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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, vs. STATE OF MONTANA, et al., Defendants.	Cause No.: CDV-2020-307 **STATE OF MONTANA'S BRIEF IN SUPPORT OF COMBINED MOTIONS *IN LIMINE* NO. 3-7**

Defendant State of Montana submits this Brief in Support of its Combined Motions *in Limine* Nos. 3-7:

Under Montana law, "'[t]he purpose of a motion *in limine* is to prevent the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial.'" *State v. Krause*, 2002 MT 63, ¶ 32, 309 Mont. 174, 44 P.3d 493 (quoting *Hulse v. State, Dept. of Justice*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75). The district court has "'inherent power . . . to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties.'"

Krause, ¶ 32 (quoting *Hulse*, ¶ 15). Motions *in limine* are particularly appropriate in a jury trial, which Defendants recognize is not the case here. However, pretrial motions *in limine* also promote judicial efficiency and economy. *Brothers v. Town of Va. City*, 171 Mont. 352, 357, 558 P.2d 464, 467 (1976) (overruled on other grounds in *Giambra v. Kelsey*, 2007 MT 158, ¶ 27, 338 Mont. 19, 162 P.3d 134).

To avoid any dispute on these matters at trial, which is to the benefit of both the parties and the Court, the State of Montana respectfully requests the Court grant its Combined Motions *in Limine*.

Motion *in Limine* No. 3 – For an order precluding any evidence, allegations, or testimony relating to claims or legal theories Plaintiffs have not pled in the Complaint. In accordance with Montana law, Plaintiffs and their witnesses should be limited at trial to the allegations set forth in the Complaint, and should be precluded from introducing evidence, allegations, or testimony not directly related to the allegations and claims for relief that Plaintiffs explicitly pled in the Complaint and that remain in dispute at the time of trial.

The "plaintiff carries the burden to plead adequately a cause of action." *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247 (internal citation omitted). Montana law requires that a plaintiff's complaint "provide a defendant with notice and an opportunity to defend itself." *Larson v. Green Tree Fin. Corp.*, 1999 MT 157, ¶ 35, 295 Mont. 110, 983 P.2d 357 (internal citation omitted).

Motion *in Limine* No. 4 – For an order precluding any witness not qualified or properly designated as an expert from offering opinions that should be based on a reasonable degree of scientific certainty. The Court should not permit any party to solicit expert opinions from witnesses who are not qualified as experts to give testimony on a given topic, or whose opinions

have not been previously disclosed in accordance with the Court's Scheduling Order or in response to discovery requests. Further, under Montana Rule of Civil Procedure 26(b)(4)(A)(i), a party is required to disclose any expert opinion testimony, including the grounds for any opinions. Plaintiffs should not be permitted to offer testimony from any witness who was not disclosed as an expert and whose opinions were not set forth in an expert disclosure.

The topics that will be discussed at trial, such as the extraction, transportation and combustion of fossil fuels, greenhouse gases and climate change, are highly technical matters. The expert witnesses who have opined on these matters in their reports and in depositions state their opinions as based on "a reasonable degree of scientific certainty." Persons not qualified to make such judgments should not attempt to do so at trial.

Accordingly, the Court should direct counsel to not attempt to solicit expert opinions from unqualified witnesses or even witnesses designated as experts but who do not adhere to the standard of scientific certainty. Such testimony from either lay witnesses or unqualified and/or undisclosed experts is more prejudicial than probative and should be excluded under Montana Rule of Evidence 403.

Motion *in Limine* No. 5 – For an order specifying that witnesses within the subpoena power of the Court should be called live to testify at trial absent the showing of unavailability.

Montana Rule of Civil Procedure 45 defines the Court's subpoena power over non-parties and parties. A subpoena may command a person's attendance at a deposition, hearing, or trial. Mont. R. Civ. P. 45. For individuals who are not parties to the action, subsection (d) of Rule 45 provides that subpoenas may require a person, who is neither a party, nor a party's officer, to attend a trial if the non-party is not required "to travel more than 100 miles from where the person resides, is employed, or regularly transacts business in person," except that the person

may be commanded to attend a trial by traveling from any such place within the state where the trial is held if the person is not required to incur "substantial expense" to travel more than 100 miles to attend trial." Mont. R. Civ. P. 45(d)(3)(A)(ii); Mont. R. Civ. P. 45(d)(3)(B)(iii).

The statements of witnesses made outside of court, and not while the witness is testifying under oath at a trial or hearing, are inadmissible hearsay statements when used to prove the truth of the matters asserted in the statements. Specifically, "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mont. R. Evid. 801(c). Hearsay is "not admissible" except as provided by statute, the Montana Rules of Evidence, or "other rules applicable in the courts of this state." Mont. R. Evid. 802. Montana Rule of Evidence 804 controls situations where the declarant of a statement is "unavailable" and a hearsay statement will be admitted as an exception to the general rule excluding hearsay statements. Under Rule 804, "unavailability" of a witness "includes situations in which the declarant . . . (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." Mont. R. Evid. 804(a)(5).

Out-of-court statements of witnesses are inadmissible hearsay unless they fall under an exception to the hearsay rule. Accordingly, non-party witnesses within the subpoena power of the Court should be called to testify live at trial unless the proponent of the testimony can justify the admission of the testimony as a substitute for the witness's live presence at trial through a showing of unavailability or another exception to the rule against hearsay.

Motion *in Limine* No. 6 – For an order requiring lay or fact witnesses who have not testified and been excused to remain outside the courtroom during trial. Fact witnesses who may

be called by either party should be excluded from the courtroom pending their testimony. Rule 615 of the Montana Rules of Evidence provides:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
> (1) a party who is a natural person;
> (2) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
> (3) a person whose presence a party shows to be essential to presenting the party's claim or defense.

Mont. R. Evid. 615.

In addition, witnesses who have testified but are subject to recall by any party should continue to be excluded. For this reason, it is respectfully requested that witnesses not be allowed to remain in the courtroom following their testimony unless released by the Court based upon stipulation of the parties that the witnesses will not be recalled.

Motion *in Limine* No. 7 – For an order requiring advance notice of at least one full trial day that a witness is unavailable, and requiring that during a party's case in chief, it must notify the other parties at the end of a trial day of the witnesses it intends to call the next day. An order granting this motion would contribute to the orderly presentation of evidence, ensure effective preparation of testimony and cross-examination, and lessen the chances of surprise. These measures are soundly within the power of the Court, which possesses broad discretion to oversee the administration of trial. *State v. Grant*, 2011 MT 81, ¶ 11, 360 Mont. 127, 252 P.3d 193. An abuse of discretion occurs only when the trial court acts "arbitrarily without employment of conscientious judgment or exceeds the bounds of [reason] resulting in substantial injustice." *Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶ 32, 335 Mont. 94, 149 P.3d 565.

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By */s/ Mark L. Stermitz*

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2023, a copy of the foregoing document was served on the following persons by the following means:

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