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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS, AND BRIEF IN SUPPORT Applicable to: *MacDonald v. BNSF Railway Co., et al* Cascade County Cause No. DV-16-549 and *Barnes et al v. State of Montana, et al* Lincoln County Cause No. DV-16-111

MOTION

Plaintiffs in the above captioned cases move this Court, pursuant to Rules 26 and 37, Mont. R. Civ. P., for an order requiring BNSF to fully answer and supplement its responses to Plaintiffs' Master Discovery Requests, specifically as to information and documents regarding: (A) cleanup efforts of Lincoln County railroad properties (Request for Production Nos. 7 & 12); (B) construction/removal/ modification of Lincoln County railroad properties (Interrogatory No. 6); and (C) entities consulted regarding Libby asbestos (Interrogatory Nos. 1, 8, & 9, Request for Production Nos. 3 & 12). As required by Rule 37(a), Mont. R. Civ. P., Plaintiffs' counsel certifies that, for two months, they have tried to resolve these issues short of seeking judicial relief. Throughout this process, very little meaningful progress has been made. With pending expert

disclosure deadlines, Plaintiffs find it necessary to seek an order of the Court compelling discovery and imposing appropriate sanctions for discovery abuse and potential destruction of relevant material evidence.

ARGUMENT

At issue are Plaintiffs' Master Discovery Requests. This means that they will apply to and control in all cases before the Asbestos Claims Court. As stated by the Court, they are meant to address global discovery issues in all these cases going forward.[1] As such, they necessarily warrant special attention and effort to ensure full and comprehensive responses thereto. Plaintiffs have repeatedly pointed this out in conferral with BNSF, but unfortunately without effect.

I. BNSF's General Failures

The requests served by Plaintiffs have been approved by the Court. *See* March 20, 2018 Hearing Transcript, pp. 26-27. They seek relevant information on various subjects vital to these cases, and further serve a catch all discovery request seeking all relevant materials as allowed by the Court at the April 16, 2018, hearing.[2] In response, BNSF has posed five pages of "General" boiler plate objections including "overly broad" and "unduly burdensome" objections in direct contravention of the Court.[3] In addition, BNSF has stated specific objections to <u>every</u> request,

[1] "<u>I was clear that the purpose of the master discovery being promulgated to each of the Defendants was for purposes of establishing liability</u> and then settlement of the cases, and that the Plaintiffs were doing the same through the releases -- and I understand they'll get a similar lecture, perhaps, in that regard in a few moments, but that is the purpose of it. <u>It's not whether it's an actively litigated case that's been set for trial, that's the purpose of the master discovery</u>." (5/15/18 Hearing Transcript, p. 14.)

[2] "Sure. And I would expect that there is a catchall discovery response that -- or request that you have that says give us everything you have about this.… Well, then I think that you need to have -- and I would allow -- one added discovery request -- for production that says give us everything you have. That should cover it." 4/16/18 Transcript, pp. 38-39.

[3] "Now, I'm not granting those extensions so I can have a whole bunch of boilerplate objections with no actual responsive documents or interrogatories. You're warned that I expect responsive discovery responses, all right? And so of course if you have an objection to a discovery request that's well founded in Montana law by all means make it, but do not be giving me overly broad and unduly burdensome objections to every single request without any foundation for doing so." 5/15/18 Hearing Transcript, p. 22.

including many specific "overly broad" and "unduly burdensome" objections which, given their bare and boiler-plate frequency in the context of these Master Discovery Requests, must be considered without foundation and intended to obstruct and delay Plaintiffs.

BNSF also consistently objects in its answers and responses that Plaintiffs' requests are not limited to the period and type of exposure alleged by the lead Plaintiffs, while at the same time it claims it is not limiting its responses to any individual exposure type or period. BNSF's conferral correspondence repeatedly represents that if any limitations regarding the scope of the discovery request was made due to an objection, they would be specifically stated in the response. No such express limitation or clarification appears in any response to Plaintiffs' requests. Many of these same objections were asserted by BNSF when opposing Plaintiffs' Master Discovery Requests that were subsequently approved by this Court. BNSF has refused to remove these objections or rectify these discrepancies despite repeated requests. Additionally, BNSF raises numerous objections that documents are privileged or protected, but it has yet to produce any kind of privilege/redaction log so that Plaintiffs or the Court can see what information and documents have been withheld and on what specific basis. The harm is real, as time is wasted on months of conferral, and it ultimately necessitates these kinds of motions.

