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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFFS' REPLY RE: PLAINTIFFS' MOTION TO COMPEL Applicable To: *Barnes, et al. v. State of Montana, et al,* Lincoln County Cause No. DV-16-111

Plaintiffs hereby submit their Reply in support of their August 24, 2018, *Motion to Compel and for Sanctions* ("Motion to Compel") and in response to Defendant BNSF's *Response to Plaintiffs' Motion to Compel* ("BNSF's Response"). Plaintiffs' incorporate herein the briefing in their *Motion to Compel*, their November 27, 2018, *Outstanding Issues Re: Plaintiffs' August 24, 2018, Motion to Compel BNSF* ("Plaintiffs' Outstanding Issues"), and their *Notice of Issue Re: Plaintiffs' August 24, 2018 Motion to Compel BNSF and for Sanctions* ("Notice of Issue") by this reference.

INTRODUCTION

The current discovery effort exists in the context of master discovery and has bearing not just on Plaintiffs' cases, but all cases before the Asbestos Claims Court. Accordingly, this single round of master discovery warrants special care and attention from involved parties.

While the Plaintiffs served discovery requests covering the information at issue here in March 2018 (over ten months ago), the Libby claimants have been formally seeking the requested information for more than fifteen years. For example, on June 28, 2001, Plaintiffs' counsel filed the claim of Plaintiff Tracie Barnes' now-deceased father Robert Barnes, asserting that conditions and activities at BNSF's downtown Libby railyard released asbestos fibers into the air substantially contributing to his asbestos related disease. (See, Exhibit 1, *Robert Barnes v. BNSF*, Lewis and Clark County Cause No. BDV-2001-406, Complaint). On October 30, 2003, Plaintiffs' counsel served discovery on BNSF seeking the same information still being sought today.[1] Litigation and attendant discovery efforts seeking this same information have continued during the ensuing 15 years culminating in the current master discovery effort directed by this Court. Clearly, BNSF's duty of preservation and disclosure of information relevant to ongoing litigation stretches back at least until the early 2000's.

BNSF claims it has gone "above and beyond the mandates of Rule 26" in producing what it has unilaterally designated as its "official record" or "central repository" for Libby. (BNSF's Response pp. 10, 12.) Gaping holes in what BNSF considers its discoverable "central repository"

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[1]For example, the 2003 discovery effort included requests seeking:

a. "All documentation relating to testing, sampling, and/or investigation of asbestos contamination at and/or near any and all BNSF properties and facilities in Lincoln County." (RFP No. 12).
b. "All documentation relating to asbestos abatement conducted by or on behalf of the BNSF and/or any other entity at any and all BNSF properties, facilities, tracks, and/or rights of way in Lincoln County." (RFP No. 13).
c. "All internal memoranda, written intercorporate communications, and/or interoffice memoranda of the BNSF and/or its predecessors in interest, which relate in any way to the hazards of exposure to asbestos, vermiculite, and/or Zonolite originating from Lincoln County." (RFP No. 32).
d. "All correspondence, reports, memoranda, or other written documentation in the possession of the BNSF, which relate to and/or document communications by the BNSF and/or any of their officials, agents, servants, and employees, with any political entity, politician, and/or community action group concerning asbestos and/or the hazard of asbestos exposure in Lincoln County." (RFP No. 37).

are obvious from the documents received via subpoena from Kennedy Jenks, including the communications between BNSF and Kennedy Jenks which were never previously produced or identified in a privilege log. As such, BNSF's "central repository" and subsequent production to Plaintiffs is logically and patently incomplete as to correspondence regarding sampling and cleanup on its properties. This also appears to be the case for communications with other entities including the EPA, the MTDEQ, and the multiple other BNSF contractors and consultants. Because such communications are largely absent from its "central repository," it surely indicates that many more such undisclosed documents exist or did exist. BNSF has had a duty to preserve such information in relation to ongoing or pending litigation since at least the 2001 filing of Robert Barnes' complaint, and separately under the Federal Order mandating retention of all documents and correspondence relating to BNSF's sampling and removal efforts in Libby.[2] BNSF's failure to produce such information in the ensuing 15 years is *prima facie* evidence of discovery abuses and spoliation of relevant evidence.

The Libby claimants are at an obvious and significant disadvantage in this effort. The existence and location of relevant, responsive information is within the exclusive knowledge and control of BNSF. Plaintiffs are left to identify holes or inconsistencies in discovery, and have done just that in identifying three key areas of missing discovery: 1) BNSF internal correspondence regarding clean-up or testing; 2) documents and correspondence leading up to the entry of the Administrative Order of Consent for the EPA-mandated clean-up; and 3) a meaningful summary

[2] As discussed in more detail in Plaintiffs' *Motion to Compel*, the Federal Order governing the sampling and cleanup of BNSF's Libby properties provides that BNSF shall "preserve and retain all non-identical copies of records and documents (including [correspondence and] documents in electronic form) now in its possession or which come into its possession or control … regardless of any corporate retention policy to the contrary."

of modification, removal, and construction activities. Aside from a few isolated cherry-picked examples, BNSF has failed to respond to these identified holes.

