Roger Sullivan
Allan M. McGarvey
John F. Lacey
Ethan Welder
Dustin Leftridge
McGarvey, Heberling, Sullivan & Lacey, P.C.
345 First Avenue East
Kalispell, MT 59901
(406) 752-5566

Mark M. Kovacich
Ben A. Snipes
Ross T. Johnson
Kovacich Snipes, P.C.
PO Box 2325
Great Falls, MT 59403
(406) 761-5595

Attorneys for Plaintiffs

IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' RESPONSE TO BNSF'S OBJECTIONS TO PLAINTIFFS' MASTER DISCOVERY REQUESTS TO BNSF

INTRODUCTION

BNSF's Objection to Plaintiffs' Master Discovery Requests inappropriately takes the form of a motion to strike the entirety of Plaintiffs' requests. BNSF alleges Plaintiffs' requests are "unnecessarily cumulative, not reasonably limited in time or scope, and seek discovery of information that is privileged." BNSF has made no specific objections to individual requests, instead asserting broad concerns with the discovery and only referencing specific requests as "examples." All of this makes

Plaintiffs' response, as intended by the Court, difficult. Nonetheless, for ease of the Court's review, the subject of Plaintiffs' response mirrors BNSF's objections.

A. Plaintiffs' requests are not unnecessarily cumulative and have been reasonably limited in time and scope.

As an initial matter, there is apparently some confusion between the parties regarding the intended scope of the Master Discovery Requests to Defendants. Plaintiffs' counsel was under the impression that the initial master discovery was intended to result in the production of initial information and documentation generally applicable to the duty, liability, and causation issues common to Plaintiffs' claims across the board rather than being specifically tailored to each Plaintiff's claim. Plaintiffs' counsel was under the impression that the Master Set of Discovery to Defendants would allow for a single response by BNSF to apply to a large number of cases and would be preferable to the parties having to revisit these issues in multiple cases in the future. This interpretation would warrant a more in-depth response by BNSF as it would only need to be accomplished once.

Plaintiffs' impression of the intent of the Master Discovery was based on the language of this Court's Order directing that the Master Discovery Requests were to provide for the "seamless and expeditious exchange of initial information" and this Court's instruction during the February 20th hearing that the Master Discovery was meant to "cut across cases for the Defendants and get basic and complete information from the Plaintiffs regarding the allegations and the claims" and that "case-specific

discovery will be allowed upon request as the cases progress." (Transcript of February 20 Hearing, 73:6-14.) Moreover, Plaintiffs were under the impression that the Plaintiff Fact Sheets were designed to convey the information necessary for case assessment and management in the vast majority of cases that are not selected as Lead/Test cases.

This difference in understanding between the parties appears to be the primary basis for BNSF's objection that Plaintiffs' requests are "unnecessarily cumulative and not reasonably limited in time or scope." For example, as pointed out by BNSF, certain requests span periods from 1950 to the present. These requests were drafted in an effort to capture the great majority of information relevant to the claims of Plaintiffs with various exposure periods throughout this span of time. Similarly, BNSF takes issue with Interrogatory No. 10, which asks BNSF to "identify all persons that have knowledge that is generally relevant in all Plaintiffs' cases, including with respect to any of the allegations contained in the Plaintiffs' most current complaints, or knowledge pertaining to any of the defenses set forth in BNSF's Answers." This request was aimed at the identification of individuals possessing knowledge generally applicable to all cases, rather than every person with knowledge about any of the cases, which drastically reduces the implied scope of the request.

BNSF also objects to the scope of Interrogatory No. 4, seeking the identification of all claims, lawsuits or requests for compensation based upon

exposure to asbestos in Lincoln County between 1950 and the present. Given Plaintiffs' stated understanding of the purpose of the "master discovery" propounded to BNSF, Plaintiffs believe this request seeks relevant information that is reasonably limited in both time and place. In addition, Plaintiffs have explicitly excluded from the request any claims made by individuals represented by Libby Plaintiffs' counsel. That said, if the number of such asbestos claims in Lincoln County is still so large as to make identification unduly burdensome, Plaintiffs are agreeable to discussing limiting the response or looking into other options for obtaining this information.

