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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,</p> <p><i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694</p> <p>PLAINTIFFS' RESPONSE TO BNSF'S SUPPLEMENTAL AUTHORITY RE: ABNORMALLY DANGEROUS ACTIVITY</p> <p>Applicable To: <i>Barnes, et al. v. State of Montana, et al,</i> Lincoln County Cause No. DV-16-111</p>
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Once again BNSF has submitted untimely briefing under the guise of a “notice of supplemental authority.” BNSF’s untimely briefing cites to no new supplemental authority and instead misrepresents the long-disclosed documentary record that has been produced in this and previous cases. Moreover, BNSF’s untimely brief containing at least seven pages of legal argument cannot reasonably be characterized as a notice of supplemental authority. Supplemental briefing or “supplemental authority” without leave of the Court is inappropriate (especially when unsupported by affidavit). The Court should reject BNSF’s efforts for those reasons and the reasons stated in *Plaintiffs’ Response to BNSF’s Notice of Supplemental Authorities re: Plaintiffs’ Motion for Summary Judgment re: Non-Party Affirmative Defenses*. While Plaintiffs are hesitant to respond to such unauthorized filings, BNSF’s latest incarnation of “supplemental authority” necessitates a response regarding the incomplete and inaccurate factual

record BNSF presents. While Plaintiffs will postpone legal arguments regarding the applicability on Montana's abnormally dangerous activity standard to BNSF's activities for the hearing on this matter, we believe it is necessary to rectify BNSF's misrepresentations of the documentary record in this case. That said, if the Court feels compelled to consider BNSF's late filed legal arguments, Plaintiffs will demonstrate that they are as flawed as their factual misrepresentations outlined below.

BNSF cites to cherry-picked and unrepresentative documents to support its argument that "between the air and soil testing, there is no evidence that there were, or are, harmful amounts of asbestos on BNSF property originating from its transportation operations." (BNSF's supplemental brief, p. 9.) In doing so, BNSF again confirms Plaintiffs' concerns, as stated in Plaintiffs' *Motions in Limine*, that BNSF intends to weave a web of misrepresentations based on BNSF's cherry-picked and unrepresentative sampling data to assert that no hazard existed at BNSF's Libby properties. In doing so, BNSF ignores sampling that unequivocally demonstrates very high levels of asbestos present in both the soil and air. (See, e.g., Plaintiffs' Reply Brief in Support of Motion in Limine Re: Various Evidentiary Issues, p. 10.)¹ Plaintiffs' concern regarding BNSF's misrepresentation is further justified by the fact that BNSF spoliated relevant evidence in this regard by its failure to perform mandatory OSHA air monitoring that would have provided very relevant air monitoring data contemporaneous with active vermiculite operations. As is obvious from BNSF's misrepresentations as outlined below, the grant of

¹"As predicted..., BNSF here again asserts that no hazard was presented by BNSF activities during Plaintiffs' exposure periods. Their primary exposures occurred during active vermiculite operations, yet BNSF's argument and position in this case relies wholly on its own cherry-picked air monitoring that occurred more than a decade after active vermiculite mining operations ceased. This is the very prejudicial misrepresentation Plaintiffs have sought to prevent. Not only is this data misrepresentative of conditions during the relevant time periods, it also ignores other more recent sampling performed in the Railyard and at the River Loading Facility demonstrating very high levels of asbestos in the soil and air."

Plaintiffs' *Motion in Limine* is appropriate and necessary to preclude BNSF's improper use of cherry-picked information to imply no hazard existed at BNSF's operations.²

Plaintiffs provide the following factual responses to BNSF's misrepresentation of the documentary record:

1. BNSF's Uncontested Facts paragraphs 2-8 all reference various air monitoring performed during the EPA mandated cleanup of BNSF's Libby properties. This testing was all performed under the scrutiny of the EPA while strict dust control and safety procedures were utilized, including the constant wetting of all surfaces and soils and the use of full Tyvek suits and supplied air respirators. (See, e.g., BNSF Libby Rail Yard Libby Amphibole Impacted Soil Removal Health and Safety Plan, excerpt attached as Exhibit 88 to the Third Affidavit of Roger Sullivan (Sullivan 3rd Aff.).) Despite the extensive dust control and safety procedures utilized during all of these sampling events, BNSF inexplicably asserts that this testing is somehow representative of the hazard presented by its activities in Libby in the preceding decades when it was actively shipping many hundred tons of asbestos contaminated vermiculite into and out of downtown Libby each day without any such dust control measures. This argument, designed to confuse this Court, is exactly what Plaintiffs' *Motion in Limine* on this topic seeks to prevent BNSF from making to the jury. Moreover, the mere fact that such extensive dust control and safety requirements were deemed necessary by EPA belies BNSF's assertion that there was no hazard present. Despite the extensive dust control and safety procedures in place during clean-

