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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 COMBINED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS *IN LIMINE* NOS. 2-6 AND COMMENT ON NO. 7**

Defendant State of Montana (joined by all other Defendants) respectfully submits this combined brief in opposition to Plaintiffs' Motions in Limine Nos. 2-6 (Docs. 261, 263, 265, 267, 269). This brief also contains a comment on Plaintiffs' Motion in Limine No. 7 (Doc. 271), regarding authenticity and foundation of Plaintiffs' documents.

PLAINTIFFS' MOTION IN LIMINE NO. 2:
PERMITTING WITNESSES TO TESTIFY REMOTELY

Plaintiffs seek an order permitting witnesses to testify remotely "in conformance with the rules utilized by this Court during the COVID-19 pandemic..." Doc. 261, p. 2. Plaintiffs

specifically reference their rebuttal expert Dr. Trenberth, for whom Defendants do not oppose remote testimony. Dr. Trenberth lives in New Zealand, and he also has serious medical issues. Remote testimony makes perfect sense in such circumstances.

On the other hand, remote testimony is not appropriate for any witness who can physically attend the trial and who is within the Court's subpoena power. Defendants' Motion in Limine No. 5 addresses this same topic; it requests an order that witnesses who are within the Court's subpoena power must testify in person. Insofar as Plaintiffs "are prepared to broaden the scope of the order to the extent other witnesses experience similar medical emergencies (Doc. 262, p. 3), Defendants reserve their position as dependent on individual circumstances.

For any witness who is found within the Court's power to compel attendance, however, there is no blanket justification for testimony by remote means. Especially in the wake of the tight COVID restrictions, and the practical and technical complications they caused, live testimony offers the benefits of convenience, effective presentation of exhibits, efficient and meaningful direct and cross examination, and better ability for the Court to evaluate a witness's credibility. Prior to COVID, these were things that the parties and courts took for granted as the normal functions of a trial, and live witnesses were neither a luxury nor an undue burden.

Additionally, Plaintiffs made the choice to file this lawsuit and have identified many witnesses and experts who may testify. That is their prerogative, but they should be held to the normal procedures for doing so.

PLAINTIFFS' MOTION IN LIMINE NO. 3:
LIMITING EXPERT TESTIMONY BY HYBRID EXPERTS AND 30(B)(6) WITNESSES

Hybrid Witnesses

Plaintiffs seek an order *in limine* that, in part, would prevent two witnesses from testifying to matters that were not addressed in their depositions taken by Plaintiffs. Doc. 263, p.

2. Plaintiffs allege that Defendants did not sufficiently prepare its Hybrid Experts for their depositions. Doc. 264, p. 10. Plaintiffs also imply that Defendants did not provide adequate notice of the substance of testimony by the two hybrid witnesses, Sonja Nowakowski and David Klemp (DEQ Air, Energy, and Mining Division Administrator, and former DEQ Air Quality Bureau Chief, respectively). *Id.* at p. 4 ("This Court should review the pre-trial disclosures and the deposition testimony to determine whether they provided sufficient notice . . ."). Plaintiffs suggest that limiting their testimony to opinions expressed in their depositions would eliminate surprise and promote effective cross-examination. *Id.*

Defendants disclosed Nowakowski and Klemp as "hybrid" experts and disclosed the scope of their expertise and potential testimony as follows:

> Sonja Nowakowski, Division Administrator Air Energy and Mining for the Montana DEQ, will testify regarding topics raised in Plaintiffs' Complaint at ¶¶ 87–90, 92–93, 118(g)–(m), 192, 194. Ms. Nowakowski's professional CV is attached as Exhibit E, and she may testify to any of the experiences or opine on the subjects
> contained therein. As a result of her positions at DEQ and formerly at the Legislature, her education, and her professional experience, Ms. Nowakowski may have factual knowledge and expertise in a number of subject areas, including but not limited to public policy, DEQ's internal functioning, permitting generally and past permits issued, air, energy, mining, past legislation, some of the panels/councils/studies discussed by Plaintiffs, fossil fuels generally, DEQ's authority to regulate or analyze climate change, what climate change analysis would require for DEQ, DEQ's budget and staff, any of the topics included below for the individuals she supervises, including those in the Air, Energy, and Mining Division.