B. The possibility that some hypothetical responsive documents are potentially privileged is insufficient to warrant striking Plaintiffs' discovery requests.

BNSF argues that Plaintiffs' requests impermissibly "seek the discovery of privileged information" and "should not be allowed by the Court." Plaintiffs do not specifically seek the discovery of properly privileged information. The mere probability that a request for information or documents could be interpreted as extending to certain hypothetical privileged materials is not an appropriate basis to strike the entire response. To the contrary, the Montana Rules of Civil Procedure dictate an appropriate and required procedure:

> Rule 26. General Provisions Governing Discovery
>
> (6) *Claiming Privilege or Protecting Trial-Preparation Materials*.
>
> (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is

> privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

M. R. Civ. P. 26(b)(6). The Manual on Complex Litigation also specifically adopts this solution and recommends the use of a privilege log as already incorporated in the Directions section of Plaintiffs' Requests to BNSF:

> A claim for protection against disclosure based on privilege or protection of trial preparation materials must be made "expressly" and describe the nature of the allegedly protected information sufficiently to enable the opposing parties to assess the merits of the claim. This is usually accomplished by counsel submitting a log (frequently called a "*Vaughn Index*") identifying documents or other communications by date and by the names of the author(s) and recipient(s), and describing their general subject matter (without revealing the privileged or protected material.) Unresolved claims of privilege should be presented directly to the judge for a ruling; if necessary, the judge can review the disputed information *in camera.*

Manual for Complex Litigation, Fourth, § 11.43, Privilege Claims and Protective Orders, p. 62-3 (italics in original).[1] Such privilege logs are an accepted and required method in all Montana courts for dealing with issues of privilege in discovery. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408

[1] Unless otherwise noted, all emphasis herein has been added.

F.3d 1142, 1150 (9th Cir. 2005) (determining privilege had been waived and ordering BNSF to produce documents it asserted were privileged because it failed to timely disclose them in a privilege log). Moreover, Defendants' Master Discovery to Plaintiffs (¶ 9) asks that Plaintiffs provide Defendants with privilege log information, conceding its appropriateness.

BNSF's objection regrading privileged materials also greatly over-states the allowable scope of attorney client and attorney work product privilege. BNSF mischaracterizes, as "brazen" impositions on privilege, Plaintiffs' requests seeking a) identification of the laws, rules and regulations that BNSF relied upon in developing asbestos safety policies in Lincoln County (Int. No. 3); b) whether BNSF contends anyone or anything other than BNSF was responsible for Plaintiffs' injuries including the identity and factual and legal basis for that contention (Int. No. 11); c) identification of written, recorded, or otherwise transcribed statements regarding or referring to Libby Vermiculite in Lincoln County (Int. No. 26); d) BNSF communications regarding Libby Vermiculite (RFP No. 7); and e) documents regarding Libby Vermiculite remediation efforts in Lincoln County (RFP No. 11). Lastly in this section, BNSF inaccurately represents that Interrogatories No. 14 and 26 specifically seek "statements that have been obtained by BNSF in anticipation of litigation." Rather, these requests simply seek the identification of documents and statements regarding the presence of Libby Vermiculite or Associated Asbestos on BNSF properties and in Lincoln County, making no reference to any litigation.

Each of these requests are narrowly focused on obtaining the relevant information and documents underlying the cases here and are far from "brazen" attempts to obtain properly privileged information. It is illogical to assume that a party can request necessary responsive materials without implicating some potentially privileged materials. If any of the above requests do implicate potentially privileged materials, the proper course is to withhold the material and list it in a privilege log rather than striking the entirety of Plaintiffs' requests as BNSF suggests.

