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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' POSITION PAPER FOR DOCUMENT REPOSITORY COST SHARING *Applicable to All Cases*

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I. INTRODUCTION

Pursuant to the established course of conduct over many years in this litigation involving the asbestos injury claims of the Libby Claimants, the Libby Claimants produced the documents they had in their possession and executed releases so that each of the requesting Defendants could obtain, at Defendants' expense, information not in the possession of the Libby Claimants. Although an electronic repository is now available that will allow the Defendants to collectively pay only once for the released documents, the Defendants now seek to force the Libby Claimants to pay for one-half of the costs for the documents—and attendant electronic processing—which Defendants are gathering to advance their defenses. The Manual for Complex Litigation, the Montana Rules of Civil Procedure, and relevant jurisprudence confer inherent authority on this Court to fairly allocate discovery costs. In accordance with this clear authority, Plaintiffs request that this Court require the Defendants to bear the cost of obtaining and processing the documents that they wish to obtain for the defense of their case.

II. FACTS

This Court requested the parties to pursue a secure electronic repository for gathering information received from the Defendants' service of Plaintiffs' releases. To that end, the parties have engaged Litigation Abstracts ("LA") for a proposal to facilitate Defendants' access to all responsive documents from the Releases.[1] LA will serve as a document retrieval and copying service. It will obtain, scan, and upload documents requested by Defendants to a specific Plaintiff's folder. Parties will have case-specific access to the documents.

Defendants requested this Court to require each Plaintiff to execute a wide variety of releases and provide a detailed Fact Sheet. Plaintiffs have embarked on an expensive and time-consuming process to make available the information Defendants request. Plaintiffs already bear the unilateral cost of over $60,000 and hundreds of staff and attorney hours for just the effort of obtaining signed Fact Sheets and releases for the benefit of the Defendants.

[1] See Proposal of Litigation Abstracts attached as Exhibit A.

Consistent with past practice, and to mitigate the enormous costs associated with LA's role in the production of medical records, Plaintiffs have offered to provide all documents in Plaintiffs' possession, including medical records related to the disease alleged in the complaint. However, Defendants have rejected this offer and instead demand releases to re-obtain most of the documents themselves—and then have Plaintiffs pay for half of the costs of making these documents, many of which have already been provided, available to all Defendants. Moreover, also at issue are tenuously relevant documents which neither party have ever relied upon in the past (e.g., union releases and tax returns), but which Defendants now intend to seek for almost 2,000 Plaintiffs.

III. ARGUMENT

A. The Manual for Complex Litigation favors allocation of costs to Defendants to pay for the production of documents they request for the development of their defense.

Rules 26(b)(2), 26(c) and 26(f), M.R.Civ.P., confer broad authority on the Court to equitably allocate the costs of discovery. The Manual for Complex Litigation §11.433 contemplates that cost allocation is an appropriate means to limit expensive discovery:

> Rule 26's purpose is not to equalize the burdens on the parties, but Rule 26(b)(2)(iii) expressly requires the court to take the parties' resources into account in balancing the burden or expense of particular discovery against its benefit. Thus, where the parties' resources are grossly disproportionate, the judge can condition discovery that would be unduly burdensome on one of them upon a fair allocation of costs. (Emphasis added.)

The Manual recommends that courts consider the benefits, burdens, and overall case efficiency when allocating costs.

Courts have articulated as many as eight factors relevant to cost allocation:

- The specificity of the discovery requests;
- The likelihood of discovering crucial information;
- The availability of such information from other sources;
- The purposes for which the responding party maintains the requested data;
- The relative benefit to the parties of obtaining the information
- The total cost associated with production
- The relative ability of each party to control costs and its incentive to do so; and
- The resources available to each party.

Manual for Complex Litigation §11.433. These factors greatly favor the Defendants carrying the burden of costs associated with the releases.

1. Documentary requests are neither specific nor likely to lead to discovery of crucial information.

Defendants are taking a scattershot approach to obtaining information via the releases. They have asked *each* Plaintiff to complete 8-12 releases for information without a clear articulation of the purpose of each release or whether the information obtained will likely lead to the discovery of "crucial" information. For example, the Social Security Earnings and Union Records of a school teacher are not specific to liability issues before this Court, nor are they likely to lead to valuable information for the resolution of these cases. Yet, the cost of obtaining the SSA records alone is estimated to be $243,340. *See* Exhibit B, attached.

2. Defendants unilaterally insist on obtaining expensive records for the purpose of building their defense.

Defendants forego obtaining readily available records from cost-effective sources. The truly relevant medical records are available through the Plaintiffs, yet Defendants seek to re-obtain duplicate records. They also seek to obtain *every* medical record in hopes of building the defense of their case.