Doc. 228, p. 4.

The paragraphs from the Complaint referenced in the Nowakowski disclosure are broad, including allegations about DEQ's permitting authority, the State's energy policy, MEPA compliance and processes, GHG emissions and air quality permitting. They also include permitting and environmental review of coal mining and "fossil fuel extraction, transportation,

and combustion." Doc. 1, ¶¶ 87-93. Paragraphs 118(g)-(m) discuss coal mining, reclamation, permits governing the operation thereof, GHG emissions associated therewith, MEPA and other topics related to specific mines and sites the Plaintiffs identified in the Complaint. Defendants' disclosure for Ms. Nowakowski also referred to the topics in Complaint paragraphs 192 and 194, which concern Montana's GHG inventories, DEQ reporting of GHG emissions, and a 2008 climate change report by the Montana Environmental Quality Council that contained, *inter alia*, suggestions for reducing GHG emissions. The same is true for former DEQ Air Quality Bureau Chief Dave Klemp. Defendants disclosed him as a hybrid witness who "will give fact and expert testimony regarding topics raised in Plaintiffs' Complaint at ¶¶ 87–90, 92–93, 118(j)–(k), and 192." Doc. 228, p. 5.

Granting Plaintiffs' motion would seriously and unfairly impact Defendants for several reasons. First, it would essentially give Plaintiffs complete control over the testimony of these witnesses and the State's ability to present testimony to defend itself in this case by limiting their testimony to answers given to the questions Plaintiffs asked at their depositions. At Ms. Nowakowski's deposition, Plaintiffs had the opportunity to ask her anything within the scope of Rule 26, Mont. R. Civ. P. and the disclosures discussed above. Plaintiffs contend that the hybrid witnesses Nowakowski and Klemp testified that they had limited or no opinions on areas listed in Defendants' expert disclosures. That general characterization is shown to be inaccurate simply by comparison to the excerpts of testimony quoted in Plaintiffs' brief in support of this motion (Doc. 264) in which Nowakowski and Klemp respond to Plaintiffs' overly broad questions with qualifiers such as "it would depend on the question asked" and "I would need to have specifics". *See id.*, pp-6-9. Yet (especially as potential rebuttal witnesses) Defendants' hybrid witnesses are impeded by Plaintiffs' persistent and vexing lack of specificity in

identifying any agency action rendering the challenged statutes unconstitutional in their as-applied constitutional claims.[1] Plaintiffs' gambit is to only describe their contentions in the broadest and most expansive terms, limit the record made in depositions of agency staff by asking few specific questions about the agencies' actions, then seek to completely exclude those hybrid witnesses on the basis of alleged lack of knowledge.

Plantiffs alone made the decisions to ask the questions they did in the depositions of Nowakowski and Klemp, and if they chose not to ask about some aspect of the topics identified in the disclosure (which in turn referred to the Plaintiffs' own language in the Complaint), that was their prerogative. But they should not be allowed to limit the scope of any witness's testimony simply because they chose not to ask questions about some broad area identified in the disclosure. The Montana Supreme Court has said that when a party may decide to call a hybrid witness, it should "identify such witnesses as expert witnesses in response to interrogatories, and to provide any sort of expert disclosure for such witnesses as the Rules of Civil Procedure and the district court may require." *Faulconbridge v. State*, 2006 MT 198, ¶ 44, 333 Mont. 186, 142 P.3d 777. Defendants did exactly that here. It would twist the rules to permit Plaintiffs to define the scope of hybrid witness testimony to something different than what Defendants fully disclosed, simply because Plaintiffs chose to limit deposition questioning. By that logic, a party could effectively neutralize another party's witness merely by asking few questions in a deposition.

At trial, Plaintiffs have the burden of proof, which should cause them to be more specific about allegations against the state agencies they have sued. They can either question Defendants' hybrid witnesses as adverse during their case in chief, or cross examine them in

[1] Defendants discuss the distinction between facial and as – applied constitutional challenges at length in summary judgment briefing. *See e.g.* Doc. 290, p. 3.

Defendants' case in chief. In any case, the Court will be in a position to judge the knowledge or credibility of these witnesses in the context of Plaintiffs' specific allegations.

