Mark L. Stermitz
Crowley Fleck PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801-2701
Telephone: (406) 523-3600
Facsimile: (406) 523-3636
mstermitz@crowleyfleck.com

Selena Z. Sauer
Crowley Fleck PLLP
1667 Whitefish Stage Road
P.O. Box 759
Kalispell, MT 59903-0759
Telephone: (406) 752-6644
Facsimile: (406) 752-5108
ssauer@crowleyfleck.com

Attorneys for State of Montana

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ANGIE SPARKS, Clerk of District Court
By [signature] Deputy Clerk

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 REPLY BRIEF IN SUPPORT OF ITS MOTIONS IN LIMINE**

Defendant State of Montana (joined by all other Defendants) submits this combined reply brief in support of its Motions in Limine No. 1 – 7.

DEFENDANTS' MOTION IN LIMINE NO. 1
Exclude Cumulative or Redundant Expert Testimony

In response to Defendants' Motion in Limine No. 1, Plaintiffs argue a) that the motion lacks specificity; and b) is unnecessary, because Plaintiffs have the right at trial to object to unnecessarily cumulative evidence. The first argument is simply not accurate. The second

argument is correct as to Defendants' right to object at trial but disregards the purposes for which motions in limine are brought.

The Motion is Clear and Most of Plaintiffs' Response is Irrelevant

Plaintiffs' Motion in Limine No. 1 is certainly specific enough to alert the Court to the possibility that a lot of needless time could be spent at trial on repetitious climate change narratives most of Plaintiffs' experts have put forth. In fact, Plaintiffs have filed a motion to allow them to do just that: their Motion in Limine No. 6 seeks to allow the wholesale introduction of hearsay expert reports containing much of the same information about the fundamental aspects of climate change and the impact of greenhouse gas emissions thereon.

Defendants' Motion in Limine identified the experts in question, the Plaintiffs' expert witness disclosures with nearly identical information for those witnesses, and portions of the reports of those witnesses with like information. That is sufficient. The Montana Supreme Court has "repeatedly approved the use of a motion in limine to preserve an objection for appeal 'provided the objecting party makes the basis for his objection clear to the district court.'" *State v. Vukasin*, 2013 MT 230, ¶ 29, 317 Mont. 204, 75 P.3d 1284, quoting *State v. Fuhrmann*, 278 Mont. 396, 403, 925 P.2d 1162, 1166 (1996). Out of respect for the Court's time (and because this is a Motion in Limine, not a dispositive motion), Defendants have not burdened the Court with the mountain of treatises, books, reports, papers, and other research produced by Plaintiffs in connection with their expert witnesses. Yet there is no real question about the basis for Defendants' objection to cumulative testimony, because a motion in limine is sufficiently specific where the Court "is able to grasp the theory and basis for" the motion. *See e.g. State v. Crider*, 2014 MT 139, ¶ 23, 375 Mont. 187, 328 P.3d 612.

A great deal of Plaintiffs' opposition is devoted to repeating allegations in their Complaint (which itself is repetitious) and Defendants' Answer. That Response simply

highlights the need for an Order *in limine* to prevent needless presentation of repetitive, cumulative evidence and to conserve judicial economy. Mont. R. Evid. 403. First, by definition, the Answer responds to the allegations of the Complaint. Repeated allegations require repeated denials. If this pattern persists at trial, an avoidable waste of time and resources will occur. Defendants' Motion in Limine No. 1 is clear in its intent to exclude cumulative testimony and evidence. The thrust of this Motion is not to exclude witnesses per se – it is to exclude cumulative witness testimony. This is not a radical proposition. Rule 403, Mont. R. Evid., states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or *by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."* (Emphasis added.)

DEFENDANTS' MOTION IN LIMINE NO. 2
Exclude Irrelevant Expert Testimony

Defendants' motion specifically highlighted the potential testimony of Drs. Jacobson and Van Susteren, the former to testify that Montana can operate completely free of fossil fuels by 2050, and the latter regarding her observations of the mental health of several young Plaintiffs. Plaintiffs' opposition highlights the necessity of maintaining vigilant sideboards on the scope of Plaintiffs' plans for trial, and the ultimate goals of this litigation, which are inconsistent with well-established Montana law. Plaintiffs state, for example, that Dr. Jacobson will offer expert testimony on:

> ...issues of Plaintiffs' injuries, causation by Defendants' conduct and the underlying statutes, the ability of this Court to redress these injuries, the ability of Defendants to comply with any Court order in favor of Plaintiffs while maintaining a state-wide energy system that meets the needs of the State and its people, Montana's contribution to the climate crisis, and how Defendants' aggregate actions as a result of the contested statutes are unconstitutional.

