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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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: DEFENDANTS' NON-PARTY AFFIRMATIVE DEFENSES THIS DOCUMENT RELATES TO: *Barnes, et al. v. State of Montana, et al.*, Lincoln County Cause No. DV-16-111

Come now the Plaintiffs and file this Reply Brief in Support of their Motion for Summary Judgment re: the Defendants' Non-Party Affirmative Defenses.

INTRODUCTION

Plaintiffs' Motion for Summary Judgment re: the Defendants' Non-Party Affirmative Defenses ("Plaintiff's Motion") sought summary judgment as to three affirmative defenses raised in the Answer of defendants BNSF Railway Company and John Swing (collectively "BNSF"):

> 7. Plaintiffs' injuries and damages, if any, may have been caused by the action or conduct of persons whose conduct and actions Defendants had neither control, nor the right to control, and for whom the Defendants have no liability.
>
> 8. If Plaintiffs have incurred or sustained any losses, damages, or injuries, said losses, damages or injuries may have been contributed to or caused, by the carelessness or negligence of persons, corporations or entities other than Defendants.

15. Pursuant to 27-1-703, MCA, Plaintiffs' claims may have been partially, or fully caused by parties that they have settled with or released.

BNSF's Brief in response to Plaintiff's Motion errs both in its characterization and application of the controlling law, and in how it interprets the parties' places and obligations under that law.

ARGUMENT

I. BNSF's reading of § 27-1-703, MCA, is unsupported and flawed.

Plaintiff's Motion set forth the applicable law from the Montana Supreme Court, *see generally* Plaintiff's Brief, pp.6-7 (discussing *Plumb*) and pp.11-15 (discussing *Faulconbridge*), and enacted by the Montana Legislature, *see* § 27-1-703, MCA. BNSF's Brief ignores the clear language of the statute.

A. Comparison of fault with W.R. Grace is plainly prohibited.

BNSF apparently seeks to exempt W.R. Grace from § 27-1-703, MCA, by challenging part of Plaintiff's Motion, pp.3-5, that described Grace factually and for terms of the statute as "immune from liability," and therefore someone with whom any comparison of fault was prohibited pursuant to§ 27-1-703(6)(c)(i), MCA. *See* BNSF's Brief, p.4 (¶ 4); *see also id.*, p.11. BNSF conspicuously ignores the second part of both the sentence and the statute that are identified in Plaintiff's Motion, pp.4-5, *see* § 27-1-703(6)(c)(ii), MCA, which further describes Grace as "not subject to this court's jurisdiction." Whether Grace is "immune" or not as BNSF contests is not determinative. BNSF's Motion fails to challenge, and indeed cannot possibly contest, that Grace is "not subject to this court's jurisdiction" pursuant to § 27-1-703(6)(c)(ii), MCA. Accordingly, the statute prohibits any comparison of fault by BNSF involving Grace.

B. The State of Montana is a settled party and therefore properly within the scope of both § 27-1-703, MCA, and Plaintiffs' Motion.

Plaintiffs' Motion, p.4 (¶ 6), established as an undisputed material fact that Plaintiffs Rhonda Braaten and Gerrie Flores have settled their claims with the State of Montana.[1] BNSF's Brief, p.5 (¶ 6), identifies this undisputed fact as "Contested." It speculates and states, "It is the understanding of BNSF that the State of Montana is not yet a settled party and is still a party to this action." *Id.* No factual support or other evidence is offered.

After Plaintiffs' Motion met their initial burden, the summary judgment burden shifted to BNSF to "present material and substantial evidence, rather than mere conclusory or speculative statements." *See State Farm Mut. Auto. Ins. Co. v. Gibson*, 2007 MT 153, ¶ 9, 337 Mont. 509, 163 P.3d 387. BNSF has failed to do so. In fact, BNSF has no grounds to contest that the State of Montana ***is* a settled party** in this case as applied to Plaintiffs Rhonda Braaten and Gerrie Flores.[2]

