

1 Chad M. Knight
 2 Anthony M. Nicastro
 3 Nadia H. Patrick
 4 Steven T. Williams
 5 KNIGHT NICASTRO, LLC
 6 304 W. 10th Street
 7 Kansas City, MO 64105
 8 Email: knight@knightnicastro.com
 9 nicastro@knightnicastro.com
 10 npatrick@knightnicastro.com
 11 williams@knightnicastro.com
 12 Telephone: (303) 815-5869
 13 Facsimile: (303) 845-9299

14 **ATTORNEYS FOR DEFENDANTS**
 15 **BNSF RAILWAY COMPANY AND JOHN SWING**

16 **IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA**

IN RE ASBESTOS LITIGATION,	)	Cause No.: AC 17-0694
)	
Consolidated Cases	)	COMBINED MOTION TO
	)	CONSOLIDATE AND BRIEF IN
	)	SUPPORT
)	
	)	<i>Applies to Azure, et al. v. International</i>
	)	<i>Paper Company, et al., Flathead County,</i>
	)	<i>Cause No. DV 18-180</i>
)	
	)	<i>And the 27 other lawsuits filed by 68 of</i>
	)	<i>the Azure, et al. plaintiffs in Cascade</i>
	)	<i>County. See Exhibit B</i>

17 COMES NOW, Defendants BNSF RAILWAY COMPANY and JOHN SWING
 18 (“Defendants”), by and through their attorneys of record, Knight Nicastro, LLC, and hereby
 19 submit this *Combined Motion to Consolidate and Brief in Support*. Defendants have
 20 contacted counsel for Plaintiffs, who have not responded indicating whether or not they
 21 oppose the relief sought herein.

1 **MOTION TO CONSOLIDATE**

2 On January 12, 2018, seventy-five plaintiffs filed a lawsuit in Flathead County
3 District Court against International Paper Company (“IP”), Champion International Paper
4 Company, St. Regis Corporation, Neils Lumber Company, Montana Light & Power
5 Company, Everett Nelson, Ralph Heinert and DOES A-Z alleging that they contracted an
6 asbestos-related illness due to negligence on the part of the defendants in and around Libby,
7 Montana. This cause of action, DV-18-018, is better known in the Asbestos Claims Court
8 (“ACC”) as *Azure, et al. vs. International Paper*. The *Complaint* lists all plaintiffs in a
9 spreadsheet attached to the Complaint. The entire Complaint and spreadsheet are attached as
10 **Exhibit A** to this Motion and Brief.

11
12 Sixty-eight of these plaintiffs have nearly identical lawsuits filed in Cascade County
13 spread among 27 different lawsuits. **Exhibit B** is a chart of lawsuits filed by the 68 Plaintiffs
14 in Cascade County. In these lawsuits, nearly all of the Plaintiffs¹ also made identical claims
15 against IP to the ones made in Flathead County and they also included claims that other
16 defendants, including BNSF Railway Company and John Swing, caused their asbestos
17 related disease.
18

19 On February 19, 2019, the Asbestos Court held a status conference hearing on the
20 Flathead County *Azure et al.* case. The purpose of the hearing was to set a trial date and
21 deadlines for that case. Plaintiff’s counsel admitted to the Court that there were dual-filings
22 for these 75 plaintiffs and that they would need to “clean this up.” Counsel indicated that if
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26 ¹ The handful of Plaintiffs who do not include IP in their Cascade County Complaint are still alleging that the
27 asbestos related disease was caused by IP in one county courthouse and caused by other defendants in another
county courthouse. That distinction is immaterial to the consolidation issue as will be addressed by the
Defendants.

1 any of these 75 plaintiffs had “dual” lawsuits filed in Cascade County then they would
2 dismiss those lawsuits and proceed to litigate their claims in Flathead County. Counsel stated
3 that the Cascade County lawsuits included other defendants, but did not state which ones.
4

7 Mr. McGarvey, is it your intention to --
8 tell me what the status of Cascade County case is.

9 MR. MCGARVEY: Well, I have an
10 incomplete understanding, Your Honor, but there is
11 some overlapping. I believe that the cases filed
12 in Cascade County that have overlapping cases are
13 against or include other defendants, so our -- I
14 think that the best way for us to clean that up is
15 to the extent that IP is a Defendant in the other
16 action, we would dismiss them from that action.