C. Production of a privilege log to Plaintiffs is appropriate and required under applicable authority.

BNSF next objects to producing a privilege log to Plaintiffs, arguing instead that is should be provided only to the Court for in-camera review. In support of its position BNSF cites to a Montana District Court order for the proposition that "a privilege log can have the effect of disclosing privileged information and litigation strategy," asking the Court to ignore the countless Montana cases in which a privilege log was provided to opposing counsel. Defendants' own Master Discovery to Plaintiffs requests that Plaintiffs provide the information typically included in a privilege log to them in Plaintiffs' responses. (Master Discovery Requests to Plaintiff, ¶ 9.) BNSF's proposition is not the accepted practice and "defeats the log's purpose of giving the adverse party notice of the details of why the privileges were applicable." *See e.g.* 1 Attorney-Client Privilege: State Law

Montana § 11:8 (treatise specifically discussing and criticizing the district court order cited by BNSF.)

In fact, the Montana Rules of Civil Procedure specifically direct that the withheld document must be described "in a manner that, without revealing information itself privileged or protected, will enable **other parties** to assess the claim," placing the burden of sufficiently describing the document without disclosing privileged information on the party claiming privilege (BNSF) and requiring that it be provided to the other parties (Plaintiffs) to assess the claim of privilege. M. R. Civ. P. 26(b)(6). If the parties cannot resolve a dispute over privilege, the Court may then become involved to assess through in-camera review the document at issue: "Unresolved claims of privilege should be presented directly to the judge for a ruling; if necessary, the judge can review the disputed information *in camera*." *Manual for Complex Litigation, Fourth*, § 11.43, Privilege Claims and Protective Orders, p. 62-3 (italics in original). This procedure is fair and equally applicable to all parties.

BNSF also objects to the information Plaintiff suggests should be included in the privilege log in the definitions section of the discovery requests to BNSF, claiming it "detailed **ten** separate categories of information." This objection is similarly without merit. An examination of the requested information reveals that it is typical and reasonable information to include in a privilege log. The requested information is limited to author, recipients, date, number of pages, a brief

description of the document, the privilege claimed, the requests it is responsive to, and how/where the document is stored. This information is largely mirrored by the information requested by Defendants in their Master Discovery to Plaintiff:

> 9. If you assert any privilege as to any information responsive to this Discovery, describe the subject matter and date of the information, the type of document (if any) containing the information, all person(s) giving and all person(s) receiving the information, and the ground(s) upon which you allege that the information is privileged or otherwise protected from discovery. If you assert a privilege with respect to a part of the Discovery, respond to the remainder of the Discovery and furnish all information over which you are not claiming the privilege.

D. Plaintiffs' requests for identification of professionals consulted in regard to asbestos contamination in Lincoln County are proper.

BNSF next objects to Interrogatories No. 8 and 9 and Requests for Production No. 3 and 13 on the basis that they impermissibly seek protected opinions of experts retained in anticipation of litigation. These requests seek 1) the identity of professional individuals or organizations whom BNSF has consulted with regarding asbestos contamination in Lincoln County (Int. No. 8); 2) the identity of professional individuals or organizations whom BNSF has consulted with regarding the propensity of BNSF's activities to entrain asbestos into the air in Lincoln County (Int. No. 9); 3) documents directly associated with that consultation (RFP No. 3); and 4) documents regarding studies of Libby Vermiculite in Montana conducted or funded by BNSF (RFP No. 13). <u>None of these requests reference, or are specifically directed at, consultations preformed in anticipation of litigation</u>.