Doc. 293, pp.7-8. The Constitutionality of Montana's energy policy and MEPA are at the end of a long list that includes the goals of redressing "Plaintiffs' injuries" and a court-ordered "state-wide energy system." Defendants' Motion in Limine No. 2 assumed, perhaps incorrectly by Plaintiffs' reckoning, that the Court will not be asked to issue an order that requires the State to adopt a plan for the complete elimination of fossil fuel extraction or combustion by 2050. Similarly, given the Court's prior rulings, Motion in Limine No. 2, may have incorrectly assumed that the Court will not be asked to issue an order that, beyond a judgment regarding Constitutionality, will seek some form of redress for "injuries" to Plaintiffs' mental health. Plaintiffs describe their evidence as relevant not just to any constitutional claims, but in basic tort law, bearing on "whether Montana's contribution of GHG emissions is a *substantial factor* in causing Plaintiffs' injuries, and whether *a reduction in Montana's emissions will alleviate Plaintiffs' injuries*. *Id.* at fn. 2 (Emphasis added).

Similarly, Dr. Van Susteren's testimony will not be offered merely to establish standing. Plaintiffs say she will testify that "based on a reasonable degree of scientific certainty, climate change is harming the mental health and wellbeing of Montana's children and these Plaintiffs, those injuries are made worse by Defendants' conduct, and [that] Plaintiffs' injuries would be meaningfully alleviated if this Court rules in their favor." *Id.*, p. 10. Plaintiffs should not be permitted to persist in the fiction that their evidence regarding mental health is only for purposes of standing, especially when they have tacitly if not literally conceded as much.

DEFENDANTS' MOTION IN LIMINE NO. 3
Excluding Evidence of Claims Not Including in the Complaint

What is objectionable about an order limiting the evidence to the claims that were pleaded? The fact that Plaintiffs are even opposing this motion strongly suggests it should be granted. Plaintiffs argue this motion should be denied because it is too vague and does not

specifically identify the evidence Plaintiffs seek to be excluded, but it does not take reading between the lines to see that Plaintiffs really do not want to be pinned down about what this trial will be about and what exactly they want from the Court.

Defendants recognize that a motion in limine should not even be necessary to ensure that at trial, Plaintiffs limit their evidence to their constitutional claims. Unfortunately, the motion is necessary because – as the discussion in the preceding sections illustrates – Plaintiffs themselves plan to try this case as if it were deciding tort claims, when there are no tort claims at issue. As the Montana Supreme Court has said, "it is not a defendant's burden to file motions in limine in order to defeat unpled claims." *Ryan v. City of Bozeman*, 279 Mont. 507, 512, 928 P.2d 228, 231 (1996).

DEFENDANTS' MOTION IN LIMINE NO. 4
Excluding Expert Testimony Not Based Upon a Reasonable Degree of Scientific Certainty

In making this motion, Defendants viewed it as unremarkable. Plaintiffs agree with the motion insofar as it requests ordering all Parties from soliciting "expert opinions from witnesses": (1) "who are not qualified as experts to give testimony on a given topic," or (2) "whose opinions have not been previously disclosed in accordance with the Court's Scheduling Order or in response to discovery requests." Doc. 295, p. 2. As Plaintiffs say, that is the law in Montana. Plaintiffs do take issue, however, with the portion of Defendants' Motion in Limine No. 4 requesting an order that expert testimony must be based on the standard, "reasonable degree of scientific certainty." *Id.*

Defendants believe that all of Plaintiffs' experts have said in discovery that their opinions are based on a reasonable degree of scientific certainty, and in light of that, Defendants filed this motion with two concerns. The first is the category of witness matching the descriptions in the preceding paragraph, about which Plaintiffs do not object. The second is that Defendants believe

it is important for the Court to know which portions of Plaintiffs' expert testimony is based on scientific certainty (i.e., a professional opinion based on the factors in Rule 702, Mont. R. Evid., and which is not, because it's personal, speculative, beyond the witnesses' area of expertise, and so on.

Dr. Van Susteren's deposition testimony is a good example. In response to straightforward questioning about what her opinions will be at trial, this exchange occurred:

> **Q.** So I think what we've come to, correct me if I'm wrong, is that if the judiciary in Montana stops the energy policies of Montana, then that will remove the injurious behavior that's impacting the plaintiffs? Did I summarize your position correctly?
>
> **A.** Yes, except I would like to change the verb stop and change it to correct. Because, obviously, we need energy policies. But we need correct energy policies that don't injure the populace in order to end the pain, the psychological harms that are coming to the plaintiffs.
>
> **Q.** Are Montana's energy policies, in your opinion, the sole source of the pain being experienced by these plaintiffs?
>
> **A.** That's not within my purview. Again, I will refer you to the complaint for that.
>
> **Q.** So if Montana corrects its energy policies, you don't have an opinion as to whether that would eliminate the injuries being felt by the plaintiffs?
>
> **A.** It would be very helpful. And it is the sole remedy, in my opinion that addresses the harm that children feel from the State of Montana's current policies on energy.

