Mark M. Kovacich
Ben A. Snipes
Jacy D. Suenram
KOVACICH SNIPES, P.C.
P.O. Box 2325
Great Falls, MT 59403
(406) 761-5595

Attorneys for KS Plaintiffs

IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA
Cause No. AC 17-0694

IN RE ASBESTOS LITIGATION,

Consolidated Cases.

THIS DOCUMENT RELATES TO:
Raan, et al. v. International Paper, et al.
Cascade County Cause No. CDV-18-0177
Judge Pinski

PLAINTIFF'S BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT (STRIKING IP'S AFFIRMATIVE DEFENSES)

INTRODUCTION

Defendant, International Paper Company (hereafter "IP"), asserts a number of affirmative defenses, many of which have no basis in law or fact. Plaintiff hereby moves the Court for an order striking those defenses which have no application to this matter. The Court should grant Plaintiff's Motion for Partial Summary Judgment for the reasons set forth below.

LEGAL STANDARD

Montana Rule of Civil Procedure Rule 56(a) provides that a party seeking to recover on a claim may move for a summary judgment "upon all or any part thereof." The Montana Supreme Court has articulated the burdens of proof attendant with summary judgment motions as follows:

The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995). In examining the viability of the affirmative defenses at issue, it is important to note that defendant bears the burden of pleading and proving these defenses. *See Gustafson v. Northern Pac. Ry. Co.*, 137 Mont. 154, 161, 351 P.2d 212, 215-16 (1960).

I. First Affirmative Defense (Failure to State a Claim)

IP's first affirmative defense alleges that Plaintiff's Complaint "fails to state a claim upon which relief can be granted." This defense, in addition to all defenses raised by IP, proves insufficient as it fails to allege how or why the

Complaint fails to state a claim.

Montana Rule of Civil Procedure Rule 8(c) requires a party to plead affirmatively certain defenses. The purpose of Rule 8(c) is to ensure that a plaintiff receives adequate notice of a defendant's affirmative defenses. *See Bitterroot Int'l Sys. v. Western Star Trucks, Inc.*, ¶ 49, 2007 MT 48, 336 Mont. 145, 153 P.3d 627. Without a statement of the grounds upon which this defense is based, it becomes a broad "catchall" place-holder for any defense that may be proffered later. Such a strategy directly controverts the "notice-pleading" purpose of Rule 8(c), by permitting trial by ambush. *Id.*

IP fails to show how or why the Complaint fails to state a claim. The Complaint speaks for itself, and alleges several causes of action, complete with factual support. Given its failure of specificity and evidence in support of the same, the Court should grant summary judgment in favor of Plaintiff on IP's first affirmative defense.

II. Second and Third Affirmative Defenses (Statute of Limitations and Laches)

Plaintiff's claims against IP are based on Larry Raan's contraction of mesothelioma and eventual death. Raan was diagnosed with mesothelioma on June 19, 2017, at which time his claims accrued. *See Carroll v. W.R. Grace &*

Co., 252 Mont. 485, 487, 830 P.2d 1253, 1254 (1992). Plaintiff's initial Complaint against IP was filed on March 27, 2018. The statute of limitations applicable to Plaintiff's claims is three years. Mont. Code Ann. § 27-2-204.

In addition to claiming a statute of limitations defense, IP's third affirmative defense invoke various common law doctrines having no good faith basis for application in this case. The equitable doctrine of laches cannot possibly bar personal injury claims filed within two years after they arose. Plaintiff's claims against IP were appropriately preserved and were not waived in any manner. Plaintiff has never made a representation to IP upon which an estoppel defense could be based. These defenses detract from the issues at hand and waste the valuable time of the Court. These defenses should be stricken.

III. Fourth Affirmative Defense (Workers' Compensation Exclusivity)

IP claims that the Workers' Compensation Act affords the exclusive remedy for Larry Raan's claims against IP. Raan's last day of work with the Libby Lumber Mill occurred in 1981, thus establishing the Montana Occupational Disease Act ("MODA") applicable to this analysis. *Nelson v. Cenex, Inc.*, ¶ 18, 2008 MT 108, 342 Mont. 371, 181 P.3d 619 (statute in effect on the last day of work controls). Under the applicable MODA, exclusivity does not protect an

employer from liability who intentionally and maliciously injures its employees. *Lockwood v. W.R. Grace & Co.*, 272 Mont 202, 900 P.2d 314, 319 (1995); *Sherner v. Conoco, Inc.*, 298 Mont. 401, 995 P.2d 990, 999 (2000). Plaintiff alleges IP and/or its predecessors intentionally and maliciously injured Raan by exposing him to a known toxic substance, which caused Raan to contract mesothelioma and experience an excruciatingly painful death. Complaint, ¶¶ 40-42.