Simply because Plaintiffs have used the word "consulted" in their requests does not result in blanket protection for all responsive documents under M. R. Civ. P. 26(b)(4)(B), nor does it support BNSF's motion to strike the requests in whole. Whether responsive information falls under the limited protections of Rule 26(b)(4)(B) requires a careful analysis of whether the individual or entity with which BNSF consulted is properly designated as an "expert" **and** whether they were "retained or specially employed by another party in anticipation of litigation or preparation for trial." *See, e.g., Sullivan v. Sturm, Ruger & Co.*, 80 F.R.D. 489, 491 (D. Mont. 1978) (expert's knowledge and opinions were developed for litigation but not for the instant litigation and not for the use of the party retaining the expert, who was not in that party's employ at the time, meaning the current party cannot shield the expert from discovery on these matters); *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 175 F.R.D. 34, 43 (S.D.N.Y. 1997), aff'd (Aug. 15, 1997)("In determining whether an expert was hired in anticipation of litigation, the court must examine 'the total factual situation in the particular case.'"). Thus, such information will only be protected if there is ongoing or pending litigation and the consultation was performed specifically in relation thereto.

Rule 26(b)(4)(B) "does not address itself to the expert whose information was not acquired in preparation for trial but who was an actor or viewer with respect to the transactions or occurrences which are a part of the subject matter of

a lawsuit, and such an expert should be treated as an ordinary witness." Fed. R. Civ. P. 26, notes of Advisory Committee. Professional consultations can be performed for many reasons other than pursuant to litigation. For example, BNSF likely consulted with various professional entities in assessing and performing necessary vermiculite and asbestos removal activities on their Lincoln County properties, assessing safety precautions that would be necessary during such removal activities, or assessing potential asbestos exposure risks to its workers and the surrounding community. Moreover, there are large periods of time in which no litigation regarding Libby Vermiculite exposure was pending or ongoing, and any professional consultations regarding Libby Vermiculite performed during these periods would be discoverable.

Moreover, as BNSF points out, Plaintiffs can obtain "facts known or opinions held by an expert who has been specially retained by another party in anticipation of litigation [when] it is impracticable for the party seeking discovery to obtain facts and opinions on the same subject matter by other means." M. R. Civ. P. 26(b)(4)(B). Courts and commentators have commonly identified two situations in which this standard is met:

> The first situation is where the object or condition observed by the non-testifying expert is no longer "observable by an expert of the party seeking discovery." *See id.;* David S. Day, *Expert Discovery in the Eighth Circuit*, 122 F.R.D. 35, 39 (1988). This situation has been demonstrated where some physical condition has deteriorated enough so that one party's expert may be the only expert who actually could have fairly observed it before its deterioration. *See*, *e.g.*, *Delcastor*, *Inc.*

> *v. Vail Assoc.*, 108 F.R.D. 405 (D.Colo.1985) (holding that one party's expert who observed a site one day after a mud slide had knowledge unobtainable through any other source); *Sanford Constr. Co. v. Kaiser Aluminum & Chemical Sales, Inc.*, 45 F.R.D. 465, 466 (E.D.Ky.1968) (holding that plaintiff's expert had knowledge unobtainable through any other source where plaintiff refused to allow defendant's experts access to site where ruptured sewer pipe was being removed); *MacDonald Sprague Roofing Co. v. USM Weather–Shield Sys. Co.*, 38 Fed.R.Serv.2d 518 (D.Mass.1983) (compelling discovery of non-testifying expert's report where defendant was unable to test allegedly defective roof since roof had been replaced).
>
> The second situation commonly recognized as constituting exceptional circumstances is where it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive. *See In re Agent Orange*, 105 F.R.D. at 581 (compelling discovery of experts retained in a companion case which was part of the same multidistrict litigation because otherwise plaintiffs would have to devote enormous time and resources to duplicating the experts' efforts).

Bank Brussels Lambert v. Chase Manhattan Bank, N.A., 175 F.R.D. 34, 44 (S.D.N.Y. 1997), aff'd (Aug. 15, 1997). Here, BNSF has removed substantial asbestos and vermiculite from, and made significant modifications to, its Lincoln County properties. Thus, any consultations BNSF engaged regarding asbestos contamination and associated airborne asbestos levels in Lincoln County would likely be discoverable even in the unlikely circumstance they were prepared in anticipation of litigation. Assessment of whether these exceptions would apply to a given consultation requires the disclosure of appropriate descriptive and identifying information.