II. BNSF's Inadequate Production

Where BNSF does provide substantive responses, the information is often blatantly incomplete or unresponsive. Despite its representations that documents are not being withheld while implying the propriety of merely preserving its objections, it is clear BNSF has withheld documents and information. Addressing just the examples that Plaintiffs have been able to identify as relevant documents and categories of information, counsel has pointed out numerous examples that BNSF excludes from its production:

> (A) BNSF has not produced documents associated with the Phase I Site Assessment of its Lincoln County Properties that occurred in or around 1990 (see,

e.g., 3/21/1990 correspondence between W.R. Grace and BNSF).

(B) In the 2018 *Wetsch v. BNSF* case litigated by the Bremseth Law Firm of Minnesota, BNSF's counsel in this matter extensively cross-examined Dr. Brad Black using what it called "Quivik interviews" which have not been produced.

(C) Plaintiffs have not received any of the materials or correspondence relating to BNSF's hiring of, and communications with, the Libby Claimants' medical providers to offer testimony against the Libby Claimants at the recent evidentiary hearing (e.g., Dr. Becker, Dr. Dal Nogare).

(D) BNSF has not produced the expert reports, deposition transcripts, or countless other responsive documents produced to or by other Plaintiffs' counsel in the other Montana Libby asbestos cases it has recently disclosed (see, e.g., BNSF's discovery disclosure to the Hedger Moyers Firm in the Steven L. Johnson case in 2005 – BNSF has not produced many of the documents referenced in this document such as the Libby Community Advisory Group Meeting Summaries).

(E) BNSF has not produced any relevant documents, information, or other materials related to the *BNSF v. Arrowood* (Cause No. DV-14-0225) and *Arrowood v. BNSF* (Cause No. 352-287082-16) actions currently filed and/or ongoing in Yellowstone County, Montana and Tarrant County, Texas and specifically involving insurance coverage issues for the Libby claims at issue.

This list is indicative of the much larger problem and not an exhaustive description of what BNSF has failed to produce, since it is no easy task to ascertain what is missing.

To make matters worse, in one of its most recent responses, BNSF concedes it is withholding certain information exchanged in discovery during prior Libby asbestos cases with counsel from other litigants, as well as information it admits is relevant but which it unilaterally designates as "impeachment documents." This is improper for several reasons, least of which is BNSF's history before the Montana Supreme Court, which has "reject[ed] the notion that BNSF is entitled to unilaterally determine which evidence is relevant or valuable" in the context of litigation. *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶ 30, 379 Mont. 314, 350 P.3d 52. As repeatedly requested throughout extensive discovery correspondence, and as directed by the Court at our 8/6/18 conference, Plaintiffs need BNSF to provide either an affirmative written statement that it has produced all relevant responsive information, or a privilege/redaction log of what has

been withheld.

BNSF's responses are inadequate in many instances. However, with the pending expert disclosure deadline, Plaintiffs' conferral with BNSF has been primarily focused on information necessary for Plaintiffs' experts' assessment of the asbestos hazard created by BNSF's Lincoln County properties and vermiculite related activities. These requests addressing information necessary for expert assessments are set forth below.

A. Correspondence/communications regarding cleanup efforts of Lincoln County railroad properties (Request for Production Nos. 7 & 12).