Additionally, BNSF inserted itself into Plaintiffs' subpoena of non-party Kennedy Jenks and BNSF has withheld and refused to produce 2,000 missing Kennedy Jenks documents identified by Plaintiffs claiming they are "duplicates." BNSF has also asserted what appear to be improper privileges and/or protections to 85 other documents. Finally, now, some two months before trial, "newly discovered" BNSF hard drives of key BNSF environmental and cleanup personnel have for the first time been identified. Notably, BNSF has not produced those BNSF hard drives to Plaintiffs despite BNSF's contention that the hard drives contain "no new documents of consequence." Instead, Plaintiffs and the Court are both simply left to "trust" that the "newly discovered" information has been accurately characterized by BNSF.

PROCEDURAL BACKGROUND

Plaintiffs' master discovery requests were served on BNSF on March 21, 2018. Those requests were approved by the Court. Transcript (3/20/18), pp. 26-27. BNSF produced documents in response thereto, but there were numerous types of documents requested that were missing from that production. Thus, Plaintiffs conferred on multiple occasions with BNSF from June 2018 through August 2018.

Having never received the requested documents, Plaintiffs filed their August 24, 2018, *Motion to Compel*. The Court conducted an informal discovery conference on Plaintiffs' *Motion to Compel* on August 28, stating it was inclined to grant that motion but offered BNSF an opportunity to file a response, if it so chose. BNSF did not file a response but instead claimed to be working on producing the requested documents. The time to file any such response has long since passed.

At the September 18, 2018, hearing, Plaintiffs' counsel advised the Court that there are "significant discovery issues that remain unresolved" and informed the Court that BNSF had not produced a single document in response to Plaintiffs' *Motion to Compel*. Transcript (9/18/18), p. 67:15-69:1. Thereafter, the Court stated:

> I would advise the parties that in regard to the latest Motion to Compel that was filed with no response that we had an informal discovery conference on its granted, and the documents need to be produced.

Transcript (9/18/18), p. 74, ln. 14-18 (emphasis added).

On September 21, 2018, BNSF supplemented its prior productions with nearly 2,500 pages of documents. On September 28, 2018, over 19,000 pages of non-party Kennedy Jenks' documents were produced (by BNSF because they had inserted themselves into the middle of Plaintiffs' subpoena on Kennedy Jenks).[3] On October 2, 2018, Plaintiffs emailed BNSF requesting BNSF address Plaintiffs' concerns regarding BNSF's claim of privilege over Kennedy Jenks' documents. Because Plaintiffs were still reviewing the thousands of pages of documents BNSF had just produced in the two weeks preceding the October 3, 2018 hearing, Plaintiffs did not want to waste the Court's time on any discovery issues and were hopeful that BNSF had complied with the Court's direction given at the August 28 informal conference and at the September 18 hearing.

[3] Plaintiffs subpoenaed Kennedy Jenks (BNSFs current cleanup contractor) on August 10, 2018. On August 27, 2018, Plaintiffs received an "*Objections to Subpoena Duces Tecum Served upon Non-Party Kennedy Jenks*" signed by Scott Carney as Project Manager for Kennedy Jenks and by Ms. Patrick of Knight Nicastro as attorney for BNSF. See Exhibit B to Plaintiffs' Outstanding Issues. Thereafter, the Kennedy Jenks' production was not made directly to Plaintiffs from Kennedy Jenks, as required by Plaintiffs' subpoena. Rather, Knight Nicastro, BNSF's attorneys, inserted itself into that production claiming these were "BNSF Documents," despite BNSF having never produced these documents previously in response to discovery requests. BNSF produced the Kennedy Jenks documents on September 14 and September 28. On November 19 and December 4, BNSF served two privilege logs asserting privileges BNSF was claiming over the Kennedy Jenks documents.

On November 13, 2018, Plaintiffs' counsel asked BNSF to identify the location of 2000 documents that were missing from the Kennedy Jenks' subpoenaed documents. On November 19, 2018, at 5:25 p.m., BNSF produced a privilege log for privileges BNSF was asserting to Kennedy Jenks' electronically stored information.

The next day, at the November 20, 2018, hearing, Plaintiffs raised the outstanding issues with their *Motion to Compel* to the Court, along with the issues posed by the privileges BNSF was asserting to non-party Kennedy Jenks' documents. The Court requested a submission from Plaintiffs regarding the outstanding discovery issues and the issues regarding BNSF's privilege logs to the Kennedy Jenks' documents. Transcript (11/20/18), p. 35:11-36:7. The Court afforded BNSF an opportunity to respond. *Id.*

As the Court requested, November 27, 2018, Plaintiffs filed their *Plaintiffs' Outstanding Issues.* In response, BNSF obtained Plaintiffs' stipulation to ask the Court to "hold any ruling in abeyance until January 2, 2019," because BNSF represented it was "actively working to identify additional relevant and responsive Discovery, including review of its claims of privilege." *See* Stipulation Regarding Outstanding Discovery Issues (12/10/18).

