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IN THE SUPREME COURT OF THE STATE OF MONTANA

)	
)	Cause No. AC 17-0694
IN RE ASBESTOS LITIGATION,)	
)	DEFENDANTS BNSF’S AND JOHN
)	SWING’S RESPONSE TO
)	PLAINTIFFS’ MOTION FOR PARTIAL
)	SUMMARY JUDGMENT RE:
)	PREEMPTION AND ABNORMALLY
)	DANGEROUS ACTIVITY
)	
)	
)	<i>Applies to Barnes, et al. v. State of</i>
)	<i>Montana, et al.</i>
)	

Defendants BNSF Railway Company and John Swing (collectively “Defendants” or “BNSF”), by and through their undersigned counsel, submit this Response to Plaintiffs’ Motion for Partial Summary Judgment re: Preemption and Abnormally Dangerous Activity (“Plaintiffs’ Motion”).

I. INTRODUCTION

Plaintiffs ask this Court to grant partial summary judgment on three issues: (1) whether Plaintiffs’ claims are preempted by the Hazardous Materials Transportation Act (“HMTA”); (2) whether Plaintiffs’ claims are preempted by the Federal Railroad Safety Act (“FRSA”); and (3) whether Defendants can be held strictly liable for their transportation of vermiculite.

Plaintiffs' argument regarding HMTA preemption is misguided and relies upon assertions of material fact that are inaccurate. Such factual disputes are to be resolved by the jury, thus rendering summary judgment inappropriate. Moreover, Plaintiffs misinterpret the law regarding preemption under the HMTA. Because the Department of Transportation ("DOT") has expressly considered and rejected a proposal to regulate asbestos-containing mineral ore, Plaintiffs' claims of negligent transportation of vermiculite ore are negatively preempted by the HMTA.

Similarly, Plaintiffs misinterpret the law regarding preemption under the FRSA. Congress drafted the FRSA for the express purpose of providing uniformity in all areas of railroad operations. In so doing, Congress demonstrated its intention that federal law occupy the entirety of the field, to the exclusion of state and local jurisdiction. Therefore, Plaintiffs' claims relating to the ways in which Defendants shipped the vermiculite ore they were contracted to carry by W.R. Grace are preempted by the FRSA.

Finally, Plaintiffs' argument regarding strict liability fails because it (1) erroneously concludes that Defendants were engaged in an abnormally dangerous activity, and (2) it ignores the fact that, under longstanding principles of common law liability, common carriers are exempt from strict liability for abnormally dangerous activities.

II. DEFENDANTS' STATEMENT OF FACTS OPPOSING SUMMARY JUDGMENT

1. Plaintiffs allege the methods used by W.R. Grace to extract and process the vermiculite created substantial asbestos-containing dust which could be found in any places the vermiculite ore was processed, bagged, stored, or transported. *Third Amended Complaint and Demand for Jury Trial* ("Complaint"), ¶¶ 20-21.
2. As a result of W.R. Grace's failure to control dust from the mining, milling, processing, bagging, transport and a variety of uses of the vermiculite, Plaintiffs allege they were

exposed to asbestos. *Id.*

3. Plaintiffs' Complaint asserts two causes of action against Defendants BNSF and John Swing. The first alleges general negligence. *Id.* at ¶¶ 111-122. The second is premised upon common law strict liability and alleges BNSF engaged in "abnormally dangerous activities thereby causing the release of asbestos contamination and exposure." *Id.* at ¶ 125.
4. "By agreement commenced in 1942, BNSF granted Grace the exclusive license to load ore onto rail cars at the loading dock in Libby. Grace was contractually obligated to maintain the loading facilities in 'proper, clean, safe and sanitary condition,' observe and comply with 'all federal, state and municipal regulations ordinances, and laws, and with the regulations of any duly constituted legal authority having jurisdiction of the said premises,' and to 'make any and all improvements, alterations, repairs, and additions, and install all appliances required on the said premises by or under any such regulations, ordinances, or laws.'" [Affidavit of James Roberts, February 8, 2007; Sullivan Affidavit Exhibit 6, pp. 2-3].
5. "For decades, vermiculite ore was transported from the Libby mine in Montana principally by rail. The mining and loading operations were performed exclusively by W.R. Grace or its predecessor corporations, Universal Zonolite Insulation Company or Zonolite Company (collectively referred to as "Grace"). Ore was transported from the mine to a loading dock, utilizing the Libby suspension bridge and conveyor belt. Grace then loaded the ore onto railroad cars for transport to various facilities, ultimately for distribution and sale." *Id.* at pp. 1-2.
6. "Thereafter, pursuant to a series of agreements from 1950 through 1995, BNSF granted

Grace licenses and permits to operate on its rail lines in Libby in exchange for Grace's agreement to indemnify and hold harmless BNSF from all liability, damages, recoveries, judgments, costs, expenses, or other charges or demands on account of injuries or death or damage to or destruction of property resulting from or during Grace operations." *Id.* at pp. 2-3.