Van Susteren Depo. 15:9 – 16:12 (excerpt attached). In two paragraphs of testimony, Dr. Susteren stated 1) that she was not in position to opine on whether Plaintiffs' mental pain would be eliminated by a ruling favorable to Plaintiffs, 2) that it would be "very helpful", and 3) that it is the "sole remedy" to address the harm to Montana children from the State's energy policies. Other of Plaintiffs' experts showed the same tendency to wander seamlessly between scientific opinion to personal opinion to competing opinions on the same question. In Dr. Van Susteren's

case, the need to identify which is which is even more acute, because at trial she intends to testify that her role in this case is to:

> listen to what they [Plaintiffs] had to say about their experiences in Montana as a result of Montana's energy policies. And then, to faithfully report without leading them to any conclusions, or leading them to particular areas that were of interest to me, potentially.

Id., 58:15-20 (excerpt attached). Yet, despite describing her role as merely a scrivener, Dr. Van Susteren intends to offer wide-ranging opinions. These include opinions on standing and constitutional injuries, impacts of climate change on the mental health of not only the Plaintiffs but all children and how Plaintiffs' injuries would be "meaningfully alleviated" if the Court rules in their favor. Doc. 293, p. 9 (Plts.' Response to Defs.' MIL No. 2).

Granting Defendants' Motion in Limine No. 4 would at least inform the Court whether the expert witness is testifying truly as an expert, or as a citizen with strong opinions about climate change.

DEFENDANTS' MOTION IN LIMINE NO. 6[1]
LAY OR FACT WITNESSES TO REMAIN OUTSIDE THE COURTROOM

Defendants' Motion in Limine No. 6 seeks an order pursuant to Mont. R. Evid. 615, that lay or fact witnesses who have not testified and been excused to remain outside the courtroom during trial, and that fact witnesses who may be called by either party should be excluded from the courtroom pending their testimony. Defendants' motion was not directed at, and did not discuss, expert witnesses.

Plaintiffs indicated that they do not oppose the Motion, to a degree. Plaintiffs state that an order on this Motion should not apply to the "Youth Plaintiffs and their guardians named in the Complaint." Defendants agree to that exception, provided it applies only to the Plaintiffs who are under the age of 18. Over half of the "Youth" Plaintiffs who were less than 18 years old

[1] Plaintiffs do not oppose Defendants' Motions in Limine No. 5 and 7.

when the Complaint was filed almost three years ago have reached the age of majority, and there is no reason to make an exception to the rule in their cases. Those Plaintiffs are Rikki H. (Rikki H. Dec. ¶ 2); Grace S. (Grace S. Dec. ¶ 2); Claire V. (Claire V. Dec. ¶ 2); Sariel S. (Sariel S. Dec. ¶ 2); Taleah H. (Taleah H. Dec. ¶ 2); Lander B. (Lander B. Dec. ¶ 2); Georgianna F. (Georgianna F Dec. ¶ 2); Olivia V. (Oliva V. Dec. ¶ 2).[2]

Plaintiffs request an exception to an Order *in limine* applicable to the attendance of one current officer or employee of each Defendant, who has been designated in writing as that party's representative by its attorney and identified for opposing counsel before trial, and also that all other employees of Defendant the State of Montana be excluded from the trial so that they cannot hear other witnesses' testimony. Defendants cannot agree with this request, because all of the employees of the State of Montana are not witnesses. Moreover, such an order would literally deprive members of the public (which includes agency employees) from attending a public trial that is of great interest. It would also prevent staff attorneys for the agencies from attending a trial that concerns their clients.

Plaintiffs also ask that an Order disallowing presence in the courtroom not apply to Plaintiffs' expert and rebuttal witnesses, Dr. Lori Byron, Dr. Robert Byron, Dr. Van Susteren, Dr. Running, Dr. Whitlock, Mr. Durglo, Dr. Trenberth, Mr. Haggerty, Dr. Jacobson, Mr. Erickson, and any other person whose presence a party shows to be essential to presenting the Party's claim or defense. Defendants do not object to these exceptions, with the obvious proviso that the treatment of experts should apply equally to both sides.

Dated this 28th day of February, 2023.

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[2] Here, Defendants have listed the initial only for the last name of these Plaintiffs, but there is no longer a reason to continue to do so.