Rule 30(b)(6) Witnesses

Plaintiffs make a similar request for an order limiting the testimony of Nowakowski and Klemp (and DEQ Director Chris Dorrington) in their capacity as witnesses designated in response to Plaintiffs' Rule 30(b)(6) deposition notices, on the grounds that the witnesses lacked sufficient knowledge to answer all of Plaintiffs' questions. The same issue attends the 30(b)(6) argument, i.e. difficulty in wrestling specific agency actions allegedly constitutionally infirm – the scope of information sought in Plaintiffs' 30(b)(6) notices is staggering:

TOPIC 2: Knowledge of each and every document provided by Defendant DEQ to Plaintiffs in response to Plaintiffs' First Discovery Requests.

TOPIC 3: Knowledge of documents listed in Attachment A. See Exhibit "A" attached – Plaintiffs' Rule 30(b)(6) deposition notice including Attachment A document list.

TOPIC 4: Knowledge of the allegations in ¶ 90 of Plaintiffs' Complaint and any factual bases upon which DEQ denies allegations in ¶ 90.[2]

TOPIC 9: Knowledge of DEQ's role in implementing the legislative policy to:

(c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;

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[2] Paragraph 90 of Plaintiffs' Complaint states (citations omitted):

> Defendant DEQ issues air quality permits to facilities that emit GHG emissions, including but not limited to coal mining operations, energy power plants, and oil and gas refineries. Through its Board of Environmental Review, which adopts rules and determines appeals under regulatory statutes, Defendant DEQ has broad statutory authority to set and enforce a quantitative limit for emissions as necessary to prevent or control air pollution.

(d) increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the mitigation of greenhouse gas and other emissions;

(e) increase local oil and gas exploration and development to provide high-paying jobs and to strengthen Montana's economy;

(f) expand exploration and technological innovation, including using carbon dioxide for enhanced oil recovery in declining oil fields to increase output; and

(g) expand Montana's petroleum refining industry as a significant contributor to Montana's manufacturing sector in supplying the transportation energy needs of Montana and the region.

TOPIC 10: DEQ's role in the creation or implementation of energy policy for the State of Montana.

TOPIC 11: Knowledge of the Energy Bureau's work "to increase Montanan's access to energy efficiency and renewable energy, improve the state's energy security, provide analysis of energy trends and issues, and demonstrate the benefits of compliance with environmental regulations through innovation, education, and technical and financial assistance."

TOPIC 12: The process by which "DEQ prepares environmental review documents in accordance with requirements of the Montana Environmental Policy Act (MEPA).

TOPIC 14: Any and all financial assistance, including but not limited to grants and/or loans, managed or funded by DEQ for the purpose of financing energy projects located in the State of Montana.

Id., passim.

The Montana and Federal Rules of Civil Procedure require Rule 30(b)(6) deposition notices to "describe with reasonable particularity the matters for examination." Mont. R. Civ. P.

30(b)(6) (emphasis added); Fed. R. Civ. P. 30(b)(6). To the knowledge of Defendants' counsel, the Montana Supreme Court has not specifically addressed what constitutes "reasonable particularity," but the majority of other courts that have, interpret "reasonable particularity" to mean that the noticing party must designate the matters for examination with "painstaking specificity." *See e.g. Prokosch v. Catalina Lighting Inc.*, 193 F.R.D.633, 638 (D. Minn. 2000); *McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, (D. Kan. 2008); *Cotton v. Costco Wholesale Corp.*, 2013 WL 3819975, *2 (D. Kan. July 24, 2013); *Phoenix Ins. Co. v. Cantex, Inc.*, 2015 WL 1740334, *2 (D. Colo. April 14, 2015); *Kelly, D.O. v. Provident Life and Acc. Ins. Co.*, 2010 WL 3259997, *2 (D. Vt. Aug. 17, 2010); *E3 Biofuels, LLC v. Biothane, LLC*, 2013 WL 4400506, *2 (D. Neb. Aug. 15, 2013); *In re Jemsek Clinic, P.A.*, 2013 WL 3994666, * 5 (W.D.N.C. Aug. 2, 2013). A Rule 30(b)(6) notice is sufficiently particular "when it is relevant to the underlying claims, covers a reasonable period of time, and is narrowly tailored." *Tumbling v. Merced Irr. Dist.*, 2009 WL 5064994, *2 (E.D. Cal. Dec. 16, 2009).[3]