7. In 1956 the Montana State Board of Health, Division of Disease Control, undertook an industrial hygiene study of the Zonolite mine and mill operation "to determine if any of the operations of this company were detrimental to the health of the employees." Affidavit of Nadia Patrick ("Patrick Aff."), **Exhibit J**—Confidential 1956 Montana State Board of Health Industrial Hygiene Report on the Zonolite Mine. *Id.* The 1956 report, p. 3, found high dust levels, that the dust contained asbestos, and that "the asbestos dust and the dust in the air is of considerable toxicity." *Id.* The report was purposefully kept confidential between the Montana State Board of Health and W.R. Grace. *Id.*
8. In 1959, the State of Montana again undertook an industrial hygiene study of the Zonolite mine and mill. Patrick Aff., **Exhibit K**—Confidential 1959 Montana State Board of Health Industrial Hygiene Report on the Zonolite Mine. The report from the study indicated high levels of dust present at the mine as well as the high levels of asbestos found in the visible dust at the mine. *Id.* The report was again purposefully kept confidential between the Montana State Board of Health and W.R. Grace. *Id.*
9. In 1962, the State of Montana again undertook an industrial hygiene study of the Zonolite mine and mill. Patrick Aff., **Exhibit L**—Confidential 1962 Montana State Board of Health Industrial Hygiene Report on the Zonolite Mine. The report stated that a 40% concentration of tremolite asbestos was found at the mine. *Id.*; Patrick Aff., **Exhibit M**—

April 13, 1962 Letter from U.S. Department of Health to Montana State Board of Health. The report was again purposefully kept confidential between the Montana State Board of Health and W.R. Grace, and its contents were not shared with any members from the community. *Id.*

10. In 1963, W.R. Grace & Co. (“W.R. Grace”), a non-party to this action, purchased and thereafter operated the Zonolite Company vermiculite mine and mill in Libby, Montana. *Complaint*, ¶17.
11. In 1963, the State of Montana again undertook an industrial hygiene study of the Zonolite mine and mill. Patrick Aff., **Exhibit N**—Confidential 1963 Montana State Board of Health Industrial Hygiene Report on the Zonolite Mine. The report from the study notes little to no improvements of dust abatement measures at the mine. *Id.* The report was again purposefully kept confidential between the Montana State Board of Health and W.R. Grace. *Id.*
12. The full extent of the State of Montana’s failure to act in protecting its citizens is outlined in a chronology compiled by the Montana Department of Environmental Quality. Patrick Aff., **Exhibit O**—Montana Department of Environmental Quality’s W.R. Grace File Review Chronology of Events at the Zonolite Mine.
13. In 1967, W.R. Grace was urged by its liability carrier, Maryland Casualty Company, to continue hiding asbestos hazards at the mine and mill from the public. Patrick Aff., **Exhibit P**—November 25, 1967 Letter from Maryland Casualty Company to W.R. Grace.
14. In 1974, the Montana State Department of Health drafted a memorandum, finding that all asbestos had been removed from vermiculite concentrate. Patrick Aff., **Exhibit Q**—1974 Montana State Department of Health Memorandum.

15. In 1983, the State of Montana received a report from the Environmental Protection Agency (EPA) regarding an epidemiological study of Grace's Libby workers. Patrick Aff., **Exhibit I**–1983 EPA Chemical Hazard Identification Memorandum. The report warned the State that 109 former Libby Grace employees had died, 16 workers had lung cancer, and two had mesothelioma, as a result of their exposures to asbestos while working at the mine and dry mill. *Id.* However, the report also stated that in animal clinical trials, tremolite was found to be non-toxic, non-carcinogenic in laboratory animals. *Id.*

III. DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Defendants' Response to Plaintiffs' Statement of Undisputed Facts is submitted and filed separately herewith. Therein, Defendants outline the discrepancies between Plaintiffs' alleged "undisputed facts" and relevant contradictory evidence. The discrepancies raised by Defendants call into question whether BNSF has committed *any* tortious activity in the present case – a question of fact that must be determined by the jury.

