

Amy Eddy, Asbestos Claims Court Judge  
Department No. 1  
Flathead County Justice Center  
920 South Main Street, Suite 310  
Kalispell, Montana 59901  
(406) 758-5906

## IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,  <i>Consolidated Cases.</i>	Cause No. AC 17-0694  ORDER RE: MOTIONS TO QUASH
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Pending before the Court is Plaintiffs' *Motion to Quash Subpoenas on CARD Clinic and CARD Foundation*, filed May 25, 2018; Non-Parties CARD Clinic's and CARD Foundation's *Objections to and Motion to Quash Subpoenas*, filed May 29, 2018; and Non-Parties CARD Clinic's and CARD Foundation's *Objections to and Motion to Quash Amended Subpoenas*, filed June 5, 2018. The Defendants filed a *Response* on June 8, 2018. Considering the expedited timeframes involved in this matter, the Court is issuing this *Order* without waiting for any *Reply* briefs to be filed.

Also pending before the Court is the Defendants' *Motion to Strike*, filed June 8, 2018. Considering the expedited timeframes involved in this matter, the Court is issuing this *Order* without waiting for any *Response* briefs to be filed.

Neither party requested a hearing, nor does one appear necessary to the Court. Having reviewed the file and being fully apprised, the Court hereby finds as follows:

**ORDER**

- (1) Plaintiffs' *Motion to Quash Subpoenas on CARD Clinic and CARD Foundation* is GRANTED in part and DENIED in part, consistent with the below rationale;
- (2) Non-Parties CARD Clinic's and CARD Foundation's *Objections to and Motion to Quash Subpoenas* is GRANTED in part and DENIED in part, consistent with the below rationale;
- (3) Non-Parties CARD Clinic's and CARD Foundation's *Objections to and Motion to Quash Amended Subpoenas* is GRANTED in part and DENIED in part, consistent with the below rationale; and
- (4) Defendants' *Motion to Strike* is GRANTED in part and DENIED in part, consistent with the below rationale.

## RATIONALE

On May 14, 2018, the Defendants in this matter served the following subpoenas pursuant to Rule 45, Mont.R.Civ.P.: (1) *Subpoena to Testify at a Deposition in a Civil Action* on the Rule 30(b)(6) representative of the CARD Clinic, outlining 56 areas of testimony; (2) *Subpoena Duces Tecum* on the CARD Clinic, outlining 54 categories of documents to be produced; (3) *Subpoena to Testify at a Deposition in a Civil Action* on the Rule 30(b)(6) representative of the CARD Foundation, outlining 21 areas of testimony; and (4) *Subpoena Duces Tecum* on the CARD Foundation, outlining 21 categories of documents to be produced.

After the Plaintiffs, the CARD Clinic and the CARD Foundation filed their initial objections to the above *Subpoenas*, on June 1, 2018, the Defendants served *Amended Subpoenas* seeking to correct some of the procedural errors with the initial subpoenas, including attaching the text of Rule 45(e), Mont.R.Civ.P., including a “Certification Pursuant to Montana Health Care Information Act”, extending the time to comply with the *Subpoenas*, and requesting complete patient files of Defendants’ defined “CARD’s Research Pool or Cohort.” Otherwise, the *Amended Subpoenas* were substantially similar to the original *Subpoenas*.

On June 5, 2018, the CARD Clinic and the CARD Foundation renewed their objections to the *Amended Subpoenas*. On June 8, 2018, the Defendant’s filed a *Motion to Strike Plaintiffs’ Motion to Quash Subpoenas on CARD Clinic and CARD Foundation*, on the grounds the Plaintiffs did not have standing to object to the subpoenas served on a non-party.