The Court can judge for itself whether Plaintiffs' 30(b)(6) notice is sufficiently particular. Defendants objected to the notice and at the time of the depositions, but in the interest of moving forward in a cooperative manner, did not file a motion for a protective order. (Neither the Montana nor the Federal rules establish a procedure for objecting to a Rule 30(b)(6) deposition notice. *See* Mont. R. Civ. P. 30(b)(6); Fed. R. Civ. P. 30(b)(6)). In any event, as both the deposition notice and Plaintiffs' Motion in Limine now vividly illustrate, "[w]hen the notice is overbroad, the responding party is unable to identify the outer limits of the areas of inquiry

[3] Montana Rule of Civil Procedure 30(b)(6) and the federal rule are identical. Thus, federal decisional authority is instructive on the rules' interpretation. *See Snell v. Montana-Dakota Utilities* Co., 198 Mont. 56, 62, 643 P.2d 841, 844 (1982) (when a state statute is closely modeled after a federal provision, "reference to federal case law is appropriate and useful.").

noticed, and designating a representative in compliance with the deposition notice becomes impossible." *Lipari v. U.S. Bancorp, N.A.*, 2008 WL 4642618, *5 (D. Kan. Oct. 16, 2008).

Defendants are aware that the Rule 30(b)(6) designated representative does not need to have personal knowledge of the matters in the deposition notice; what is required is that the witness is prepared to answer with the information "known or reasonably available to the organization." *See* Mont. R. Civ. P. 30(b)(6); *Hooker v. Norfolk Southern Ry. Co.*, 204 F.R.D. 124 (S.D. Ind. 2001). The problem here is that it would literally take a large portion of DEQ staff to cover the topics listed, whether as designees or in preparing the 30(b)(6) witnesses.

PLAINTIFFS' MOTION IN LIMINE NO. 4:
LIMITING EXPERT TESTIMONY OF DR. DEBRA SHEPPARD

Plaintiffs' brief in support of their Motion in Limine No. 4 describes their request as an order "to limit the scope of Dr. Sheppard's expert testimony at trial to describing methodology practices she utilizes in her field as a neuropsychologist, to the extent the Court finds that generalized testimony relevant in this case where Dr. Sheppard lacks any expertise in the specialized field of climate and mental health." Doc. 266, p. 2. However, the brief then goes on more broadly to essentially argue that the Court should not find that Dr. Sheppard will have relevant testimony to offer because she "lacks any knowledge, skill, experience, training, or education related to how climate change is harming the mental health of children..." *Id.* In effect, Plaintiffs are asking the Court for a blanket rejection of a witness's credibility before she has even taken the witness stand. This is not an appropriate use of a motion in limine.

Moreover, Plaintiffs' motion confirms yet again that despite their previous representations to the Court, resulting in the Court's admonishment to the parties that the Plaintiffs' mental health is not at issue here (Doc. 225, Order on Def.'s Rule 35 Mot.), Plaintiffs are putting the issue squarely before the Court. In fact, the entire premise of their Motion in

Limine No. 4 is the alleged lack of experience on the part of Dr. Sheppard "on climate change and its impacts on the mental health of children." Doc. 266, p. 3. Plaintiffs emphasize that in their view Dr. Sheppard is not qualified to address the "primary purpose of Dr. Van Susteren's testimony [which] is 'to evaluate facts and science and to render opinions on the impacts of climate change on the mental health of children, including the 16 Youth Plaintiffs in this case.'" *Id.* p. 4 (quoting Dr. Van Susteren's expert report). Plaintiffs' motion is based on the premise that their expert Dr. Van Susteren is a qualified practitioner in the purported climate change sub-specialty in the field of pediatric mental health, and Dr. Sheppard is not. Plaintiffs describe this alleged specialty in various statements such as: "The mental health impacts of climate change are well-studied and documented in the peer-reviewed scientific literature, as illustrated by the dozens of studies cited in Dr. Van Susteren's expert report." *Id.* Plaintiffs go on to cite passages from Dr. Sheppard's deposition stating that she lacks expertise "in how climate change impacts children's mental health." *Id.* p. 5.

