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IN THE SUPREME COURT OF THE STATE OF MONTANA	
IN RE ASBESTOS LITIGATION,	Cause No. AC 17-0694
<i>Consolidated Cases.</i>	OBJECTIONS TO PLAINTIFFS' PROPOSED LEAD CASES

On February 23, 2018, plaintiffs furnished to the defendants their list of Proposed Lead Cases. Defendants object to Plaintiffs' Proposed Lead Cases because they do not comply with the Courts' directive. As the Court wrote in the Order dated February 6, 2018:

The purpose of the parties identifying lead/test cases is for the Court to be able to select cases for trial. The Court expects the selection of cases identified to encompass a variety of types of Plaintiffs, types of exposure, types of diagnosis, legal issues and defendants.

As set forth below, the cases identified in Plaintiffs' Proposed Lead Cases are not representative of the various classes of cases with regard to exposures, types of diagnosis, legal issues or defendants. With only minimal discovery exchanged, in some cases less than 15 pages of records received, it is apparent that the cases plaintiffs' counsel named do not reflect a representation of the various cross-sections of classes and types of claims as the Court directed. Instead, the cases proposed appear to be selected solely upon self-serving criteria favoring the plaintiffs such as severity of illness.

Additionally, this list of cases seeks to take several existing individual claims, bifurcate them, and then aggregate multiple unrelated plaintiffs for joint trial. These

Proposed Lead Cases are joined with no regard for nexus to one other – with each plaintiff claiming different manners of exposures, at different times, at different ages that allegedly resulted in different illnesses. They also vary in terms of the defendants named, the exposure periods, the latency periods and outside contributing factors. Each of the respective proposed plaintiffs to be aggregated in these actions present unique circumstances and facts and trying them jointly as part of the first round of trials will only serve to frustrate the defined goals for test cases set forth by *The Manual for Complex Litigation, Fourth*. The issues aggregated will only result in the parties raising sharply contrasted arguments against defendants, will blur the issues and will risk substantial jury prejudice. Grouping them together for joint trial when every major aspect of their claims differs frustrates the concept of test trials.

The Defendants’ respectfully request that the Court disregard Plaintiffs’ submissions and view the Plaintiffs’ as having waived their right to select lead cases in light of their failure to abide by the Court’s directive and guidance set forth by *The Manual for Complex Litigation, Fourth*.

ARGUMENT

Plaintiffs’ Proposed Lead Cases fail to present a cross-section of the representative classes as mandated by the February 6, 2018 Court Order, fails to reflect the guidelines set for by the *Manual for Complex Litigation, Fourth* (“MCL”), and seeks to aggregate plaintiffs with no rational basis other than what appear to be the self-serving interests of the Plaintiffs rather than cases that would help resolve the more pressing

issues presented in these cases. Accordingly, Plaintiffs' Proposed Lead Cases should be excluded by the Court.

In the January 9, 2018 Court Order by Judge Amy Eddy, the parties were directed to familiarize themselves with the MCL, noting in the same sentence of that Order that the parties should be prepared to suggest procedures that will facilitate just resolution of these cases. As the MCL notes, "[T]est cases should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis' and what the range of values may have if resolution is attempted on a group basis." MCL 22.315. The more representative the test cases, the more reliable the information about similar cases will be. MCL 22.315. Here, plaintiffs' counsel's proposed cases do not appear to be randomly selected, nor do they appear representative of the larger collection of the cases as a whole. They vary in all four respects identified in MCL 22.316. Rather, the Plaintiffs' Proposed Lead Cases appear to be a self-serving list of cases that Plaintiffs' counsel has deemed the most likely to succeed and look to blur issues rather than narrow them.

Moreover, three of the Proposed Lead Cases seek to aggregate a series of claims by distinct plaintiffs with gross disparities between their claims and very different applicable facts, questions, and required expertise. The cases proposed for aggregation are not representative of the greater class or classes. The basic premise behind the MCL's guidelines for mass torts is to provide a forum for all parties to have a fair test

of the merits of their claims and defenses. MCL 22.2. To obtain the most representative cases from the available pool, a judge should direct the parties to select test cases randomly or limit the selection to cases that the parties agree are typical of the mix of cases. MCL 22.2, *citing In re Chevron U.S.A. Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (MCL noting that “A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to a universe of claimants has as a core element representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence ...”). Plaintiffs’ Proposed Lead Cases do not appear random nor do they reflect a mix of the cases.