As an undisputed "person with whom [Plaintiffs Braaten and Flores] ha[ve] settled," the State is one of the non-parties addressed by multiple subsections of § 27-1-703, MCA. However, BNSF failed at any time to specifically identify to the Court, to Plaintiffs, or to the State of Montana that it might seek to argue that the State was either a cause of or at fault for the injuries alleged by Plaintiffs Braaten and Flores. *See* § 27-1-703(6)(f) & (g), MCA. Likewise, BNSF failed to preserve any potential right under § 27-1-703(4) & (6), MCA, to have the jury determine a percentage of the State's share of liability for any damages awarded to Plaintiffs

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[1] *See also* Plaintiffs' Statement of Undisputed Facts in Support of Summary Judgment ("SUF"), ¶ 36, filed October 5, 2018, and Affidavit of Roger Sullivan, ¶ 3, filed October 5, 2018.

[2] *See also* Plaintiffs' Answers to Defendants' Master Discovery Requests, May 11, 2018, Interr. No. 10 (respectively describing Plaintiff Braaten's 6/27/16 $32,360 settlement with the State, and Plaintiff Flores's 7/5/16 $32,360 settlement with the State).

Braaten and Flores. Having failed to do so, BNSF is now wholly precluded from arguing the State's non-party conduct as an empty chair defense to Plaintiffs Braaten's and Flores's claims.

BNSF's right to have the jury consider the State's fault and apportion a percentage of liability to the State regarding Plaintiff Tracie Barnes is not at issue in this motion. Just like BNSF, the State is one of the defendants that Tracie Barnes is actively litigating against in this case and from whom he seeks to recover. Both defendants will appear before the jury per Plaintiff's pleadings, argument, and evidence. Nonetheless, should *BNSF* settle with Tracie Barnes prior to trial, the potential exists for the *State* to rely on the overall protections of § 27-1-703, MCA, by arguing "with reasonable promptness" BNSF's newfound status as a settled non-party under § 27-1-703(f), MCA. Here, BNSF has always had and maintains that same right still regarding the State as to Tracie Barnes. What BNSF cannot do is rely upon the State's status as a *non*-settled party as to Tracie Barnes to falsely represent here the State's relationship to Plaintiffs Braaten and Flores under, or as a defense for its failures regarding, § 27-1-703, MCA.

C. BNSF cannot avoid the requirements of § 27-1-703, MCA, by relying on potential future occurrences.

BNSF's Brief, p.11, admits that it raised its Fifteenth Affirmative Defense and § 27-1-703, MCA, because of the settlements or releases that Plaintiffs may enter into during litigation. Like with any statutory requirement enacted by the Legislature, § 27-1-703, MCA, represents a continuing obligation for the parties and a valid, persisting statement of Montana law to the Court. The fact remains that the statute very clearly allows all persons to be defined as parties or non-parties, and their respective rights protected, at any given time. There is no moving target or ripeness threshold like what BNSF's Brief, p.11, argues.

Here, BNSF wishes to define W.R. Grace as a "soon-to-be" settled party. *See* BNSF's Brief, p.11. BNSF's argument that "the requirements of Montana 27-1-703 do not apply" hinges

on the fact that Plaintiffs have claims with Grace as "a potential settled party." BNSF's Brief, p.11. BNSF's argument that none of the "procedural and notice requirements of [§ 27-1-703, MCA] . . . are ripe," *id.*, further makes clear that BNSF misreads Montana law.

It is not uncommon for a plaintiff to have the ability to pursue—and at times obtain—recovery from several joint tortfeasors. Section 27-1-703, MCA, establishes the mechanism in that potential multi-party landscape for protecting all parties' rights and the constitutional interests identified in *Plumb v. Fourth Jud. Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1101. *See also Faulconbridge v. State*, 2006 MT 198, ¶¶ 72-94, 333 Mont. 186, 142 P.3d 777 (describing additional constraints as to how and when parties may rely on non-party conduct in the context of any potential causation-based defense). The statute identifies the rights and obligations associated with those who are or would-be "parties" to an action, whether from the outset or those who may be joined as additional parties. It separately identifies "persons released from liability by the claimant or with whom the claimant has settled." *See, e.g.,* § 27-1-703(6)(b), MCA. These non-parties under the statute, made so at some point in time by their settlement or release with a plaintiff, are very often going to be the same persons or entities who were previously an original defendant or third party plaintiff or defendant. *See, e.g., Faulconbridge*, ¶¶ 16-19 (describing the varied parties' joinder of parties, cross claims, and subsequent settlements and dismissals).