CROWLEY FLECK PLLP

By */s/ Mark L. Stermitz*
Mark L. Stermitz
305 S. 4th Street E., Suite 100
Missoula, MT 59801-2701

Attorneys for State of Montana

CERTIFICATE OF SERVICE

I hereby certify that on the28th day of February, 2023, a copy of the foregoing document was served on the following persons by the following means:

[ ] U.S. Mail	Roger M. Sullivan
[ ] FedEx	Dustin A. Leftridge
[ ] Hand-Delivery	MCGARVEY LAW
[ ] Efile	345 1st Avenue East
[ ] Facsimile	Kalispell, MT 59901
[X] Email	rsullivan@mcgarveylaw.com
	dleftridge@mcgarveylaw.com
	Attorneys for Plaintiffs
[ ] U.S. Mail	Melissa A. Hornbein
[ ] FedEx	Barbara Chillcott
[ ] Hand-Delivery	WESTERN ENVIRONMENTAL LAW CENTER
[ ] Efile	103 Reeder's Alley
[ ] Facsimile	Helena, MT 59601
[X] Email	Hornbein@westernlaw.org
	chillcott@westernlaw.org
	Attorneys for Plaintiffs
[ ] U.S. Mail	Julia A. Olson *(pro hac vice)*
[ ] FedEx	Nathan Bellinger (*pro hac vice*)
[ ] Hand-Delivery	Mathew dos Santos (*pro hac vice*)
[ ] Efile	Andrea Rodgers (*pro hac vice*)
[ ] Facsimile	OUR CHILDREN'S TRUST
[X] Email	1216 Lincoln Street
	Eugene, OR 97401
	nate@ourchildrenstrust.org
	mat.dossantos@ourchildrenstrust.org
	andrea@ourchildrenstrust.org
	Attorneys for Plaintiffs
[ ] U.S. Mail	Philip L. Gregory (*pro hac vice*)
[ ] FedEx	GREGORY LAW GROUP
[ ] Hand-Delivery	1250 Godetia Drive
[ ] Efile	Redwood City, CA 94062
[ ] Facsimile	pgregory@gregorylawgroup.com
[X] Email	*Attorneys for Plaintiffs*

[ ] U.S. Mail	Emily Jones
[ ] FedEx	SPECIAL ASSISTANT ATTORNEY GENERAL
[ ] Hand-Delivery	JONES LAW FIRM, PLLC
[ ] Efile	115 N. Broadway, Suite 410
[ ] Facsimile	Billings, MT 59101
[X] Email	emily@joneslawmt.com
	Attorneys for State of Montana

[ ] U.S. Mail	Thane Johnson
[ ] FedEx	Assistant Attorney General
[ ] Hand-Delivery	215 North Sanders
[ ] Efile	P.O. Box 201401
[ ] Facsimile	Helena, MT 59620-1401
[X] Email	Thane.johnson@mt.gov

/s/ Mark L. Stermitz

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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IN THE MATTER OF:	:	
RIKKI HELD, ET AL.,	:	
PLAINTIFFS,	:	
v.	:	Case No. CDV-2020-307
STATE OF MONTANA, ET AL.,	:	
DEFENDANTS.	:	

Tuesday,
December 6, 2022

DEPOSITION OF:

DR. LISE VAN SUSTEREN

called for examination by Counsel for the Defendants, pursuant to Notice of Deposition, via Videoconference, when were present on behalf of the respective parties:

the injurious actions as you refer to them?

A Correct.

Q And the injurious actions, what are they? However you want to approach it. Either in general, or if you could detail them, specifically?

A The energy policies that are based on fossil fuels.

Q So I think what we've come to, correct me if I'm wrong, is that if the judiciary in Montana stops the energy policies of Montana, then that will remove the injurious behavior that's impacting the plaintiffs? Did I summarize your position correctly?

A Yes, except I would like to change the verb stop and change it to correct. Because, obviously, we need energy policies. But we need correct energy policies that don't injure the populace in order to end the pain, the psychological harms that are coming to the plaintiffs.

Q Are Montana's energy policies, in your

opinion, the sole source of the pain being experienced by these plaintiffs?

A That's not within my purview. Again, I will refer you to the complaint for that.

Q So if Montana corrects its energy policies, you don't have an opinion as to whether that would eliminate the injuries being felt by the plaintiffs?

A It would be very helpful. And it is the sole remedy, in my opinion that addresses the harm that children feel from the State of Montana's current policies on energy.

Q Are the plaintiffs experiencing their injuries as a result of the policies themselves, in your opinion, or as a result of the climate effects of the policies?

A I can't see how those are any different.

Q Well, would you agree with me that whatever the impacts are from global warming, they're generated by sources other than Montana, correct?

C E R T I F I C A T E

This is to certify that the foregoing transcript

Deposition of: Dr. Lise Van Susteren

In the matter of: Held, et al. v State of Montana

Before: Montana First Judicial District Court

Date: 12-06-22

Place: teleconference

were duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.

Neal R Gross

Court Reporter