MCL 22.2 sets forth a series of criteria for the court to consider when deciding whether to aggregate/consolidate plaintiffs or separate them out for individual trials. In this instance, Plaintiffs propose aggregating and consolidating the claims of dispersed exposures as opposed to single-event exposures. “A court should be cautious before aggregating claims or cases, particularly for trial...Premature aggregation might be unworkable, unfair, or even accelerate the number and rate of filings and increase the size of mass tort.” (portions omitted) MCL 22.2.

“The criteria for aggregation of mass tort cases for trial are more stringent than for more limited purposes, such as pretrial.” MCL 22.311 “[A]ggregation can increase the complexity of cases and introduce additional cost and delay associated with

individual issue resolution. In such instances, aggregation can be unfair to plaintiffs and defendants.” MCL 22.312. MCL 22.316 provides as follows:

For example, in litigation involving harmful products or substances, the parties might be directed to organize information such as (1) the circumstances of exposure to the toxic product (e.g., the place, time span and amount of exposure), (2) the types of diseases or injuries attributable to the exposure, (3) relevant and distinguishing characteristics of multiple products, including manufacturing and distribution information (e.g., prescription from a doctor or over-the-counter distribution through specific retailers), and (4) the types of occupations or other roles of the plaintiffs (e.g. asbestos factory worker, installer, consumer, bystander, exposed spouse).”

MCL 22.316.

The cases counsel seeks to aggregate for a joint test trial will not help resolve any issues. “When the circumstances of exposure vary widely, or where causation is uncertain or varying, aggregation for trial is inappropriate.” MCL 22.312. Additionally, the MCL provides that, “[i]n dispersed mass tort litigation, by contrast, coordinated discovery and pretrial motions may be feasible, but differences in facts relevant to exposure, causation, and damages, as well as in the applicable law, often make consolidation for trial purposes both inefficient and unfair.” MCL 22.32. Aggregating cases randomly based upon subjective criteria not reflective of the entire larger class will not facilitate settlement or resolution

Aggregating cases with such discrepancies will not give the court, the parties, any mediators or any observer the information that would be needed to meaningfully assess

the merits of the yet-to-be-tried cases or to move the cases to resolution without trial. “When the circumstances of exposure vary widely, or where causation is uncertain or varying, aggregation for trial is inappropriate.” MCL 22.2. Fairness may demand that mass torts be litigated first in smaller units, single-plaintiff, single defendant trials until general causation, typical injuries, and levels of damages become established. MCL 22.2. Consolidated trial “is more feasible in a single incident mass tort than in a dispersed mass tort.” MCL 22.93.

In this instance, there is significant disparity between where the respective claimants were exposed, the manner they were exposed, the duration of exposure, the number of times they were exposed and the degrees of exposure. Consolidating multiple plaintiffs or aggregating them on a non-random basis that appear to be based solely upon one factor (severity) is not representative of the larger group. Group trials, commonly known as Bellwether trials, should be limited to situations where the Bellwether cases are truly representative of the larger group. MCL 22.2 *citing, for example, In re Chevron, USA, Inc.*, 109 F.3d 1016 (5th Cir. 1997)(MCL noting the holding that there is compelling efficiency in having a small number of cases serve as a sample of the larger group). Before the trial court may utilize Bellwether trials, it must find that the claims to be tried together are representative of the larger group of cases or claims from which they are selected. MCL 22.2.

Consolidating/Aggregating these plaintiff's claims when there are so many unique factors between the claims would not achieve that affect. Moreover, they would

increase the likelihood of jury confusion. MCL 22.312 *citing* *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993)(reversing joint trial of forty-eight asbestos cases on grounds that lack of commonality resulted in jury confusion). The Court in *Malcom v. National Gypsum*, 995 F.2d 346 (2nd 1993), as cited in the MCL, disapproved of consolidated trials in asbestos cases, noting that “it is possible to go too far in the interests of expediency and to sacrifice basic fairness in the process.” MCL 22.312. Test cases should produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis and what range of values the cases may have if resolution is attempted on a group basis. Aggregating non-randomized plaintiffs that have unique issues does not achieve these goals.