The MODA is not Raan's exclusive remedy. The question of whether Raan's employer's conduct satisfies the intentional and malicious standard is a question of fact for the jury not subject to dismissal as an affirmative defense. IP's fourth affirmative defense should be dismissed.

IV. Fifth, Fifteenth, Eighteenth, Twenty-Fifth, and Thirty-First Affirmative Defenses (Non-Party Fault and Causation)

IP's fifth, fifteenth, eighteenth, twenty-fifth, and thirty-first affirmative defenses attempt to negate or lessen its own fault by introducing wrongdoing of persons or entities who are not parties to this litigation. Given the Constitutional prohibitions on non-party fault, as clearly and repeatedly echoed by the Montana Supreme Court, these defenses are inappropriate and contrary to Montana law.

The Montana Supreme Court has consistently determined non-party fault is not a valid defense under Montana law. *Plumb v. Fourth Judicial Dist. Court*, 279

Mont. 363, 927 P.2d 1011 (1996); *Newville v. State*, 267 Mont. 237, 883 P.2d 793 (1994). Based, in part, on the Supreme Court's holdings in *Plumb* and *Newville*, the Court in *Stone v. Atlantic Richfield Co., et al.*, Cause No. DDV-04-967 (July 25, 2006), prohibited the defendant in an asbestos personal injury case from blaming the plaintiff's disease on exposures for which non-parties were responsible. (A copy of the Court's order in *Stone* is attached hereto as Exhibit "A").

In *Stone*, the plaintiff was diagnosed with mesothelioma following years of occupational exposure to asbestos while working at the Anaconda Company Smelter in Anaconda, Montana. The plaintiff filed a negligence claim against his employer, in addition to strict products liability claims against the manufacturers of asbestos-containing products to which he was exposed. The plaintiff settled with his employer and all but one of the manufacturers. The remaining defendant asserted an affirmative defense based on the fault of the other parties, who were no longer present in the case. Consistent with *Plumb* and *Newville*, the Court found allowing the defendant to attribute fault to parties who were not present to defend their conduct would violate the plaintiff's constitutional right to due process of law. Thus, the Court granted partial summary judgment to the plaintiff rejecting the non-party defense. The Court also granted the plaintiff's motion in limine,

prohibiting any evidence or argument regarding the non-party conduct.

Approximately one month after the order in *Stone*, the Montana Supreme Court decided *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, further solidifying the prohibition of the non-party fault defenses in Montana. Alicia Faulconbridge was killed in a motorcycle accident near Missoula. She was a passenger on a motorcycle driven by Jason Weaver. Her parents filed a wrongful death action against the State of Montana claiming the road on which the accident occurred was defectively designed and maintained. The State sought to introduce evidence that Jason had consumed alcohol, was speeding, and was driving the motorcycle with a mis-aimed headlight. The State conceded that Jason's fault was not a valid affirmative defense under *Plumb* and *Newville*. The State argued, however, that the evidence remained admissible to negate causation under the Montana Supreme Court's decision in *Pula v. State*, 2002 MT 9, 308 Mont. 122, 40 P.3d 364. While recognizing that evidence of non-party conduct was admitted to establish a superseding intervening cause in *Pula*, the Court strictly limited application of the rule and held the evidence inadmissible:

> We conclude, after revisiting *Pula* and its subsequent application, that a defendant may introduce non-party conduct only for the purpose of demonstrating that the non-party conduct was a superseding intervening cause of plaintiff's damages. By "superseding intervening cause" we mean "an unforeseeable event that occurs after

> the defendant's original act of negligence ... [which] will generally serve to cut off defendant's liability." A defendant may not, however, introduce such non-party conduct in an attempt to merely diminish its own responsibility, for this would constitute an attempt to apportion fault to a non-party, in violation of *Plumb*.

Faulconbridge, ¶ 81.

In this case, the conduct IP seeks to introduce cannot be characterized as an intervening cause. An intervening cause is defined as an unforeseeable act of negligence, occurring after the defendant's conduct, and breaking the chain of causation between the defendant's conduct and the injury. Acts of multiple parties which combine to produce an injury, on the other hand, are properly characterized as multiple causes. *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139-40 (1996). The allegations at issue here are not a series of acts producing a result, but rather alleged exposures combining to produce a result. Thus, pursuant to *Faulconbridge*, the non-party conduct is not admissible.