² See e.g. *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶ 20, 379 Mont. 314, 350 P.3d 52 (noting that default judgement and other sanctions should be taken against a defendant who engages in discovery abuses or spoliates evidence); *Id.* ¶ 49 (Wheat concurring) (citing to several occasions where BNSF has spoliated or obstructed evidence); *Sweet v. Sisters of Providence in Washington*, 895 P.2d 484, 491 (Alaska 1995) (where the Alaska Supreme Court held that where a medical malpractice plaintiff's ability to prove negligence is impaired by the defendant's breach of duty to create or maintain adequate records a trial court); *Hall v. Flying B Properties et al.*, Missoula Cause No. DV-16-699 (12/11/18 Order) (where Judge Halligan entered spoliation sanctions against Defendants who allowed removal of evidence from scene of a fire without first letting Plaintiff inspect the scene despite the fact Plaintiff had previously notified Defendants to preserve all relevant evidence).

up, numerous air samples taken during this period, including perimeter samples taken outside the removal area, demonstrated airborne asbestos fiber levels well in excess of the EPA's Reference Concentration (safety threshold) for Libby Asbestos of 0.00009 f/cc.

2. BNSF's Uncontested Facts paragraphs 1, 9, and 10 reference the only sampling of airborne asbestos levels generated by railroad activities that occurred prior to the EPA mandated cleanup of BNSF's Lincoln County Properties. BNSF asserts this testing demonstrates "airborne concentrations of asbestos fibers in the Libby rail yard were extremely low and mostly non-detectable even before remedial activities were conducted, as evidenced by air sampling performed during the spring of 2001 during the upkeep and repair of BNSF's track and yard in Libby." (BNSF's supplemental brief, p. 2.) Determinative here, the EPA reviewed this same testing and came to the opposite conclusion that "Respondent [BNSF] recently implemented its own investigations to determine if yard activities would entrain asbestos fibers into the air; the results confirmed that such activities can entrain high levels of asbestos fibers." (See, e.g., 11/4/2001 Administrative Order on Consent - Negotiation Document, excerpt attached as Exhibit 89 to the Sullivan 3rd Aff.) Although this testing occurred eleven years after active vermiculite operations had ceased in Libby and in April when soil/moisture conditions were less conducive of dust production, it still demonstrated extremely high levels of airborne asbestos continued to be produced by BNSF's regular maintenance activities. (See Railyard Maintenance Activity Asbestos Sample Results, 4/24/2001-4/25/2001, attached as Exhibit 90 to the Sullivan 3rd Aff.)