Plaintiffs' applicable requests are:

> REQUEST FOR PRODUCTION NO. 7: Please produce copies of all documents, including reports, e-mails, correspondence, memoranda (internal and otherwise), meeting minutes or agendas, and business records, embodying, or pertaining to, BNSF communications regarding Libby Vermiculite or Associated Asbestos (including that potentially found in soil, groundwater, trees/vegetation, atmosphere, equipment, or buildings).
>
> * * *
>
> REQUEST FOR PRODUCTION NO. 12: Please produce copies of all documents regarding communications had, or submissions made, which address, concern, or otherwise reference Libby Vermiculite or Associated Asbestos (including that found in soil, groundwater, trees, vegetation, atmosphere, equipment, or buildings) or regarding the removal, abatement, remediation, or hazards of exposure to, any of these materials in Montana, between:
>
> a) BNSF or its agents, employees, representatives, attorneys, insurers or contractors, and any political entity, government entity (including Lincoln County), agency (including the EPA, DEQ, OSHA, or NIOSH), politician, or community action group;
>
> b) BNSF or its agents, employees, representatives, attorneys, insurers or contractors, and any environmental consultant/consulting firm, environmental contractor, or other such company hired, retained, or consulted by BNSF; and
>
> c) All persons, entities, agencies, contractors, or consultants and any political entity, government entity (including Lincoln County), agency (including the EPA, DEQ, OSHA, or NIOSH), politician, or community action group, which were obtained, received, or maintained by BNSF.

BNSF's production of correspondence and communications regarding the presence of

vermiculite and asbestos on its properties and the cleanup thereof is clearly incomplete. For example, the production is devoid of communications leading up to and resulting in the Administrative Order of Consent entered between BNSF and United States Environmental Protection Agency (EPA). Pursuant to the Administrative Order of Consent (hereinafter "Federal Order") entered into between BNSF and EPA, BNSF agreed to take responsibility for the clean-up in house, and agreed that it was in sole control of the documentary record regarding that cleanup. Attached as Exhibit One is the relevant portion of the Federal Order. That Federal Order provides:

> Respondent shall provide to EPA, upon reasonable request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. …
>
> Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that directly relate to the implementation of this Order, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

Federal Order, ¶¶ 26, 30.[4] Although Plaintiffs have not received in discovery the referenced Notice of Completion of Work, to the extent one has even been issued, other documents obtained show that the subject cleanup was not completed until 2013. BNSF did not issue its Final Remedial Investigation Report until April of 2014. Accordingly, BNSF has a **current** independent federal responsibility to "preserve and retain . . . documents (including records or documents in electronic

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

form) *now* in its possession or control or *which c[a]me into its possession or control . . .* regardless of any corporate retention policy . . . [and] instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work." Production here of Libby EPA documents BNSF is under federal order to preserve, retain, and instruct its agents to maintain and preserve should not be contested.

However, instead of producing a full record of such documentation in its possession or simply stating that it failed to retain such documents, BNSF agreed to submit a Freedom of Information Act (FOIA) request to the EPA. BNSF's willingness to submit such a FOIA request does not relieve BNSF from its duty to preserve and produce relevant and requested evidence. More importantly, the EPA's recent response to BNSF's FOIA request demonstrates that Plaintiffs simply cannot (nor should they have to) rely on this third party method of receiving documents that are clearly discoverable from defendant BNSF in these cases. *See* Exhibit Two, BNSF's 8/23/18 letter (describing a two-year period and $25,000 cost of production to which Plaintiffs must commit before BNSF will authorize the EPA's search/production to proceed).

Because BNSF has refused to produce communications and documents with its contractors regarding the asbestos cleanup of its Libby properties, Plaintiffs have served subpoenas on BSNF's contractors. Again, BNSF's duty pursuant to the above Federal Order and as a defendant in these (and prior) proceedings to preserve and produce relevant and requested evidence is not negated by Plaintiffs' subpoenas. Importantly, Plaintiffs' counsel has already learned from at least one of BNSF's contractors that, due to its own document and email retention policies, they are unlikely to possess a full record of such communications.[5]

[5] This itself indicates BNSF's failure to comply with the above-discussed Federal Order, which obligates BNSF to "instruct its contractors and agents to preserve all documents," and the important responsibility placed upon a party like BNSF who undertakes an agreement with the EPA to maintain all attendant responsibilities, including document retention and not merely property remediation.

