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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

MONTANA MEDICAL  
ASSOCIATION, et al.,

Plaintiffs,

and

MONTANA NURSES  
ASSOCIATION,

Plaintiff-Intervenor

v.

AUSTIN KNUDSEN, Montana  
Attorney General, and LAURIE ESAU,  
Montana Commissioner of Labor and  
Industry,

Defendants.

Cause No. 9:21-cv-108

Hon. Donald W. Molloy

**PLAINTIFF-INTERVENOR'S  
COMBINED RESPONSE TO  
DEFENDANTS' MOTIONS IN  
LIMINE**

## INTRODUCTION

To the extent Defendants' eight serially-filed motions in limine do not violate L.R. 7.1(d)(2)(D) ("Filing serial motions to avoid word limits may result in denial of all such motions"), the Court should deny them. *See* Docs. 99, 101, 103, 105, 107, 109, 111 and 113. There is no jury in this case that could be misled absent the pre-exclusion of certain testimony. And the objections raised by Defendants are largely illusory, or are better suited for adjudication when, and if, there is a trial.

To avoid redundancy, Plaintiff Intervenor the Montana Nurses Association ("the Nurses") joins in and incorporates by reference all of Plaintiffs' arguments in their concurrently filed Combined Brief in Response to Defendants' Motions in Limine. In this brief, the Nurses provide additional argument with respect to the Nurses' three witnesses subject to Defendants' motions: Dr. Wilson, Dr. Holzman, and Vicky Byrd.

### I. ARGUMENT

#### A. Background

The Nurses disclosed the expected testimony of Drs. Wilson and Holzman in accordance with the deadline for expert disclosures in this case, accompanied by the items required under Fed. R. Civ. P. 26(a)(2)(B). *See* Doc. 86-7 (Wilson Declaration) and 86-3 (Holzman Declaration). The Nurses also timely disclosed

Vicky Byrd as a hybrid witness under Fed. R. Civ. P. 26(a)(2)(C).

For each witness, much of the disclosure covered expected testimony on factual, *non*-expert matters over which the witness has extensive personal knowledge. The Nurses disclosed all the witnesses' expected factual testimony and their opinions. Defendants deposed the witnesses exhaustively. Now, with the benefit of advance disclosure above and beyond the requirements of the rules, Defendants seek to pre-exclude certain testimony in advance of a possible bench trial.

**B. The motion to exclude Dr. Wilson should be denied**

Defendants target commonly accepted medical facts that Dr. Wilson repeats in her report—based on her training education and experience as a pediatric hospitalist in Montana—and insist that Dr. Wilson owes them a book report and bibliography. Defendants also say Dr. Wilson needs a “reliable methodology” for her opinions because, they say, Dr. Wilson should have cited more studies on matters like hand washing and infection control in healthcare settings. Doc. 100 at 9.

The Federal Rules of Civil Procedure do not require experts to provide research studies or citations for their opinions. The rules require “a complete statement of all opinions the witness will express and the basis and reasons for them” and “the facts or data considered by the witness in forming them,” among

other requirements. Fed. R. Civ. P. 26(a)(2)(B). The statements Defendants challenge are commonly accepted facts in the medical field, and along with Dr. Wilson’s “knowledge, skill, experience, training, or education,” provide ample basis for her opinions. *See* Doc 86-7 at 2-3 (describing Dr. Wilson’s experience and credentials); F. R. Evid. 702.

Finally, the issues raised by Defendants go to the weight and credibility of her opinions, not their admissibility.

The motion should be denied.

**C. The motion to limit Dr. Holzman’s testimony should be denied**

Defendants also demand a book report and bibliography from Dr. Holzman. The motion should be denied because his disclosure comports fully with the rules. Dr. Holzman’s opinions are well within his “knowledge, skill, experience, training, or education,” which includes experience working for the Centers for Disease Control and Prevention and for *Defendants* as the State of Montana’s State Medical Officer. Doc. 86-3 at 2-3 (Dr. Holzman qualifications and experience).