There is no question that Dr. Sheppard is qualified as an expert witness on the subject of neuropsychology, psychological compromise or impairment, mental illness, psychological functioning, etc. *See e.g.* Bellinger Decl., Ex. 1 (Sheppard deposition) at 12:17-13-12; 14:1-15:12; 18:1-19:1. Dr. Sheppard has testified as an expert "[a]t least a dozen times in an actual trial situation, and as recently as last week." *Id.* at 12:6-10. (Deposition taken December 22, 2022.) As Plaintiffs note, however, Dr. Sheppard is not an expert on climate change. If Dr. Sheppard was planning to testify as a climate scientist Plaintiffs might have a point. However, the sole reason for Dr. Sheppard's testimony is to address the issue that Plaintiffs' motion really concerns – the mental health of the Plaintiffs. "The focus of this report [Dr. Van Susteren's expert witness report] will be on the current psychological harm to children, including the 16

youth Plaintiffs in this case [due to climate change and energy policies]." Bellinger Decl., Ex. 2, p. 2. Plaintiffs' argument is the same as claiming that an experienced psychologist should not be allowed to opine on mental health issues experienced by a car accident victim because the psychologist is not an expert on accident reconstruction.

Rule 702, Mont. R. Evid. permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify "in the form of an opinion or otherwise" if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." An evaluation under Rule 702 requires the Court to make a legal determination of an expert's reliability against "(1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts." *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489. While the district court must determine whether the field is reliable, it is for the trier of fact to determine whether the expert is qualified." *Id.*

The Court's belief that the Plaintiffs are not putting their mental health at issue is severely strained by their Motion in Limine No. 4. The motion should be denied, or at least deferred to the time of trial when the Court, as trier of fact, can determine whether Dr. Sheppard's extensive resume as an expert neuropsychologist is somehow not sufficient for the circumstances of this case.

PLAINTIFFS' MOTION IN LIMINE NO. 5:
EXCLUDING EXPERT TESTIMONY OF DR. JUDITH CURRY

Plaintiffs' Motion in Limine No. 5 employs a scattershot approach in an effort to limit Dr. Judith Curry's expert testimony at trial largely based on 'straw man' arguments and mischaracterizations of her qualifications and anticipated testimony. Plaintiffs acknowledge that the purpose of a motion in limine is to "prevent the introduction of evidence which is irrelevant,

immaterial, or unfairly prejudicial[,]" but they fail to show that Dr. Curry's testimony meets that description. *See* Doc. 268, p. 4 and *passim*. Plaintiffs' obvious goal is to prevent the Court from considering any counterpoint to their own experts' opinions or any expert testimony that militates against climate alarmism by falsely portraying Dr. Curry as a fringe scientist who relies on random sources of information obtained from the internet. But the reality is that Dr. Curry is an eminently accomplished scientist, academic, and expert in climate science and numerous related areas as demonstrated by her extensive knowledge, skill, experience, training, and education pertaining to the same. *Id.* at Ex. 2, p. 30-41. This includes a Ph.D. in geophysical sciences, a lengthy career in academia with positions at various universities including the position as Chair of Georgia Tech's School of Earth and Atmospheric Sciences, authoring several books, publishing more than 190 academic journal articles, fellowships in several major professional societies, and her position as co-founder and President of Climate Forecast Applications Network ("CFAN"), among other relevant experience, awards, and accomplishments. *Id.*

Plaintiffs start off with selective references to an Order from an entirely unrelated defamation case in the Superior Court of the District of Columbia's Civil Division which excluded expert testimony from Dr. Curry based on its evaluation of the methodology she applied there. However, Plaintiffs ignore the fact that Dr. Curry's proposed testimony in that case has nothing to do with her anticipated testimony or expert report here, and they make no coherent argument explaining how the methodology Dr. Curry employed in this case is unreliable.