13 See **Exhibit C: Asbestos Court Transcript (2/19/2019)**. The Court set a Scheduling Order
14 and ordered that all matters in the *Azure* cases would be held in Flathead County.
15

16 **Exhibit D** is one example of a dual filed lawsuit. This is Cause No. DV-15-891, filed
17 by Plaintiffs Joann Azure, Grace Bache, Margaret Fox and Lawrence Urdahl in Cascade
18 County. This *Complaint* filed by these four Plaintiffs includes identical claims against IP as
19 filed in their Flathead County lawsuit; however, in this lawsuit these four Plaintiffs also claim
20 that the same asbestos related illness was also caused by negligence on the part of BNSF and
21 John Swing. This is one example where counsel McGarvey indicated to the Asbestos Court
22 that he would merely dismiss IP from this lawsuit so the four Plaintiffs could try their asbestos
23 related illness claim against IP, and only IP, in Flathead County. They would then leave their
24 related claims for the same injury and illness against the other defendants in Cascade County
25 for a later date.
26
27

1 Furthermore, IP additionally informed the ACC at the February hearing that they had
2 not yet been served by the Azure Plaintiffs in Flathead County. *Id.*, 14:7-11. Counsel for the
3 Plaintiffs stated that they would “try to get them served yet this week.” *Id.*, 14:13-17. As of
4 the filing of this Motion, however, IP has still not been served. As a result, Plaintiffs’ Flathead
5 County case is at its earliest possible stages and consolidating 68 cases that these Plaintiffs
6 filed in Cascade County with their Flathead County case would create no delay or prejudice.
7

8 This Court has the authority to consolidate cases that are now pending in the ACCt.
9 Plaintiffs admit through their pleadings that these claims are nearly identical and they are
10 claiming but one asbestos related injury which they believe was caused by any one of these
11 defendants or all jointly. Their claims should be tried to one jury and that jury should decide
12 if any of these defendants were negligent, caused the illness alleged and other issues and
13 defense raised by all parties. There is no reason for these 68 dual-filed Plaintiffs to have their
14 cases against BNSF proceed separately from the Flathead County case. Consolidating these
15 lawsuits and trying the cases together with the Azure case in Flathead County complies with
16 the reasoning behind the creation of the ACC and the rationale of just, speedy and
17 inexpensive determination of legal issues.
18

19 Defendants respectfully request that the 68 Plaintiffs with dual-filings be consolidated
20 into the Flathead County District Court’s *Azure et al* case pursuant to the authority granted
21 to the ACC.
22

23 **BRIEF IN SUPPORT**

24 Plaintiffs’ dual-filing of their claims is a clear waste of judicial resources and is simply
25 another example of counsel for the Plaintiffs creating confusion or waste with their pleadings.
26 There have been a number of other instances where counsel for Plaintiffs has attached a single
27

1 plaintiff to multiple cases for ACC claims in an effort to split up defendants or has failed to
2 amend complaints to remove improper parties. *See, e.g., Barnes v. BNSF, et al.*² The Flathead
3 County *Azure et al* litigants engaged in the same multiple filing shell game.

4 The 68 of the 75 Plaintiffs in *Azure et al* decided at the scheduling conference on
5 February 19, 2019, that their asbestos related illness lawsuit claims would be heard in
6 Flathead County and the Court has complete authority to order that **all** of their claims be
7 heard in Flathead County.

9 **I. Consolidation is appropriate.**

10 The Montana Supreme Court established the ACC to help deal with cases similar to
11 Plaintiffs’, and to avoid “the enormous detrimental impact on the resources of Montana
12 district courts if required to litigate these [Libby asbestos] cases on an individual basis.”

13 **Exhibit E: Order Establishing the Asbestos Claims Court and Consolidating Cases**
14 *(November 28, 2017)*, p. 1 (emphasis added). As such, the ACC was created to address the
15 express “need of all parties to have asbestos-related claims timely resolved.” *Id.* Because 68
16 of the 75 Plaintiffs in Flathead *Azure et al.* filed a nearly identical lawsuit against IP and
17 BNSF, but asked the Court to proceed with the Flathead County case and dismiss their
18 Cascade County case, justice requires that they timely resolve all of their claims at once. The
19 ACC has the authority to consolidate these matters and has done so on other matters pending
20 in the ACC.
21
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23 Since its establishment, the ACC has affirmed its purpose of streamlining similar
24 cases. As part of this, the ACC has expressed a preference for consolidating similar cases to
25 save judicial resources. This has included the practice, both express and implied of the ACC
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27 _____
28 ² Plaintiff Barnes had multiple claims, prior to the ACC’s consolidation of his claims into one case.