Defendants also argue that portions of Dr. Holzman’s disclosure “lack[] necessary foundation” in that, Defendants say, he has failed to “quantify” certain risks. Doc. 108 at 7. To begin with, this is not a foundation objection. Whether Dr. Holzman has quantified risks properly goes to the weight not credibility of his opinions. Neither do the Rules of Civil Procedure nor the Rules of Evidence

require an expert to engage in quantitative analysis (as opposed to qualitative analysis) to have a “sound methodology.” Defendants also complain that they wished Dr. Holzman had included more hypothetical scenarios in his disclosure. When, and if, there is a trial, Defendants will have ample opportunity to cross-examine Dr. Holzman. But a Defendant’s preferences for how an opposing party’s expert authors a report—so long as the report conforms to the rules, as Dr. Holzman’s does—are no basis for excluding that expert’s testimony. Finally, Defendants object that Dr. Holzman’s report uses the phrase “known hazard” and that his testimony “strikes directly at [the Nurses’] equal protection claims.” This is the point of expert testimony: to support a party’s claims. Use of the phrase “known hazard”—a hazard people know about—is not a legal conclusion and has no effect on the weight or admissibility of this testimony.

Like the motion to exclude Dr. Wilson, Defendants’ objections to Dr. Holzman’s testimony at most go to weight and not admissibility. This motion should also be denied.

**D. The motion to exclude Vicky Byrd’s testimony should be denied**

Defendants seek to exclude portions of Ms. Byrd’s testimony because, they say, the Nurses should have provided the same information in response to written discovery requests *that did not ask for it*. This motion should be denied.

Defendants received everything they requested in discovery, and Ms. Byrd’s

testimony about MNA members was disclosed to Defendants well in advance of the discovery deadline. *See* Exhibit A, Nurses' Expert Disclosure at 3, 5.

First, Defendants argue that the Court should exclude Ms. Byrd's testimony that "MNA has members who are vulnerable to vaccine-preventable disease" and "MNA has members whose vulnerability to vaccine-preventable disease qualifies as a disability under the Americans With Disabilities Act." Doc. 85-1 at 3. These are factual assertions; Defendants can cross examine Ms. Byrd about them or interpose an objection if foundation is not properly laid; but there is no legal basis for striking this testimony now. As Ms. Byrd testified in her affidavit, "In my experience as a nurse and in my position as CEO of MNA, I have visited personally with thousands of Montana nurses about the conditions of their employment, their work environments, and other aspects of their work as nurses in Montana, including workplace safety concerns and the risk of vaccine preventable disease." Doc. 85-1 at 2-3.

Defendants seek to exclude this testimony under a Rule 37 theory—that they asked for this information in discovery and did not receive it. First, the Nurses disclosed *exactly* the same information that Defendants now seek to exclude when they disclosed Ms. Byrd as a hybrid witness and summarized her expected testimony. Exhibit A, Nurses' Expert Disclosure at 3, 5 ("In addition to her factual testimony, Ms. Byrd may provide opinion testimony on the following matters: . . .

The makeup of MNA’s membership, including that its membership includes nurses with disabilities and those who are at high risk or vulnerable to vaccine-preventable diseases.”). Second, the Request for Production that Defendants rely upon for their Rule 37 theory was only for *documents* showing the Nurses’ members who are vulnerable. As the Nurses responded in discovery, the Nurses do not maintain such records. But that does not mean the Nurses do not have the knowledge as an organization. An organization’s knowledge is far broader than simply the documents it maintains, otherwise there would be no point to a 30(b)(6) deposition. As Ms. Byrd testified in her affidavit, “In my experience as a nurse and in my position as CEO of MNA, I have visited personally with thousands of Montana nurses about the conditions of their employment, their work environments, and other aspects of their work as nurses in Montana, including workplace safety concerns and the risk of vaccine preventable disease.” Doc. 85-1 at 2-3.