### A. Factual and Procedural Background

In 1963, W.R. Grace & Co. purchased a vermiculite mine and mill in Libby, Montana from the Zolonite Company and continued to operate the mine until its closure in 1990. While in operation, the mine produced approximately 80 percent of the world’s supply of vermiculite, a mineral used in building insulation and soil conditioner. A highly toxic form of asbestos, commonly called Libby Amphibole asbestos, intermixed with the vermiculite, and by extracting and processing the vermiculite, substantial asbestos-laden dust was generated. Additionally, expansion, bagging, storage, and transport facilities in Libby produced the asbestos dust.

Over the course of decades, the W.R. Grace & Co. mine and mill and associated facilities released asbestos dust throughout Libby and Troy in Lincoln County, Montana. Termed the “Libby Asbestos Site” by the Environmental Protection Agency (“the EPA”), the exposure to asbestos dust there is unique because of the variety of exposure routes, the cumulative exposures experienced by community members, and the adverse health effects present and documented in residents. Asbestos exposure was not limited to vermiculite mine and associated facility workers and their families; the community at large used asbestos-containing material in homes, gardens, and public areas. Many people insulated their homes with asbestos-containing vermiculite insulation. Children played on vermiculite piles.

Atmospheric deposition of toxic asbestos also contaminated the soil in the Libby community. The EPA attributed soil contamination from community transportation and use of the

vermiculite mine wastes. Atmospheric deposition also contributed to indoor asbestos dust inside homes and businesses.

Finally, Libby's unique topography and weather patterns concentrated asbestos dust in the Libby Asbestos Site. Libby is located in a narrow valley, surrounded by mountains 4,000 feet higher than the town. In the winter, persistent temperature inversions concentrate atmospheric contaminants, including asbestos, in the valley.

At the Libby Asbestos Site, disease and death rate from asbestosis and asbestos-related disease significantly higher than the national average. In 2002, the Center for Asbestos Related Disease ("CARD Clinic") was established in Libby in response to raised awareness of widespread asbestos exposure. Since then, the CARD Clinic's stated goal has been to provide long-term screening, health monitoring, disease diagnosis, and counseling to people exposed to Libby Amphibole asbestos. The CARD Clinic also assists in asbestos-related disease research. Since establishment, the CARD Clinic has screened approximately 5,700 people for asbestos-related disease; and, it continues to actively follow the status of 7,700 patients.

The CARD Clinic is governed by a volunteer board, and it employs about 25 people. Doctor Brad Black, M.D., is the CARD Clinic's Chief Executive Officer and Medical Director and is supported in identifying and managing Libby Amphibole asbestos-related disease by Doctor Alan Whitehouse, M.D., a Spokane-based pulmonologist. Prior to joining the CARD Clinic, Dr. Black specialized in pediatrics and worked as the Lincoln County Health Officer. Dr. Whitehouse began seeing patients affected by asbestos in 1985 and worked for the CARD Clinic between 2004 and 2009.

The CARD Clinic is open four days per week. In 2017, the CARD Clinic's budget was approximately \$3 million, with funding primarily derived from the federal government by way of grants. In whole or in part, grants pay for the salaries of 19 CARD Clinic employees. Grant-funded salaried time is limited to specific functions.

Established in 2008, the CARD Foundation is a separate nonprofit 501(c)(3) organization from the CARD Clinic. The CARD Foundation accepts monetary donations on behalf of the CARD Clinic. With no employees, the CARD Foundation is operated solely by a volunteer board. In 2017, the CARD Foundation raised about \$13,000 for the CARD Clinic. Of the CARD Clinic's \$3 million budget in 2017, donations garnered by the CARD Foundation on its behalf only contributed about 0.4 percent.

The Libby asbestos litigation represents some of the most complicated and long-standing litigation known in Montana. The claims of over 2,100 individuals have been consolidated under the authority of the Asbestos Claims Court. Some of these individuals were exposed to asbestos over 50 years ago, some more recently. The CARD Clinic initially diagnosed virtually every individual involved in this litigation with asbestosis. While many of those individuals' initial asbestosis has unfortunately progressed to other asbestos-related disease, including mesothelioma and various cancers, the majority of these individuals have not progressed beyond the initial asbestosis diagnosis and are not suffering from any impairment, despite 95% of them being exposed over 30 years ago.