What is obvious to all except BNSF is that at any point in time, an interested person or entity is **only** capable of occupying one defined role under § 27-1-703, MCA. And further, that at any point in time, every person may be identified as occupying one of the defined roles under the statute, be it 'party' or 'settled non-party'[3] or 'other potential wrongdoer.'[4] For example, prior to

[3] Per the statute, this captures "persons released from liability by the claimant or with whom the

the amendment of Plaintiffs' pleading and entry of the May 18, 2018, Agreed Order of Dismissal, Libby Defendant International Paper ("IP") was a party defendant in this case. As such, it had the opportunity (and procedural burden) under § 27-1-703(4), MCA, to move to join as an additional party any other person whose negligence it wished to assert as having contributed to causing Plaintiffs' injury. After its dismissal, the remaining parties were free to continue to assert that whatever negligence Plaintiffs originally alleged against IP, it *still* constituted a cause of Plaintiffs' injuries. They were free to employ their own rights and necessarily the procedural tools under the statute if they wished to apportion some percentage of liability to IP and have the jury perhaps assign a lesser percentage of liability to them. *See, e.g.,* § 27-1-703(6), MCA. BNSF failed to do so. Consequently, there can be no debate that now, Montana law prevents any argument or evidence regarding *the fault* of non-party IP in this case. Similarly here, there is no place in the statute for a "potential settled party" to be assigned fault in this case.

BNSF's Brief, p.11, asserts that Plaintiffs ignore the language "[e]xcept for persons who have settled with . . . claimant," at the start of § 27-1-703(6)(c), MCA. In fact, BNSF errs by equating a future potential recovery from Grace with the statute's clear language identifying an already completed, "***have settled*** with or ***have been released***" requirement. *See* § 27-1-703(6)(c), MCA. BNSF's argument—that it is allowed to apportion fault to a person with whom there may be a future settlement—violates every constitutional concern articulated by the Montana Supreme Court in *Newville v. State, Dep't of Family Servs.* (1994), 267 Mont. 237, 883 P.2d 793, *Plumb*, and their progeny. Moreover, it ignores the plain language of § 27-1-703(6)(c), MCA, which clearly only addresses persons who may have settled with a claimant in

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claimant has settled." § 27-1-703(6)(b), MCA.

[4] Per the statute, this captures "any other person whose negligence may have contributed as a proximate cause to the injury complained of." § 27-1-703(4), MCA.

the past tense, not those who may do so in the future as relied upon by BNSF. This Court must enforce the statute as written and according to its plain language. *See, e.g., JTL Group, Inc.v. New Outlook, LLP*, 2010 MT 1, ¶ 36, 355 Mont. 1, 223 P.3d 912. This Court should not indulge or support the illusory version of Montana law that BNSF promotes, wherein the prospect of a future settlement allows a party to ignore the present requirements of a statute and clear Montana Supreme Court precedent.[5] BNSF cannot save to some later date its need to comply with the requirements of § 27-1-703, MCA, and preserve its 15th affirmative defense in the meantime. Plaintiff is entitled at present to judgment as a matter of law on BNSF's 15th affirmative defense.

II. BNSF cannot avoid clear limitations in Montana law regarding introduction of non-party conduct simply by asserting a general 'causation' defense.

BNSF seeks to save its seventh and eighth affirmative defenses by faulting Plaintiff's Motion as ignoring "the distinction between apportionment and defending causation." *See* BNSF's Brief, p.12. In truth, BNSF is guilty of ignoring the limits associated with that very distinction relied upon by the Montana Supreme Court in *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777. The defendant there tried the same argument that BNSF attempts, which is that a defendant should be permitted to circumvent Montana's rule against apportioning fault to non-parties so long as their pointing at a non-party serves their defense of "negating causation." *See Faulconbridge*, ¶ 74.