1 seeking to prevent plaintiffs from suing the different defendants in a piecemeal fashion. To
2 this point, the ACC set forth procedures for the defendants to collectively handle each
3 plaintiff's claim. The defendants, for example, are collectively propounding master
4 discovery, collecting medical records and more together. Similarly, when the ACC sought to
5 have the parties provide proposed test cases, the judge limited the defendants to collectively
6 choose five proposed cases, because the parties would be trying the cases together:
7

8 MS. STUDEBAKER: Your Honor, when you ask for five per side do you
9 mean five for all the Defendants or five for each Defendant?

10 THE COURT: Five for all the Defendants. If you're going to be trying them
11 together pick five cases and we'll go from there.

12 **Exhibit F:** *ACC Transcript (2/20/2018)*, p. 74.

13 These collective procedures are geared towards a single plaintiff's claim being
14 resolved globally, with all defendants being placed in the same lawsuit.

15 Additionally relevant to the need to consolidate an ACC plaintiff's claim globally, is
16 the issue of non-party defenses. In the *Barnes* case, Counsel for Plaintiffs briefed this issue,
17 moving to exclude evidence relating to non-parties. *See, e.g., Exhibit G: Plaintiff's Motion*
18 *for Summary Judgment re: Defendants' Non-Party Affirmative Defenses (Barnes v. BNSF et*
19 *al., 10/5/2018)*. There, Counsel for the plaintiffs made the argument that BNSF could have
20 brought the third party into the case but didn't, and was therefore barred from entering
21 evidence of non-parties:

22 However, the statute requires that BNSF "join as an additional party to the
23 action" any other person whom it contends "may have contributed as a
24 proximate cause to [Plaintiff's] injury." § 27-1-703(4), MCA. This part of the
25 statute thus allows the jury to attribute percentages of liability "to each party"
26 allegedly at fault, including that "of the claimant, injured person, defendants,
27 and third-party defendants," as well as "persons released from liability by the
claimant and persons with whom the claimant has settled . . . as provided in
subsection (6)." Here, BNSF has failed to join any such party.

1 *Id.* p. 8.

2 Plaintiffs' Counsel's argument in *Barnes* is directly relevant to the prejudice created
3 by allowing these plaintiffs to casually split up the defendants and having multiple claims for
4 a single plaintiff. Permitting ACC plaintiffs to try their cases in such a piecemeal fashion
5 would allow them to manufacture this position in an attempt to keep out reference to non-
6 party defendants. These 68 Plaintiffs claimed in a court of law through their Cascade County
7 Complaints that their asbestos related disease was caused by multiple defendants. They
8 should not be allowed to use procedural parliamentary tricks to hide these claims in an effort
9 to try to convince one jury that one defendant should fully compensate them and two years
10 later ask another jury to do the exact same as to another defendant.
11

12 The ACC's intention to have all defendants consolidated by an individual plaintiff
13 has also been directly expressed by the Court's actions. In the *Barnes* case, the plaintiff had
14 originally filed two lawsuits, one in Cascade County and one in Lincoln County. **Exhibit H:**
15 *Asbestos Court Transcript (3/20/2018)*, p. 53. BNSF, John Swing, & IP were among the
16 defendants in the Lincoln County action, while the State of Montana and Robinson Insulation
17 were the defendants in Cascade County. *Id.*, pp. 53-4. Because of the dual-filing, the Court
18 consolidated the Lincoln County and Cascade County cases. *Id.*, p. 57:1-4. The Court noted
19 that it was preferable to remove the case from Cascade County and consolidate the two cases
20 in Lincoln County "to spread out the workload between the counties, if we have the
21 opportunity to try the case somewhere else [other than Cascade County] that would be my
22 preference." *Id.*, p. 57:10-13. The Court then properly exercised its authority to consolidate
23 the two *Barnes* cases that were pending in the ACC.
24
25
26
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1 The Flathead *Azure et al* plaintiffs present a similar scenario, where ACC plaintiffs
2 have split their claims into two cases by dividing the defendants between the Flathead County
3 and Cascade County. As in *Barnes*, consolidation is appropriate into the Flathead County
4 case to again spread out the workload.