Montana courts apply a different standard on the admissibility of expert testimony than in the District of Columbia – Montana Rule of Evidence 702 requires this Court to determine "(1)

whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts." *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 16, 380 Mont. 204, 354 P.3d 604 (internal citation omitted). The last question, i.e. the expert's methodology, "is for the finder of fact." *Id.* (internal citation omitted). In other words, the reliability of Dr. Curry's methodology here is a determination for this Court to make *at trial*, and Plaintiffs' nebulous criticism in that vein is not an adequate basis to preemptively limit or exclude Dr. Curry's expert testimony.

The remainder of Plaintiffs' Motion in Limine No. 5 uses the same tactic discussed above in their motion on Dr. Sheppard, in which they argue that Dr. Curry is not an expert in a number of discrete fields (e.g. engineering, law, economics, fish biology, etc.) in which she neither claims nor needs to be an expert in order for her expert testimony to be reliable and admissible. Plaintiffs simply identify numerous specific topics on which they deem Dr. Curry to have opined in certain sections of her Report according to their own strained interpretation, and then leap to the conclusion that because Dr. Curry is not an expert in those topics, she must be prohibited from testifying to entire sections of her Report. *See* Doc. 268, p. 20.

For example, Plaintiffs identify fish biology as one such topic, pointing to Section 1.1 on page 2 of Dr. Curry's Report where she merely identifies "[s]ummertime warm temperatures in rivers and streams that impact fish" in her summary of Plaintiffs' weather- and climate-related concerns based on her review of the Complaint. *See* Doc. 268, p. 20, Ex. 2, p.2. This hardly amounts to a reasonable basis to limit Dr. Curry's expert testimony.[4] Plaintiffs' reference to greenhouse gas accounting in Montana is another such example – Plaintiffs identify that topic, point to certain portions of Dr. Curry's Report despite there being no reference to "greenhouse

[4] "You don't need a weatherman to know which way the wind blows." Bob Dylan, *Subterranean Homesick Blues* (1965).

gas accounting," and simply conclude that she would need to be an expert on that topic for such testimony to be allowed. *See* Plaintiffs' Motion in Limine No. 5, at 9-10, 20.

Plaintiffs assert that Dr. Curry is not an expert on "energy transition and Montana's renewable energy resources and capacity" or "climate change in Montana" and should not be permitted to testify on those topics, apparently because her prior work was not specific to or conducted in Montana. Plaintiffs' Motion in Limine No. 5, at 5-6, 10-12. By that standard, many of Plaintiffs' experts would be disqualified. Dr. Curry is highly qualified to opine on climate science, which would certainly include analyzing climate data and studies specific to Montana, or any other place.

Moreover, the topic of energy transition and renewable energy resources and capacity falls squarely within Dr. Curry's extensive experience with CFAN – a company that "supports the energy sector with extended-range probabilistic forecasts of temperature extremes, severe convective weather, hurricanes, fire weather and renewable energy[]" whose "climate scenario projections and impact assessments support power plant siting and investment decisions, insurance decisions, electric power demand, and severe weather vulnerability." Plaintiffs' Motion in Limine No. 5, at Ex. 2, p. 2. Plaintiffs gloss over these glaring facts and instead argue that Dr. Curry should not be allowed to testify regarding her work at CFAN because Defendants objected to discovery requests seeking the proprietary information belonging to CFAN's clients. *Id.*, at 19. This argument is a classic red herring in which Plaintiffs contort a discovery dispute they never brought before the Court into a justification to limit Dr. Curry's testimony. The reality is that Dr. Curry's work with CFAN endows her with significant expertise directly relevant to the conclusions in her Report and her anticipated testimony at trial.[5]

[5]Plaintiffs' fixation with Dr. Curry's assistant, Mark Jelinek, is another red herring that mischaracterizes his technical, formatting, and research support as his "extensive participation," meaning that Dr. Curry

Among the most spurious of Plaintiffs' assertions is the insinuation that Dr. Curry suffers from so-called "Dr. Google syndrome." *Id.*, at 14-17. This disrespectful contention does not merit serious consideration. Although Dr. Curry undoubtedly referenced numerous sources of publicly available data obtained from the internet in her Report, Plaintiffs make no effort to dispute the relevance, validity, or reliability of that data, all sources of which Dr. Curry specifically cited via endnotes. *See id.*, at Ex. 2, pp. 41-46. Plaintiffs instead imply that Dr. Curry merely relied on information garnered from any source available from a generic Google search, all the while conveniently failing to acknowledge Dr. Curry's specific reference to Google Scholar, a massive database of *scholarly articles*. *See* Curry Depo., 276:19-20; https://scholar.google.com). The scholarly articles that are available pursuant to a Google search) are a far cry from the collection of random blog posts portrayed by Plaintiffs.