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[5] Plaintiffs' interpretation that properly recognizes Grace as a 'non-party' who cannot support premature apportionment or diminishment of Plaintiffs' claims against the defendants in this case does not necessarily result in a windfall to Plaintiffs or prejudice defendants. Just as BNSF can be expected to do regarding the State settlements received by Plaintiffs Braaten and Flores, Defendants can still seek an offset from the Court after any jury award to address any Grace recovery that ***might*** by then have occurred, and thereby prevent a double recovery for the same injury and damage. *See, e.g., Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002; § 27-1-308, MCA; *see also Hulstine v. Lennox Indus., Inc.*, 2010 MT 180, ¶¶ 22-23, 357 Mont. 228, 237 P.3d 1277 (pro tanto reduction to jury's verdict appropriate for plaintiffs' recovery from settling defendant even though § 27-1-703, MCA, not applicable).

The Court in *Faulconbridge*, ¶¶ 73-80, thoroughly reviewed several cases comparing the concepts of apportionment vs. negating causation.[6] It affirmed its prior holdings and held that it had "never applied *Pula* to allow evidence of third-party conduct to rebut causation generally." *Id.*, at ¶ 80. The *Faulconbridge* Court confirmed that contrary to what BNSF implies here, "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," and not as part of an effort to simply negate the general causation claims made against it. *Id.*, at ¶ 81 (Emphasis added).[7]

The fact remains that BNSF's seventh and eighth affirmative defenses allege generally that some other unidentified persons or conduct caused Plaintiffs' injuries. **Nowhere do they allege that such other person or non-party conduct was a superseding intervening cause**. Montana law defines the difference as critical, and in this case BNSF's reliance on a merely general causation defense is determinative. BNSF cannot rely on these affirmative defenses to introduce non-party conduct, since BNSF has failed to preserve a specific superseding intervening cause defense as required by *Faulconbridge*. Arguments relying upon caselaw that preceded, or that ignore this point from, *Faulconbridge* are simply off point. *See, e.g.,* BNSF's Brief, p.18 (discussing *Kirschbaum v. Montana State Univ.*).

Montana law requires that affirmative defenses not raised by answer will be waived. *See Meadow Lake Estate Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 29, 341 Mont. 345, 178 P.3d 81. In *Faulconbridge*, the Montana Supreme Court specifically stated that "the State should have included superseding intervening cause as an affirmative defense." *Faulconbridge*, ¶ 84.

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[6] *Pula v. State*, 2002 MT 9, 308 Mont. 122, 40 P.3d 364; *Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, 327 Mont. 146, 112 P.3d 1018.

[7] Unless otherwise noted, all emphasis hereinafter is added.

BNSF's Brief, pp.12-13, argues that its seventh affirmative defense is a sufficient and "textbook" defense. After the discussion in *Faulconbridge* of the (a) decisive differences between a superseding intervening cause defense and a general cause defense, and (b) need for a defendant to specifically plead superseding intervening cause, Montana law cannot support any reading of BNSF's seventh or eighth defenses, which never so much as mention the terms 'foreseeable,' 'superseding,' or 'intervening,' as adequate much less textbook. They should be stricken as a matter of law to the extent that BNSF would apply them to any non-party conduct in this case.

BNSF's Brief, p.13, argues from *Faulconbridge*, ¶ 84, that it is sufficient to put a party "on notice" of the intent to raise a superseding intervening cause defense. The factual distinction between here and *Faulconbridge* is striking. Again, BNSF's defenses never mention <u>any</u> words that would put Plaintiffs on notice of the specific superseding intervening cause defense. Moreover, in *Faulconbridge*, ¶¶ 83-84, the court relied on the fact that the plaintiffs had the benefit of pleadings from the <u>specific</u> third-party claims and counterclaims that had been filed prior to the settled non-party's dismissal. Those other pleadings included the particular entities and facts of non-party conduct for the causation defense. Here, prior to this briefing, BNSF has never identified who, much less the nature of any specific conduct, that it associates with the superseding intervening cause defense that it supposedly intended when submitting its general causation affirmative defenses (Number 7 & 8). Plaintiffs certainly never had timely notice that would have allowed their experts or discovery preparations to address BNSF's "intended" defense within the deadlines of the Court's scheduling order.