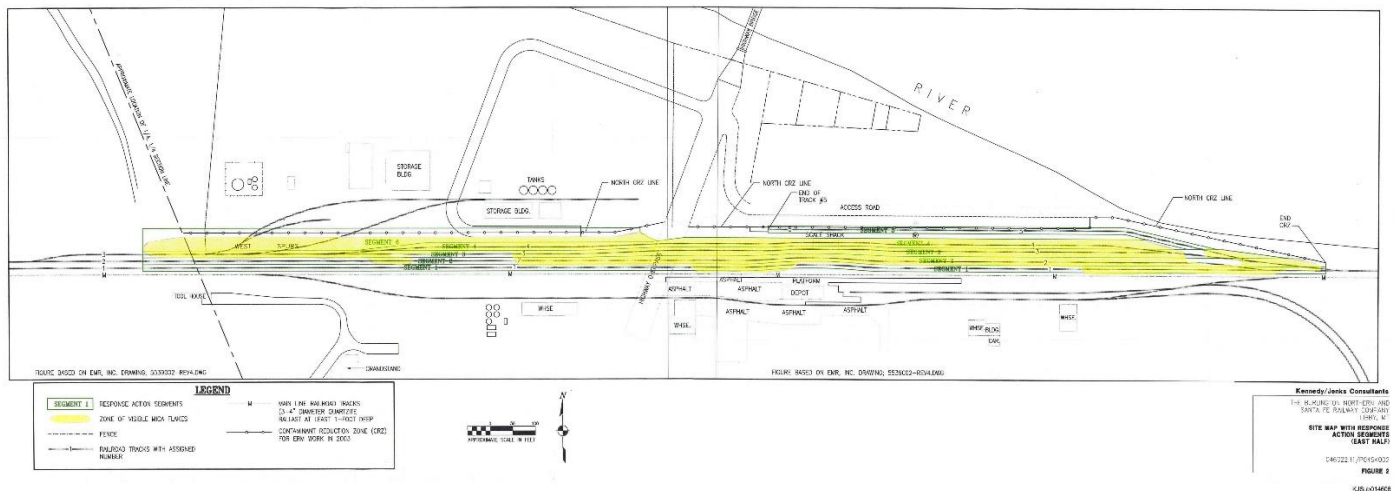
BNSF asserts that the highest personal air sample measured during the spring 2001 testing was 0.092 f/cc and that "Plaintiffs point to a single area air test that showed a 14 f/cc result which they misleadingly suggested was representative or prevalent." (BNSF's supplemental briefing, pp. 2, 9.) Neither assertion is true. In fact, Plaintiffs have instead stated

that the testing ranged up to 14 f/cc. The testing from April 24-25 demonstrates multiple extremely high airborne asbestos measurements in addition to the 14 f/cc result, including 9.6 f/cc, 7.2 f/cc, 3.1 f/cc, and a personal air sample of 2.6 f/cc (nearly 30 times higher than the alleged “highest” personal air sample referenced by BNSF). (See Exhibit 90 to the Sullivan 3rd Aff., with results exceeding OSHA’s 8 hour workplace standard highlighted.)³ To put these results in perspective, they are among the highest, if not the highest, airborne asbestos results measured during all Libby remediation related testing, they exceed the OSHA 8 hour workplace standard by 26 to 140 times, and exceed the EPA Reference Concentration (safety threshold) by 29,000 to 155,000 times. Moreover, the results of this testing are confirmatory of the only available contemporaneous air monitoring for the areas of downtown Libby surrounding BNSF’s railyard, which demonstrated airborne asbestos levels during active vermiculite operations ranging from 0.67 to 1.5 f/cc (6.7 to 15 times the current OSHA workplace standard; attached as Exhibit 91 to the Sullivan 3rd Aff.) and tree bark sampling “collected 7 miles west of the town [and 14 miles west of the W.R. Grace Mine] next to a railroad line [that] had concentrations of 19 million fibers/g.” Ward et al., *Trees as reservoirs for amphibole fibers in Libby, Montana*, Sci. Total Environ. 2006 Aug 15;367(1). Contrary to BNSF’s misrepresentations, the available evidence overwhelmingly establishes that its activities in downtown Libby substantially contributed to airborne asbestos levels in the area.

3. BNSF’s uncontested facts paragraph 12 asserts that the “extensive soil sampling on BNSF’s property consistently found no or only trace amounts of asbestos fibers in the soil.”

³ While BNSF would have this Court believe that the 14 f/cc sample is somehow unrepresentative of then current railyard conditions because it is an outlier or was improperly performed, this argument is without foundation and the proposition that BNSF would for some reason perform its own non-representative sampling belies logic. Regardless, the validity of the result is confirmed by the multiple other high sample results accompanying it.

This statement is without support and incredibly deceptive. In performing the referenced soil sampling BNSF did not take any samples in the extensive areas covered in “visibly obvious vermiculite.” (See 11/30/2001 Correspondence from EMR to BNSF re: Results of October Sampling at Libby, attached as Exhibit 92 to the Sullivan 3rd Aff.) These vermiculite covered areas made up the large majority of BNSF’s Libby railyard:



(Areas covered in visible vermiculite indicated in yellow, Railyard perimeter indicated in green; see Map of Areas of BNSF Railyard Covered in Visible Vermiculite which were not sampled for the presence of asbestos, attached as Exhibit 93 to the Sullivan 3rd Aff.) Per the EPA’s order, these areas covered in vermiculite as well as the other areas of the downtown Libby railyard containing significant levels of amphibole asbestos required removal. Thus, BNSF did not test the clearly contaminated large majority of the railyard prior to removal.