Statistical sampling can be expected to yield accurate results only when the set of cases being tried is homogenous (i.e. similar injuries to similar plaintiffs under similar circumstances.” MCL, 22.93. *citing, e.g.,* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan L. Rev. 815 (1992). Moreover, differences in affirmative defenses, such as statute of limitations defenses, sometimes create a need for separate discovery and motions practice. MCL 22.317.

Where there are serious questions as to liability, a jury’s knowledge that more than one plaintiff was injured can be expected to affect a jury’s decision on liability.

MCL 22.93, *citing* Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice or Justice Altered?*, 22 Law & Psychol. Rev. 43, 47, 59-60(1998). Moreover, MCL 22.2 also considers causation. Where the cases are too intertwined with individual questions, the claims should not be consolidated. MCL 22.2. For example, “Some products leave a signature injury, such as mesothelioma from asbestos. Even in those cases, however, proof of individual exposure to causal agent is essential.” MCL 22.2. As noted above, Plaintiffs’ counsel seeks to mix the claims of people who worked for Grace in the mines with people who lived with lumber mill workers. Plaintiffs seek to combine claimants born and raised in Libby with people who moved to Libby as adults. Plaintiffs seek to combine plaintiffs with vermiculite in their homes, in their gardens and on their clothes with people who have none of those factors. Plaintiff seeks to combine cases of long-time heavy smokers with non-smokers. Plaintiffs seek to combine lawsuits where the primary named defendant is the State of Montana with cases where the State of Montana isn’t a named party at all. The plaintiffs do not share the same work site or occupations, they do not share the same asbestos-containing products, they do not work with the same asbestos containing materials, and they do not share the same proximity to asbestos containing materials. Plaintiff seeks to litigate cases against BNSF and International Paper seemingly unaware that their client has released BNSF and International Paper. None of these aggregations make sense. They will not narrow the issues and promote resolution or judicial economy.

PLAINTIFFS' PROPOSED LEAD CASES

I. Proposed Lead Case #1:

(*Tracie Barnes v. State of Montana* (CDV-15-1025); *Tracie Barnes v. BNSF* (DV-16-111); *Rhonda Braaten v. BNSF* (DDV-16-0862); *Gerrie Flores v. BNSF* (DV-17-0259))

Plaintiffs' Proposed Lead Case #1 includes three wholly unrelated plaintiffs with significant contrast in claims, defendants, damages and causation issues that, if tried together, would serve only to frustrate the purpose of a test case. The respective plaintiffs differ significantly as to named defendants. Tracie Barnes' combined claims are against the State of Montana (Cascade County; DV-15-1025¹), Robinson Insulation (Cascade County; DV-15-1025), BNSF (Lincoln County; DV-16-111²), John Swing (Lincoln; DV-16-111), International Paper (Lincoln; DV-16-111), Champion International (Lincoln; DV-16-111), St. Regis, J. Neils Company (Lincoln; DV-16-111), Montana Light & Power (Lincoln; DV-16-111), Everett Nelson (Lincoln; DV-16-111), Ralph Heinert (Lincoln; DV-16-111) and Maryland Casualty (Lincoln; DV-16-111) (See **Chart A** below).³ The other two actions that plaintiffs' counsel seek to aggregate for joint trial as part of Proposed Lead Case #1 involve two entirely unrelated plaintiffs with claims against different defendants. Neither Rhonda Braaten nor Gerrie Flores

¹ In this second action by Mr. Barnes, he is one of two named plaintiffs. The other named plaintiff in DV-16-111 is Ms. Linda Loyd. The Ms. Loyd named in DV-16-111 is the same Ms. Loyd listed in DV-15-1025 above and the same Ms. Loyd listed to be included as part of Plaintiffs' Proposed Lead Case #5. DV-16-111 asserts causes of action against

² DV-15-1025 was filed in Cascade County. DV-16-111 was filed in Lincoln County. Allowing Plaintiffs to consolidate DV-16-111 with DV-1025 would not only further burden Cascade County's judiciary, it would also deny Defendants their day in court before a Lincoln County jury.