The parties currently dispute whether individuals who have an asbestosis diagnosis but do not suffer from any impairment should be placed on a deferred docket. Placing these individuals on a deferred docket would give them an opportunity to determine whether the disease was going to progress, and, if so, give them the opportunity to resolve their claims against the Defendants at fair value. Defendants counter that the majority of these individuals were exposed so long ago, that if the disease has not progressed by now, it is not going to. Defendants are separately contesting the adequacy and reliability of an asbestosis diagnosis from the CARD Clinic. These issues are coming before the Court for an evidentiary hearing on July 24-25, 2018. However, the *Subpoenas* do not seek information just for purposes of the hearing. The Court has also separately set five separate cases for trial in 2019. Those cases involve numerous individuals with various levels of disease ranging from asbestosis to mesothelioma, with corresponding claims for personal injury, wrongful death and survivorship damages.

Accordingly, the information sought in the *Subpoenas* is viewed in the broader context of this litigation as a whole—not just the hearing set for July 24-25, 2018.

## B. Legal Standards

“The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.” *Richardson v. State*, 2006 MT 43, ¶22, 331 Mont. 231, 130 P.3d 634. Accordingly, the discovery rules are “liberally construed to make all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage.” *Richardson*, ¶24. Under Rule 26(b)(1), Mont.R.Civ.P.:

Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense -- including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Rule 26(b)(2)(C), Mont.R.Civ.P. in turn provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the

parties resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Consistent with the boundaries of the discovery rules, Rule 45(3), Mont.R.Civ.P. outlines the procedure for quashing subpoenas that do not comply with the discovery rules and provides in relevant part:

- (A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:
  - (i) fails to allow a reasonable time to comply;
  - (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person -- except that, subject to Rule 45(d)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
  - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
  - (iv) subjects a person to undue burden.
- (B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:
  - (i) disclosing a trade secret or other confidential research, development, or commercial information;
  - (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
  - (iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.
- (C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
  - (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
  - (ii) ensures that the subpoenaed person will be reasonably compensated.

### C. Legal Analysis

The Court will address the individual subpoenas in turn:

- (1) *Subpoena to Testify at a Deposition in a Civil Action* on the Rule 30(b)(6) representative of the CARD Foundation and *Subpoena Duces Tecum* on the CARD Foundation

The CARD Foundation is the private fundraising arm of the CARD Clinic. In 2017, it raised \$13,000. The Defendants have subpoenaed 21 separate categories of documents from the CARD Foundation, and seek Rule 30(b)(6) testimony as to each of those categories. The categories range from organizational structure, names of employees, and fundraising activities to payroll, invoices, communications with regulatory agencies and all other information related to the CARD Clinic. These categories are generally irrelevant and do not appear reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Mont.R.Civ.P. Moreover, even if relevant, the burden or expense of the proposed discovery outweighs its likely benefit, considering the information to be produced by the CARD Clinic. Rule 26(b)(2)(C)(3), Mont.R.Civ.P.

The only exceptions are the categories requested in ¶¶4-5, as contained in both the *Subpoena to Testify at a Deposition in a Civil Action* on the Rule 30(b)(6) representative of the CARD Foundation and *Subpoena Duces Tecum* on the CARD Foundation. Information relating to any relationship between the CARD Foundation and the law firms or lawyers that are *currently* representing plaintiffs before the Asbestos Claims Court is relevant or appears reasonably calculated to lead to the discovery of admissible evidence. Dr. Alan Whitehouse, of the CARD Clinic, has previously testified that some of his publications have been funded by some of the Plaintiffs' lawyers in this case. *Daley v. BNSF, et al.*, Flathead County Cause No. DV-95-882(C), Trial Testimony Transcript, pp. 229-230, dated 7/13-14/17. Accordingly, such information may be relevant to the credibility of witnesses testifying on behalf of the CARD Clinic or CARD Foundation during the trials of these matters. In this vein, the Court would draw an analogy to the situation in which plaintiff's counsel subpoenas similar information from a Rule 35 IME physician. The *Subpoenas* to the CARD Foundation are otherwise QUASHED.