In August of 2003 BNSF attempted remediation of the areas covered in visible vermiculite by removing the top few inches of contaminated soil/substrate using an excavator and vacuum trucks to suck up the material. (See Photos of vacuum remediation efforts, attached as Exhibit 94 to the Sullivan 3rd Aff.) After that soil was removed, “clearance” samples were taken of the underlying soil in 50 foot grids. BNSF alleges “For the samples that did have

detectable LA, most reported only trace amounts and all were below 1% asbestos content with the exception of a single sample in the northeast corner of the railyard.” This is a patently false misrepresentation.⁴ Instead, BNSF contractors took 18 samples from these areas spanning several hundred feet before the EPA shut down the vacuum remediation operations in mid-course because of the continuing “high levels of asbestos.” (See, e.g., EPA’s Initial Pollution Report for Operable Unit 6, 9/29/2003, attached as Exhibit 96 to the Sullivan 3rd Aff.). Moreover, these samples were not “all below 1% asbestos” as BNSF misrepresents, rather they demonstrated consistent levels of asbestos in the soil of 2% and ranging to over 3%:

2003 Soil Sample Laboratory Analytical Data
The Burlington Northern and Santa Fe Railway Company
Vermiculite Remediation
Libby, Montana
EMR Project: 5539.003

Sample ID	Type	Sample Collection Date	Depth (inches)	Color	Latitude	Longitude	Asbestos	Mica	Asbestos Type	Purpose
T3-00001	Grab	08/13/2003	3-6	Brown	48.39417	115.54592	ND	20%	NA	Test
T4-00001	Grab	08/13/2003	3-6	Brown/Red	48.39417	115.54592	ND	10%	NA	Test
BN-38000	Composite	08/15/2003	NA	Brown/Red	NA	NA	2%	10%	Tremolite/Actinolite	Clearance
BN-38001	Discreet	08/15/2003	3-6	Brown	38.39415	115.54572	2%	10%	Tremolite/Actinolite	Clearance
BN-38002	Discreet	08/15/2003	3-6	Brown/Red	48.39424	115.54587	ND	0%	NA	Clearance
BN-38003	Discreet	08/15/2003	3-6	Red	48.39438	115.54559	2%	10%	Tremolite/Actinolite	Clearance
BN-38004	Discreet	08/15/2003	3-6	Red	48.3943	115.54572	<1%	10%	Tremolite/Actinolite	Clearance
BN-38005	Discreet	08/15/2003	3-6	Brown	48.39428	115.54597	2%	10%	Tremolite/Actinolite	Clearance
BN-39000	Composite	08/18/2003	NA	Brown	NA	NA	2%	20%	Tremolite/Actinolite	Clearance
BN-39001	Discreet	08/18/2003	3-6	Brown	48.39433	115.54609	2%	10%	Tremolite/Actinolite	Clearance
BN-39002	Discreet	08/18/2003	4-7	Red	48.39436	115.54616	ND	0%	NA	Clearance
BN-39003	Discreet	08/18/2003	6-9	Brown	48.39437	115.54628	2%	8%	Tremolite/Actinolite	Clearance
BN-39004	Discreet	08/18/2003	3-6	Red	48.3944	115.54607	ND	10%	ND	Clearance
BN-39005	Discreet	08/18/2003	3-6	Red	48.39444	115.54622	<1%	0%	Tremolite/Actinolite	Clearance
BN-40000	Composite	08/18/2003	NA	Brown	NA	NA	2%	10%	Tremolite/Actinolite	Clearance
BN-40001	Discreet	08/18/2003	4-7	Brown	48.39443	115.54646	2%	10%	Tremolite/Actinolite	Clearance
BN-40002	Discreet	08/18/2003	4-7	Brown	48.39448	115.54658	2%	0%	Tremolite/Actinolite	Clearance
BN-40003	Discreet	08/18/2003	3-6	Red	48.39453	115.5467	3%	15%	Tremolite/Actinolite	Clearance
BN-40004	Discreet	08/18/2003	4-7	Red	48.39445	115.54647	<1%	10%	Tremolite/Actinolite	Clearance
BN-40005	Discreet	08/18/2003	4-7	Red	48.39453	115.54657	<1%	0%	Tremolite/Actinolite	Clearance

