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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. 3: REPLY BRIEF IN SUPPORT OF MOTION RE: DEFENDANTS' 30(b)(6) WITNESSES AND HYBRID EXPERT TESTIMONY**

I. INTRODUCTION

In Plaintiffs' Motion *in Limine* No. 3 (Doc. 263), Plaintiffs request this Court enter an order limiting: (1) the scope of expert testimony at trial of two of Defendants' Hybrid Expert witnesses, Mr. Klemp and Ms. Nowakowski, to the testimony in their respective depositions, on the grounds that the underlying purposes of Mont. R. Civ. P. 26 are to eliminate surprise and to promote effective cross-examination of experts; and (2) the testimony to be offered by the three Defendant agencies on the topics noticed in their Rule 30(b)(6) deposition notices to the testimony given in the Rule 30(b)(6) depositions of those witnesses.

During deposition questioning about the areas covered by Defendants' Hybrid Expert disclosure (Doc. 228), Mr. Klemp and Ms. Nowakowski vaguely responded that their trial testimony "would depend on the questions asked" and "I would need to have specifics." Doc. 264 at 6-9. Defendants' response to this Motion attempts to place on Plaintiffs the responsibility for Defendants' refusal to disclose requested information. Doc. 291 at 4. In essence, Defendants assert it is Plaintiffs' fault that these Hybrid Experts could not respond to questions about the matters on which Defendants' disclosure indicated these Hybrid Experts would address at trial.

A similar problem arose during depositions of the witnesses who testified under Rule 30(b)(6): (a) Department of Environmental Quality ("DEQ"); (b) Department of Natural Resources & Conservation ("DNRC"); and (c) Public Service Commission ("PSC").[1] During their depositions, the Rule 30(b)(6) witnesses for these three Defendant agencies expressed varying degrees of knowledge, or lack thereof, on many of the deposition topics noticed by Plaintiffs. Accordingly, to the extent a Rule 30(b)(6) witness testified during his or her deposition, and the

[1] DEQ's Rule 30(b)(6) witnesses are Chris Dorrington, Dave Klemp, and Sonja Nowakowski. DNRC's Rule 30(b)(6) witness is Shawn Thomas. PSC's Rule 30(b)(6) witness is Will Rosquist.

witness either lacked knowledge or expressed limited knowledge on topics covered by the deposition notice, Motion *in Limine* No. 3 seeks to limit the Rule 30(b)(6) witness from testifying differently on such topics at trial. Defendants opposed this Motion on the basis that Plaintiffs' 30(b)(6) deposition notices were required to, but failed to, designate the matters for examination with "painstaking specificity." (*Id.* at 8; citations omitted). Plaintiffs' notices were more than legally sufficient, as indicated by Defendants' failure to seek protective orders as allowed under the Rules or make specific objections to the scope of the 30(b)(6) deposition topics during any of the depositions.[2] Thus, Plaintiffs are entitled to an order limiting the testimony to be offered by the three Defendant agencies to the testimony given in their Rule 30(b)(6) depositions.

[2] Paragraph 3 of Defendants' objections to Plaintiffs' 30(b)(6) deposition notices contains a boilerplate objection that the listed topics are "vague, overbroad, unduly burdensome, and not specifically tailored in such a way as to ascertain what information is being sought from the deponent." Not only did Defendants fail to meet and confer on this issue and fail to seek a protective order, but Defendants' counsel did not raise any specific objections to the scope of the noticed 30(b)(6) topics during the various 30(b)(6) depositions. *See, e.g.*, Dorrington 30(b)(6) Dep. 64:3-74:8 (questioning on DEQ 30(b)(6) Topic 5, no objections to topic scope from DEQ counsel); *id.*, 115:25-119:17 (questioning on DEQ 30(b)(6) Topic 13, no objections to topic scope from DEQ counsel); Nowakowski 30(b)(6) Dep. 30:16-36:19 (questioning on DEQ 30(b)(6) Topic 4, no objections to topic scope from DEQ counsel); *id.*, 36:23-51:10 (questioning on DEQ 30(b)(6) Topics 9 and 10, no objections to topic scope from DEQ counsel); Klemp 30(b)(6) Dep. 33:17-36:10 (introduction of DEQ 30(b)(6) Topics 3, 6, 8, no objections to topic scope from DEQ counsel); Thomas 30(b)(6) Dep. 17:17-19:14 (introduction of DNRC 30(b)(6) Topics 1 through 10, no objections to topic scope from Defendants' counsel). Plaintiffs' counsel's attempts to focus on the "information known or reasonably available," Mont. R. Civ. P. 30(b)(6), to Defendants by asking the 30(b)(6) designee specific questions pertaining to the noticed topics were routinely met with form or other objections. *See, e.g.,* Rosquist 30(b)(6) Dep. 31:2-33:10 (various objections to "form" on questioning pertaining to PSC 30(b)(6) Topic 2); *id.*, 35:5-37:21 (various objections to "form" on questioning pertaining to PSC 30(b)(6) Topic 3); Thomas 30(b)(6) Dep. 51:11-57:13 (various objections to "form" on questioning pertaining to DNRC 30(b)(6) Topic 3); *id.*, 63:18-79:20 (various objections to "form" on questioning pertaining to DNRC 30(b)(6) Topic 4); *id.*, 86:10-104:24 (various objections to "form" on questioning pertaining to DNRC 30(b)(6) Topic 5).