Most telling is that BNSF has not produced a single internal communication on these subjects.[6] The only source for BNSF internal communications is BNSF itself. BNSF should have retained all such communications pursuant to its duty to preserve evidence relevant to active or pending litigation. Plaintiffs' counsel has been continually pursuing Libby asbestos cases against BNSF since 2000, before cleanup operations began at BNSF's Lincoln County Properties, and ever since. BNSF's duty to preserve and now produce such information—or at least a log of what is being withheld—could not be more straight-forward.

Based on BNSF's lack of response to these requests, its unwillingness to state whether it has any such documents, and its eagerness to assert that a FOIA request or Plaintiffs' subpoenas somehow absolves BNSF of its duty to produce these documents, it appears BNSF has either destroyed these critical documents or failed to maintain them. The effect of BNSF's apparent destruction of such evidence, whether intentional or negligent, is a major and actionable hurdle for Plaintiffs to overcome in proving their case. Plaintiffs' experts are left to offer opinions regarding hazards associated with historic conditions on BNSF Lincoln County properties where the facilities have since been completely altered and remediated and there is not a complete record supporting what took place during BNSF's decade long clean-up effort. This information is clearly relevant to Plaintiffs' claims and is unavailable elsewhere.

Plaintiffs know further that BNSF uses this supposed lack of information as a sword. In prior litigation, BNSF continually notes the lack of contemporaneous testing data to support opinions regarding the toxic environment at its properties. Lacking such data, Plaintiffs are left to

[6] As comparison, Plaintiffs' counsel was involved in litigation regarding another BNSF superfund cleanup in Somers, Montana. In that case, different BNSF counsel produced extensive communications spanning multiple decades regarding the tie plant cleanup, including internal BNSF communications and communications with and between EPA, BNSF, and BNSF's contractors. BNSF also produced a privilege/redaction log in that case to allow Plaintiffs to ascertain what and why information had been withheld. Absolutely nothing comparable has been produced here.

elicit testimony and opinions to attempt to refute BNSF's offensive use of this lack of evidence. BNSF gains that advantage wholly by withholding—or perhaps even having destroyed—relevant documents on this issue in its possession and control.

BNSF repeatedly asserts that it has produced all documents maintained by BNSF on this topic. As explained above, however, this production is logically and patently incomplete. The missing information is relevant and material to Plaintiffs' cases and their experts' ability to make thorough disclosure. The lack of any record of such information in BNSF's production, despite numerous requests and independent duties to maintain the documents and information, should be considered *prima facie* proof of spoliation of evidence.

The Montana Supreme Court has declared:

> Relevant evidence is critical to the search for the truth. The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system. There can be no truth, fairness, or justice in a civil action where relevant evidence has been destroyed before trial. Historically, our judicial system has fostered methods and safeguards to insure that relevant evidence is preserved. Ultimately, the responsibility rests with both the trial and appellate courts to insure that the parties to the litigation have a fair opportunity to present their claims or defenses.

Oliver v. Stimson Lumber Co., 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11. BNSF is of course no stranger to these obligations, or the audacity of engaging such litigation offenses in other Montana cases. *See Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶¶ 22-27, 379 Mont. 314, 350 P.3d 52 (discussing numerous cases where BNSF was admonished for concealing or disposing of evidence). "Parties to litigation unquestionably have a duty to preserve evidence." *BNSF Ry. Co. v. Quad City Testing Lab., Inc.*, 2009 WL 10678241, at *3 (D. Mont. Nov. 30, 2009), *report and recommendation adopted*, No. CV-07-170-BLG-RFC, 2010 WL 11534510 (D. Mont. Feb. 25, 2010). "The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated

litigation." *Wooten v. BNSF Ry. Co.*, No. CV 16-139-M-DLC-JCL, 2018 WL 2417858, at *8 (D. Mont. May 29, 2018) citing *Bel Air Mart*, 2014 WL 763185 *3 (*quoting World Courier v. Barone*, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007)).