(Note that the composite samples, which measure the overall asbestos content of the combined discrete samples, demonstrate a consistent asbestos soil content of 2% asbestos; see August 2003 Soil Sample Results, attached as Exhibit 97 to the Sullivan 3rd Aff.) Because of this extensive contamination, the EPA shut down BNSF’s initial unsuccessful vacuum remediation effort in

⁴ BNSF counsel made this same misrepresentation to the jury in the recent case of *Wetsch v. BNSF* further establishing the necessity for an *Order in Limine* precluding BNSF counsel from making such misrepresentations to future juries. (See excerpt of Opening Statement of Chad Knight attached as Exhibit 95 to the Sullivan 3rd Aff.)

mid-course, and mandated a deeper excavation (at 4 to over 6 feet deep in some areas) removal and replacement of all contaminated soils, as well as preventative barrier capping of the entire downtown Libby Railyard. (See Photos of subsequent excavation and capping efforts attached as Exhibit 98 to the Sullivan 3rd Aff.)

In sum, these samples taken during the initial remediation are the only representative samples taken from the majority of the railyard and are most representative of conditions present over a decade earlier when active vermiculite operations were ongoing. (See the Expert Report of Dr. Julie Hart, p. 39, attached as Exhibit 71 to the Sullivan 2nd Aff.) This 2003 testing confirms the Railyard substrate exceeded 2% asbestos during active vermiculite shipping operations that had ceased more than a decade earlier. In fact, at this level the entire Railyard would be considered a regulated asbestos containing material subject to additional specific dust control and removal requirements. (See, e.g., the NESHAP 1% asbestos standard, adopted by BNSF in its uncontested fact paragraph 15.)

BNSF also understates the hazard documented by the limited pre-remediation sampling that was performed in those areas not covered in visible vermiculite. While these samples were found to contain less than 1% asbestos, which may sound like a low or non-hazardous level to a lay person, such asbestos soil levels have long been recognized as capable of producing very hazardous levels of airborne asbestos when disturbed. Even the Millette & Compton Study attached by BNSF to its supplemental briefing as Exhibit G notes that, “it has been shown that as little as 0.001% of asbestos in loose clay soil can produce around 0.1 fibre per ml (0.1 fibers/cc)

of asbestos in the air,” which is equivalent to the OSHA permissible exposure limit. (See highlighted copy of the Millette study attached as Exhibit 99 to the Sullivan 3rd Aff.)⁵

Finally, as to soil sampling, at paragraph 13 BNSF asserts based on their expert Dr. Kind’s report that EPA soil sampling taken in the Libby community “between 1999-2009 demonstrated that LA detection in soil is not clustered around BNSF’s rail or track yards.” As expressed in detail in the rebuttal reports of Dr. Julie Hart and Dr. Julian Marshall, the EPA sampling cannot be used to discern a gradient as Dr. Kind suggests because it was primarily performed in areas of self-reported use of vermiculite ore in gardens, yards, and flowerbeds and thus would not depict ambient depositions, was not performed using any spatial methodology (i.e. multiple clustered samples were taken from isolated properties with reported use of vermiculite and none from neighboring properties), lacks sufficient sensitivity (i.e. uses 0-1.75% asbestos as the lowest detection category), and asbestos fibers released from the Railyard were capable of travelling considerable distances prior to deposition on surfaces from which they were easily and continually re-entrained and further dissipated (in comparison, when vermiculite is intentionally mixed into soil as an amendment it is more readily preserved for detection decades later as was observed with Libby Soil sampling). (See Dr. Julie Hart, Dr. Hart Rebuttal Report, p. 13; Dr. Julian Marshall Rebuttal Report, pp 1-2.)

4. BNSF’s uncontested fact paragraph 15 asserts that “BNSF hauled only a refined vermiculite product that contained at most trace amounts of residual asbestos.”⁶ As support for

⁵ Moreover, a reduction in surface soil asbestos content would be expected to result from the distribution of asbestos fibers during the more than a decade of soils disturbance activities that occurred since the vermiculite was actively shipped through the yard and levels were undoubtedly higher during active vermiculite operations.