³ Interestingly, DV-16-111 was filed in Lincoln County. Allowing Plaintiffs to consolidate DV-16-111 with DV-1025 (brought in Cascade County) would not only further burden Cascade County's judiciary, it would also deny Defendants their day in court before a Lincoln County jury.

assert causes of actions against (a) the State of Montana, (b) International Paper, (c) St. Regis, (d) J. Neils Company, (e) Montana Light & Power, (f) Everett Nelson, (g) Ralph Heinert, or (h) Maryland Casualty. Each of the proposed plaintiffs have different alleged injuries that will unduly complicate causation and risk significant confusion and may require multiple experts for each injury alleged (See **Chart B** below).⁴ The plaintiffs proposed to be aggregated each have different alleged exposure periods, each of which will give rise to different defenses (See **Chart C** below).⁵ Each plaintiff presents different latency periods which will also give rise to different defenses (See **Chart D** below).⁶ Each plaintiff differs significantly in their smoking history (See **Chart E** below).⁷ Not only do the three plaintiffs present disparate differences in defendants named, diseases alleged, exposure periods and latency periods, but there are also unique issues of causation individual to each proposed plaintiff to be aggregated. For example, the minimal discovery completed thus far establish several unique factors as to causation between each plaintiff such as whether they worked at Grace, whether they worked at lumber mills, whether they lived with people with these exposures; other exposure sources, etc. (See **Chart F** below). It is respectfully noted that these are the

⁴ Tracie Barnes is alive and claims moderate ARD; Rhonda Braaten is deceased and claims mesothelioma, Gerrie Flores is alive and claims lung cancer.

⁵ Tracie Barnes alleges 63 years of exposure from 1955 to present; Rhonda Braaten alleges 45 years of exposure from 1960 – 2005; Gerrie Flores alleges 12 years of exposure from 1978 – 1990.

⁶ Tracie Barnes alleges 58 years from time of first alleged exposure until time of diagnosis of moderate ARD; Rhonda Braaten alleges 50 years from time of first exposure until diagnosis of mesothelioma; Gerrie Flores alleges 37 years from time of first exposure until diagnosis with lung cancer.

⁷ Tracie Barnes has no smoking history; Rhonda Braaten smoked for 22 years and has a family history of cancer; Gerrie Flores smoked for 2.5 years.

known discrepancies after receiving less than 45 pages of discovery per plaintiff, let alone what a detailed investigation will uncover.

Chart A (Plaintiffs' Proposed Lead Case #5 Parties):

Cause Number	Plaintiff/Case to be Aggregated	Basis for Consolidation:
DV-15-1025	Tracie Barnes; Gerard Backen; Carol Taylor; and Linda Loyd; v. The State of Montana; Robinson Insulation;	Plaintiffs' represent to the Court that these cases have overlapping periods of exposure and similar manners of exposure. As set forth below, defendants dispute these representations.
DV-16-111	Tracie Barnes and Linda Loyd v. BNSF Railway; John Swing; International Paper; Champion International; St. Regis; J. Neils Lumber; Montana Light and Power; Everett Nelson; Ralph Heinart; Maryland Casualty	
DV-16-0862	Rhonda Braaten v. BNSF; John Swing; Robinson Insulation	
DV-17-0259	Gerard Flores v. BNSF; John Swing; Robinson Insulation;	

Chart B (Illness Alleged):

Plaintiff name	Alleged Illness:
Tracie Barnes	Moderate ARD
Rhonda Braaten	Deceased (previously diagnosed with Mesothelioma)
Gerrie Flores	Lung Cancer

Chart C (Alleged Exposure Period):

Plaintiff name	Alleged Exposure Period
Tracie Barnes	1955 – present (63 years)
Rhonda Braaten	1960 – 2005 (45 years)
Gerrie Flores	1978 – 1990 (12 years)

Chart D (Alleged Latency Periods):

Plaintiff name	Latency Period:
Tracie Barnes	58 years from time of first alleged exposure until date of diagnosis.
Rhonda Braaten	50 years from time of first alleged exposure until date of diagnosis of ovarian cancer; 52 years until date of diagnosis with ARD.
Gerrie Flores	37 years from time of first alleged exposure until date of diagnosis of lung cancer and ARD.