In *Spotted Horse*, the Montana Supreme Court singled out BNSF as a "sophisticated and recurrent party to litigation," making clear that duties prevail in the context of both pending and potential litigation. 2015 MT 148, ¶ 22. It stated, "BNSF is a seasoned and sophisticated corporate litigant well aware of its obligations when responding to workplace violations and employee injuries and accidents. These obligations include the retention of evidence relevant to injury claims." 2015 MT 148, ¶ 27. Here, any failure to retain such evidence rises beyond the level of discovery gamesmanship and failure to preserve evidence under Montana law, since BNSF has a duty to retain all such information pursuant to the EPA, Administrative Order on Consent for Removal Action noted above. It now rests on this Court to enforce BNSF's duties.

There are blatants gaps in BNSF's production of documents and information regarding the presence and cleanup of vermiculite and associated asbestos on BNSF's Lincoln County properties. Given the ongoing litigation during this entire period, there is no reasonable basis to withhold, or to have destroyed, this extremely relevant and probative information. Plaintiffs respectfully request the Court enter an Order compelling the production of such information, and/or to enter another appropriate sanction. *See, e.g.*, Rule 37(b)(2), M. R. Civ. P.

B. Construction/removal/modification of Lincoln County railroad properties from 1990 to 2010 (Interrogatory No. 6).

Plaintiffs' applicable request is:

> INTERROGATORY NO. 6: Please identify and describe all track maintenance or construction activities involving repair, alteration, removal, replacement, or additions to any BNSF track, right-of-way, siding, surface, or subsurface premises within a 10-mile radius of the Libby railyard and conducted during the period of 1990 to 2010 on BNSF owned or leased premises. In each instance, please also identify what specific track maintenance activities occurred, the

> section, including milepost markings, where the work was done, the workforce responsible for the track maintenance activities, including any contractors or agencies retained by BNSF for the project, the motorized equipment employed by workers on the project, and whether any air sampling tests or other work environment testing occurred during the project. Your answer should also include the construction and maintenance schedules or how often such maintenance and reconstruction activities were expected or required to occur.

In short, Interrogatory No. 6 requests a description of all track maintenance or construction activities involving BNSF's property within a 10-mile radius of the Libby railyard and conducted during the period of 1990—2010. This information reflecting pre- and post-remediation conditions is key to Plaintiffs' experts' ability to interpret the asbestos sampling and monitoring performed on Lincoln County railroad properties by BNSF contractors and others.

Rather than providing the requested description of these activities, BNSF objected because the request "seeks disclosure of evidence of subsequent remedial actions," "are not temporally related to plaintiff's allegations in this lawsuit," and are not limited "to a sufficiently narrow topic or claimed injury relevant to claims in this suit." In so doing, BNSF again improperly takes the position that "it is entitled to unilaterally determine which evidence is relevant or valuable" and fails to provide any log of what has been withheld pursuant to these objections. *Spotted Horse*, 2015 MT 148, ¶ 30.

BNSF supplemented its prior non-response with incomplete and indecipherable rail maintenance and repair logs, asserting that they serve as a sufficient substitute to the requested descriptive response of removal actions. Attached as Exhibit Three is a representative sample of the logs. However, this supplement is inherently non-responsive and incomplete. The limited information appears to be confined to maintenance records from the early 2000s forward. Worse, the information is utterly indecipherable without specific knowledge of, or a key as to what, the numeric entries, codes and railroad jargon mean. Plaintiffs requested a complete production

including information of "how often undercutting operations, sweeping operations, ballast replacement activities, soil removal activities, tie replacement operations, etc., took place in Lincoln County" and the missing information from 1990 until the early 2000s as requested in the Interrogatory. BNSF responded to these requests and Plaintiffs' request for a key regarding the logs, refusing to produce a key of what the entries mean and instead stating its position that the logs "contain the type of activities outlined in your letter." BNSF counsel recently offered to "talk through those records" in lieu of an actual key or specific discovery response that Plaintiffs' experts can rely upon. BNSF cannot equate conversations between counsel with the necessary information and documents that a party must produce, especially in this instance where clearly, somewhere, a key for interpreting the logs must either already exist or be within the scope of BNSF's present ability—and responsibility—to describe.