⁶ BNSF inexplicably cites a U.S. Army Corps. Of Engineers report (Exhibit E) that does not convey what BNSF contends as to the association between visible vermiculite and asbestos in soil samples. Moreover, the referenced figures from this report are maps of the Libby Lumbermill rather than the Downtown Libby Railyard.

this argument, BNSF cites, out of context, to the Millette and Compton study entitled *Analysis of Vermiculite and Screening for Vermiculite from Libby Montana*, which provides that in 1980 W.R. Grace self-reported that the vermiculite concentrate it was shipping contained an average level of 0.5% asbestos.⁷ (Exhibit 99 to the Sullivan 3rd Aff.) However, the study goes on to reference the other extensive outside studies refuting the 0.5% level. For example, the referenced study goes on to note that in 1977 the EPA found:

After mining, vermiculite is processed to remove impurities, however, attempts to remove all contaminants have been unsuccessful and tremolite asbestos remains as a contaminant in the vermiculite obtained from the Libby mine at a concentration of **at least 1%**.

The Millette study also reproduces the following table from the 1982 EPA study determining that the Libby vermiculite concentrate contained up to 7% asbestos:

Sample	<u>Fibrous phases</u>	
	Estimated mass, %	Mineral types
Grade 1, 270-I	4-6	Trem-actin
Grade 2, 276-I	4-7	Trem-actin
Grade 3, 259-I	2-4	Trem-actin
Grade 4, 282-I	0.3-1	Trem-actin
Grade 5, 264-I	2-4	Trem-actin
Grade 5, 267-I (1-day)	2-5	Trem-actin
Screen Plant Composite (288-I)	2-5	Trem-actin

⁷ BNSF also intentionally misrepresents a 0.2% asbestos level in the vermiculite concentrate. Upon cursory review of the cited study the 0.2% number is clearly provided in reference to the W.R. Grace self-reported level of asbestos in the expanded vermiculite material. This number is wholly inapplicable to the vermiculite concentrate.

In addition, the fact that soils were measured in the Railyard at 2% asbestos refutes the proposition that the vermiculite concentrate contained less than this amount of asbestos.

Finally, BNSF references reports at uncontested facts paragraphs 17-19 to assert that only a small or negligible hazard was presented by the transportation of asbestos contaminated vermiculite. It is important to note that the studies were comparing transportation of vermiculite by rail to all other vermiculite related activities including mining, processing, expansion, and end user use. Nonetheless, the 1981 study notes that “Industry should be encouraged to adopt more stringent controls” in regards to asbestos-contaminated vermiculite (p. 4) and reports that “workers in loading areas” are still being exposed to airborne asbestos up “to 5 f/cc.” (p. 8). The 1985 EPA study concedes at page 1 that exposure levels for those living near the vermiculite mining and milling operations were not assessed in the study yet estimated transportation of Libby vermiculite in 1985 resulted in an annual release of 10,800 kg of dust to the air. Such significant releases certainly created hazardous conditions, particularly considering the epicenter of such releases was in downtown Libby within mere feet of children’s recreational facilities and community residences. Moreover, other contemporaneous agency publications note that transportation of vermiculite by rail created high exposure scenarios resulting, for example, in estimated exposures for rail workers of 400 billion asbestos fibers per year, which exceeded contemporaneous exposure estimates for Libby vermiculite miners by more than an order of magnitude. (See, e.g., Chemical Control Division Office of Toxic Substances (1982) - *Disposition Paper for Asbestos-Contaminated Vermiculite*, attached Exhibit 100 to the Sullivan 3rd Aff.: “Some high-exposure occupational groups identified include rail workers transporting raw ore, miners, and exfoliators. These three types of occupational exposure were estimated at levels of 4.0×10^{11} fibers per year, 1.7×10^{10} fibers per year, and 8.3×10^8 fibers per year,

respectively.”) BNSF’s final reference is to EPA’s 2015 Site Wide Risk Assessment which assessed post-remediation risks to community members. Such assessments are completely inapplicable to hazards presented by the conditions prior to asbestos clean-up and during active vermiculite operations that had ceased twenty-five years earlier.

In conclusion, BNSF’s untimely supplemental briefing should be disregarded, and the Court should grant Plaintiffs’ pending *Motions in Limine* precluding BNSF from presenting the misleading and misrepresentative information referenced in its supplemental briefing to a jury in any case pending before the Asbestos Claims Court.

Respectfully submitted this 4th day of January 2019.

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Dated: 01-04-2019