Chart E (Smoking and Family History):

Plaintiff:	Additional Disparate and Unique factors:
Tracie Barnes	None
Rhonda Braaten	Smoked for 22 years from 1978 -1990; Family history of both skin cancer and uterine cancer.
Gerrie Flores	2.5 year smoking history

Chart F (Known Unique Causative Factors):

Plaintiff:	Known Unique Causative Factors:
Tracie Barnes	Spent a year in 1965 living with a person who worked for Grace; Spent five years from 1955 to 1960 living with his father who would have daily exposure to vermiculite; He estimates spending 255+ days per year for 13 years sharing a household and car with someone whose cloth were visibly covered in vermiculite dust; Worked a year in the logging industry in 1979 Spent a year in 1974 working at a plywood plant and/or lumber mill; Held full time employment working as a truck freight driver where he would load and unload bags of vermiculite.
Rhonda Braaten	Her father worked in the Libby lumber mills from 1962 to 1978;

	She reported that she would frequently shovel vermiculite in her garden.
Gerrie Flores	Reports no direct exposure to vermiculite; Reports no direct exposure to lumber mill workers; Reports no direct exposure to Grace workers.

II. Plaintiffs' Proposed Lead Case #2:

(Mary Robertson v. International Paper Company (ADV-17-0502))

Defendants do not object to *Mary Robertson v. International Paper Company* (ADV-17-0502) specifically as this case also appears on Defendants' list of proposed lead cases. However, the Defendants do note that this case, like those in every other case on Plaintiffs' list, does not appear to be a random case representative of the greater class. Rather, again, it appears to be someone who plaintiffs' counsel has unilaterally deemed the sickest – with Plaintiffs' stating outright in their selections that they selected her case because she “suffers from mesothelioma” and that “her disease is rapidly progressing and her prognosis is fatal.” In fact, of the 1016 plaintiffs that the BNSF defendants are aware of, 590 – 58% of the cases – are instances where the alleged diagnosis appears to be mild to normal ARD. Furthermore, another 12% of the 1016 plaintiffs appear to be instances where the alleged injury is moderate ARD. Collectively, that reflects 70% of the class of Plaintiffs' insufficiently represented by Plaintiffs' Proposed Lead Cases.

III. Plaintiffs' Proposed Lead Case 3:

(James Ward as PR for Eugene Ward, Lynda Hanley-Cole, Grace Whitmarsh as PR for John Whitmarsh and Frederick Boothman v. International Paper Company (BDV-10-0839))

The Defendants object to this group of cases to the extent that Plaintiffs' counsel requests this Court to set the cases for trial as a group and further objects on the basis that Plaintiffs have exceeded the maximum number of cases and plaintiffs contemplated by this Court. Furthermore, Grace Whitmarsh (PR John Whitmarsh) was previously settled with International Paper ("IP"). Frederick Boothman is pending in multiple actions. Plaintiffs' counsel acknowledges that these three plaintiffs have varying locations and manners of exposure (employment, spouse, friends, housemates), combines different medical conditions, with some claims involving wrongful death and survival claims, with some plaintiffs asserting causes of action against the Wood Products Defendants and others not. For example, two plaintiffs proposed to be aggregated involve deceased plaintiffs, while the available medical records of another proposed plaintiff, Mrs. Lynda Hanley-Cole, involves an instance where Ms. Hanley-Cole has normal lung function and should be dismissed. To date, International Paper has insufficient information to fully evaluate these proposed test cases. However, based on **Charts G through L** below, it would be counter-productive to set these cases for trial as a group.

Chart G (Plaintiffs' Proposed Lead Case #3 Parties):

Cause Number	Plaintiff/Case to be Aggregated	Basis for Consolidation:
BDV-10-0839	James Ward (PR for Eugene Ward); Lynda Hanley Cole; Grace Whitmarsh (PR for John Whitmarsh); Frederick Boothman v. International Paper Company	Plaintiffs' represent to the Court that these cases have a variety of disease levels, and both survival and wrongful death claims.