The benefit of these productions flows solely to the Defendants. Plaintiffs have previously obtained and shared the records they require to prove their case, and remain willing to freely share records in their possession. The additional medical records and other information from these releases relate strictly to the Defendants' case. Under past practice employed for years, Defendants have always acknowledged their responsibility to obtain, pay for, and share such records as part of the Defendants' case. Their current position is abusive and inconsistent with a proper allocation of the burden of discovery.

Furthermore, the repository *lowers* each Defendant's total production cost dramatically since they *share with each other* the price of records production. Previously, each Defendant independently sought and paid for its own desired medical records. Now, Defendants receive an

inherent benefit from LA's system because they split their respective per Plaintiff charges. This further exposes the opportunistic inequity of Defendants' proposal that Plaintiffs pay fifty-percent of all release and LA document processing costs. Thus, instead of paying 100% of the cost as before, individual Defendants will likely pay approximately 12-25% each, after their collective 50% is distributed among the multiple Defendants in each case.[2]

3. Defendants are in exclusive control of what documents to request and have the resources to finance their own discovery.

The Defendants have exclusive control over how many documents they seek for the defense of their case. Under the Defendants' proposal, they have no incentive to control costs, since their traditional expenses would be shifted to Plaintiffs. Indeed, this proposal actively incentivizes Defendants to seek every possible record, relevant or not, on a fishing expedition for the defense of their case and as a means of burdening Plaintiffs.

The costs are enormous: for just three of the twelve releases the statutorily mandated costs will be $550,000. See Exhibit B. Based on a reasonable estimate for medical records, the cost of medical record production may run over $201,020, and LA's price to process such documents may exceed $124,000 the first year. Additional set costs for IRS Records and SSE Earnings Records for each plaintiff is over $349,140.[3] The MCL contemplates that the parties relative resources should be considered in allocating costs. This only highlights the inequities of Defendants' proposal. While most Plaintiffs are retired or disabled, and while the median household income for Lincoln County is among the lowest in Montana, the three corporate Defendants each had operating profits over two-billion dollars in 2017.[4] There is no doubt the equities favor the Defendants paying for their own discovery and defense.

[2] If a Plaintiff has a case against four Defendants, and the production and processing costs of medical records and other documents total $2,000, Plaintiff would pay $1,000, and each Defendant would pay $250.
[3] Fees associated with the releases: Social Security Administration Request for Earnings-Itemized Statement: $115; IRS Request for Earnings: $50; Medical Records (from Montana providers) $15/person/provider and $.50/page.
[4] International Paper's 2017 operating profits: $2.1B -- BNSF's 2017 operating income: $7.34B -- Maryland Casualty's parent company Zurich American Ins. Co. 2017 operating profit: $3.8B.

B. Case law regarding documentary production under Rule 34 favors cost allocation to the party seeking documents.

In applying Rule 34, most courts have held that the moving party must bear such expenses. *See Taxation of Costs and Expenses in Proceedings for Discovery or Inspection,* 76 A.L.R.2d 953 (Originally published in 1961). Under long standing precedent, federal courts routinely require the requesting party to incur the expense of document production.

In *Reeves v Pennsylvania R. Co*, 80 F. Supp. 107, 109 (D. Del., 1948), the defendant moved to receive a copy plaintiff's income tax returns for certain years. The court ruled that the party seeking such production bears the expense of such copies:

> Rule 34 provides that an order for production may prescribe such terms and conditions as are just and in view of the fact that the obtaining of copies of the income tax returns may involve some expense, the order for the production of such copies shall include the provision that the expense of such copies shall be advanced by or borne by the party seeking such production.

Similarly, in *Currie v Moore-McCormack Lines, Inc*., the court authorized the production of plaintiff's medical records but held that the expense of furnishing copies of such records and reports should be borne by the defendant. 23 FRD 660 (D. Mass., 1959). Courts have further held that not only should defendants bear the costs of obtaining records, but they should also bear the cost of safeguarding such records while they are being examined. *See, e.g., Campbell v Johnson*, 11 FRD 107 (D. N.Y., 1950).

IV. CONCLUSION

In accordance with the above-stated equities and authorities, Plaintiffs propose the following costs be allocated directly to the Defendants: (1) Loading Documents into System; and (2) fees charged by medical providers and other entities responding to Defendants' use of the releases. Plaintiffs also propose that the following costs be shared equally between the parties, or allocated directly to Defendants: (1) Set-Up Costs; (2) Administration of Repository; and (3) Site Shut Down. [5]

[5] See Exhibit B for cost estimates and definitions to these sections.

Respectfully submitted this 25th day of May, 2018.

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