II. ARGUMENT

A. Defendants' Hybrid Expert Witnesses

1. The Breath of Defendants' Disclosure

In considering whether or not to limit the expert witness testimony of Dave Klemp and Sonja Nowakowski, this Court should first consider the breath of Defendants' expert disclosure as to these Hybrid Experts:

> Dave Klemp *will* give fact and expert testimony regarding topics raised in Plaintiffs' Complaint at ¶¶ 87–90, 92–93, 118(j)–(k), and 192. Mr. Klemp's professional CV is attached as Exhibit F, and *he may testify to any of the experiences or opine on the subjects contained therein.*
>
> 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 at 4-5 (emphasis added).

As is readily apparent, there are few limits in Defendants' disclosure as to the areas to be covered at trial by these Hybrid Experts, especially as to Ms. Nowakowski. The only topics specified by Defendants on which these witnesses "will testify" are various paragraphs in the Complaint. Defendants disclosed that these Hybrid Experts "may testify to any of the experiences or opine on the subjects contained" in their respective resumes, which show wide experience. *Id.* The laundry list for Ms. Nowakowski's testimony at trial includes "public policy, DEQ's internal functioning, permitting generally and past permits issued, air, energy, mining, past legislation, . .

. fossil fuels generally, DEQ's authority to regulate or analyze climate change, what climate change analysis would require for DEQ . . . ." Doc. 228 at 4. In advance of trial, both the personal knowledge of factual events relevant to the case and the expert opinions regarding those factual events of these two Hybrid Experts could only be obtained through their depositions.

2. The Witnesses Responses at Deposition

At their depositions, Plaintiffs' counsel questioned these Hybrid Experts based on Defendants' Expert Disclosure describing their respective areas of testimony at trial. Rather than provide thorough responses reflecting proper witness preparation, these Hybrid Experts testified they had limited opinions (or testified they had no opinions) on areas listed in Defendants' Expert Disclosure, especially as to the areas on which they "will" testify at trial. Contrary to the underlying purposes of Mont. R. Civ. P. 26 of eliminating surprise and promoting effective cross-examination of experts, during questioning about the areas covered by the disclosure, Mr. Klemp and Ms. Nowakowski vaguely responded that their trial testimony "would depend on the questions asked" and "I would need to have specifics." Doc. 264 at 6-9. In opposing this Motion *in Limine*, Defendants do not contest these were typical responses about the areas covered by the disclosure. The depositions of these Hybrid Experts show a lack of witness preparation, resulting in depositions that were, in many respects, a waste of time.

3. The Trial Testimony Should Be Limited to the Deposition Testimony

Both purposes of Mont. R. Civ. P. 26 will be satisfied if this Court restricts the trial testimony of the two Hybrid Experts to the opinions expressed in their depositions. In their opposition, Defendants assert limiting these witnesses will "effectively neutralize another party's witness merely by asking few questions in a deposition." Doc. 291 at 5. Yet "asking a few questions in a deposition" is not what happened here, and Defendants do not even attempt to

establish that only "a few questions" were asked. Plaintiffs' counsel took extensive depositions of these witnesses and the lack of preparation of these witnesses to testify was a consistent problem throughout both depositions.

Also, Defendants claim Plaintiffs supposedly "chose not to ask about some aspect of the topics identified in the disclosure," yet Defendants do not cite one area of the Expert Disclosure not covered by questions asked during the depositions, with responses similar to the following:

Q. Okay. What opinions do you intend to offer at trial about the allegations contained in that paragraph 87?
A. I can't speculate. It will depend on the questions asked.

Nowakowski Dep. 43:6-10.