IV. LEGAL STANDARD

Summary judgment represents an extreme remedy that should be granted only when no material factual controversy exists. *See Northern Cheyenne Tribe v. Roman Catholic Church ex rel.*, 2013 MT 23, ¶21, 296 P.3d 450, 454, 2013 WL 433180, ¶21. "Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury and all such evidence and any legitimate inferences that might be drawn from that evidence must be considered in the light most favorable to the party opposing the motion." *See Bevacqua v. Union Pacific R. Co.*, 289 Mont. 36, 50, 960 P.2d 273, 281 (1998); *Durden v. Hydro Flame Corp.*, 1998 MT 47, ¶22, 288 Mont. 1, 955 P.2d 160. The purpose of

summary judgment is “to isolate and dispose of factually unsupported claims or defenses.” *See Celotex v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Only where a rational trier of fact could not find for the non-moving party based on the record as a whole is there no “genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). The question of preemption or preclusion is a matter of law for the Court to determine. *See, e.g., Commonwealth Edison Co. v. State*, 189 Mont. 191, 214 (1980). Likewise, “the determination of whether an activity is abnormally dangerous, thereby subjecting the operator to strict liability, is a question of law for the courts to decide.” *Chambers v. City of Helena*, 2002 MT 142, ¶ 18.

V. LEGAL AUTHORITIES AND ARGUMENT

A. **Plaintiffs’ common law negligence claims fail because they are preempted by the Hazardous Materials Transportation Act (“HMTA”) and its implementing regulations, and there are genuine issues of material fact regarding Defendants’ activities**

When Congress has legislated a subject within its constitutional control, and it has demonstrated its intention to address the regulated subject in full, federal regulation displaces state and local jurisdiction. *Northern Pacific Railway Co. v. State of Washington*, 222 U.S. 370, 378 (1912). Such preemption is a function of the Supremacy Clause. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 340 (2011) (Thomas, J., concurring) (citing *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984)). “The purpose of Congress is the ultimate touch-stone in every preemption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotations omitted). Although this intent is to be discerned primarily from the language of the relevant preemption statute, “[a]lso relevant . . . is the . . . *purpose of the statute as a whole*, as revealed not only in the text, but through the reviewing court’s reasoned understanding of *the way in which Congress*

intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Id.* at 486 (internal quotations and citations omitted) (emphasis added).

A state law claim may also be barred by what is referred to as “negative” or “inverse” preemption. Negative preemption occurs “where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute[.]” *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)). In such situations, “States are not permitted to use their police power to enact such a regulation.” *Ray*, 435 U.S. at 178. In other words, a considered decision not to regulate a given subject invokes preemption to the same extent as a decision to regulate. *Id.*

Although Defendants acknowledge that the HMTA and its implementing regulations do not expressly regulate the transportation of asbestos-containing mineral ore, the Department of Transportation (“DOT”) has expressly considered and rejected a proposal to do so. *See* 49 C.F.R. § 172.102(c)(1)(156) (“Asbestos that is immersed or fixed in a natural or artificial binder material, such as cement, plastic, asphalt, resins or mineral ore, or contained in manufactured products is not subject to the requirements of this subchapter.”); *see also* 43 Fed. Reg. 8563 (March 2, 1978) (“[T]he [DOT] does not believe their specific regulation is warranted.”). This considered decision not to require special handling constitutes negative preemption. *Ray*, 435 U.S. at 178.

Plaintiffs incorrectly contend that this conclusion cannot be correct because it would embrace the larger conclusion that Congress intended for “anyone transporting or causing the transportation of *any material* in commerce would have complete immunity from all state regulation or remedies for injury so long as *the material is not regulated* under the HMTA.” *Plaintiffs’ Motion*, p. 12 (emphasis added). However, Plaintiffs entirely ignore that fact that, unlike

the litany of other materials in commerce, the DOT has expressly considered and rejected the idea of requiring “special handling” for asbestos-containing mineral ores. In other words, asbestos-containing mineral ores are not simply “not regulated under the HMTA”; they’ve been expressly considered and purposefully excluded from regulation. *See Ray*, 435 U.S. at 178. Furthermore, not applying preemption in the present case would result in Defendants being penalized for failing to put in place special handling procedures, even though railroads were specifically informed by the DOT that no special handling procedures were necessary.