Affirmative defenses must be stated with sufficient particularity as will enable the opposing party to <u>identify the basis</u> of the defense and afford the plaintiff a <u>fair opportunity</u> to prepare his case to address that contention:

> Rule 8(c) requires a party to set forth affirmatively all matters constituting avoidance or affirmative defenses. The rationale for requiring that these defenses be affirmatively pleaded is simple: **the same principles of fairness and notice** which require a plaintiff to set forth the basis of the claim require a defendant to shoulder a **corresponding duty** to set out not merely general denials as appropriate, but also those specific defenses not raised by general denials by which a defendant seeks to avoid liability, rather than merely to controvert plaintiff's factual allegations.

Brown v. Ehlert (1992), 255 Mont. 140, 146, 841 P.2d 510, 514; *accord*, *Chandler v. Madsen* (1982), 197 Mont. 234, 241, 642 P.2d 1028, 1032 ("The key to determining the sufficiency of the pleading of an affirmative defense is whether it gives **fair notice** of the defense."); *Meadow Lake*, 2008 MT 41, ¶ 28, ("8(c)'s requirement that an affirmative defense be pled by answer serves the same principles of fairness and notice that require a plaintiff to set forth the **basis** of a claim in a complaint"); *Tobacco River Lumber Co. v. Yoppe* (1978), 176 Mont. 267, 271, 577 P.2d 855, 857 ("**definite enough to enable the opposing party to prepare**").

Here, BNSF's general affirmative defenses cannot be deemed sufficient to have given Plaintiffs adequate notice. Plaintiff is entitled to judgment as a matter of law on BNSF's seventh and eighth affirmative defenses.

III. Plaintiffs are entitled to judgment as a matter of law on any superseding intervening cause defense that might still be allowed because the conduct of non-parties here cannot be deemed "unforeseeable" under Montana law.

BNSF did not adequately assert or preserve as required by Montana law a superseding intervening cause defense. Plaintiff is therefore entitled to judgment as a matter of law regarding BNSF's seventh and eighth affirmative defenses to the extent that BNSF might employ them as to any non-parties. However, even if this Court were to deem BNSF's pleading sufficient, the defenses must still fail and not allow for the introduction of non-party conduct because this Court can and should determine that the non-party conduct on which BNSF relies was foreseeable to

BNSF as a matter of law. As such, that non-party conduct cannot constitute a superseding intervening cause, and summary judgment is appropriate.

Faulconbridge, ¶¶ 86-92, and Plaintiffs' Motion, pp.14-18, demonstrate that when "reasonable minds may reach but one conclusion," foreseeability can be determined as a matter of law. *See* Plaintiffs' Motion, p.15 (quoting *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 48, 350 Mont. 538, 208 P.3d 836). As explained in *Faulconbridge*:

> '[a] defendant's liability for his wrongful act will not be severed by an intervening cause if the intervening cause is one that the defendant might reasonably foresee as probable or one that the defendant might reasonably anticipate under the circumstances.'

¶ 88 (quoting *Thayer v. Hicks* (1990), 243 Mont. 138, 155, 793 P.2d 784, 795).

BNSF's Brief raises many facts in an attempt to display controverted evidence. At their core, however, BNSF's facts and its desire to argue what BNSF knew or did in relation to the wrongdoing of other non-parties misses the point. This motion and the Court's ability to reach "but one conclusion" has to do not with whether cars were properly placarded (BNSF's Brief, p.16) or whether Plaintiffs' injuries were foreseeable (BNSF's Brief, p.15). The proper focus is on whether there is "an **unforeseeable *event*** that occurs ***after*** **the defendant's original act of negligence** [which] will generally serve to **cut off** defendant's liability." *Faulconbridge*, ¶ 81 (quoting *Whiting v. State* (1991), 248 Mont. 207, 216, 810 P.2d 1177, 1183). BNSF's Brief tries to argue that BNSF was never negligent, and that a fact issue exists as to BNSF's own duty pursuant to questions of foreseeability.