Over the ensuing weeks, instead of producing a single additional document or withdrawing a single privilege claimed, on January 2, 2019, BNSF filed its *Status Report to the Court.* There, BNSF, for the first time, informed Plaintiffs and the Court that BNSF located 6 hard drives from key environmental and remediation personnel. In response on January 14, 2019, because it was clear BNSF had shined Plaintiffs and the Court on long enough, Plaintiffs filed their *Notice of Issue*.

The Court entered its *Oder Re: Various Motions* dated January 16, 2019, giving BNSF five days to file a response to the *Notice of Issue* and to explain why sanctions should not be imposed. Conveniently, BNSF unilaterally asserts that there are no additional responsive documents to

produce, the "newly discovered" document sources contain no relevant information, and/or are duplicative.

APPLICABLE LEGAL AUTHORITIES

Regardless of whether this Court "ordered" BNSF to produce certain items, Montana Rule Civil Procedure Rule 37(c) allows this Court to impose any sanction it deems appropriate for BNSF's failure to provide information requested by Plaintiffs. The Montana Supreme Court has recently declared:

> Compliance with discovery rules and orders is essential to the efficient and fundamentally fair administration of justice on the merits. *Peterman*, ¶ 17; *Richardson*, ¶¶ 56-57; *Owen v. F. A. Buttrey Co.*, 192 Mont. 274, 276-81, 627 P.2d 1233, 1235-37 (1981). *See also* M. R. Civ. P. 1. Upon a party's failure "to provide information requested in accordance with" M. R. Civ. P. 26-36, a district court may impose any sanction "listed in Rule 37(b)(2)(A)(i)-(vi)" in addition to, or in lieu of, imposing reasonable costs, including attorney fees, or "inform[ing] the jury" of a party's non-compliance. M. R. Civ. P. 37(c)(1)(C). M. R. Civ. P. 37(b)-(d) embodies a strong preference for liberal imposition of sanctions as necessary and proper to remedy, punish, and deter non-compliance with discovery rules and orders.

Montana State Univ.-Bozeman v. Montana First Judicial Dist. Court, 2018 MT 220, ¶ 20, 392 Mont. 458, 426 P.3d 541. In *Cass v. Composite Indus. of Am., Inc.*, 2002 MT 226, ¶¶ 19-20, 311 Mont. 406, 56 P.3d 322, the Montana Supreme Court explained the broad discretion vested with this Court on these issues:

> On several occasions this Court has stated that dilatory abuse of discovery must no longer be dealt with leniently and that the transgressors of discovery abuses should be punished rather than encouraged repeatedly to cooperate. Furthermore, "The trial judge is in the best position to know ... which parties callously disregard the rights of their opponents and other litigants seeking their day in court. The trial judge is also in the best position to determine which sanction is the most appropriate."
>
> This Court has a consistent history of deferring to the district court regarding the imposition of sanctions.

Id. (where over one year had elapsed since the original discovery had been served and the district court conducted three hearings on the matter and gave the party every opportunity to produce the discovery). *See also, McKenzie v. Scheeler* (1997), 285 Mont. 500, 516, 949 P.2d 1168, 1177–78 (where Court noted prejudice can be inferred and stated that "[a]lthough the extent of the discovery abuse and prejudice to an opposing party are both factors to be considered in determining an appropriate sanction, a party's disregard of the court's orders and authority is an additional consideration.").

BNSF has engaged in multiple instances of *per se* discovery abuses as outlined below. While prejudice is a consideration in formulating an appropriate sanction, that is not the only consideration. BNSF's conduct is an additional consideration. In these proceedings BNSF has attempted to use the lack of evidence, particularly testing, as a basis to support their motions for summary judgment and accompanying oral argument to this Court. That lack of evidence has been directly propounded by BNSF. That conduct further justifies a severe sanction.

Moreover, "[b]y implication, Federal and Montana Rules of Civil Procedure 26-37 give rise to a common-law duty to preserve evidence when a party in control knows or reasonably should know that existing items or information may be relevant to pending or reasonably foreseeable litigation." *Id.* at ¶ 23. "The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *See also Wooten v. BNSF Ry. Co.*, No. CV 16-139-M-DLC-JCL, 2018 WL 2417858, at *8 (D. Mont. May 29, 2018) ("Parties to litigation unquestionably have a duty to preserve evidence."); *BNSF Ry. Co. v. Quad City Testing Lab., Inc.*, 2009 WL 10678241, at *3 (D. Mont. Nov. 30, 2009) ("Parties to litigation are unquestionably obligated to preserve evidence in Montana."). "Relevant evidence is critical to the search for the

truth. The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system." *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11.