In its discovery responses, IP suggests fault should be attributed to Zonolite Company and its successor, W.R. Grace. *See* IP's Second Supplemental Response to Interrogatory No. 24 [Master Discovery], attached hereto as Exhibit "B." No other asbestos product manufacturers were a named party in this case. Generally speaking, most of those manufacturers are immune from tort liability pursuant to bankruptcy orders. Certainly, they are not subject to the jurisdiction of this Court,

nor could they have been named as a third party. No other manufacturers, employers, residential owners, schools, or commercial building owners have appeared in this action, and IP has done nothing to procure their participation. Consistent with the Montana Supreme Court authority discussed above, Montana Code Annotated § 27-1-703(6)(c) prohibits consideration of fault with respect to:

> (i) a person who is immune from liability to the claimant;
> (ii) a person who is not subject to the jurisdiction of the court; or
> (iii) any other person who could have been, but was not, named as a third party.

This Court has no authority, at present, to impose liability against any of the persons or entities identified in IP's discovery. Montana law does not allow consideration of non-party fault because fault attributed to a party who is not present to defend the allegations against it proves unlikely to result in a fair adjudication. *Plumb*, 279 Mont. at 376-78, 929 P.2d at 1019-20. The non-parties identified in IP's discovery responses will not be present to defend the allegations against them. As such, the Court should not allow IP to place blame regarding Plaintiff's injuries.

Based on the foregoing, IP's fifth, fifteenth, eighteenth, twenty-fifth, and thirty-fourth affirmative defenses are inapplicable and should be stricken.

V. Sixth Affirmative Defense (Comparative Fault)

IP's sixth affirmative defense asserts that Larry Raan's injuries or damages are barred or must be proportionally reduced by Raan's own comparative negligence. IP's reliance on this defense is without merit.

Although negligence is ordinarily a question of fact which is not susceptible to summary judgment, a party's negligence, or lack thereof, may be determined as a matter of law "where reasonable minds could reach but one conclusion . . ." *Schwabe v. Custers Inn Assoc., LLP*, 2000 MT 325, ¶ 34, 303 Mont. 15, 15 P.3d 903 (overruled on other grounds). Plaintiff's suit arises from the failure of IP to live up to duties owed its workers, their families, and others exposed by lumber mill operations, including Raan. Such failures ultimately caused Raan's mesothelioma. While IP asserts that Raan somehow contributed to his own disease, it fails to identify any careless or negligent conduct by Raan that would cause a reasonable juror to infer negligence or assess fault on his part. Because IP lacks factual basis in support of this defense, it should be stricken.

VI. Eighth Affirmative Defense (Plaintiff's Common Law Strict Liability Cause of Action)

The same deficiencies present in IP's first affirmative defense are repeated here. This defense proves insufficient as it fails to allege how or why Plaintiff

cannot bring a claim under this cause of action. Plaintiff has specifically and sufficiently plead a claim against IP based on common law strict liability. Complaint, ¶¶ 30-33. This cause of action remains a viable mean of recovery under Montana law, and has been sufficiently pled. To the extent this statement intends to disagree generally with Plaintiff's claim, it is not an affirmative defense and should be stricken. The Complaint speaks for itself, alleges a viable cause of action, complete with factual support. Given IP's failure of specificity and evidence in support of the same, the Court should grant summary judgment in favor of Plaintiff on IP's eighth affirmative defense.

VII. Ninth Affirmative Defense (Statute of Repose)

IP has not identified any statute of repose or corporate survival statute that will be applicable to this matter. In not doing so IP has failed to provide adequate notice of this defense, contrary to the aforementioned purpose of Rule 8(c). IP's ninth affirmative defense therefore proves inapplicable.

VIII. Tenth, Seventh, and Twenty-First Affirmative Defenses (Failure to Mitigate)

Larry Raan was diagnosed with mesothelioma on June 9, 2017, and died in July of 2017. During that time, he cooperated with his treating physicians and did everything in his power to minimize the impact of this fatal disease. Once

contracted, mesothelioma is difficult to treat and has an extremely low survival rate. Plaintiff fails to see how Raan failed to mitigate the fatal malignancy resulting in his death.