5
6 **II. Consolidation would not create prejudice or slow the progress of the cases.**

7 The *Azure* Plaintiffs’ dual-filed complaints contain similar allegations and have had
8 no subsequent actions taken in the cases. As a result, there would be no prejudice created by
9 consolidating the 68 dual-filed Plaintiffs into the *Azure* matter pending in Flathead County.
10 Instead, consolidating these cases into the Flathead County District Court would save
11 significant costs by reducing the total number of cases, and will speed up the progress of the
12 entire litigation. The large number of Libby asbestos cases filed in Montana has lead to the
13 creation of the ACC, and also the need to have additional district court judges appointed as
14 Asbestos Court Judges. **Exhibit I: ACC Transcript (12/11/2018)**, pp. 59:21-60:2. The volume
15 of cases is so high that “[a]ny out-of-county judge that is going to try a case in Cascade
16 County will be trying cases at the federal courthouse” causing additional expense, as the
17 county courthouse does not have the capacity for the extra cases. *Id.*, 60: 9-11. Consolidation
18 secures a “just, speedy, and inexpensive determination” of the cases pursuant to Mont. R.
19 Civ. P., Rule 1.
20

21
22 Importantly, consolidation will not slow the progress of the Flathead County *Azure et*
23 *al* case as any issues currently on appeal in the BNSF *Barnes* matter would be identical issues
24 that would be raised by IP. To this point, IP has previously pleaded the issue of third-party
25 liability as an affirmative defense making the Court’s eventual ruling directly relevant to IP.
26 *See, e.g., Exhibit J: International Paper Company’s Answer re: Chambers et. al. v. BNSF*
27

1 *et. al.* Furthermore, consolidating the cases would remove one of the complaints plaintiffs
2 made in *Barnes* regarding non-party liability which was: “BNSF should have joined the other
3 parties.” Sixty-eight of these Plaintiffs alleged in a different formal pleading that another
4 defendant was a cause of their asbestos related disease. Thus the ruling from the Supreme
5 Court on the writ in *Barnes* will have a direct impact on the scope of evidence in this case.
6 Furthermore, independent of IP’s vested interest in the Supreme Court’s ruling on BNSF’s
7 writs, Plaintiff *Azure* has yet to serve IP with the complaint for the Flathead case. Because of
8 the early stage of this matter, there would be no prejudice or delay by adding BNSF and John
9 Swing to this lawsuit.
10

11 Based on these factors, consolidating the dual-filed cases would create no undue
12 prejudice or unreasonable delay.
13

14 CONCLUSION

15 For the reasons outlined above, Defendants respectfully requests that the Court take
16 the Cascade County lawsuits filed by 68 of the 75 Flathead County *Azure et al* Plaintiffs and
17 consolidate those claims with the identical lawsuit they filed in Flathead County against just
18 IP. Those Plaintiffs asked that the ACC set their Flathead County case for trial, and therefore
19 the Court should set all of their claims for trial in Flathead County. There is no legitimate
20 reason for these Plaintiffs to fully litigate their entire claim of asbestos-related illness in
21 Flathead County and then on a later date litigate their claims again, changing little more than
22 the name of the defendants on his or her jury instructions and verdict form.
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DATED this 2nd day of May, 2019.

KNIGHT NICASTRO, LLC

By: /s/ Anthony M. Nicastro

Chad M. Knight

Anthony M. Nicastro

Nadia H. Patrick

Steven T. Williams

ATTORNEYS FOR DEFENDANTS

BNSF RAILWAY COMPANY AND

JOHN SWING

CERTIFICATE OF SERVICE

I, Anthony Michael Nicastro, hereby certify that I have served true and accurate copies of the foregoing Motion - Consolidate to the following on 05-02-2019:

Amy Poehling Eddy (Attorney)
920 South Main
Kalispell MT 59901
Representing: Amy Eddy
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jon L. Heberling (Attorney)
345 First Ave E
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Ethan Aubrey Welder (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jeffrey R. Kuchel (Attorney)
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Danielle A.R. Coffman (Attorney)
1667 Whitefish Stage Rd
Kalispell MT 59901
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: Honeywell International
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: CNH Industrial America LLC
Service Method: eService

G. Patrick HagEstad (Attorney)
PO Box 4947
Missoula MT 59806
Representing: United Conveyor Corporation, Riley Stoker Corporation et al
Service Method: eService

Jennifer Marie Studebaker (Attorney)
210 East Capitol Street
Suite 2200
Jackson MS 39201
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Joshua Alexander Leggett (Attorney)

210 East Capitol Street, Suite 2200
Jackson MS 39201-2375
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Vernon M. McFarland (Attorney)
200 South Lamar Street, Suite 100
Jackson MS 39201-4099
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Jason Trinity Holden (Attorney)
1314 CENTRAL AVE
P.O. BOX 2466
Montana
GREAT FALLS MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec
LLC, International Paper Co.
Service Method: eService

Chad E. Adams (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore,
Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American
Inc.
Service Method: eService

Katie Rose Ranta (Attorney)
Faure Holden, Attorneys at Law, P.C.
1314 Central Avenue
P.O. Box 2466
GREAT FALLS MT 59403
Representing: Borg Warner Morse Tec LLC
Service Method: eService