Plaintiffs' assertion that "Dr. Curry claims to be a 'wicked scientist'" is yet another example of Plaintiffs' unnecessarily pejorative and inaccurate description of Dr. Curry's Report and testimony. *Id.*, at 17. At no point in her Report or deposition does Dr. Curry refer to herself as a "wicked scientist." Instead, Dr. Curry referred to the "wickedness" of the climate change problem, (*id.*, at Ex. 2, p. 28) and explained that "wicked science" is a newer term used to denote the extreme complexity and interdisciplinary nature of that problem and the efforts to address it. *See* Curry Depo., 79:18—80:1, 247:18—248:8, 265:22—266:9. Plaintiffs cannot simply ignore Dr. Curry's vast wealth of scientific knowledge, experience, and analytic ability in their attempt to discredit her.

"heavily relied" on his work in the preparation of her Report. Plaintiffs' Motion in Limine No. 5, at 6 and fn. 5. Contra Curry Depo., 26:13-19. Plaintiffs fail to demonstrate that his assistance affected Dr. Curry's conclusions in any way or to otherwise establish that his assistance is of any consequence for purposes of their present Motion.

Plaintiffs further argue that Dr. Curry should not be allowed to rebut or testify regarding Plaintiffs' experts' because Dr. Curry was not specifically designated as a rebuttal expert, and because her review of Plaintiffs' experts' reports did not cause her to reconsider any of her opinions in this case. Plaintiffs' Motion in Limine No. 5, at 3, 18-19. This argument can be reasonably translated as merely attempting to prevent Dr. Curry from presenting any testimony that may conflict with Plaintiffs' experts' testimony. Plaintiffs ignore the reality that, by virtue of the staggered deadlines setting Defendants' expert disclosure a month after Plaintiffs' (*see* Doc. 145, Order, p. 1-2), the retention of Defendants' experts was in direct response to the disclosures of Plaintiffs' experts. It would be illogical and unfairly prejudicial to exclude any testimony from Dr. Curry that may conflict with Plaintiffs' experts simply because she did not submit a separate report dedicated solely to rebuttal or because she was not later designated specifically as a rebuttal expert. The Court should not grant Plaintiffs' request for an effectively one-sided presentation of expert testimony based on such a tortured procedural argument.

The list of Plaintiffs' meritless arguments goes on, none of which rise to a level worth addressing. The fact remains that Plaintiffs' Motion in Limine No. 5 is woefully insufficient to justify the exclusion of Dr. Curry's testimony considering the Montana Supreme Court's instruction that "[d]istrict courts should construe liberally the rules of evidence so as to admit all relevant expert testimony." *McClue*, ¶ 23 (internal citation and quotations omitted). The Court should deny Plaintiffs' Motion accordingly.

PLAINTIFFS' MOTION IN LIMINE NO. 6:
ADMITTING EXPERT REPORTS INTO EVIDENCE WITHOUT THE HEARSAY RULE

Plaintiffs' Motion in Limine No. 6 creates an issue where none should exist. Plaintiffs request suspension of the hearsay rules (but not an exception) so they can deluge the Court with expert witness reports. Plaintiffs request "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."

Plaintiffs argue that granting the motion will "educate" the Court, assist in determining the weight to give expert testimony on complex issues and streamline the presentation of evidence. The Court has the capacity to be educated at trial through efficient live witness testimony and well-organized visual evidence. Burying the Court with voluminous and cumulative expert witness reports merely relieves Plaintiffs of the work necessary to effectively present their case at trial within the time allotted and puts the burden on the Court to deal with the excess. Turning the case into a trial-by-report might streamline the presentation of live testimony, but it will not save the Court any time, has definite potential to frustrate or prevent the fundamental right to cross-examination, and generally does not serve the ends of justice.