## **(2) *Subpoena Duces Tecum* on the CARD Clinic**

The Defendants have subpoenaed 54 separate categories of information from the CARD Clinic, which the Court will permit or quash as follows:

The Plaintiffs do not object to the information sought in ¶32.<sup>1</sup> This information must be produced accordingly.

The *Subpoena Duces Tecum* is QUASHED as to the information sought in ¶¶1, 2, 3, 4, 5, 7, 9, 11, 12, 15 and 23. As to the claimants before the Asbestos Claims Court, this information is already being produced through the regular discovery process, as agreed to by the parties. Rule 26(b)(2)(C)(ii), Mont.R.Civ.P.<sup>2</sup> As to any other patient of the CARD Clinic, their medical information is irrelevant to the claims before this Court. Any argument that the information might be reasonably calculated to lead to the discovery of admissible evidence, is overshadowed by

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<sup>1</sup> As reflected in *Plaintiffs' Brief in Support of Motion to Quash Subpoenas to CARD Clinic and CARD Foundation*, Ex. 6, *Summary*, pp. 1-2.

<sup>2</sup> The Court takes very seriously the Defendants' contention that Plaintiffs' counsel has not even begun providing releases so that the Defendants can start gathering this information. Counsel has been reminded repeatedly of their obligation to timely provide these releases—with the priority being cases set for trial. It should not take this many months to provide this limited number of releases.

concerns of patient confidentiality, and the requirement that the CARD Clinic redact all personally identifying patient information for the 5,000 patients who are not involved in this litigation, renders the request unduly burdensome. Rule 45(3)(A)(4), Mont.R.Civ.P.<sup>3</sup>

As to the remaining categories, the Plaintiffs object on the grounds the information sought is irrelevant, duplicative and/or overly broad. The CARD Clinic agrees the requests are unduly burdensome, and further objects on the ground there is insufficient time to comply with the *Subpoenas*, and to do so will cause the CARD Clinic to incur substantial expense. As to the remaining categories, the Court finds as follows:

The information requested in ¶¶ 8, 13, 14, 16, 18, 19, 20, 21, 24, 28, 29, 32, 33, 37, 38, 39, 40, 43, 45, 46, 48, 49, 50 and 54 is relevant or appears reasonably calculated to lead to the discovery of admissible evidence, is not duplicative, and is not overly broad within the context of this litigation. This information must be produced accordingly.

The *Subpoena Duces Tecum* is QUASHED as to other categories of information requested and not otherwise addressed above. This information, while perhaps appearing reasonably calculated to lead to the discovery of admissible evidence, is overly broad and unduly burdensome.

**(3) *Subpoena to Testify at a Deposition in a Civil Action on the Rule 30(b)(6) representative of the CARD Clinic***

**(a) Subpoena Topics**

The Defendants have requested the CARD Clinic produce a Rule 30(b)(6) representative to testify on 56 separate topics. These topics range from organizational structure, contents of the website, advertising, medical criteria, and involvement with W.R. Grace to relationships with other healthcare providers, medical research and referral sources. Consistent with the above rationale for limiting the scope of the *Subpoena Duces Tecum* on the CARD Clinic, the Court finds as follows:

The topics contained in ¶¶ 1, 2, 4, 5, 6, 7, 11, 12, 13, 15, 18, 20, 21, 22, 23, 24, 25, 28, 31, 34, 35, 37, 38, 39, 40, 42 and 53 are appropriate for inquiry of the CARD Clinic's Rule 30(b)(6) corporate representative. Additionally, ¶¶ 55 and 56 are appropriate when limited to the relationship between the CARD Clinic and Drs. Whitehouse and Black. Requesting all the communications between the CARD Clinic and Drs. Whitehouse and Black is clearly over broad.

