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Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
BY [Signature]

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Attorneys for Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc., Christian Congregation of Jehovah's Witnesses, and Thompson Falls Congregation of Jehovah's Witnesses

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

ALEXIS NUNEZ and HOLLY
McGOWAN,

Plaintiffs,

v.

WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.;
WATCHTOWER BIBLE AND TRACT
SOCIETY OF PENNSYLVANIA, INC.;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES and
THOMPSON FALLS CONGREGATION
OF JEHOVAH'S WITNESSES,

Defendants.

Hon. James A. Manley
Cause No. DV 16-84

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO STRIKE
EXPERT DR. ALAN NEWMAN'S
SUPPLEMENTAL REPORT

WATCHTOWER BIBLE AND TRACT
SOCIETY OF NEW YORK, INC.;
CHRISTIAN CONGREGATION OF
JEHOVAH'S WITNESSES and
THOMPSON FALLS CONGREGATION
OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs,

v.

MAXIMO NAVA REYES, MARCO
NUNEZ, IVY MCGOWAN-
CASTLEBERRY,

Third-Party Defendants.

Defendants/Third-Party Plaintiffs Watchtower Bible and Tract Society of New York, Inc. ("Watchtower NY"), Christian Congregation of Jehovah's Witnesses ("CCJW") and the Thompson Falls Congregation of Jehovah's Witnesses ("Thompson Falls Congregation") (collectively "Religious Defendants") respectfully respond to Plaintiffs' Motion to Strike Expert Dr. Alan Newman's Supplemental Report. For the following reasons, this Court should deny Plaintiffs' Motion.

I. FACTUAL BACKGROUND

Per the agreement of the parties, expert witness disclosures were exchanged in this case on May 21, 2018. In his May 21, 2018 disclosure, Plaintiffs' expert Dr. David Corwin noted that he had interviewed both Plaintiffs in his office in Sandy, Utah—Holly McGowan on March 25, 2018 and Alexis Nunez on April 1, 2018. Corwin noted that he had videotaped the interviews, would be providing them to Plaintiffs' counsel, and would be using those videotapes at trial. That was the first time counsel for Religious

Defendants were aware that Dr. Corwin had videotaped the Plaintiffs. By contrast, when Religious Defendants' expert interviewed Holly McGowan and Alexis Nunez on April 23, 2018, counsel for Plaintiffs insisted on being present and videotaped the interview. *See* Apr. 6, 2018 email from Neil Smith (attached as Ex. A).

On February 13, 2018, Religious Defendants served their Third Set of Requests for Production, on both Holly McGowan and Alexis Nunez. For both Plaintiffs, Religious Defendants sought all communications, including videotapes, between the Plaintiffs and any other person relating to this litigation:

REQUEST FOR PRODUCTION NO. 9: All non-privileged communications between Plaintiff Holly McGowan and any other person or organization about any of the allegations in Plaintiffs' Complaint. The word "communications" as used herein means all correspondence, emails, notes, diaries, summaries of conversations, taped or electronically recorded, audio or video material, Facebook or other social media communication, and any other printed, written, recorded, or handwritten material constituting, referring to, or summarizing any communications.

2d Found. Aff. Kathleen L. DeSoto ¶ 5, Apr. 30, 2018 ("2d Found. Aff. DeSoto"), Ex. 3.

REQUEST FOR PRODUCTION NO. 10: All non-privileged communications between Plaintiff Alexis Nunez and any other person or organization about any of the allegations in Plaintiffs' Complaint. The word "communications" as used herein means all correspondence, emails, notes, diaries, summaries of conversations, taped or electronically recorded, audio or video material, Facebook or other social media communication, and any other printed, written, recorded, or handwritten material constituting, referring to, or summarizing any communications.

2d Found. Aff. DeSoto ¶ 6, Ex. 4. Plaintiffs did not provide the videotaped interviews of Dr. Corwin to Religious Defendants until July 26, 2018, although they were responsive to prior discovery requests and had been sought by counsel shortly after receipt of the Corwin report.

During the August 14, 2018 Final Pretrial Conference and Motion Hearing, counsel for Religious Defendants noted that the videotapes had recently been turned over, were sent to Dr. Newman, and that supplementation would be forthcoming based on his review. Counsel stated that the videotapes contained statements that were relevant to the statute of limitations, and that Dr. Newman (who was preparing for testifying in a murder trial) would be reviewing the videos as soon as he could and supplementing his opinion, which he did on Friday, September 7, 2018. That report was sent to Plaintiffs' counsel on Monday, September 10, 2018.