BNSF is well aware of its duty to preserve and disclose relevant evidence after having been the offending party in many of Montana's cases issuing Rule 37 sanctions for abusive discovery practices. *See Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, ¶¶ 22-27, 379 Mont. 314, 350 P.3d 52 (discussing numerous cases where BNSF was admonished for concealing or disposing of evidence). In *Spotted Horse*, the Montana Supreme Court singled out BNSF as a "sophisticated and recurrent party to litigation," making clear that duties prevail in the context of both pending and potential litigation. *Id.* at ¶ 22. Determinative of many issues raised herein, the Montana Supreme Court has already "reject[ed] the notion that BNSF is entitled to unilaterally determine which evidence is relevant or valuable when investigating an alleged work-related accident preceding litigation." *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶ 30.

Here, BNSF's failure to retain and produce relevant evidence rises beyond the level of discovery gamesmanship and failure to preserve evidence under Montana law, particularly given the gravity of this Master Discovery effort affecting the thousands of claims before the Asbestos Claims Court and BNSF's duty to retain all such information pursuant to the EPA Administrative Order on Consent for Removal Action noted above.

ARGUMENT

A. BNSF Has Failed to Produce Its Correspondence Regarding Clean-up or Testing.

While BNSF has attached to its brief isolated examples of correspondence fitting this description, such responsive documents are remarkably rare among the extensive documentary record regarding the cleanup and testing on BNSF properties which spanned more than a decade.

As discussed above, it is apparent that BNSF's production of its "central repository" does not contain a complete record of communications with outside entities regarding the asbestos contamination issues on its Libby properties. In addition, the record is clearly lacking as to BNSF internal communications on this subject matter.[4] The only source for BNSF internal communications is BNSF itself. While BNSF continues to assert various privileges in its discovery responses, it has produced no privilege log covering any documents contained in its "central repository" precluding Plaintiffs from even assessing what has been withheld.

BNSF should have retained all such communications pursuant to its duty to preserve evidence relevant to active or pending litigation and pursuant to Federal Court Order. Plaintiffs' counsel has been continually pursuing Libby asbestos cases against BNSF since 2001, before cleanup operations began at BNSF's Lincoln County Properties. BNSF's continuing duty to preserve and produce here such information—or at least a log of what is being withheld—could not be more straight-forward.

Based on BNSF's lack of a complete response to these requests, its unwillingness to state whether it has withheld any such documents, and its eagerness to assert that a FOIA request or Plaintiffs' subpoenas of non-parties somehow absolves BNSF of its duty to produce these documents, the question reasonably arises as to whether BNSF has either destroyed these critical documents or failed to maintain them. The question must now be answered. The effect of BNSF's

[4] In comparison to the extremely scant record of internal BNSF communications produced here, Plaintiffs' counsel was involved in litigation regarding another contemporaneous BNSF superfund cleanup in Somers, Montana. In that case, different BNSF counsel produced extensive communications spanning multiple decades regarding the tie plant cleanup, including internal BNSF communications and communications with and between EPA, BNSF, and BNSF's contractors. BNSF also produced a privilege/redaction log in that case to allow Plaintiffs to ascertain what and why information had been withheld. Absolutely nothing comparable has been produced here.

potential destruction of such evidence, whether intentional or negligent, is a major and actionable hurdle for Plaintiffs to overcome in proving their case. Plaintiffs' experts are left to offer opinions regarding hazards associated with historic conditions on BNSF Lincoln County properties where the facilities have since been completely altered and remediated. This information is clearly relevant to Plaintiffs' claims and is unavailable elsewhere.

Plaintiffs know further that BNSF uses this supposed lack of information as a sword. In prior litigation, BNSF continually notes the lack of contemporaneous testing data to support opinions that BNSF's properties did not contain toxic asbestos. This lack in data is directly attributable to a failure to comply with federal regulation mandating airborne asbestos monitoring in any workplace where asbestos fibers are released. (See, 29 CFR §1910.93, attached as Exhibit 2; *see also, Plaintiffs' Motion in Limine Re: Various Evidentiary Issues*, pp. 11-14.) Lacking such data, Plaintiffs are left to elicit testimony and opinions to attempt to refute BNSF's offensive use of this lack of evidence. BNSF gains that advantage by its withholding—or perhaps even having destroyed—relevant documents on this issue in its possession and control. Given the lack of a reasonable timely response to these requests, and separately because BNSF failed to perform mandatory contemporaneous air monitoring, at a minimum the Court should impose an adverse inference as to the lack of monitoring and preclude BNSF from relying on its own selective sampling performed more than a decade after active vermiculite operations had ceased to assert that no hazard was presented by its vermiculite related activities in Libby. (*See Plaintiffs' Motion in Limine Re: Various Evidentiary Issues*, pp. 11-14, and *Reply Brief*, pp. 10-13.)