Plaintiffs also argue that the expert reports should be admitted under the so-called "residual hearsay exception" in Rule 803(24), Mont. R. Evid. Doc. 270, p. 8. The Rule states:

> ***Other Exceptions.*** A statement not specifically covered by this Rule if:
> (A) the statement has equivalent circumstantial guarantees of trustworthiness;
> (B) it is offered as evidence of a material fact;
> (C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;
> (D) admitting it will best serve the purposes of these rules and the interests of justice; and
> (E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Mont. R. Evid. 803(24). Plaintiffs go to lengths to explain how expert witness reports meet these criteria but cite only one Montana case in support of their motion. The case is *Matter of C.K.*, 2017 MT 69, 387 Mont. 127, 391 P.3d 735, which happens to be from this Court. The Montana Supreme Court upheld the admission of hearsay statements relied upon by an expert in a mental health commitment proceeding. The Montana Supreme Court mentioned in passing (2017 MT

69 at fn. 3) that Rule 803(24) "could also be viewed as a residual hearsay exception." There are several other reported Montana cases applying the residual hearsay exception, universally in the context of whether hearsay statements made to an expert witness were sufficiently trustworthy to be admitted. *See State v. S.T.M.*, 317 Mont. 159, 75 P.3d 1257 (2003); *State v. Osborne*, 295 Mont. 54, 982 P.2d 1045 (1999); *State v. Mayes*, 251 Mont. 358, 825 P.2d 1196 (1992).

Plaintiffs do not seek the application of the residual hearsay rule to admit statements made by others to their experts; rather, they seek to apply the rule to their own expert reports, which are other statements made by Plaintiffs' experts themselves at another time while not on the witness stand. These circumstances are similar to *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989), a lawsuit alleging that tobacco snuff caused oral cancer, in which reports of cancer research and other health information were deemed inadmissible hearsay because the information in the reports was quoted or discussed by expert witnesses at trial. *Marsee*, 866 F.2d at 325 "(Since these reports merely repeated a great deal of other material introduced into evidence, the ends of justice did not require the admission of these reports. This is particularly true in view of the fact that much of the information contained in these reports was otherwise admitted into evidence through expert witness testimony.")

For these reasons, the Court should deny Plaintiffs' Motion in Limine No. 6.

COMMENT ON PLAINTIFFS' MOTION IN LIMINE NO. 7:
FOUNDATION AND AUTHENTICITY OF PLAINTIFFS' EXHIBITS

Motion in Limine No. 7 asks the Court to rule that the exhibits listed on Plaintiffs' Appendix A have proper authentication and foundation. Defendants told Plaintiffs that in theory, they do not oppose Plaintiffs' Motion in Limine No. 7, and that is true. However, State agencies have not completed their review of the voluminous documents Plaintiffs sent. Defendants are

committed to completing review in a timely fashion, meaning within a reasonable time to complete the exhibit lists for the pretrial order.

Defendants wish to advise the Court that Plaintiffs' Appendix A contains more than 150 listed exhibits, comprising thousands of pages of documents from numerous state agencies, including some government entities not named in this suit. Defendants dispute that many of these documents are relevant to the question of whether the State Energy Policy Goal Statements and MEPA Limitation are facially unconstitutional.[6] Thus, even if the documents are authentic, their admissibility on other grounds (and helpfulness to the Court's determination) may be questionable. It would facilitate more efficient document review if Plaintiffs narrowed their list to documents they realistically intend to introduce at trial, because they would never succeed in introducing all of them into evidence as relevant to the two topics at issue: the facial constitutionality of the State Energy Policy Goal Statements and the MEPA Limitation.

Defendants maintain the belief that at least narrowing or hopefully eliminating disagreement about authenticity or foundation will inure to the benefit of all concerned, and trust that Plaintiffs share that sentiment. At this juncture, however, it is not entirely clear, without some serious document winnowing by Plaintiffs, that the parties will succeed.

DATED the 16th day of February, 2023.

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[6] As demonstrated in Defendants' Brief in Support of their Motion for Summary Judgment, Plaintiffs do not make an as-applied challenge to any specific agency action. Therefore, documents related to specific agency actions are not relevant to any cause of action in this case.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2023, a copy of the foregoing document was served on the following persons by the following means:

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