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IN THE SUPREME COURT OF THE STATE OF MONTANA

)	
)	Cause No. AC 17-0694
IN RE ASBESTOS LITIGATION,)	
)	DEFENDANTS BNSF RAILWAY
)	COMPANY AND JOHN SWING’S
)	RESPONSE BRIEF TO
)	PLAINTIFFS’ MOTION IN
)	LIMINE RE: NONPARTIES
)	
)	<i>Applies to Barnes, et al. v. State of</i>
)	<i>Montana, et al.</i>
)	

COMES NOW Defendants, BNSF RAILWAY COMPANY and JOHN SWING (“Defendants”), by and through its attorneys of Knight Nicastro, LLC, and hereby submits its *Response to Plaintiffs’ Motion in Limine re: Nonparties*.

ARGUMENT

I. Evidence regarding Grace’s criminal trial and criminal allegations

Evidence relating to W.R. Grace’s activities, and their history of concealment is clearly relevant, and Plaintiffs concede this in their brief. *Plaintiffs’ Brief*, p. 3. Such evidence is relevant and necessary to establish BNSF’s knowledge regarding any asbestos-related hazards arising from the processed vermiculite ore BNSF was transporting. With

this consideration, BNSF is largely unopposed to Plaintiff's motion regarding evidence of the Grace criminal trial. It is not BNSF's intent to reference the trial or obtain testimony that certain individuals associated with W.R. Grace were charged with criminal offenses.

As such, BNSF does not agree to Plaintiffs' broadly worded request to ban of all evidence related to the criminal trial. Prior testimony may be admissible as direct evidence or for impeachment regardless of whether that testimony was given in connection with the criminal case. To the extent the ruling of this Court is limited to offering testimony that W.R. Grace officials were indicted and tried on criminal charges, BNSF does not object.

II. Collateral Source

Plaintiff does not cite to any specific evidence it seeks to exclude. A general motion *in limine* requesting the court to merely state that it will enforce rules of evidence is not proper and should be denied. BNSF does not intend to present evidence of collateral sources unless Plaintiff or other witnesses open the door and make such evidence relevant. *See Campbell v. Natures Enhancement, Inc.*, 2003 ML 4233, 21, 2003 Mont. Dist. LEXIS 2794, *9-10 ("Only if [plaintiff] 'opens the door' by offering evidence contradictory to his receipt of workers' compensation and other collateral source benefits should [defendant] be allowed to rebut with such evidence.")

Knight Nicastro, LLC
Respectfully submitted,

s/ Nadia H. Patrick

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I hereby certify that I have served true and accurate copies of the foregoing Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment re: Defendants' Non-Party Affirmative Defenses to the following on November 16, 2018:

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