The *Subpoena to Testify at a Deposition in a Civil Action* is QUASHED as to other categories of information requested and not otherwise addressed above. This information, while perhaps appearing reasonably calculated to lead to the discovery of admissible evidence, is overly broad and unduly burdensome, and can be better sought through other sources.

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<sup>3</sup> Based on this ruling, the Court need not address whether the *Subpoenas* comply with Rule 45(a)(4), Mont.R.Civ.P. The Court also finds that because this portion of the *Subpoenas* does impact the rights of the Plaintiffs, they had standing to file the *Motion to Quash* on this basis.

**(b) Scope of Deposition**

Consistent with Rule 29(d), Mont.R.Civ.P., any deposition of a single individual shall not exceed seven hours. The Court will not retain a special master to supervise the deposition, nor will the Court make itself especially available during the deposition as requested by Plaintiffs' counsel. The attorneys in this case have hundreds of years of collective experience litigating complex civil cases. All counsel are well-aware of their professional obligations under the Montana Rules of Evidence, the Montana Rules of Civil Procedure, the Montana Rules of Professional Conduct, and the boundaries of *pro hac vice* admission—both for out-of-state counsel and local counsel. Since the first hearing before this Court, counsel for the parties have been advised the Court will take any discovery abuses seriously.

**D. Fees and Costs**

While the Court does not at this point concur with the Plaintiffs that the *Subpoenas* “appear to be a fishing expedition aimed at abusing a nonparty to this action and smack of witness intimidation”, the Court did quash half of the requests as duplicative, overly broad, overly burdensome and/or seeking confidential information. Accordingly, consistent with Rule 45(d)(1), Mont.R.Civ.P., the Defendants are responsible for paying the attorneys’ fees and costs incurred by the CARD Clinic and the CARD Foundation for moving to quash these *Subpoenas*.

Consistent with Rule 45(3)(C)(ii), Mont.R.Civ.P., the Defendants are also responsible for paying reasonable costs incurred by the CARD Clinic and CARD Foundation in responding to these *Subpoenas*.

DATED this 8<sup>th</sup> day of June, 2018.

/s/ Amy Eddy

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Amy Eddy, Asbestos Claims Court Judge



## **CERTIFICATE OF SERVICE**

I, Amy Poehling Eddy, hereby certify that I have served true and accurate copies of the foregoing Other - Other to the following on 06-08-2018:

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

Ethan Aubrey Welder (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

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

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

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

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

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 North 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

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

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

Kevin A. Twidwell (Attorney)  
1911 South Higgins Ave  
PO Box 9312  
Missoula MT 59807  
Representing: Libby School District #4  
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)  
345 First Avenue East  
Kalispell MT 59901  
Representing: Adams, et al  
Service Method: eService

Michael Crill (Other)  
PO Box 145  
Rimrock AZ 86335  
Service Method: Conventional

Michael D. Plachy (Attorney)  
1200 17th Street  
Denver CO 80202  
Representing: Honeywell International  
Service Method: Conventional

Conor A. Flanigan (Attorney)  
1200 17th Street  
Denver CO 80202  
Representing: Honeywell International  
Service Method: Conventional

Fredric A. Bremseth (Attorney)  
601 Carlson Parkway, Suite 995  
Minnetonka MN 55305-5232  
Representing: Brent Wetsch  
Service Method: Conventional

Walter G. Watkins (Attorney)  
210 E. Capitol Street, Ste. 2200  
Jackson MS 39201  
Representing: International Paper Co.  
Service Method: Conventional

Electronically Signed By: Amy Poehling Eddy  
Dated: 06-08-2018