Once again, if any responsive information involves professionals retained in anticipation of this or related litigation, the proper course is to disclose the requisite information in a privilege log without revealing the privileged facts or opinions. It would be improper to strike the entirety of Plaintiffs' requests as BNSF suggests.

E. Plaintiffs' requests are not duplicative of prior cases.

While it is true that certain of Plaintiffs' requests implicate some responsive materials that have been produced in prior litigation, Plaintiffs believe it is appropriate to have a complete production in the cases currently before the Court. In addition, where duplicative productions were requested or expected, Plaintiffs have directed BNSF that "reference to bates number, description of the documents, and date of production will be sufficient and no repeat production is requested, as long as documents can be identified and located by Plaintiffs' counsel."[2] Plaintiffs' counsel does not intend to create extra work for any party and would stipulate to this procedure throughout the requests as to any duplicative production.

BNSF's specific objection in this regard is to RFP No. 29, which requests certain historic documents regarding railroad knowledge of asbestos hazards, which were submitted or admitted in the case of *Kath v. Burlington Northern R. Co.*, 441 N.W.2d 569 (1989). BNSF contends that it has already produced these documents

[2] In this regard, please note that Plaintiffs' reference to Interrogatory No. 28 in RFP No. 4 is a drafting error and is meant to reference Interrogatory No. 27 (there is no Interrogatory No. 28).

to Plaintiffs' counsel in multiple other cases.[3] BNSF's responses to similar requests in the past were in the form of objections and BNSF has yet to produce the requested materials. As an example, BNSF's most recent response to this request in the *Kampf v. BNSF* case, CDV-16-0424, was as follows:

> **REQUEST FOR PRODUCTION NO. 34:** Produce copies of the documents known as the "Alton Railroad documents" that were admitted and referenced as such by the Court of Appeals of Minnesota in the case of *Kath v. Burlington Northern R. Co.*, 441 N.W.2d 569 (1989) and/or any related proceedings, along with any associated or related documents including those used to establish foundation and/or authenticity of the "Alton Railroad documents."
>
> **RESPONSE:** In addition to the General Objections, BNSF objects to this request as overly broad on the grounds it is not limited in scope as to "related proceedings, along with any associated or related documents." BNSF further objects on the grounds the request is vague and ambiguous as to what is meant by "Alton Railroad documents." BNSF also objects on the grounds the request is not tailored to the claims of the Plaintiff, or to a sufficiently narrow topic or claimed injury relevant to the issues in this case. BNSF further objects to the extent the requested documents were "admitted" in the cited case, and therefore are in the public domain, and equally available and accessible to Plaintiff. Furthermore, BNSF does not keep the "Alton Railroad Documents" as part of its corporate or business records. Subject to and without waiving the foregoing objections, BNSF does not keep any such documents as part of its corporate or business records. Finally, given the age of the documents, and the fact that BNSF does not maintain the documents as part of its corporate or business records, BNSF does not believe that the documents can be authenticated because a meaningful foundation cannot be laid.

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[3] BNSF inaccurately asserts these materials were also produced in the unrelated case of *Daley v. BNSF*, DV-05-882. Plaintiffs object to any reliance on the unrelated *Daley* case as it did not involve exposure to Libby asbestos or vermiculite but instead involved occupational exposure to various substances of a tie plant worker in Somers, Montana.

Because BNSF has yet to produce these materials, Plaintiff has again requested their production.

CONCLUSION

Plaintiffs' requests are not unnecessarily cumulative, are reasonably limited in time and scope, and do not improperly seek discovery of information that is privileged. Plaintiffs' requests have been narrowly tailored to obtain relevant responsive information and materials. In addition, Plaintiffs have attempted to resolve BNSF's objections as reasonably as possible. For the reasons stated herein, the Court should overrule BNSF's general objections and deny BNSF's motion to strike Plaintiffs' requests in their entirety.

Respectfully submitted this 9th day of March, 2018.