This Court should plainly see that when it evaluates the appropriate question about whether the non-party conduct of Grace could be an unforeseen event occurring after BNSF's own alleged negligence, there is but one conclusion. Every single day for decades, BNSF put its hands on and moved cars filled with Grace vermiculite, interacting daily with Grace at Grace's

River Loading facility and in the Libby Railyard. Millions of tons of asbestos-contaminated vermiculite were moved by BNSF in and through Libby, in direct, daily cooperation with Grace. The prominence of both (a) vermiculite and (b) dust in that environment are undisputed. There is simply no reasonable way that Grace's negligence or Grace's misconduct regarding the toxicity of a mineral known to and shipped on a daily basis by BNSF can be deemed unforeseeable to BNSF.

IV. Plaintiffs do not seek the total exclusion of *evidence* regarding non-parties like W.R. Grace. Plaintiffs' motion addressing BNSF's affirmative empty chair defenses seeks appropriately to exclude all argument and evidence that Defendants would employ to address the *fault* of and potential *apportionment of liability* to non-parties.

BNSF's Brief, pp.16-20, argues that the conduct of Grace is relevant to this case and that BNSF should be allowed to rely on it as evidence in this case.

Plaintiffs' Motion seeking denial of BNSF's non-party defenses does not equate to the suggestion implied by BNSF that the events involving non-parties like Grace or the State are not relevant to this case. Rather, Plaintiffs' Motion properly acknowledges that there is an essential distinction between (a) evidence of certain events and conduct having occurred, and (b) then arguing that such events or conduct constitute wrongdoing that would serve to diminish the fault of BNSF as a proper defendant in this case, and (c) finally and most inappropriately under Montana law given BNSF's non-compliance with § 27-1-703, MCA, and its failure to plead a superseding intervening cause defense, suggesting that the jury can actually apportion a specific percentage of fault to those non-parties based on such events or conduct. As separately noted in Plaintiff's Motion in limine re: Non-Parties, filed November 2, 2018, precautionary direction is appropriate and necessary from the Court regarding how non-party evidence may be addressed by the parties.

Ultimately, this Court should implement its summary judgment rulings on the "empty chair" defense by prohibiting argument or comment assigning fault to a non-party, and should rule on the content of a Rule 105, M.R. Evid. "limited admissibility" instruction. Rule 105 M.R. Evid. states:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

While it is the role of the trial court to give a limiting instruction, this Court should rule on the **content** of the instruction so that it will correctly state the application of this Court's ruling on the empty chair issues in this and similar Libby asbestos cases. In doing so, the Court will properly address the issues identified by BNSF that necessitate evidence of non-parties being discussed before the jury. Specifically, this Court should rule that (a) a limiting instruction must be given, (b) the instruction must clearly state that the jury is not to assign fault or liability to non-parties for their actions or failures, and (c) the instruction must clearly state that the jury may only consider evidence of the conduct of non-parties for the purposes of evaluating whether the Defendants met their own duties in the circumstances.

Another tool is a ruling *in limine* preventing counsel from making any comment or argument in any stage of trial (including voir dire) that has an effect of leading the jury to believe that it may apportion fault and liability to the non- party. This Court should rule that any such argument or comment is prohibited.

CONCLUSION

Based upon the above, Plaintiff respectfully asserts that summary judgment should be entered in Plaintiff's favor, and that BNSF's non-party affirmative defenses numbered Seventh, Eighth, and Fifteenth be denied as a matter of law.

Consistent with its ruling, Plaintiff further respectfully requests that the Court issue an appropriate *in limine* order, including the content of a limiting instruction pursuant to Rule 105, M.R. Evid., to effect its order precluding non-party affirmative defenses from being argued or in any way presented.

DATED this 9th day of November 2018.

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