B. <u>BNSF Has Failed to Preserve and Produce Sampling and Cleanup Information.</u>

BNSF's selected production from its "central repository" is also lacking in documents relating to the sampling and cleanup of BNSF properties. Apparent gaps exist in the record as to

documents and communications leading up to and resulting in the entry of the Administrative Order on Consent, including any CERCLA investigation and enforcement action leading to that Administrative Order on Consent, for the EPA mandated cleanup of BNSF's Lincoln County properties. Among the documents produced by BNSF, Plaintiffs' counsel has been able to locate only a very limited sampling of documents regarding this process consisting primarily of draft and final versions of the Order, extremely limited correspondence between the EPA and BNSF, and no meaningful BNSF internal correspondence. A process of this magnitude would undoubtedly result in a substantial record of correspondence and documentation, which is largely lacking from the production. A complete record of this process is vital to documenting the impetus and circumstances leading to the EPA mandated cleanup of BNSF's properties. There was active litigation occurring between Libby claimants and BNSF at the time these documents were created. Moreover, assuming these documents were in existence when the April 2003 Federal Order was entered requiring BNSF to retain all documents, these documents should have been retained.

Given the lack of a reasonable timely response in this regard, and the substantial record demonstrating the contrary, at a minimum the Court should impose an adverse inference as to hazardous conditions at the Railyard and precluded BNSF from asserting that it performed the cleanup of its Libby properties on its own out of an excess of caution, rather than pursuant to the EPA mandated remediation to address a recognized health hazard. (See, e.g., Exhibit 3, 10/31/2006 EPA correspondence to BNSF - the "Administrative Order on Consent required BNSF to perform a removal action in connection with the BNSF property in Libby, Montana"; Exhibit 4, EPA's Initial Pollution Report for OU6 - "Asbestos contaminated materials were hauled and shipped through the railyard, and spilled into the soil for decades. The soil around the tracks and under the ballast is contaminated and needs to be removed."; *see also Plaintiffs' Motion in Limine Re:*

Various Evidentiary Issues, p. 13, and *Reply Brief*, p. 13.) In addition, as discussed in the following section, the record clearly remains incomplete as to sampling and clean-up efforts on the BNSF properties constituting the two Libby vermiculite loading facilities.

Moreover, the cases of Bob Barnes and multiple other Plaintiffs were filed well in advance of asbestos removal actions at the Downtown Libby Railyard. The allegations of those complaints asserted hazardous conditions at that facility and put BNSF on notice that asbestos contamination levels in the railyard constituted material relevant evidence. Rather than fully sampling and characterizing asbestos levels in the railyard, or allowing Libby claimants to perform necessary sampling, BNSF destroyed the evidence by removing and disposing of the vast areas of the railyard which contained visible vermiculite without performing any sampling. This alone constitutes *prima facie* spoliation of evidence. These actions bear remarkable similarity to the sanctioned spoliation actions of the defendants recited in the recent Orders in *Hall v. Flying B Properties and Temp Right Service,* Missoula DV-16-699. (See Order granting Rule 37 sanctions 10/15/18 and Order on spoliation sanctions 12/11/18, both attached as Exhibit 9.) There Judge Halligan issued sanctions, including adverse inference, for spoliation of evidence where defendants "allowed removal of certain items from the scene" of the alleged injury "without providing Plaintiff or his reps to view the scene" "until well after the remediation." *Id.* p. 10*, accord Montana State Univ.-Bozeman v. Montana First Judicial Dist. Court,* 2018 MT 220; *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶ 39, 397 Mont. 314, 350 P.3d 52. The gravity of BNSF's spoliation in this regard, and the resultant prejudice to Plaintiffs, are compounded by a lack of other evidentiary sources documenting asbestos levels at BNSF's Libby properties which directly resulted from its failure to conduct asbestos air monitoring in Libby as mandated by OSHA by the early 1970s.

C. BNSF Has Failed to Produce a Meaningful Summary of Modification, Removal, and Construction Activities.

In their Master Discovery Requests, the Libby claimants have again sought a description of, and records relating to, modification, removal, and construction activities occurring in a 10-mile radius of the downtown Libby railyard between 1990 and 2010. (Master Discovery Requests Interrogatory No. 6.) As previously explained, given the lack of any contemporaneous sampling, this information is necessary to put into context asbestos sampling that has occurred more recently in such areas. For example, if soils or structures had been removed prior to sampling, this would be pertinent to conclusions that could be drawn from results of later efforts. Rather than providing Plaintiffs with the requested information regarding these activities, BNSF objected because the request "seeks disclosure of evidence of subsequent remedial actions," "are not temporally related to plaintiff's allegations in this lawsuit," and are not limited "to a sufficiently narrow topic or claimed injury relevant to claims in this suit." In so doing, BNSF again improperly takes the position that "it is entitled to unilaterally determine which evidence is relevant or valuable" and fails to provide any log of what has been withheld pursuant to these objections. *Spotted Horse*, 2015 MT 148, ¶ 30.