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: /s/ Ethan Welder
ROGER SULLIVAN
ALLAN M. McGARVEY
JOHN F. LACEY
ETHAN WELDER
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Ethan Aubrey Welder, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 03-09-2018:

Amy Poehling Eddy (Attorney)
920 South Main
Kalispell MT 59901
Representing: Amy Eddy
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jon L. Heberling (Attorney)
345 First Ave E
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Adams, et al

Service Method: eService

Jeffrey R. Kuchel (Attorney)
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Danielle A.R. Coffman (Attorney)
1667 Whitefish Stage Rd
Kalispell MT 59901
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: Honeywell International
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: CNH Industrial America LLC
Service Method: eService

Thomas C. Bancroft (Attorney)
2619 St. Johns Ave., Suite E
Billings MT 59102
Representing: Arrowood Indemnity Company
Service Method: eService

G. Patrick HagEstad (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co., United Conveyor Corporation, Riley Stoker Corporation et al
Service Method: eService

Rachel Hendershot Parkin (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co.
Service Method: eService

Kirk D. Evenson (Attorney)
Marra, Evenson & Bell, P.C.

P.O. Box 1525
Great Falls MT 59403
Representing: CBS Corporation, Hennessy Industries, Inc.
Service Method: eService

Mark Andrew Thieszen (Attorney)
Poore Roth & Robinson, P.C.
1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Patrick M. Sullivan (Attorney)
1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Jennifer Marie Studebaker (Attorney)
210 East Capitol Street
Suite 2200
Jackson MS 39201
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Joshua Alexander Leggett (Attorney)
210 East Capitol Street, Suite 2200
Jackson MS 39201-2375
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Vernon M. McFarland (Attorney)
200 South Lamar Street, Suite 100
Jackson MS 39201-4099
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec LLC, International Paper Co.
Service Method: eService

Jason Trinity Holden (Attorney)
1314 CENTRAL AVE
P.O. BOX 2466
Montana

GREAT FALLS MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec LLC, International Paper Co.
Service Method: eService

Chad E. Adams (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

W. Scott Mitchell (Attorney)
P.O. Box 639
401 N. 31st Street
Suite 1500
Billings MT 59101
Representing: Pfizer, Inc.
Service Method: eService

Brianne McClafferty (Attorney)
401 North 31st Street, Suite 1500
P. O. Box 639
Billings MT 59103-0639
Representing: Pfizer, Inc.
Service Method: eService

Steven Robert Milch (Attorney)
P.O. Box 2529
Billings MT 59101
Representing: Farm Equipment Sales, Inc.
Service Method: eService

Joe C. Maynard (Attorney)
PO Box 2529
Billings MT 59103
Representing: Farm Equipment Sales, Inc.
Service Method: eService

Katie Rose Ranta (Attorney)
Faure Holden, Attorneys at Law, P.C.
1314 Central Avenue
P.O. Box 2466
GREAT FALLS MT 59403
Representing: Borg Warner Morse Tec LLC
Service Method: eService

Ryan T. Heuwinkel (Attorney)

283 W Front St, Suite 201
PO Box 7729
Missoula MT 59807
Representing: New Holland North America, Inc.
Service Method: eService

John Eric Bohyer (Attorney)
283 W Front, Suite 201
PO Box 7729
Missoula MT 59807
Representing: New Holland North America, Inc.
Service Method: eService

John Patrick Davis (Attorney)
1341 Harrison Avenue
Butte MT 59701
Representing: Atlantic Richfield Company, et al
Service Method: eService

Stephen Dolan Bell (Attorney)
Dorsey & Whitney LLP
125 Bank Street
Suite 600
Missoula MT 59802
Representing: Ford Motor Company
Service Method: eService

Dan R. Larsen (Attorney)
Dorsey & Whitney LLP
111 South Main
Suite 2100
Salt Lake City UT 84111
Representing: Ford Motor Company
Service Method: eService

Peter L. Helland (Attorney)
311 Klein Avenue, Suite A
P.O. Box 512
Glasgow MT 59230
Representing: Ford Motor Company
Service Method: eService