Mesothelioma is only caused by asbestos exposure. There is no evidence that Raan had any pre-existing conditions that would have contributed to his contraction of mesothelioma. These defenses are baseless, inapplicable to the facts of this case, and should be stricken.

IX. Eleventh, Twelfth, and Twenty-Fourth Affirmative Defenses (Assumption of Risk and Misuse)

In *Abernathy v. Eline Oil Field Service, Inc*., 200 Mont. 205, 650 P. 772 (1982), the Montana Supreme Court abolished implied assumption of risk as a defense to negligence actions but reserved decision on the applicability of assumption of risk where the defense was interposed in a products liability case. Plaintiff has not presented a case upon which the defenses of misuse or assumption of risk apply. Mont. Code Ann. § 27-1-719(5). Furthermore, no evidence exists to support an argument that Larry Raan misused any asbestos-containing product or assumed the risk of inhaling asbestos dust. Raan used the asbestos-containing products for their intended purpose and as he was instructed, during the course of his work at the Libby Lumber Mill. He was not

aware that asbestos could harm him until long after he was harmfully exposed to asbestos by lumber mill operations. Additionally, misuse may not be asserted as a defense when the manner of use at issue was foreseeable to the product manufacturer. *Lutz v. National Crane Corp,* 267 Mont. 368 375, 884 P.2d 455, 459-60. Raan's use of the asbestos-containing products was not only foreseeable, it was specifically intended by the parties selling the products.

Finally, assumption of risk is not a valid defense unless the defendant demonstrates that the plaintiff knew the product at issue would cause him or her injury. *Id.* at 461. Again, Raan was unaware of the harmful effects of asbestos, and the Defendant's predecessors did not so warn him. For each of these separate reasons, IP's eleventh, twelfth, and twenty-fourth affirmative defenses should be stricken.

X. Thirteenth Affirmative Defense (State of the Art)

Montana law is clear that IP's state of the art defense is not a proper affirmative defense. Any evidence that IP's asbestos-containing retail products and/or facilities conformed with the state of the art is both irrelevant and inadmissible. *See Speaks v. Mazda Motor Corp*. 2105 WL 4719905, *11 (August 17, 2015) citing *Sternhagen v. Dow*, 282 Mont. 168, 935 P.2d 1139, 1142 (1997) ("we expressly reject the state-of-the-art defense"). IP's thirteenth affirmative

defense is inapplicable.

XI. Fourteenth Affirmative Defense (Service of Process)

Montana law requires that a party in any civil action pending in a district court or the party's agent or attorney to forward by mail any process, summons, or other papers required in the cause. Mont. Code Ann. § 25-3-201(1)(a). Montana Rule of Civil Procedure Rule 4 dictates that upon the filing of a Complaint the Clerk of Court must issue a Summons that Plaintiff serves with the Complaint on the Defendant. Rule 4(t) requires that Plaintiff must accomplish service within three years after filing a Complaint. The Complaint in this matter was filed on March 27, 2018. Plaintiff served the Complaint and Summons to IP through its registered agent on May 22, 2018, clearly within the three year time frame. IP has alleged no facts regarding improper service. IP's fourteenth affirmative defense should be stricken.

XII. Sixteenth Affirmative Defense (Legal Duty)

IP's alleges that Plaintiff's claims are barred because "the Answering Defendants did not owe a duty to the plaintiffs which would give rise to liability." Plaintiff contends that IP owed the Plaintiff a duty to act with reasonable care concerning their business operations, so as not to jeopardize his health and welfare. Complaint, ¶ 22.

The existence of a legal duty is a question of law to be determined by the court. *Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38. In analyzing whether a duty exists, a court should consider whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his or her conduct could have resulted in an injury to the plaintiff. *Henricksen*, ¶ 21.

At the most basic level, everyone shares a common law duty to exercise the level of care a reasonable and prudent person would exercise under the same circumstances. *Runkle v. Burlington Northern*, 188 Mont. 286, 299, 613 P.2d 982, 990 (1980) (holding that a railroad had a duty to exercise this level of care, even in the absence of statutorily imposed duties). Employers in particular are required to furnish their employees with a safe workplace. Mont. Code Ann. § 50-71-201.

IP could and should have foreseen that exposure to or ingestion of asbestos proved unreasonably dangerous and hazardous to human health. IP and/or its predecessors knew that Larry Raan and other employees were inhaling harmful asbestos and vermiculite, but concealed such knowledge from Raan. IP and/or its predecessors deliberately acted in conscious disregard of and indifference to the risk imposed upon Raan by their continued operations resulting in employee exposure to asbestos.