BNSF supplemented its prior non-response with incomplete and indecipherable rail maintenance and repair logs, asserting that they serve as a sufficient substitute to the requested descriptive response of removal actions. (See, BNSF's most recent documentary response to this request attached as Exhibit 5.) BNSF's cited legal authority in this regard is inapplicable as these supplements are inherently non-responsive and incomplete. The limited information provided does not address the stated intent or timeframe of Plaintiffs' requests. Instead, BNSF's indecipherable logs of rail maintenance records are only from the early 2000s forward. Worse, the

information is utterly indecipherable without specific knowledge of, or a key as to what, the multiple spreadsheets of numeric entries and codes mean.

Plaintiffs followed up by requesting a complete production including information of "how often undercutting operations, sweeping operations, ballast replacement activities, soil removal activities, tie replacement operations, etc., took place in Lincoln County" and the missing information from 1990 until the early 2000s, as requested in the Interrogatory. BNSF responded by refusing to produce a key and stating that the logs "contain the type of activities outlined in your letter." BNSF counsel all but admitted the production is indecipherable by then offering to "talk through those records" in lieu of an actual key or specific discovery response that Plaintiffs' experts can rely upon. BNSF cannot equate conversations between counsel with the necessary information and documents that a party must produce, especially in this instance where, somewhere, a key for interpreting the logs must either already exist or be within the scope of BNSF's present ability—and obligation—to describe.

Regardless, even if they were decipherable, limited rail maintenance and inspection logs from the early 2000's forward are not adequately responsive to the requested description of the significant property modifications that have clearly occurred on the relevant BNSF properties between 1990 and 2010, such as the removal and replacement of rail ties, track bed, and substrate in BNSF's Libby properties.

As one example, BNSF's "official record" is largely devoid of information regarding the substantial modifications that took place at both vermiculite loading facilities. BNSF owned and operated the River Loading Facility at the base of the W.R. Grace mine, and owned the sidings serving and making up part of the W.R. Grace downtown Libby vermiculite bagging plant. (See, e.g., Exbibit 6 - BNSF's SDF's 10, 13, 14, admitting ownership and/or operation of vermiculite

loading facilities; Exhibit 7 - June 1, 2010 EMR Libby Railyard Map showing BNSF right of way occupying area of bagging facility.) The facilities at both these BNSF properties have been dismantled, tracks and supporting structures have been removed, and the substrate in these areas has been extensively modified and/or remediated. Plaintiffs have independently discovered documentation that investigations into environmental issues at BNSF's River Loading Facility apparently began in 1990, yet BNSF has not provided any documentation of the removals and modifications at this facility. (See, e.g., Exhibit 8 - 3/21/1990 correspondence from BNSF Manager of Environmental Operations Michael Perrodin[5] to W.R. Grace regarding a Phase I Site Assessment on property leased from BNSF.) Removal of BNSF's sidings at the downtown vermiculite bagging plant apparently took place around the year 2000, yet BNSF has similarly provided no documentation relating to this action. Even assuming that these activities on BNSF property were performed by entities other than BNSF, they were certainly performed with BNSF's consent, notice, and knowledge. Moreover, while it seems unlikely, if BNSF has not retained the records regarding these extensive activities, at a minimum a descriptive summary of what took place is necessary.

As evidenced by BNSF's previous arguments to this and other courts, BNSF intends to rely on sampling performed in these areas to assert that no hazard existed on its properties. Its position denies Plaintiffs and fact finders the ability to put this late sampling in an appropriate context. By refusing to provide information of its property modifications, BNSF is also inhibiting Plaintiffs experts' ability to offer opinions in that necessary context. Given the lack of a timely reasonable response to Plaintiffs' requests and Plaintiffs' resultant inability to put asbestos

[5] Notably, Mr. Perrodin, who has been involved in BNSF's Libby operations and cleanup since the 1990s or earlier is the source of one of the "newly discovered" hard drives currently at issue.

sampling in these areas in context, at a minimum the Court should impose an adverse inference as to hazardous in these locations and preclude BNSF from relying on asbestos sampling in these areas[6] to assert that no asbestos hazard existed on its Libby properties.

D. <u>BNSF Has Improperly Withheld Kennedy Jenks' Documents Claiming they are Attorney Client Privileged or Work Produced Protected.</u>

BNSF asserts attorney client privilege and work product protection over 85 Kennedy Jenks documents identified in response to Plaintiffs' subpoena to Kennedy Jenks, although produce through Knight Nicastro. Tellingly, BNSF makes no response to Plaintiffs' reasonable request (as contained in *Plaintiffs' Outstanding Issues* and the *Notice of Issue*) that the 85 documents be submitted to the Court for an *in camera* review to assess the privilege. In its *Response*, BNSF still fails to explain its claim of attorney client privilege and work product protection. Rather, it simply attaches its inadequate privilege logs (BNSF Response, p. 13) and implies that Plaintiffs and this Court should trust BNSF. It is clear BNSF's privilege logs, and the privileges asserted therein, justify further scrutiny of the 85 documents withheld.

