City of N.Y.*, No. 08 Civ. 1034, 2013 WL 1955683, at *2 (S.D.N.Y May 13, 2013) (admitting expert report in evidence in a bench trial and explaining that the court "would not be swayed in the same way a jury might be, in the event it viewed evidence that was ultimately inadmissible"); *U.S. v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997) ("We traditionally assume that judges, unlike juries, are not prejudiced by impermissible factors.").

Finally, no party can credibly claim prejudice from the admission of the Parties' Expert Reports into evidence because there is no threat that the Court, sitting as a fact finder, will give such materials undue weight. When the Court sits as the finder of fact, it does not need to fulfill its traditional gatekeeper function to restrict the admissibility of expert materials because "there is no possibility of prejudice, and no need to protect the factfinder from being overawed by expert analysis." *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 502 (S.D.N.Y. 2013) (internal quotations and citations omitted). The Court "can discern testimony that seeks to make legal conclusions from testimony that provides the Court with background, context and industry knowledge that are traditionally supplied by experts." *Jones Superyacht Miami, Inc. v. M/Y Waku*, 451 F. Supp. 3d 1335, 1346 (S.D. Fla. 2020) (internal citations omitted). Thus, "there is no need for the Court to deny the admissibility of an expert report where the Court is acting as fact-finder." *Id.* at 1345. Stated differently, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

B. Admission of the Expert Reports Will Aid in Assessing Weight.

Another reason why the Court should admit all of the Parties' Expert Reports into evidence for this trial is doing so will aid the Court in assessing the weight of expert testimony on technical and complex issues.

In this case, the Court should make its own decisions with respect to the weight and reliability of the evidence contained within the Expert Reports. There is no threat that a jury will give undue weight to these materials. Accordingly, no party can demonstrate any undue prejudice, and the Court should exercise its discretion to declare that rule against hearsay is no bar to the admission of the Parties' Expert Reports into evidence.

C. Admission of the Expert Reports Meet the Residual Hearsay Exception.

Also, expert reports meet the residual hearsay exception under Montana Rule of Evidence 803 and Federal Rule of Evidence 807. *See Matter of C.K.*, ¶ 20 ("Therefore, Rule 703 is, in effect, an implicit exception to the hearsay rule."); *id.*, n. 3 ("As an alternative to an implied standalone exception, this Rule 703 construction could also be viewed as a residual exception under Rules 803(24) and 804(b)(5) where the requisite circumstantial guarantee of trustworthiness is Rule 703's foundational reliability requirement, *i.e.*, that the information is of a type relied upon by experts in the field."); *Televisa, S.A. de C.V. v. Univision Commc'ns, Inc.*, 635 F. Supp. 2d 1106, 1110 (C.D. Cal. 2009); *see Bianco v. Globus Med., Inc.*, 30 F. Supp. 3d 565, 570 (E.D. Tex. 2014) (admitting expert reports on the basis that expert incorporated by reference his expert reports in his declaration at summary judgment); *see also Muhammad v. Crews*, No. 4:14-CV-379-MW/GRJ, 2016 WL 3360501 at *9-10 (N.D. Fla. June 15, 2016) (finding sworn expert reports prepared for other lawsuit "with issues similar to this one" as admissible under the residual hearsay exemption of Fed. R. Evid. 807). Here, the Parties' Expert Reports satisfy the residual exception,

where the relevant question is whether the statement "demonstrate[s] a level of trustworthiness at least equivalent to that of evidence admitted under traditional hearsay exceptions." *Robinson v. Shapiro*, 646 F.2d 734, 743 (2d Cir. 1981). This standard is met in this case.

First, the authors of the expert reports in this matter are specialists that the parties each retained to analyze and draw inferences and conclusions from complicated subject material and complex data. Their motivations in drafting their respective reports are the same that their motivations will be in live testimony at trial: to explain these complex issues and data to the Court in a comprehensible manner.

Second, there is substantial foundational evidence that the expert reports were drafted in a careful and trustworthy manner. The experts signed their respective reports. Each expert was questioned under oath during their deposition about the content of their expert report. The experts will also be available at trial to authenticate their respective reports. These affirmations assure that the reports are trustworthy representations of the experts' respective opinions. *See Bianco*, 30 F. Supp. 3d at 570; *Muhammad*, at *10 (finding that sworn expert reports prepared for the United States Department of Justice "in a lawsuit with issues similar to this one" had "clearly met the first two prongs" of Fed. R. Evid. 807(a)).