Plaintiffs also incorrectly argue that the DOT’s decision not to regulate asbestos-containing materials was merely a determination to wait until the DOT had further information on which to base a final decision and was therefore not a clear and manifest decision by Congress that such materials should not be subject to regulation. Indeed, in explaining its decision not to regulate asbestos-containing materials, the DOT stated, “It is not known whether the transportation of [these] products under current conditions presents an unreasonable risk to the public health and safety.” 43 Fed. Reg. 8563 (March 2, 1978). However, the reasoning provided by the DOT does not negate the fact that the designation of asbestos contained in mineral ore as a hazardous material was specifically considered – and rejected – by the DOT. This specific consideration by the DOT distinguishes the present case from all the cases cited to by both Plaintiff and the Court in the *Murphy-Fauth v. BNSF* case. [Cause No. CV-17-19-GF-BMM-JTJ; Sullivan Aff., Ex. 69.] Furthermore, nearly forty years after its initial decision to not regulate asbestos contained in mineral, the DOT had declined to alter its decision to not regulate such products, and it has not repealed or otherwise amended the codification of that decision at 49 C.F.R. § 172.102(c)(1)(156). DOT’s continued conformity with its initial 1978 determination demonstrates a more permanent,

considered judgment that the transportation of asbestos-containing mineral ores should not be subject to regulation. *See Ray*, 435 U.S. at 178; *Bethlehem Steel Co.*, 330 U.S. at 774.

To allow a jury to find liability against BNSF for shipping asbestos contained in mineral ore would impose a legal duty where the federal government has determined there should be none, and it would stand as a clear obstacle to the HMTA's goal of regulatory uniformity. *See Arizona v. United States*, 567 U.S. 387, 406 ("The ordinary principles of pre-emption include the well-settled proposition that a state law is pre-empted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal quotations omitted); *S. Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353-54 (9th Cir. 1990) ("Congress enacted the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.* . . . to replace a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations.") (emphasis added).

Plaintiffs' final contention regarding preemption under the HMTA is that "BNSF's tortious activities extended well beyond [the] transport activities" regulated by the HMTA. *Plaintiffs' Motion*, pp. 15-17. However, Defendants' activities that Plaintiffs rely upon to support this contention are either related to transportation or are simply inaccurate. *See* 49 C.F.R. § 171.8 ("Transportation or transport means the movement of property and loading, unloading, or storage *incidental to that movement.*") (emphasis added); 49 CFR § 105.5 (same); 49 C.F.R. § 174.1 ("This part prescribes requirements in addition to those contained in parts 171, 172, 173, and 179 of this subchapter, *to be observed with respect to the transportation* of hazardous materials in or on rail cars.") (emphasis added).

For example, Plaintiffs cite to a number of "undisputed" factual assertions regarding BNSF's River Loading Facility – however, all of these factual assertions have been disputed by

BNSF. *See Plaintiffs' Motion*, p. 16; *see also Plaintiffs' Statement of Undisputed Facts*, ¶¶ 6, 9-14, 16, 21; *Defendants' Response to Plaintiffs' Undisputed Facts*, ¶¶ 6, 9-14, 16, 21. Even if we assumed, *arguendo* that these assertions are true, they nevertheless illustrate only that Defendants were engaged in the storage and transportation of W.R. Grace's vermiculite ore. Plaintiffs rely upon facts that demonstrate nothing more than the fact that BNSF was engaged in "the movement of property and loading, unloading, or storage *incidental to that movement*," which is fully within the purview of the HMTA and its implementing regulations. 49 C.F.R. §§ 171.8, 105.5.

To the extent Plaintiffs rely on other factual assertions to support their contention that Defendants were not engaged exclusively in activities incidental to the storage, loading, and transportation of vermiculite ore, there is genuine dispute between the parties regarding the scope of Defendants' activities. For example, Plaintiffs characterize the relationship between W.R. Grace and BNSF as a joint venture. *Plaintiffs' SUF*, ¶ 9. However, if W.R. Grace operated a facility on BNSF property at any time, it was through a lease agreement—and in any such agreement, "Grace expressly agreed to indemnify and hold harmless BNSF 'against any and all claims, demands, expenses, costs or judgments arising from loss of or damage to property or injury to or death of persons, occurring directly or indirectly by reason of any covenant containing in this contract.'" *Defendants' Response to Plaintiffs' Undisputed Facts*, ¶ 9. There are many more examples of such a discrepancy between Plaintiffs' alleged facts and those presented by BNSF. *See Defendants' Response to Plaintiffs' Undisputed Facts*, ¶¶ 19, 20, 22, 24, 25-28. Such factual issues are properly resolved by the jury, not addressed in summary judgment. Mont. R. Civ. P. 56(c)(3).