Given the particular circumstances of this case, IP owed a duty to Raan to act reasonably. The Court should therefore enter summary judgment in favor of Plaintiff on IP's sixteenth affirmative defense.

XIII. Seventeenth Affirmative Defense (Indispensable Parties)

"[I]t should not be overlooked that the philosophy of Montana Rule of Civil Procedure Rule 19 is to avoid dismissal whenever possible." *Mohl v. Johnson*, 275 Mont. 167, 172, 911 P.2d 217, 220 (1996). Under Rule 19, "a person who is subject to service of process must be joined as a party" if (1) complete relief cannot be granted among existing parties, or (2) the person not joined would have an impediment to protecting an interest, or there would be substantial risk that an existing party would incur inconsistent obligations. Rule 19(b) states that if an "indispensable party" cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed or be dismissed." IP cannot identify any indispensable parties. Even if it could identify any indispensable party, an application of the factors identified in 19(b) show that the action should proceed in equity and good conscience.

IP's defense should be stricken for several reasons. First, it has not identified any "person who is subject to service of process" to which Rule 19 could apply. IP cannot show that complete relief cannot be granted among the

current parties. While a party should be joined if his presence is deemed necessary for the according of complete relief, it must be noted that complete relief refers to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought. Nor is joinder necessary where, although certain forms of relief are unavailable due to a party's absence, meaningful relief can still be provided. *Mohl v. Johnson*, 275 Mont. 167, 171, 911 P.2d 217, 220 (1996). IP cannot show that meaningful, adequate relief cannot be granted from IP who is currently party to the lawsuit.

Nor can IP show that there is any substantial risk that it may incur "double, multiple, or otherwise inconsistent obligations" based upon any failure of the Plaintiff to join indispensable parties. IP's obligations towards Larry Raan arise from its acknowledged liability for its predecessors' wrongdoing. IP cannot show prejudice, or any substantial risk of it incurring obligations inconsistent with its own responsibilities under Montana law. This defense should be stricken.

XIV. Twentieth Affirmative Defense (Patient Protection and Affordable Care Act)

IP alleges that "Plaintiff's claim for damages based on an alleged loss of insurability is precluded or otherwise barred by the Patient Protection and Affordable Care Act." Plaintiff has not alleged a loss of insurability in his

Complaint. This defense is inapplicable and a waste of judicial resources. IP's twentieth affirmative defense should be stricken.

XV. Twenty-Second and Twenty-Third Affirmative Defense (Proximate Cause)

IP asserts that it did not proximately cause the injury to Plaintiff, and that any exposure to Plaintiff "was so minimal, or in such a form, that it could not constitute a proximate cause of Plaintiff's alleged injuries and damages."

"The law of foreseeability, as it relates to liability law in Montana, has had a tortuous history." *Busta,* 276 Mont. at 360, 916 P.2d at 133. The Court in *Busta* determined that the defendant's conduct caused the injury where such conduct was a substantial factor in bringing about the injury. *Id.* citing *Kyriss v. State*, 218 Mont. 162, 707 P.2d 5 (1985).

As addressed above, IP cannot diminish its own liability by asserting that the actions or inactions of third parties were intervening or superceding causes. Not only was it foreseeable that lumber mill workers (and their families) would be exposed to respirable asbestos, IP and/or its predecessors were well aware of the dangers of inhaling harmful asbestos. The contribution of exposure attributable to IP and/or its predecessors remains a question of fact best left to the evaluation of the jury. *Estate of Strever v. Cline*, 278 Mont. 165, 175, 924 P.2d 666, 672 (1996).

Given the nature of the lumber mill operations, the jury must determine if IP's actions and inactions were a substantial factor in causing Larry Raan's contraction of mesothelioma and death. As a result, IP's twenty-second and twenty-third defense should be stricken.

XVI. Twenty-Sixth Affirmative Defense (Set-Offs)

Plaintiff has not filed any other litigation where other judgments can be obtained. Plaintiff has sought his remedy through this lawsuit alone. This defense is inapplicable and should be stricken.

XVII. Twenty-Eighth Affirmative Defense (Non-Economic Damages)

IP alleges that "Plaintiff's non-economic damages may be statutorily limited." Plaintiff remains unaware of any applicable Montana statute that would limit his non-economic damages and IP has failed to identify one. IP's twenty-eight affirmative defense proves inapplicable and should be stricken.