Chart H (Illness Alleged):

Plaintiff/Decedent Name	Alleged Illness:
Frederick Boothman	Asbestos Related Disease
Lynda Hanley-Cole	Asbestos Pleural Disease/Asbestosis (Normal lung function)
Eugene Ward	Lung Cancer
John Whitmarsh	Mesothelioma (settled)

Chart I (Alleged Exposure Period):

Plaintiff/Decedent Name	Alleged Exposure Period
Frederick Boothman	1973
Lynda Hanley-Cole	1948-1966
Eugene Ward	1958-1960
John Whitmarsh	N/A (settled)

Chart J (Alleged Latency Periods):

Plaintiff/Decedent Name	Latency Period:
Frederick Boothman	33 years

Lynda Hanley-Cole	38 years
Eugene Ward	46 years
John Whitmarsh	N/A (settled)

Chart K (Smoking and Family History):

Plaintiff/Decedent Name	Additional Disparate and Unique factors:
Frederick Boothman	unknown
Lynda Hanley-Cole	Smoked for 25 years from 1961 -1986;
Eugene Ward	Smoked for 30 years 1968-1998
John Whitmarsh	N/A (settled)

Chart L (Known Unique Causative Factors):

Plaintiff/Decedent Name	Known Unique Causative Factors:
Frederick Boothman	Alleges exposure to Zonolite attic insulation from 1953-1979, and other exposures to vermiculite and Zonolite in the community. Alleges he or family members purchased vermiculite/Zonolite from the Lumber mill store
Lynda Hanley-Cole	Alleges exposure to Zonolite in her home and used in her garden; Alleges her father worked at the Libby Lumber mill for 38 years; Alleges exposure to vermiculite/Zonolite at the Libby Lumber mill while visiting the retail store.
Eugene Ward	Alleges community exposure to vermiculite and/or Zonolite as well as employment with the Lumber Mill.
John Whitmarsh	N/A (settled)

IV. Plaintiffs' Proposed Lead Case #4:

Ralph Hutt v. Maryland Casualty Company (DV-16-0786)

Hutt is inappropriate for selection as a lead case. Plaintiff Ralph Hutt is actually one of **884** plaintiffs identified in a 21-page exhibit to a complaint styled as “*Nancy H. Adams, et al v. MCC et al.*, DDV-16-0786” in Cascade County (“Adams Ex. A”). Many

of the plaintiffs identified in Adams Exhibit A are also named in separately numbered actions in this Court. Additionally, the litigation status of *Hutt* is extremely premature. When MCC attempted to reach out to Plaintiffs regarding cases they were considering as lead cases prior to the Asbestos Claims Court's February 20, 2018 hearing, Plaintiffs declined to provide any such information. To date, there has been no discovery or exchange of information in the matter. Even in Plaintiffs' notice of proposed lead cases, Plaintiffs declined to state Ralph Hutt's injury severity. Additionally, Ralph Hutt also has claims against Robinson Insulation.

V. Plaintiffs' Proposed Lead Case #5:

(Gerald Backen, Linda Loyd, and Sharon Wittlake v. State of Montana (CDV-15-1025); Gerald Backen v. BNSF (DV-16-113) and Linda Loyd v. BNSF (DV-16-111))

As is the case with Proposed Lead Cases #1 and #3, Plaintiffs' Proposed Lead Case #5 also seeks to aggregate and consolidate three separate lawsuits with no rhyme or reason when there are significant disparities between their claims readily apparent after minimal discovery. Specifically, Plaintiffs counsel wishes to consolidate the claims of Mr. Gerald Backen, Ms. Linda Loyd and Ms. Sharon Wittlake (See **Chart M** below)⁸: One of these proposed plaintiffs, Ms. Sharon Wittlake, is not a named plaintiff in any of the cases cited and the defendants are not aware of any such action brought by her and would object to her being added as a party after the expiration of any applicable