Q. Okay. Do you have any additional knowledge or opinions regarding the allegations in paragraph 90 that you intend to offer at trial that we haven't discussed?
A. I may. It depends on the questions that are asked.
Q. But you haven't been asked to provide any other opinions at this point?
A. I have not been asked by you today to provide any additional opinions.
Q. Good point. Have you been asked by DEQ?
A. I have not.

Nowakowski Dep. 60:22-61:8.

The Montana Supreme Court stressed the importance of clarifying a hybrid expert's trial testimony through deposition: "Any ambiguity within these records readily could have been clarified through proper inquiry at Strizich's deposition." *Norris v. Fritz*, 2012 MT 27, ¶ 39, 364 Mont. 63, 270 P.3d 79. Here, Plaintiffs' counsel asked at deposition about the witnesses' opinions in order to clarify the precise opinions "through proper inquiry" and "cross-examination." Based on *Norris*, the Hybrid Experts should be held to their answers at deposition when testifying at trial.

Because Defendants failed to prepare these Hybrid Experts in advance of their deposition with the opinion testimony to be offered at trial, these witnesses should be limited at trial to

testifying only about the opinions offered at their depositions. Failure to so limit their testimony would controvert the purposes of the rules and subject Plaintiffs to unfair surprise.

Finally, Defendants failed to assert any opposition to the portion of Plaintiffs' Motion *in Limine* No. 3 requesting that—to the extent either of the two Hybrid Experts intends to testify on topics outside his or her personal knowledge obtained while working at their current (or former) government agency—those topics must be presented as expert opinions, established after the events at issue, because, by definition, the two Hybrid Experts simply would not have percipient knowledge of them. Doc. 264 at 11. Thus, because neither of the two Hybrid Experts disclosed any opinions on issues relating to matters for which they do not have any personal knowledge, the trial testimony of both Hybrid Experts must be limited to opinions based solely on their personal knowledge and which were disclosed at the deposition. Accordingly, the trial testimony of the two Hybrid Experts should be limited to what he or she witnessed or experienced that is the subject of the lawsuit, and not from any information resulting from an "after-the-fact" examination of facts, as would be the case with a retained expert.

B. Defendants' Rule 30(b)(6) Witnesses

A similar problem arose during the depositions of the witnesses who testified under Mont. R. Civ. P. 30(b)(6) for DEQ, DNRC, and the PSC. During their depositions, these Rule 30(b)(6) witnesses expressed varying degrees of knowledge, or lack thereof, on many deposition topics. To the extent a Rule 30(b)(6) witness testified during his or her deposition, and the witness either lacked knowledge or professed limited knowledge on topics covered by the deposition notice, the Rule 30(b)(6) witness should not be allowed to testify differently on such topics at trial.

Only addressing DEQ Rule 30(b)(6) deposition testimony,[3] Defendants' opposition is centered on a supposed lack of "reasonable particularity" as to "the matters for examination." Doc. 291 at 7-8. As to the Rule 30(b)(6) deposition of DEQ, Defendants provide the following topic as an example of one that allegedly lacks "reasonable particularity": "TOPIC 4: Knowledge of the allegations in ¶ 90 of Plaintiffs' Complaint and any factual bases upon which DEQ denies allegations in ¶ 90." Defendants fail to explain why this topic lacks "reasonable particularity" and Plaintiffs do not believe the topic could be any more specific.[4]

The same is true for Topic 9, another topic cited by Defendants: "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 . . ." Again, Defendants fail to explain why this topic lacks "reasonable particularity."[5] As Defendants and the Court are well aware, this language comes directly from one of the statutes at issue in this case, Montana's fossil-fuel based State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)-(g) ("State Energy Policy"). By quoting language from the State Energy Policy and asking questions about how DEQ is implementing the policy expressed in that language, Plaintiffs reasonably could not be any more particular.

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[3] Defendants' opposition fails to address the Rule 30(b)(6) testimony of DNRC and PSC. In any event, Defendants' counsel did not raise any specific objections to the scope of the 30(b)(6) topics for DNRC and PSC. *See* Thomas 30(b)(6) Dep. 17:17-19:14 (introduction of DNRC 30(b)(6) Topics 1 through 10, no objections to topic scope); Rosquist 30(b)(6) Dep. 15:1-17:19 (introduction of PSC 30(b)(6) Topics to witness, no objections to topic scope).

[4] When Plaintiffs' counsel questioned DEQ's 30(b)(6) witness, Ms. Nowakowski, on Topic 4, counsel for DEQ did not object to the scope of the 30(b)(6) topic and raised only one objection as to the form of a specific question. *See* Nowakowski 30(b)(6) Dep. 31:3-36:19 (questioning on Topic 4), *id.*, 34:21-22 (objection as to vagueness for question about DEQ 30(b)(6) Topic 4).