The privileges asserted by BNSF appear improper on their face and cannot be withheld without at least *in camera* review of the documents by the Court. For example, BNSF asserts attorney client privilege over correspondence <u>where no attorney is involved</u>. This would be *per se* discovery abuse. *See, e.g.*, *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶¶

[6]The only area in BNSF's Libby properties where a reasonably complete record of such activities has been provided is BNSF's downtown Libby Railyard, albeit without characterization of a majority of the facility which contained visible vermiculite. A reasonable description of modifications to the remainder of the BNSF right-of-way within 10 miles of Libby, including the mainline tracks running through the Downtown Libby Railyard, has not been provided.

8-22, 280 P.3d 240 ("Voluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege.").

Yueh Chuang is BNSF's Manager of Environmental Remediation. See BNSF's Response, Exs F, p. 1; N, p. 2 (signature blocks on correspondence from Yueh Chuang). Mr. Chuang is not an attorney, let alone an attorney representing Kennedy Jenks. Despite that fact, BNSF has claimed 37 communications between Mr. Chuang and Kennedy Jenks' Project Manager Scott Carney as "Attorney/Client" privileged. Communications between BNSF's Manager of Environmental Remediation and Kennedy Jenks are not protected by attorney client privilege eve if BNSF now wrongly describes them as communication "between Scott Carney and BNSF Legal Department containing legal advice."

Bates Range	Description	Privilege	To	From[1]	Author[2]
KJSub_ESI_Priv_0000070	3/11/18 Email between Scott Carney and BNSF Legal Department containing legal advice	Attorney/Client	Scott Carney	Yueh Chuang	
KJSub_ESI_Priv_0000071	5/11/18 Email between Scott Carney and BNSF Legal Department containing legal advice	Attorney/Client	Yueh Chuang	Scott Carney	

See BNSF Exhibit L (11/19/18 Privilege Log), p. 13.

Likewise, BNSF has claimed "attorney work product" protection over 14 documents with the following descriptors:

1. Kennedy Jenks' Project Manager Scott Carney's notes from meetings with BNSF litigation counsel Chad Knight,

2. Kennedy Jenks' Project Manager Scott Carney's notes from meetings with BNSF in-house counsel Brooke Kuhl,

3. Emails with BNSF in-house counsel Brooke Kuhl (other participant to the email is not identified), and

4. 5/7/2004 memo from Kennedy Jenks to BNSF's in-house legal department.

BNSF Response, Ex. K (12/4/18 Privilege Log). Additionally, BNSF has asserted "attorney client privilege" to correspondence between Kennedy Jenks employees and BNSF counsel (there is no indication that BNSF counsel ever represented Kennedy Jenks) and to notes created by Kennedy Jenks employees pursuant to communications with BNSF employees and counsel. BNSF Response, Ex. L (11/19/18 Privilege Log).

To the extent BNSF's alleged privilege/protection is really an unarticulated objection under M. R. Civ. P. 26(b)(4)(B) limiting the discovery of "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation," that limitation should not apply here. For reasons explained in *Plaintiffs' Motion to Compel*, those limited protections do not apply to an actor (here, Kennedy Jenks) in the transactions or occurrences which are the subject matter of the lawsuit (cleanup of BNSF's Libby Railyard). Fed. R. Civ. P. 26, Advisory Committee Notes. Moreover, that limitation does not apply [when] "it is impracticable for the party seeking discovery to obtain facts and opinions on the same subject matter by other means." M. R. Civ. P. 26(b)(4)(B). As the Court is well aware, testing data is critical to understanding the level and extent of the contamination at BNSF's downtown Libby Railyard. To the extent the withheld documents relate to any testing, they are not subject to any M. R. Civ. P. 26(b)(4)(B) limitation because BNSF and Kennedy Jenks are the only sources of that information.

E. <u>BNSF Had Improperly Withheld 2,000 Kennedy Jenks Documents which It Claims are "Duplicates".</u>

On November 13, 2018, Plaintiffs' counsel asked BNSF to identify the location of 2,000 documents that were missing from the Kennedy Jenks' subpoenaed documents (as Plaintiffs were able to decipher by identifying a gap in the Bates numbering of the Kennedy Jenks' documents). (See, 11/13/2018 Letter from Jinnifer Mariman attached as Exhibit 10.) In its *Response*, p. 9, BNSF has represented those documents were discovered on "an additional CD . . . included in the physical files" given to a third-party vendor to process, and BNSF appears to blame "vendor oversight" for this issue. However, BNSF does not explain how those 2,000 missing documents were Bates numbered in the first place, which seems to imply the third-party vendor did in fact process and Bates number the documents, but that BNSF later chose to withhold them. Regardless, now more than two months after Plaintiffs requested these materials, BNSF has still not produced them. Instead, BNSF claims they are "duplicates of documents Plaintiff already has" but makes no further attempt to identify or describe those documents. In essence BNSF is asking Plaintiffs, and the Court, to trust BNSF. Actions speak louder than words and it is telling that BNSF has not produced these documents.