Finally, the HMTA regulates a broader swath of conduct than just transportation; for example, the HMTA's implementing regulations include standards governing the marking, labeling, placarding, and loading of hazardous materials. *See generally* 49 C.F.R. Part 172,

Subparts D-F, H; *see also* 49 C.F.R. Part 174, Subpart C. The regulations even set minimum training standards for “hazmat employees.” *See* 49 C.F.R. § 172.700(a). The alleged activities Plaintiffs provide as examples falling outside the purview of “transportation” fall well within the dominion of the HMTA and its implementing regulations. *See Plaintiffs’ Motion*, p. 16. Plaintiffs’ Motion should therefore be denied.

B. Plaintiffs’ common law negligence claims fail because they are preempted by the Federal Railroad Safety Act (“FRSA”) and its implementing regulations

Plaintiffs’ claims are also preempted by the FRSA. A central purpose of the FRSA it to ensure that “[l]aws, regulations, and orders related to railroad safety . . . be *nationally uniform* to the extent practicable.” 49 U.S.C. § 20106(a)(1) (emphasis added). To that end, the FRSA gives the Secretary of Transportation broad powers to prescribe rules, regulations, orders, and standards for “for all areas of railroad safety.” *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 606 (1989) (emphasis added); 49 U.S.C. § 20103(a). The Secretary, in turn, has delegated the authority to “carry out all functions vested in the Secretary” by the FRSA to the Federal Railroad Administration (“FRA”). 49 C.F.R. § 1.49(m).

The FRSA includes an express savings and preemption clause:

(a) National Uniformity of Regulation.—

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and
(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(1). This provision has been given broad application. *In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir. 2005). It not only preempts state laws that impair or are inconsistent with FRA regulations, but all “state regulations aimed at the same safety concerns addressed by FRA regulations.” *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1105-06 (9th Cir. 1989). Plaintiffs’ state-law claims are preempted (and any FELA claims precluded) “if the federal regulations substantially subsume the subject matter of the relevant state law.” *In re Derailment Cases*, 416 F.3d at 793 (quoting *Easterwood*, 507 U.S. at 664).

Moreover, by its plain terms, section 20106 is not limited to FRA regulations; it applies to “any regulation ‘adopted’ by the Secretary . . . , regardless of the enabling legislation.” *Easterwood*, 507 U.S. at 663, n.4. As such, the FRSA’s preemption clause also applies to the HMTA and its implementing regulations as they relate to the transportation of hazardous materials by rail. *CSX Transp., Inc. v. Pub. Utils. Comm’n*, 901 F.2d 497, 501–02 (6th Cir. 1990), *cert. denied*, 498 U.S. 1066. The DOT’s regulations under the HMTA, therefore, trigger the FRSA’s preemption provision. As explained at greater length above, *supra* Part V.A, the DOT has expressly considered and rejected the notion that special measures governing the handling, loading, transporting, etc. of asbestos-containing mineral ores is warranted. *See* 49 C.F.R. § 172.102(c)(1)(156); *see also* 43 Fed. Reg. 8563 (March 2, 1978) (“[T]he [DOT] does not believe their specific regulation is warranted.”). Plaintiffs’ state law claims with respect to such measures are therefore barred under the negative preemption doctrine. *Ray*, 435 U.S. at 178; *see also Easterwood*, 507 U.S. at 661.

The FRSA also directly preempts Plaintiffs' claims via its implementing regulations. The fact that the Act does not explicitly regulate asbestos is immaterial; Congress, again, intended for the FRSA and its implementing regulations to cover "all areas of railroad safety." *Skinner*, 489 U.S. at 606; 49 U.S.C. § 20103(a); *cf. GMC v. Kilgore*, 853 So. 2d 171, 179 (Ala. 2002) ("The fact that FLIA does not explicitly regulate asbestos does not affect our decision today. Congress intended for the [Federal Locomotive Inspection Act] to occupy the entire field."). Thus, contrary to Plaintiffs' contention, it is not necessary that a regulation address the challenged conduct in specific detail; rather, the claim will be preempted if a federal regulation generally applies to the area at issue. *See, e.g., Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999).

Furthermore, preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941); *Felder v. Casey*, 487 U.S. 131,

138, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988); *Perez v. Campbell*, 402 U.S. 637, 649, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971). Where Congress has explicitly provided that federal law is to be exclusive in a given field, states cannot regulate in that field, even if their efforts complement or further federal objectives. See, e.g., *Morales v. TWA*, 504 U.S. 374, 387, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (stating that an express preemption provision may displace “all state laws that fall within its sphere, even including state laws that are consistent with [the federal law’s] substantive requirements.”). Even if the Court finds that Plaintiffs’ claims are not encompassed by field preemption, they would nonetheless be covered by conflict preemption—specifically, conflict preemption would cover Plaintiffs’ claims that Defendants failed to warn them of the hazards present in vermiculite ore, failed to properly keep vermiculite contained in its hopper cars, and failed to prevent dust from escaping from the tops of its moving railcars would all be preempted. See *Complaint*, ¶¶ 101, 118, 121(f).