Third, prior to the admission of any expert reports into evidence at trial, the parties will have an opportunity to object to the qualifications of each to provide expert testimony.[3] Montana

[3] Motions *in limine* have been filed herewith challenging the qualifications of two experts to provide expert testimony on some subjects. *See* Plaintiffs' Motion *in Limine* No. 4 for an order *in limine* to limit the scope of Dr. Debra Sheppard's expert testimony at trial on the grounds that Dr. Sheppard lacks any knowledge, skill, experience, training, or education related to how climate change can harm the mental health of child; and Plaintiffs' Motion *in Limine* No. 5 for an order *in limine* to exclude and/or limit the scope of Dr. Judith Curry's expert testimony at trial on the grounds that Dr. Curry lacks the necessary knowledge, skill, experience, training, or education to proffer expert testimony on a number of topics she covers in her Expert Report.

has not adopted the rigorous gatekeeper standards under the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993). In circumstances where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," M.R. Evid. 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education," to offer testimony "thereto in the form of an opinion or otherwise." M.R. Evid. 702. Nevertheless, this Court will make a threshold determination as to whether "the subject matter requires expert testimony," and "the witness qualifies as an expert in the particular area on which the witness intends to testify." *State v. Harris*, 2008 MT 213, ¶ 8, 344 Mont. 208, 186 P.3d 1263. In essence, this Court will gauge whether the expert is sufficiently qualified to give a reasonably trustworthy opinion in the form of a written report. *See McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶¶ 19-22, 380 Mont. 204, 354 P.3d 604.

Fourth, to the extent that the parties' experts have, over the course of this litigation, recognized any errors or other issues with their respective reports, they have provided supplemental or revised reports. *See, e.g.*, Defendants' Expert Disclosure (Doc. 227, dated October 31, 2022), as amended by Defendants' Supplemental Expert Witness Disclosure (Doc. 236, dated November 22, 2022) and Defendants' Second Supplemental Expert Witness Disclosure (Doc. 248, dated January 3, 2023). This iterative process ensures that the final set of Parties' Expert Reports is the most accurate and thoroughly considered expression of each expert's opinions and analysis.

Fifth, *the experts will be available for examination irrespective of the admission of their reports into evidence.* As such, the parties will each have an opportunity to cross-examine one another's experts concerning any matters contained within the reports. This process ensures any

potential defects in the trustworthiness or reliability of the Expert Reports are brought to the Court's attention.

D. Admission of the Expert Reports Will Streamline Presentation of Evidence.

The admission of the reports will streamline—not confuse—the issues to be litigated at trial and will expedite trial. There is no doubt the parties could offer most of the substantive material in the Parties' Expert Reports into evidence through direct testimony by the experts. The question is whether this effort at trial would be reasonable. Plaintiffs submit that taking the additional time at trial to set out all of the foundational, methodological, and bibliographic matters that are central to the experts' various analyses—and recreate the contents of the Parties' Expert Reports through direct examination—is unnecessary when the same effect may be achieved by simply admitting the reports into evidence. On this basis, it is simply unreasonable to use the rule against hearsay as a cudgel to prevent the admission of these materials when there is no serious doubt concerning their admissibility through other means.

IV. CONCLUSION

For the foregoing reasons Plaintiffs respectfully request this Court declare the Parties' Expert Reports shall not be excluded from evidence pursuant to the rule against hearsay and, conditioned on resolution of any other evidentiary objections at trial, may be admitted into evidence. Before ruling that all Expert Reports will be admitted, however, the Court should consider whether the parties object to admitting the opposing side's expert reports on any grounds other than that the Expert Reports contain hearsay. The Court should direct counsel for the parties to meet and confer and file a joint status report indicating whether they stipulate to admission of all of the Parties' Expert Reports in evidence and, if they do not, explaining their reasons for objecting to this approach. Thus, Plaintiffs seek an order that the Parties' Expert Reports,

conditional upon the resolution of any other evidentiary objections at trial, may be admitted into evidence and all hearsay objections to those Expert Reports will be deemed denied.

DATED this 1st day of February, 2023.

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