Moreover, even if they are duplicates, the fact Kennedy Jenks had "documents Plaintiff already has" can still be reasonably calculated to lead to the discovery of admissible evidence if, for example, they have copies of literature regarding the toxicity of Libby vermiculite, literature regarding the ability of asbestos to entrain into the air, etc. BNSF has named Kennedy Jenks Project Manager Scott Carney as a non-retained expert in this case. Knowing the information Kennedy Jenks had in its files as they were maintained in the course of Kennedy Jenks' operations is important for cross examining Mr. Carney at trial.

F. <u>BNSF Is Withholding "Newly Discovered" Hard Drives from Key Personnel.</u>

The Court has directed BNSF to "explain why sanction should not be imposed for failing to produce responsive documents almost one year after they were requested … [and] fully explain when the internal and external hard drives were discovered and under what circumstances." Order Re: Various Motions, p. 2. BNSF's Response provides no explanation for why or how the "newly discovered materials" came to light now rather than a year ago (or 15 years ago for that matter). The Response merely states that they were "forwarded to Knight Nicastro on December 17, 2018." BNSF's Response, Ex. H, ¶ 8. BNSF does not dispute those hard drives were within BNSF's "possession, custody, and control" as required to be discoverable under Mont. R. Civ. P. Rule 34(a)(1). Instead, BNSF dismisses the Courts concerns by stating that these materials fall outside what it has unilaterally determined to be its discoverable "official record" or "central repository" and unilaterally concludes that there is no, or minimal, responsive information in any of those sources. The Montana Supreme Court has already "reject[ed] the notion that BNSF is entitled to unilaterally determine which evidence is relevant or valuable when investigating an alleged work-related accident preceding litigation." *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶ 30. BNSF's failure to identify and disclose the 6 hard drive or the missing 2,000 documents is *per se* discovery abuse.

BNSF claims it reviewed the 6 "newly discovered" hard drives and found only "two pages of information" not already in Plaintiffs' possession. BNSF's Response, p. 1. They assert they revealed "no new documents of consequence." *Id.*, p. 11. Of course, as it currently sits, BNSF is the only party to have seen these "new" hard drives and, therefore, continues to deem itself the final arbiter of what is discoverable. Telling, BNSF has produced nothing from the hard drives (except for the two pages of information). BNSF again asks Plaintiffs and the Court to trust BNSF.

Further telling is that BNSF's position appears implausible as four of the hard drives are from two key BNSF personnel involved in BNSF's Libby sampling and cleanup since the beginning: BNSF's Manager of Environmental Remediation David Smith and BNSF's Manager of Environmental Operations Mike Perrodin. Frankly, these are two of the first sources BNSF should have considered in identifying documents and information responsive to Plaintiffs' master discovery. The fact these hard drives were just discovered two months prior to trial and not discovered a year ago when discovery was first served (or 15 years ago in response to discovery requests in other cases) is *per se* abuse of discovery.

The issues posed with the six newly discovered hard drives poses a bigger issue: BNSF's assurance to the Court that BNSF's "official record is the central repository" and it contains all "Libby documents" "of which Plaintiffs have had for months if not years." BNSF's Response, pp. 10-11. The fact that BNSF has not provided a privilege log for any of its document productions (except for the Kennedy Jenks' document production into which BNSF inappropriately inserted itself) means that BNSF believes there are no privileged documents in the "central repository." By virtue of BNSF identifying privileged documents in the possession of Kennedy Jenks but to which BNSF should have had in its possession (because they were direct communications with BNSF), it is clear that BNSF's alleged "central repository" is not a complete record of BNSF's documents regarding Libby. This is further confirmed by the fact two emails from EPA were identified from one of the hard drives and not previously provided to Plaintiffs. This alone undermines BNSF's position that we can trust BSNF that the information on the six hard drives was "kept in the central repository" and that they revealed "no new documents of consequence."

CONCLUSION

BNSF has engaged in a discovery strategy of stonewalling Plaintiffs in an apparent effort to gain a tactical advantage. Given the ongoing litigation since the early 2000's, there is no reasonable basis to withhold, or to have destroyed, this extremely relevant and probative information. BNSF's apparent position is that the requested information no longer exists despite its duty to preserve such information pursuant to ongoing litigation and Federal Order. Thus, compelling such "non-existent" information is a hollow remedy. Moreover, even if such information still exists, compelling production at this late stage, a mere 8 weeks from trial and well after expert disclosure have been made, is a similarly hollow remedy that is incredibly burdensome on Plaintiffs. As such, sanctions are the only appropriate recourse. Plaintiffs believe BNSF's conduct warrants severe sanctions, including preclusion of argument based on the absence of evidence and attendant adverse inferences, and "these cases going to trial only on damages." (See, Rule 37(b)(2), M. R. Civ. P; Order Re: Various Motions, p. 2.)

Respectfully submitted this 24th day of January, 2019.

McGARVEY, HEBERLING, SULLIVAN
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By: /s/ Ethan A. Welder
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