[5] Again, during Ms. Nowakowski's 30(b)(6) deposition, counsel for DEQ did not object to the scope of Topic 9. *See* Nowakowski 30(b)(6) Dep. 36:23-51:9 (questioning on Topics 9 and 10); *id.* 43:22-44:14 (objection as to foundation for exhibit introduced during Topic 9 questioning).

Defendants conclude their opposition by asserting: "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." Doc. 291 at 9. Yet Defendants failed to make this objection (or one similar) during DEQ's Rule 30(b)(6) deposition. The witnesses designated under Rule 30(b)(6) "must testify about information known or reasonably available to the organization." At no point did DEQ object to a line of questioning on the grounds that it had not had an opportunity to educate its designee so she or he can testify on behalf of DEQ and provide binding answers to the matters in the notice. Nor do Defendants assert they properly complied with their affirmative duty to provide a witness who is able to provide binding answers on behalf of the agency. *Ecclesiastes 9:10–11–12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007).

As stated by the court in one of the opinions cited by Defendants, *Hooker v. Norfolk Southern Ry. Co.*, 204 F.R.D. 124, 126 (S.D. Ind. 2001):

> Rule 30(b)(6) also operates as a vehicle for streamlining the discovery process. *See Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5th Cir.1993). The effect of the rule is to place upon the business entity the burden of identifying witnesses who possess knowledge responsive to subjects requested in the Rule 30(b)(6) request. *Id.*; *Canal Barge Co. v. Commonwealth Edison Co.*, 2001 WL 817853, *1 (N.D. Ill. July 19, 2001). The rule is designed to prevent business entities from "bandying", the practice of presenting employees for their deposition who disclaim knowledge of facts known by other individuals within the entity. *Smithkline Beecham Corp. v. Apotex Corp.*, 2000 WL 116082 at *8 (N.D. Ill. Jan.24, 2000) (citing *Alexander v. F.B.I.*, 186 F.R.D. 148, 152 (D.D.C.1999)). Consequently, it imposes a duty upon the named business entity to prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know. *Canal Barge Company v. Commonwealth*, 2001 WL 817853 at * 1, citing *Smithkline*, 2000 WL 116082 at *9.

Or as reiterated in another opinion cited by Defendants, *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D.633, 638 (D. Minn. 2000):

> "Corporations, partnerships, and joint ventures have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." *Starlight Intern, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D.Kan.1999), citing *Dravo*

> *Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D.Neb.1995). "[I]f it becomes obvious during the course of a deposition that the designee is deficient, the [organization] is obligated to provide a substitute." *Dravo Corp. v. Liberty Mut. Ins. Co., supra* at 75. Having surveyed the pertinent case authorities, we are satisfied that the burdens imposed by Rule 30(b)(6) are as taxing as they are mutually beneficial. Since a corporation can only act through its employees, directors and agents, the potential thrives for an inquiring party to be bandied, from one corporate representative to another, vainly searching for a deponent who is able to provide a response which would be binding upon that corporation.

Contrary to Defendants' assertion in their opposition, Defendants had the duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter. In order to prevent "bandying," Defendants also had the burden to prepare these witnesses to adequately testify not only on matters known by the deponent, but also on subjects each Defendant should reasonably know. If, during a deposition, it became obvious that the designee's knowledge was deficient, Defendants were obligated to provide a substitute, which they did not do. By opposing on the grounds that "it would literally take a large portion of DEQ staff to cover the topics listed," Doc. 291 at 9, Defendants impliedly concede they did not properly prepare or designate their Rule 30(b)(6) witnesses. As a result, Defendants should be held to the testimony given in deposition. Thus, an order limiting the testimony to be offered by the three Defendant agencies to the testimony given in their Rule 30(b)(6) depositions is appropriate because these 30(b)(6) witnesses were obligated to testify both on matters known by the agency and on subjects the agency should reasonably know.

III. CONCLUSION

Plaintiffs respectfully request this Court enter an order *in limine* limiting: (1) the scope of the expert testimony of Dave Klemp and Sonja Nowakowski at trial to the testimony set forth in their respective depositions on the grounds that the underlying purposes of Mont. R. Civ. P. 26 are to eliminate surprise and to promote effective cross-examination of experts; and (2) limiting the

testimony to be offered by the three Defendant agencies on the matters noticed to the testimony given in the Rule 30(b)(6) depositions.

DATED this 28th day of February, 2023.

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