Kelly Gallinger (Attorney)
315 North 24th Street
Billings MT 59101
Representing: Maryland Casualty Corporation
Service Method: eService

Richard Allan Payne (Attorney)

44 West 6th Ave, Suite 200
P.O. Box 1185
Helena MT 59624
Representing: The Goodyear Tire & Rubber Company
Service Method: eService

Jack G. Connors (Attorney)
P.O. Box 1185
Helena MT 59624
Representing: The Goodyear Tire & Rubber Company
Service Method: eService

Mark M. Smith (Attorney)
44 W. 6th Ave.
Suite 200
Helena MT 59624
Representing: The Goodyear Tire & Rubber Company
Service Method: eService

Charles J. Seifert (Attorney)
P.O. Box 598
Helena MT 59624
Representing: Ford Motor Company, Maryland Casualty Corporation
Service Method: eService

Robert J. Phillips (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Emma Laughlin Mediak (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Daniel Jordan Auerbach (Attorney)
201 West Railroad St., Suite 300
Missoula MT 59802
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company
Service Method: eService

Leo Sean Ward (Attorney)
PO Box 1697
Helena MT 59624

Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Robert B. Pfennigs (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Rick A. Regh (Attorney)
P.O. Box 2269
GREAT FALLS MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Mark Trevor Wilson (Attorney)
300 Central Ave.
7th Floor
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Robert M. Murdo (Attorney)
203 N orth Ewing
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Ben A. Snipes (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Mark M. Kovacich (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al

Service Method: eService

Ross Thomas Johnson (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: A.W. Chesterson Company
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: A.W. Chesterson Company
Service Method: eService

M. Covey Morris (Attorney)
Tabor Center
1200 Seventeenth St., Ste. 1900
Denver CO 80202
Representing: FMC Corporation
Service Method: eService

Robert J. Sullivan (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Ingersoll-Rand, Co.
Service Method: eService

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: State of Montana
Service Method: eService

Vaughn A. Crawford (Attorney)
SNELL & WILMER, L.L.P.
400 East Van Buren
Suite 1900
Phoenix AZ 85004
Representing: The Proctor & Gamble Company et al
Service Method: eService

Tracy H. Fowler (Attorney)
15 West South Temple
Suite 1200
South Jordan UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: eService

Rexford L. Palmer (Attorney)
301 W Spruce
Missoula MT 59802
Representing: Alexander et al
Service Method: eService

Jon P. Parrington (Attorney)
6600 France Avenue South
Suite 680
Minneapolis MN 554351814
Representing: Hennessy Industries, Inc.
Service Method: eService

Martin S. King (Attorney)
321 West Broadway, Suite 300
P.O. Box 4747
Missoula MT 59806
Representing: Foster Wheeler Energy Services, Inc.
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: Continental Casualty Company
Service Method: eService

Geoffrey R. Keller (Attorney)
PO Box 1098
Billings MT 59103
Representing: ABCO Supply Inc.
Service Method: eService

Tom L. Lewis (Attorney)
2715 Park Garden Lane
Great Falls MT 59404
Representing: Harold N. Samples
Service Method: eService

Keith Edward Ekstrom (Attorney)
601 Carlson Parkway #995
Minnetonka MN 55305
Representing: Brent Wetsch

Service Method: eService

William Rossbach (Attorney)
401 N. Washington
P. O. Box 8988
Missoula MT 59807
Representing: Michael Letasky
Service Method: eService

Kennedy C. Ramos (Attorney)
1717 Pennsylvania Avenue NW
1200
wash DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Chad M. Knight (Attorney)
929 Pearl Street
Ste. 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Anthony Michael Nicastro (Attorney)
401 North 31st Street
Suite 770
Billings MT 59101
Representing: BNSF Railway Company
Service Method: eService

Nadia Hafeez Patrick (Attorney)
929 Pearl Street Suite 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Electronically Signed By: Ethan Aubrey Welder
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