II. DISCUSSION

A party must supplement or correct the expert disclosure statement when the party learns that “in some material respect” the information given in the expert’s statement “is incomplete or incorrect” and the updated information has not otherwise been disclosed to the other party during the discovery process. Mont. R. Civ. P. 26(e)(1)-(2); *see also* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus 8A, *Federal Practice & Procedure*, § 2049.1, 319 (3d ed., West 2010). “Information is ‘incomplete or incorrect’ in ‘some material respect’ if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party’s discovery plan or trial preparation.” *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 77 (W.D.N.Y. 2011) (quoting Fed. R. Civ. P. 26(e); *Sender v. Mann*, 225 F.R.D. 645, 653-654 (D. Colo. 2004)); *Wheaton v. Bradford*, 2013 MT 121, ¶ 22, 370 Mont. 93, 300 P.3d 1162.

Montana courts have permitted supplementation when new evidence, previously

not disclosed to the expert, results in an expansion of a previously disclosed opinion. See e.g. *Suda v. Harmon*, No. DV-05-605, 2008 Mont. Dist. Lexis 493, at *23-24 (Sept. 18, 2008) (permitting modification of financial damages based on changing medical scenario); *Plumb v. Southgate Mall Assoc.*, No. DV-94-80076, 2000 Mont. Dist. LEXIS 2584, at *17 (Mar. 14, 2000) (district court granted defendant's motion to supplement expert witness disclosure in event that the court permitted key witness to testify); *Huggans v. Turnbow*, 2002 ML 1400 (21st Jud. Dist. Ct.) (denial of plaintiff's motion to exclude or limit expert witness testimony due to alleged expansion of defense expert's testimony).

Courts have also distinguished between completely new theories in an expert report and a refinement or extrapolation from a previously disclosed opinion.

[While] [i]t is correct that if a supplemental expert disclosure presents a new theory of the case, the district court has the discretion to exclude it and if it represents a refinement, the expert should be allowed to testify. Compare *Global Naps, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 91-92 (1st Cir. 2010) (affirming a district court's exclusion of a supplemental expert declaration filed one week before trial that "presented a new theory that differed from the expert's earlier affidavit"), with *Martinez-Serrano v. Quality Health Servs. Of P.R., Inc.*, 568 F.3d 278, 283 (1st Cir. 2009) (excluding testimony where newly offered expert testimony "amounted to the propagation of a brand-new theory, not merely a refinement of an existing theory").

Me. Human Rights Comm'n v. Sunbury Primary Care, P.A., 770 F. Supp. 2d 370, 389 (D. Me. 2011).

In Dr. Newman's supplemental report, he clearly lists new information that he learned from the videotapes of Dr. Corwin's interviews, which were not provided to the

Religious Defendants until four months after the interviews took place and two months after the expert disclosures were exchanged. For example, Holly told Dr. Corwin that she was having genital intercourse by the time she was 13 or 14, but she did not admit that to Dr. Newman. She told Dr. Corwin, but not Dr. Newman, that she had previously sought counseling for the sexual abuse she suffered at the hands of Max Reyes in 2004 or 2005. She told Dr. Corwin that she always remembered being abused.

These statements, which were contained in the videotapes received by the Religious Defendants after July 26, 2018, relate directly to whether Holly knew or should have known that she was suffering psychological damages related to her abuse by Max Reyes. The videotapes were not provided to Religious Defendants until late July and they seasonably provided the tapes to Dr. Newman so he could appropriately consider the new statements.

Dr. Newman's original expert report discussed Holly's awareness of her damages, awareness of her abuse, and the counseling she had sought for it. Because her statements to Dr. Corwin materially changed the timeline Holly discussed with Dr. Newman, he appropriately considered whether her newly-disclosed statements reflected an earlier awareness of her abuse and subsequent damages. Dr. Newman should be able to testify about the statements made by Holly, and the effects of those statements on his opinions, because he supplemented his opinion in a reasonable amount of time after being provided the videotapes by Plaintiffs. Plaintiffs cannot reasonably claim prejudice, as they assumedly have been in custody and possession of their own expert's videotapes since his report, and should have been aware that Holly's statements during the Dr. Corwin

interviews established different facts than she disclosed to Dr. Newman.