XVIII. Twenty-Ninth Affirmative Defense (Personal Jurisdiction and Venue)

Montana law provides that "if there are two or more defendants in an action, a county that is a proper place of trial for any defendant is proper for all defendants." Mont. Code Ann. § 25-2-117. Furthermore, Montana law provides a specific venue statute for tort actions. Montana Code Annotated § 25-2-122(1)(a)

dictates that the "proper place of trial for a tort action is the county in which the defendants or any of them reside at the commencement of the action." Defendant Robinson Insulation Company was incorporated in Montana and maintained its principal place of business in Cascade County, Montana. Venue remains proper in Cascade County as Robinson Insulation Company resided there at the commencement of this action. *See also Allen v. Atlantic Richfield Co.*, 2005 MT 281, 329 Mont. 230, 124 P.3d 132 (Court determined that venue remained proper in county where defunct insulation corporation sold its asbestos products). IP's twenty-ninth affirmative defense should be stricken.

XIX. Thirty-Second Affirmative Defense (Catchall Defense)

For its thirty-second affirmative defense, IP attempts to incorporate every defense asserted by every party to this litigation. As the Court is aware, another Defendant appeared in this case, and asserted several affirmative defenses. IP's affirmative defense, if allowed, would encompass dozens of defenses having no application to the claims against IP. Montana Rules of Civil Procedure Rule 8 requires a party to "state in short and plain terms" the party's defenses, including any affirmative defenses. Further, Montana Rules of Civil Procedure Rule 12 requires that "every defense, in law or in fact, to a claim for relief in any pleading . . . be asserted in the responsive pleading thereto . . ." The rules do not allow for

"catchall" defenses, particularly under the facts of this case.

XX. Thirty-Third Affirmative Defense (Fraudulent Misjoinder)

IP alleges that the "inclusion of resident Defendants in this lawsuit is fraudulent and improper and was done only to defeat federal diversity jurisdiction." Diversity jurisdiction under 28 U.S.C. § 1332 cannot be invoked absent complete diversity, where the citizenship of every plaintiff is diverse from every defendant. Under well settled law, an action may be nonetheless removable if joinder of a non-diverse party proves to be fraudulent. Fraudulent joinder occurs where the Plaintiff fails to state any cause of action against a non-diverse defendant, and the failure is obvious according to the settled rules of the State. *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). Plaintiff's claims against resident Defendants were properly asserted together with his claims against IP. Under Montana law, multiple defendants may be joined in one action if:

> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all defendants will arise in the action.

Mont.R.Civ.P. 20.

All of the Defendants' activities contributed to cause the same disease, resulting in the same damages, and the ultimate death of Larry Raan. The Montana Supreme Court has directed trial courts to avoid bifurcation of claims "which would result in extended and needless litigation." *Fitzgerald v. District Court*, 217 Mont. 106, 703 P.2d 148, 156 (1985). Separating Plaintiff's claims against the Defendants in this case would result in multiple trials involving many of the same witnesses, and much of the same evidence. Each trial would require proof of how and where Raan was exposed to asbestos, and precisely the same proof concerning the nature of his disease, damages, and death.

IP cannot establish misjoinder in this matter. Plaintiff has appropriately asserted causes of action against non-diverse parties. This defense proves inapplicable and should be stricken.

XXI. Thirty-Fourth and Thirty-Fifth Affirmative Defenses (Subject Matter Jurisdiction)

Montana Rule of Civil Procedure Rule 4 provides that "all persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising . . . from the transaction of any business within Montana." IP and/or its predecessors have conducted business in Montana since 1911. *See*

IP's Second Supplemental Response To Plaintiffs' Discovery Requests Preliminary Statement No. 1 [Master Discovery], attached hereto as Exhibit "C." Such business included the operations of the lumber mills resulting in the exposures at issue in this matter. This Court possesses jurisdiction. IP's thirty-fourth affirmative defense should be stricken.

CONCLUSION

Plaintiff respectfully requests an Order striking the aforementioned affirmative defenses from the record in this case. None of the defenses can apply to Plaintiff's claims against IP.

DATED this 12th day of October, 2018.

KOVACICH SNIPES, P.C.

By: /s/ *Jacy D. Suenram*
Jacy D. Suenram
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Jacy Suenram, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 10-12-2018:

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

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

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

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

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

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

Electronically signed by Monique Wagner on behalf of Jacy Suenram
Dated: 10-12-2018