⁸ Plaintiffs' Proposed Lead Case #5 lists Ms. Sharon Wittlake as an additional plaintiff in DV-15-1025. The State of Montana, International Paper, and BNSF Railway have not been served with any amended pleading in DV-15-1025, or any other action, that names Ms. Sharon Wittlake. Maryland Casualty is in receipt of a complaint, Nancy H. Adams, et al., v. Maryland Casualty, Robinson Insulation, DV-16-0786, in which Sharon Wittlake is one of 884 plaintiffs.

statute of limitations.⁹ The remaining two plaintiffs, Gerald Bracken and Linda Loyd bare no rational relationship to each other. Aside from having no familial relationship among them, each proposed plaintiff has different exposure periods (See **Chart N** below).¹⁰ In fact, Ms. Loyd's alleged exposure period did not start until three years after Mr. Bracken's exposure period ended (See **Chart N** below). Not only are the dates of exposure unrelated, but the alleged latency period for each plaintiff also varied significantly, with Mr. Bracken alleging a 63 year latency period from time of alleged exposure until date of diagnosis and Ms. Loyd alleging a 40 year latency period (See **Chart O** below).¹¹ In addition to the stark differences in exposure periods, latency periods, and possible defendants - there are also unique issues of causation individual to both proposed plaintiffs to be aggregated such as the fact that Mr. Bracken spent several years working in the Grace mines and grew up in Libby – playing on the ballfields and vermiculite piles while Ms. Loyd moved to Libby in her 30's (See **Chart P** below). As in the case of Plaintiffs' Proposed Lead Case #1, these differences were discerned from a review of approximately 30 pages of records received thus far for each

⁹ In fact, to the contrary, Sharon Wittlake had previously entered into a settlement agreement with BNSF in which she signed a release agreement where she agreed to discharge any and all future claims against BNSF. The Release Agreement is annexed hereto as **Exhibit "A."**

¹⁰ Gerald Bracken's alleged period of exposure was from 1948 to 1971. Ms. Loyd's alleged exposure is from 1974 to present. It is further noted that this discrepancy will likely result in different defenses as to Mr. John Swing, who was not a BNSF agent in Libby during the period of Mr. Bracken's exposure.

¹¹ These extended periods before diagnosis of an asbestos-related disease is important because both were diagnosed with ARD by physicians at the CARD clinic in Montana. Dr. Alan Whitehouse of the CARD Clinic testified at deposition in July, 2017 that the latency period for an ARD is 30 years. (See, Deposition Transcript, **Exhibit "B"**).

plaintiff and the defendants expect more significant disparities to be noted as discovery proceeds.

Chart M (Plaintiffs' Proposed Lead Case #5 Parties):

Cause Number	Plaintiff/Case to be Aggregated	Basis for Consolidation:
DV-15-1025	Tracie Barnes; Gerald Backen ; Carol K. Taylor; and Linda Loyd ; ¹² v. The State of Montana; Robinson Insulation;	Plaintiffs represent that these cases are proposed to be aggregated because there are similar issues as to the nature and extent of the duties owed by the State to Grace workers, family members of Grace workers, and the nature and extend of duties owed by BNSF to the members of the Libby community. As set forth below, defendants dispute the aggregating of these claims together.
DV-16-113	Gerard Backen v. BNSF Railway; John Swing; International Paper; Champion; St. Regis; J. Neils Lumber; Montana Light and Power; Everett Nelson; Ralph Heinart; Maryland Casualty	
DV-16-111	Tracie Barnes and Linda Loyd v. BNSF Railway; John Swing; International Paper; Champion; St. Regis; J. Neils Lumber; Montana Light and Power; Everett Nelson; Ralph Heinart; Maryland Casualty	

Chart N (Alleged Exposure Periods):

Plaintiff name	Alleged Exposure Period
Gerald Backen	1948-1971
Linda Loyd	1974 to date

Chart O (Alleged Latency Periods):

Plaintiff name	Latency Period:
Gerald Backen	63 years from time of first alleged exposure until date of diagnosis of ARD.
Linda Loyd	40 years from time of first alleged exposure until date of diagnosis of ARD.