But the Defendants only ever asked about *documents*. Their failure to ask better, or different, or more questions during discovery is not a basis for excluding Ms. Byrd’s (totally unexpected, totally unsurprising) testimony now. Defendants were clearly on notice that the Nurses and their representative would state these facts, but declined to test them when Defendants had the opportunity. If there is a trial, Defendants will have the opportunity again. This portion of the motion

should be denied.

Second, Defendants make a similar argument about Ms. Byrd's testimony on workplace safety concerns facing nurses. As with the first portion of the motion, the testimony the Defendants seek to strike would not have been responsive to the questions Defendants asked the Nurses and Ms. Byrd in written discovery—Defendants received what they asked for, and now wish they had asked different questions. They can at trial, if there is one.

The interrogatories Defendants highlight asked about the *protocols* enforced by healthcare settings in which the Nurses' members work. The Nurses responded that they do not maintain *employers'* individual policies, for the most part, and pointed Defendants to documents arguably responsive to the interrogatory that were produced in response to two other of the Defendants' forty-two requests for production. Defendants did *not* ask about the matters that Ms. Byrd testifies to in paragraphs 11, 12, and 15-22 of her declaration. Doc. 85-1 at 3-4. These matters would not have been responsive to the interrogatories as written, and it is not the responsibility of the Nurses' to guess at what else the Defendants may have in mind for an interrogatory response—beyond that which is contained in the plain text of the interrogatory itself. Defendants' failure to ask the question is no basis for excluding the testimony now.

As with the first portion of the motion to exclude Ms. Byrd's testimony,



Defendants argue Ms. Byrd should have answered questions Defendants did not ask. As before, Defendants were apprised well in advance – through the Nurses’ complaints, pretrial disclosures, preliminary pretrial statement and supplemental preliminary pretrial statement, and hybrid expert disclosure – that the Nurses would state these facts. Defendants can ask if there is a trial.

The motion should be denied.

## **CONCLUSION**

The Court should deny Defendants’ Motions in Limine, Docs. 99, 101, 103, 105, 107, 109, 111 and 113.

DATED this 16th day of September, 2022.

/s/ Raph Graybill

Raph Graybill

Attorney for Plaintiff-Intervenor

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this Combined Response to Defendants' Motions in Limine is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365, is 1656 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Raph Graybill

Raph Graybill

Attorney for Plaintiff-Intervenor

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 16, 2022, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

/s/ Raph Graybill

Raph Graybill

Attorney for Plaintiff-Intervenor

# Exhibit A

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**PLAINTIFF-INTERVENOR'S  
EXPERT DISCLOSURE**

Plaintiff-Intervenor the Montana Nurses Association, pursuant to the Court's Order dated May 20, 2022 (Doc. 77), hereby provides its Expert Disclosures.

Plaintiff-Intervenors may call one or more of the following witnesses to testify at

trial:

**Rule 26(a)(2)(B) Retained Expert Witnesses**

1. **Lauren Wilson, M.D.**, 2827 Fort Missoula Road, Missoula, MT 59804. Dr. Wilson's expert report and curriculum vitae are attached to this disclosure as Exhibit A.
  - a. Dr. Wilson's report contains a complete statement of the opinions Dr. Wilson will express and the basis and reasons for them;
  - b. Dr. Wilson's report contains the facts and data considered by Dr. Wilson in forming her opinions;
  - c. Dr. Wilson's report contains and/or references the exhibits that will be used to summarize and/or support her opinions;
  - d. Dr. Wilson's CV outlines her qualifications and all publications she has authored in the previous ten years;
  - e. Dr. Wilson report describes her testimony as a witness during the previous 4 years; and
  - f. Dr. Wilson is being compensated \$400/hour for her testimony in this matter.
  - g. Dr. Wilson reserves the right to supplement her opinions. She also reserves the right to offer rebuttal opinions.
2. **Greg Holzman, M.D., M.P.H.**, 1311 E. Broadway St, Helena, MT