III. CONCLUSION

For the following reasons, Religious Defendants respectfully request the Court deny Plaintiffs' Motion to Strike.

DATED this 21st day of September, 2018.

Attorneys for Religious Defendants/Third-Party
Plaintiffs:

GARLINGTON, LOHN & ROBINSON, PLLP

By  (for)
Kathleen L. DeSoto

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
3 Mail
_____ Overnight Delivery Service
_____ Fax (include fax number in address)
1-2, 4-5 E-Mail (include email in address)

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5. **COURTESY COPY TO:**
Hon. James A. Manley
20th Judicial District Court
106 Fourth Ave. E.
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CWMcCauley@mt.gov



From: Neil Smith
To: jmtaylor@jw.org
Cc: Ross Leonoudakis; Jim Molloy; Kathleen L. DeSoto; Jackie D. Lawrenson; JDBRANNA@jw.org
Subject: Re: Nunez v. Watchtower - Request for mental examination Mont. Rule Civ. Pro. 26(a)
Date: Friday, April 6, 2018 10:48:34 AM

From your email, it looks like this will be an interview limited to the 3 topics that you identified. Please confirm that there will be no other examination or testing.

Since Dr. Newman is hired by defendant / lawyers, we need to have someone present and we need to record the interview. We would just have someone sit quietly in a corner to make sure that the interview is limited to the proposed topics and that no privileged issues are discussed. I don't want something to come up and Plaintiffs not know if they can answer. This would avoid that problem.

We would just set up a camera to record the interview—probably just hire a videographer.

It will be really tough to get the girls out to San Francisco. Let me know if your guy has some dates available in Montana, near the Plaintiffs. If so, I'll find someone who can attend for Plaintiffs counsel.

Sounds like we could knock both of these out in a day with one in the morning and one in the afternoon.

I also have a draft order for examination that we can submit once the details are nailed down.

Lastly, I didn't see Dr. Newman's CV on the link that you sent. Can you email me a copy when you have time?

--
Neil Smith
972-831-1188
neilsmith@nixlaw.com
www.nixlaw.com

On Apr 5, 2018, at 1:26 PM, jmtaylor@jw.org wrote:

Neil,

Our expert is Alan Newman, MD. Psychiatry with Park Dietz. He is based in San Francisco. Here is a link: <https://www.sutterhealth.org/find-doctor/dr-alan-w-newman>

He is available April 20th or 23rd in San Francisco or April 23rd in Missoula. If your clients are agreeable to San Francisco we would cover economy airfare, up to 2 night hotel stay (holyday inn express or similar quality), ground transportation in San Francisco, and up to \$150/per plaintiff for meals and incidentals while in San Francisco.

The diagnostic examinations would be approximately 3 hours in length per plaintiff (done on the same day) and cover the following:

- Childhood;
- All abuse allegations; and
- Present mental health conditions.

We would like to lock in the dates as soon as possible to avoid troubling the court with a formal motion to extend discovery. We await your response.

Joel M. Taylor, Esq.

Associate General Counsel

P (845) 306-1000

F (845) 306-0709

From: Neil Smith [<mailto:neilsmith@nixlaw.com>]

Sent: Thursday, March 29, 2018 4:26 PM

To: Taylor, Joel

Cc: Ross Leonoudakis; jim@galliklawfirm.com; kidesoto@GARLINGTON.COM; jdlawrenson@GARLINGTON.COM; Brannan, Jared

Subject: Re: Nunez v. Watchtower - Request for mental examination Mont. Rule Civ. Pro. 26(a)

Joel,

We will need to know the identity of the proposed examiner and the details of the examination to be conducted. Please send that when you get the chance.

"";" class="">--

"";" class="">Neil Smith

972-831-1188

"";" class="">dneilsmith@me.com"";" class="">

www.nixlaw.com

<image001.png>

On Mar 28, 2018, at 10:43 AM, jmtaylor@iw.org wrote:

Hi Ross/Jim,

We are in the process of retaining a mental health expert and would like him to evaluate both of your clients. The evaluations can take place in Missoula. We would like to complete the evaluations sometime during the first two weeks of April. What dates work for your clients?

Thanks.

Joel M. Taylor, Esq.

Associate General Counsel

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