First, Defendant BNSF had no duty to warn Plaintiffs of the inherent dangers present in the vermiculite concentrate it was shipping or to display placards that identified any such hazard; rather, it is the duty of the product’s shipper to identify and alert the carrier of any hazardous materials. See, e.g., 49 C.F.R. § 171.2(a) (“No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of Part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized[.]”); see also 49 C.F.R. § 173.22 (Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following” requirements.); 49 C.F.R. § 173.31(a) (“No person may offer a hazardous material for transportation in a tank car unless the tank car meets the applicable specification and

packaging requirements of this subchapter or, when this subchapter authorizes the use of a non-DOT specification tank car, the applicable specification to which the tank was constructed.”). Simply, BNSF cannot be held liable for failure to warn the public of hazards it was not made aware of by W.R. Grace because such liability would conflict with hazard placarding regulations.

Second, the FRA has adopted extensive regulations regarding the inspection of freight cars, which preempt state-law negligent inspection claims. *See In re Derailment Cases*, 416 F.3d at 793-94 (discussing regulations governing inspection and concluding that plaintiffs’ negligent inspection claims were preempted by the regulations). FRA regulations require that inspections of freight cars occur at each location where they are placed in a train. 49 C.F.R. § 215.13. Railroads must designate inspectors who “have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the [FRA regulations].” *Id.* at § 215.11. Absent a showing that Defendants have failed to comply with these inspection regulations, any claim by Plaintiffs that Defendants allowed vermiculite to seep out of its hopper cars, or that Defendants used damaged hopper cars to transport the vermiculite should be preempted because such a claim would run in direct contravention of the inspection regulations promulgated by the FRA.

Third, Plaintiffs’ allegations that BNSF was negligent because it failed to prevent dust from escaping its railcars as trains were speeding by are preempted by extensive regulations concerning train speed. *See* 49 C.F.R. § 213.9 *et seq.* Furthermore, FRA regulations also establish a “national railroad safety program” intended “to promote safety in all areas of railroad operations in order to reduce deaths, injuries and damage to property resulting from railroad accidents.” *Id.* at § 212.101(a). Federal and state inspectors “determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to inspection, maintenance, training, and supervision.” *Id.* at § 212.101(b)(1). Inspectors visit rail yards to ensure compliance with the

regulations, *id.* at § 212.213, and railroads face civil penalties for violations. *Id.* at §§ 215.7 and 215, App. B.

To allow Plaintiffs to present evidence supporting claims under state law, that are conflict-preempted by federal regulations, would frustrate Congress's stated intent of ensuring that all "[l]aws, regulations, and orders related to railroad safety . . . be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). Accordingly, the Court should deny Plaintiffs' motion for summary judgment, grant Defendants' motion for summary judgment, and dismiss Plaintiffs' transport related claims.

C. Plaintiffs' strict liability theory fails because Defendants are exempt from strict liability as a common carrier, and in the alternative, the handling and shipment of vermiculite is not an abnormally dangerous activity

Plaintiffs also seek to hold Defendants strictly liable for their alleged injuries. They contend that Defendants should be held strictly liable because they "engaged in abnormally dangerous activities thereby causing the release of asbestos contamination and exposure of Plaintiffs to deadly asbestos." *See* Complaint, p. 29, ¶ 125. However, Montana courts follow the Second Restatement of Torts with respect to the assignment of liability for abnormally dangerous activities. *Matkovic v. Shell Oil Co.*, 218 Mont. 156, 159-60 (1985). The Restatement provides, "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." *Id.* at 159.

While a defendant that engages in true abnormally dangerous behavior is strictly liable to any individual harmed by that activity, the determination of whether an activity is abnormally dangerous is a question of law for the Court to decide. *Chambers v. City of Helena*, 2002 MT 142, ¶ 18, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158. In determining whether

an activity is abnormally dangerous and thus triggers strict liability, the court must consider the following factors:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on;
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. (quoting Rest. 2d Torts § 520 (1976)).

Even where an activity may be deemed abnormally dangerous, the Restatement exempts common carriers from strict liability. It provides, “The rules as to strict liability for abnormally dangerous activities *do not apply* if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee *or as a common carrier.*” Rest. 2d Torts § 521 (emphasis added).