59601. Dr. Holzman's expert report and curriculum vitae are attached to this disclosure as Exhibit B.

- a. Dr. Holzman's report contains a complete statement of the opinions Dr. Holzman will express and the basis and reasons for them;
- b. Dr. Holzman's report contains the facts and data considered by Dr. Holzman in forming his opinions;
- c. Dr. Holzman's report contains and/or references the exhibits that will be used to summarize and/or support his opinions;
- d. Dr. Holzman's CV outlines his qualifications and all publications he has authored in the previous ten years;
- e. Dr. Holzman's report describes his testimony as a witness in the previous 4 years; and
- f. Dr. Holzman is being compensated \$500/hour for his testimony in this matter.
- g. Dr. Holzman reserves the right to supplement his opinions. He also reserves the right to offer rebuttal opinions.

**Rule 26(a)(2)(C) Non-Retained, Hybrid Fact/Expert Witnesses**

3. **Vicky Byrd, M.S.N., R.N.**, Chief Executive Officer, Montana Nurses Association, 20 Old Montana State Hwy, Clancy, MT 59634, (406) 442-6710. In

addition to her factual testimony, Ms. Byrd may provide opinion testimony on the following matters:

- a. The role of vaccines in preventing the spread of vaccine-preventable diseases in the workplace.
- b. The role of actual knowledge of immunity status in redressing the workplace hazard of vaccine-preventable diseases.
- c. Recognized hazards for nurses in the workplace.
- d. The effects of vaccine-preventable illnesses and pandemics/illness outbreaks on healthcare settings.
- e. The requirements of participation in CMS programs and importance of the same to Montana healthcare facilities, vaccination requirements of CMS participating Montana healthcare facilities prior to implementation of House Bill 702.
- f. The effects of HB 702 on workplace safety for Montana nurses.
- g. The ability of Montana APRN-led practices to comply with the Americans with Disabilities Act, and the effects of HB702.
- h. The ability of Montana APRN-led practices to comply with workplace safety requirements, and the effects of HB702.
- i. Implications of the Americans with Disabilities Act (ADA) on the workplace, requests for reasonable accommodations from both an

employer standpoint and a public accommodations standpoint, and the interactive process required by the ADA.

- j. Requirements and implications of Occupational Health and Safety Administration (OSHA) rules and regulations as it applies to a variety of different care settings, including what is generally required by the general duty clause's requirement to maintain a workplace free from recognized hazards, including infectious disease.
- k. The effects of HB702 on Montana APRN-led practices' ability to respond to obligations under both the ADA and OSHA.
- l. The effects of HB702 on nurses in Montana who enjoy protection under the ADA and OSHA.
- m. The makeup of MNA's membership, including that its membership includes nurses with disabilities and those who are at high risk or vulnerable to vaccine-preventable diseases.

4. **Robin Haux**, Labor Program Director, Montana Nurses Association, 20 Old Montana State Hwy, Clancy, MT 59634, (406) 442-6710. In addition to her factual testimony, Ms. Haux may provide opinion testimony on the following matters:

- a. Recognized hazards for nurses in the workplace.



- b. The effects of vaccine-preventable illnesses and pandemics/illness outbreaks on healthcare settings.
- c. The effects of HB 702 on workplace safety for Montana nurses.
- d. The effects of HB702 on nurses in Montana who enjoy protection under the ADA and OSHA.
- e. The makeup of MNA's membership, including that its membership includes nurses with disabilities and those who are at high risk or vulnerable to vaccine-preventable diseases.

**Cross-Designation of Experts Disclosed by Plaintiffs Montana Medical Association, et al.**

5. The Montana Nurses Association cross-designates all retained and non-retained experts disclosed by Plaintiffs the Montana Medical Association, et al. ("MMA"), and incorporates MMA's Expert Disclosure by this reference.

**Other Experts**

- 6. Any expert witness identified by any party, whether called or not.
- 7. Expert witnesses for appropriate impeachment or rebuttal.

DATED this 15th day of July, 2022.

/s/ Raph Graybill  
Raph Graybill

Attorney for Plaintiff-Intervenor

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2022, an accurate copy of the foregoing document was served by email and U.S. mail on the following:

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