Plaintiffs request this Court compel BNSF to provide a complete descriptive response to Interrogatory No. 6.

C. Entities consulted regarding Libby asbestos (Interrogatory Nos. 1, 8, & 9, Request for Production Nos. 3 & 12).

These requests seek the identity of all specialists, scientists, researchers, engineers, technicians or other professionals whom BNSF has consulted regarding vermiculite or associated asbestos in Lincoln County and information associated with those consultations. In response, BNSF objects that the information is protected "to the extent it purports to seek disclosure of the identities of consulting (i.e., non-testifying) experts." It provides no log of what information has been withheld or any specific basis therefor. BNSF then refers Plaintiffs to a list of testing documents related to its clean-up efforts and provides a list of four individuals who all worked for one of BNSF's clean-up contractors, EMR. This is clearly not even a complete list of its clean-up

contractors[7] or associated individuals and is completely unresponsive as to all other entities consulted regarding vermiculite or asbestos in Lincoln County as specifically sought in these requests. BNSF must be compelled to provide a comprehensive list of individuals consulted on this subject and to produce all associated documentation and information.

As to BNSF's objection regarding "consulting experts," we assume BNSF is referring to the M. R. Civ. P. 26(b)(4)(B) limitation on discovery of "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation." 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.'"). Additionally, 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, Advisory Committee Notes.

There were substantial periods of time prior to 2000 in which no litigation regarding Libby

[7] A review of the minimal documentary record provided by BNSF demonstrates that its clean-up contractors in Libby included not only EMR, but also Kennedy Jenks, Envirocon, Clayton Laboratories, and others.

vermiculite exposure was pending or ongoing, and any professional consultations regarding Libby vermiculite performed during these periods would be discoverable. Additionally, 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.

Plaintiffs must also be allowed to 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, 175 F.R.D. 34, 44.

Here, BNSF has removed substantial asbestos and vermiculite from, and made significant modifications to, its Lincoln County properties. The historic conditions of BNSF's Lincoln County properties no longer exist. Because the conditions are no longer "observable by an expert of the party seeking discovery," and separately because the cost of replicating historic conditions would be judicially prohibitive, any consultations BNSF engaged regarding asbestos contamination and associated airborne asbestos levels in Lincoln County should 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.

As repeatedly requested by Plaintiffs in recent correspondence, BNSF must be compelled at minimum to prepare a redaction/privilege log covering documents BNSF has withheld pursuant to its objections to afford Plaintiffs the opportunity to assess whether they would be protected by M. R. Civ. P. 26(b)(4)(B). In the case of a large corporate entity such as BNSF, which is constantly engaged in litigation, there must be a careful assessment of what constitutes qualifying litigation under the rule. As such, the redaction/privilege log must identify the litigation BNSF claims it was anticipating and under which it asserts the protections of M. R. Civ. P. 26(b)(4)(B), and provide a sufficient description of the consultation to allow Plaintiffs' and the Court's evaluation. Without this check on the assertion of these protections, BNSF could simply refuse to produce any non-favorable asbestos sampling and claim that it was performed by consulting experts in anticipation of litigation.

BNSF must be ordered to disclose all consultations and associated information regarding vermiculite and associated asbestos in Lincoln County and to produce a privilege/redaction log of

any such information withheld with sufficient information provided to allow Plaintiffs to discern the relevance and discoverability of such information.

CONCLUSION

BNSF has engaged in a discovery strategy of stonewalling Plaintiffs' requests in an apparent effort to gain tactical advantage while attempting to delay redress of the issue through continuous and fruitless discovery conferral. Given the pending expert disclosure deadlines, Plaintiffs cannot wait any longer and must file this motion. The Court should order BNSF to immediately and adequately respond to the above discovery requests.

Additionally, Plaintiffs respectfully request that the Court consider the full array of relief available under Rule 37 for BNSF's withholding or destruction of relevant evidence.

DATED this 24th day of August, 2018.

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

By: /s/ Ethan Welder
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CERTIFICATE OF SERVICE

I, Ethan Aubrey Welder, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 08-24-2018:

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