Here, both Montana law and federal law impose a public duty upon BNSF as a common carrier; Montana law provides, “A common carrier *shall*, if able to do so, accept and carry whatever is offered to the carrier, at a reasonable time and place, of a kind that the carrier undertakes or is accustomed to carry.” Mont. Code Ann. § 69-11-403 (emphasis added). Federal law provides, in relevant part, “A rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part . . . *shall* provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a) (emphasis added); *see also* 49 U.S.C. § 10501 (laying out the jurisdiction of the Surface Transportation Board). Thus, even assuming *arguendo* that the transportation of vermiculite is, as a matter of law, an abnormally dangerous activity, Defendants

are nonetheless exempt from strict liability because they were fulfilling a public duty imposed upon them as a common carrier. Rest. 2d § 521.

Alternatively, even if the common carrier exemption from strict liability does not apply, the transportation of vermiculite is not an abnormally dangerous activity. Montana courts have not yet addressed whether the *transportation* of asbestos is, as a matter of law, an abnormally dangerous activity. The closest case the undersigned could find is an unpublished district court order that addressed whether the installation of asbestos insulation was an abnormally dangerous activity. See *Nelson v. Cenex*, 2008 Mont. Dist. LEXIS 444, No. BDV-2003-543, *15-16 (2008). In *Nelson*, the court expressly declined to find that such activity was abnormally dangerous. *Id.* at *16. It reasoned:

The Court is unable to determine, at this point, whether the risks of installing asbestos insulation can be eliminated by the exercise of reasonable care, the extent to which the activity is a matter of common usage, the inappropriateness of the activity to the place where it is carried on, or the extent to which its value to the community is outweighed by its dangerous attributes.

Id. at *15-16.

Although Montana's appellate courts have not addressed whether the handling of asbestos is an abnormally dangerous activity, other jurisdictions have, and those courts place particular emphasis on the third factor listed in the Restatement, "inability to eliminate the risk by the exercise of care." Rest. 2d § 520(c). The Seventh Circuit has suggested that although no one factor is dispositive, this third factor is particularly instructive to courts seeking to determine whether an activity is abnormally dangerous. It explained:

There are, of course, six factors in section 520. They are related to each other in that each is a different facet of a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control. The interrelations might be more conspicuous if the six factors were reordered. One might for

example start with (c), inability to eliminate the risk of accident by the exercise of due care. *The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful . . . , there is no need to switch to strict liability.*

Ind. H. B. R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (internal citations omitted) (emphasis added). There, the court ultimately *rejected* the plaintiff's theory that the defendant's transportation of acrylonitrile – a flammable, corrosive, and carcinogenic material – was an abnormally dangerous activity, and it did so on the basis that its risk could be ameliorated by the exercise of due care. *Id.* at 1179 (“[Acrylonitrile] is not so corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, average) care. No one suggests, therefore, that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness[.]”) (emphasis original).

Other jurisdictions have reached the same result with regard to asbestos, and they have done so for the same reason. For instance, in *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 466 (R.I. 1996), the supreme court of Rhode Island held that an asbestos inspection company could not be held strictly liable because it was not engaged in an abnormally dangerous activity. There, the plaintiffs sued an asbestos inspection company, claiming lost property value resulting from the demolition of nearby asbestos-containing buildings. *Id.* at 464. The plaintiffs contended that the company's pre- and post-demolition inspection of the asbestos-containing buildings was an abnormally dangerous activity. *Id.* at 465-66. The court rejected plaintiff's theory and affirmed the trial court's issuance of summary judgment in the inspection company's favor. *Id.* at 466. Its decision rested primarily upon a finding that the risk of asbestos exposure *can* be ameliorated by the exercise of reasonable care. *Id.* at 466; *see also* Rest. Torts 2d § 520(c). The court explained:

Although asbestos is understandably an ultrahazardous or abnormally dangerous material, [defendant's] activities in this case were not ultrahazardous or abnormally dangerous. . . . [W]hile we recognize that great harm might result from the ingestion of asbestos fibers, *the risk thereof resulting from [defendant's] limited activities, leaves that probability on the facts here, most improbable because its activities were in fact carried out safely and with the exercise of reasonable care.*

Id. (emphasis added) (internal quotations and citations omitted). In other words, the *Splendorio* court left open the possibility that, under the proper factual circumstances, a court may find that the *handling* of a “underhazardous or abnormally dangerous material” may not itself be an abnormally dangerous activity, regardless of how hazardous the material itself may be. *Id.*