Chart P (Known Unique Causative Factors):

Plaintiff:	Known Unique Causative Factors:
Gerard Backen	Worked in the Grace mill as a sweeper and truck driver for 3 years. Grew up in Libby; played in the ballfields and on piles of vermiculite for years as a child.
Linda Loyd	Share a home with her father in both southern California and then Libby, who worked with fertilizers and chemicals; Worked at a “shabby garage office” with dust exposures from Libby vehicles;

	Moved to Libby when she was in her 30's.
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SUMMARY

The Defendants took the directives of the MCL to heart and submitted a list to the Court of ten cases randomly selected from broader groupings that are meant to reflect issues that would be a snapshot of the larger classes of cases. These ten cases included randomly-selected plaintiffs from several categories of alleged injuries; several categories of places of exposure, and several categories of manner of exposure; extent of exposure, time period of exposure, and time frame of exposure. Following the Court's directive on February 20, 2018, the defendants paired that list down to five proposed test cases. The Defendants submitted the following five cases with the written basis for the selection:

Plaintiff's Name/Cause Number	Reason for Selection
<i>Clayton Allen v. BNSF, et al.</i> ; Cascade County; CDV 16-0780	Matter is representative of cases with a) the State of Montana as an active defendant; b) a briefer alleged exposure period; c) a claimant who grew up in Libby and may have played on the ballfields, on the piles of vermiculite, recreated in Rainy Creek and gardened with vermiculite; d) that involves a plaintiff with no direct known relationship to Grace or the lumber industry and e) where the injury alleged is Mild/Normal ARD, which reflects the vast majority of the cases pending before the court.
<i>Jason C. MacDonald v. BNSF, et al.</i> ; Cascade County;	Matter is representative of cases with a) the State of Montana as a named but settled party; b) Stimson Lumber as a named defendant by virtue of

CDV-16-549	employment, ¹³ c) parents/relatives/friends other than spouse with logging industry or mining exposures, d) with no currently known smoking history, d) with vermiculite in the home and e) with Mild/Normal ARD.
<i>Carol K. Taylor v. BNSF, et al.</i> ; Cascade County; DV-16-112	Matter is representative of cases a) with claims against Montana Light & Power Company; b) with claims against Champion International Corporation; c) with claims against various insurance companies; d) with first exposures over 50+ years before claim commencement, e) with a claimant who resided with someone with Grace exposures, f) where the claimant was a moderate tobacco user for an extended period of time; and g) with a claimant diagnosed with lung or other cancer.
<i>Elmore Richey v. BNSF, et al.</i> ; Cascade County; DDV 15-707	Matter is representative of cases a) with claims against Mine Safety Appliance; ¹⁴ b) by a former employee of Grace; c) where plaintiff's alleged exposures are in-part attributed to community exposure and in-part attributed to work/take-home; d) where the plaintiff was a heavy tobacco user for an extended period of time; and d) where the injury alleged might be classified as severe ARD.
<i>Mary Robertson v. International Paper, et al.</i> ; ¹⁵ Cascade County; ADV-17-0502	Matter is representative of classes of cases where a) BNSF is not a named defendant; and b) the plaintiff had multiple family members in employment with exposure to asbestos materials and products.

¹³ Despite being frequently named in cases, Stimson Lumber is not a defendant in any of Plaintiffs' Proposed Lead Cases.

¹⁴ Despite being frequently named in cases, Mine Safety Appliance is not a defendant in any of Plaintiffs' Proposed Lead Cases.

¹⁵ It is noted that the Plaintiffs' and Defendants' Proposed Lead Cases are in agreement that the matter of Mary Robertson v. International Paper, et al. should be a lead case.

Conversely, the Plaintiff's submitted a list of cases that is not reflective of the greater classes, that are grouped together with no rhyme or reason, that blur issues, risk jury confusion and are unlikely to help resolve critical questions that test cases are intended to address. Plaintiffs' proposed cases only appear to serve one purpose: to create a strategic advantage for the Plaintiffs' counsel. As such, the court should not allow for the aggregation of these cases, should not use the cases Plaintiffs' counsel selected and should set individual plaintiff's claims for trial.

DATED this 2nd day of March, 2018.

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Electronically Signed By: Chad M. Knight
Dated: 03-02-2018