The Indiana supreme court has reached precisely the same conclusion, albeit in a different legal context. In *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943 (Ind. 2005), the plaintiff contracted mesothelioma after working for an insulation company. *Id.* at 948. He and his wife sued PSI Energy, a power company that had contracted with his employer. *Id.* They argued that although the insulation company was an independent contractor, PSI Energy was vicariously and strictly liable for the insulation company’s activities because those activities were intrinsically dangerous. *Id.* at 954. The court rejected this theory, reasoning that the insulation company’s activities were not intrinsically dangerous and concluding that PSI Energy could not be held vicariously liable for those activities. *Id.* at 953. The court explained:

The term ‘inherently or intrinsically dangerous’ has been defined as work necessarily attended with danger, no matter how skillfully or carefully it is performed. . . . It imposes liability for activities that are dangerous by nature, not merely because they are carried out in a risky manner. . . .

Roberts asserts that asbestos itself is intrinsically dangerous and any work that causes inherently dangerous fibers to enter the breathing space of humans is intrinsically dangerous work. . . .

We agree that working with asbestos can be perilous, but that is not enough to render it intrinsically dangerous as that term is used to establish liability for actions of an independent contractor. . . . *Here, it seems agreed by all that precautions could have minimized Roberts's exposure to asbestos.*

Id. at 954-55 (internal quotations and citations omitted) (emphasis added); *cf.* Rest. Torts 2d § 520(c) (“In determining whether an activity is abnormally dangerous, the following factors are to be considered . . . (c) inability to eliminate the risk by the exercise of reasonable care.”). The Wisconsin supreme court reached the same conclusion as the Indiana supreme court. *See Tatera v. FMC Corp.*, 2010 WI 90, ¶ 36 (“In this case, we conclude that machining an asbestos-containing friction disk is not an extrahazardous activity *because steps may be taken to minimize the risk of injury.*”) (emphasis added).

The supreme court of Iowa has also declined to find that asbestos-related activities are *per se* abnormally dangerous, and for the same reason: the risk posed by asbestos *can* be managed with the exercise of due care. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 695 (Ia. 2009). The court there affirmed the trial court’s entry of summary judgment for the defendants on the plaintiff’s strict liability claim. *Id.* at 696. The court reasoned:

To be sure, exposure to asbestos presents a grave health risk for industrial workers. *The mere presence of such a grave risk of physical injury in the workplace is not, standing alone, sufficient to render work inherently dangerous . . .* The grave risk associated with exposure to asbestos in the workplace at the Port Neal plant was not abnormally dangerous . . . because it was not inherent in Van Fossen’s work. *The risk arose not from the nature of the construction and maintenance work, but rather from the manner in which the work was performed . . . without reasonable safety precautions to manage the ordinary and customary dangers associated with exposure to asbestos.*

Id. at 695 (emphasis added).

Here, Defendants transported vermiculite ore that was allegedly contaminated with asbestos. Although asbestos itself poses risks to human health at certain levels of exposure, such risks do not render the handling of such vermiculite ore an abnormally dangerous activity; generally, precautions may be taken in the handling of the ore that ameliorate the risk of asbestos exposure. Whether Defendants took such precautions in this case is a question of fact for the jury to determine, and that question sounds in negligence, not strict liability. *See Scott v. Henrich*, 283 Mont. 97, 104 (1997) (“The traditional standard of negligence, as defined under Montana law, is ‘conduct of a reasonable and prudent person under the circumstances.’”) (internal citation omitted); *see also Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 49 (“[S]trict liability for the conduct of an abnormally dangerous activity . . . means that the defendant is liable for harm resulting from the activity, *even if the defendant acted with reasonable care.*”) (emphasis added).

Again, Defendants do not dispute that asbestos itself, in high enough doses with a long enough duration of exposure, can pose risks to human health. But such a risk does not *per se* render any and all asbestos-related activities – here, the transportation of vermiculite ore allegedly containing asbestos – abnormally dangerous. Plaintiffs have failed to present any evidence establishing that the transportation of vermiculite ore cannot be made safe, no matter the precautions taken. Moreover, other jurisdictions following the same Restatement approach as Montana have held, under circumstances nearly identical to those presented here, that the handling of asbestos is not *per se* abnormally dangerous.

This Court should therefore follow the overwhelming weight of decisions by other jurisdictions and hold that, as a matter of law, the transportation of vermiculite ore is not an abnormally dangerous activity triggering strict liability. In so doing, this Court should deny

Plaintiffs' motion for summary judgment, grant Defendants' motion for summary judgment, and dismiss Plaintiffs' strict liability claims.

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Partial Summary Judgment Regarding Preemption and Strict Liability.

DATED this 26th day of October, 2018.

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