Stephen Dolan Bell (Attorney)
Dorsey & Whitney LLP
125 Bank Street
Suite 600
Missoula MT 59802

Representing: Ford Motor Company
Service Method: eService

Dan R. Larsen (Attorney)
Dorsey & Whitney LLP
111 South Main
Suite 2100
Salt Lake City UT 84111
Representing: Ford Motor Company
Service Method: eService

Kelly Gallinger (Attorney)
315 North 24th Street
Billings MT 59101
Representing: Maryland Casualty Corporation
Service Method: eService

Robert J. Phillips (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Emma Laughlin Mediak (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Daniel Jordan Auerbach (Attorney)
201 West Railroad St., Suite 300
Missoula MT 59802
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company
Service Method: eService

Leo Sean Ward (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Robert B. Pfennigs (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.

Service Method: eService

Rick A. Regh (Attorney)

P.O. Box 2269

GREAT FALLS MT 59403

Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.

Service Method: eService

Mark Trevor Wilson (Attorney)

300 Central Ave.

7th Floor

P.O. Box 2269

Great Falls MT 59403

Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.

Service Method: eService

Robert M. Murdo (Attorney)

203 North Ewing

Helena MT 59601

Representing: Mine Safety Appliance Company LLC

Service Method: eService

Murry Warhank (Attorney)

203 North Ewing Street

Helena MT 59601

Representing: Mine Safety Appliance Company LLC

Service Method: eService

Ben A. Snipes (Attorney)

Kovacich Snipes, PC

P.O. Box 2325

Great Falls MT 59403

Representing: Backen et al, Sue Kukus, et al

Service Method: eService

Mark M. Kovacich (Attorney)

Kovacich Snipes, PC

P.O. Box 2325

Great Falls MT 59403

Representing: Backen et al, Sue Kukus, et al

Service Method: eService

Ross Thomas Johnson (Attorney)

P.O. Box 2325

Great Falls MT 59403

Representing: Backen et al, Sue Kukus, et al

Service Method: eService

Randy J. Cox (Attorney)

P. O. Box 9199
Missoula MT 59807
Representing: A.W. Chesterson Company
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: A.W. Chesterson Company
Service Method: eService

Robert J. Sullivan (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Ingersoll-Rand, Co.
Service Method: eService

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: State of Montana
Service Method: eService

Vaughn A. Crawford (Attorney)
SNELL & WILMER, L.L.P.
400 East Van Buren
Suite 1900
Phoenix AZ 85004
Representing: The Proctor & Gamble Company et al
Service Method: eService

Tracy H. Fowler (Attorney)
15 West South Temple
Suite 1200
South Jordan UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: eService

Martin S. King (Attorney)
321 West Broadway, Suite 300
P.O. Box 4747
Missoula MT 59806
Representing: Foster Wheeler Energy Services, Inc.
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103

Great Falls MT 59403
Representing: Continental Casualty Company
Service Method: eService

Tom L. Lewis (Attorney)
2715 Park Garden Lane
Great Falls MT 59404
Representing: Harold N. Samples
Service Method: eService

Keith Edward Ekstrom (Attorney)
601 Carlson Parkway #995
Minnetonka MN 55305
Representing: Brent Wetsch
Service Method: eService

William Rossbach (Attorney)
401 N. Washington
P. O. Box 8988
Missoula MT 59807
Representing: Michael Letasky
Service Method: eService

Kennedy C. Ramos (Attorney)
1717 Pennsylvania Avenue NW
1200
wash DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Chad M. Knight (Attorney)
929 Pearl Street
Ste. 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Nadia Hafeez Patrick (Attorney)
929 Pearl Street Suite 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Kevin A. Twidwell (Attorney)
1911 South Higgins Ave
PO Box 9312
Missoula MT 59807
Representing: Libby School District #4
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)
345 First Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

James E. Roberts (Attorney)
283 West Front Street
Suite 203
Missoula MT 59802
Representing: BNSF Railway Company
Service Method: eService

Jacy Suenram (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al
Service Method: eService

William Adam Duerk (Attorney)
283 West Front Street
Suite 203
Missoula MT 59802
Representing: BNSF Railway Company
Service Method: eService

Daniel W. Hileman (Attorney)
22 Second Ave. W., Suite 4000
Kalispell MT 59901
Representing: Maryland Casualty Corporation
Service Method: eService

Michael Crill (Other)
PO Box 145
Rimrock AZ 86335
Service Method: Conventional

Matthew Cuffe (Interested Observer)
512 California
Libby MT 59923
Service Method: Conventional

Tammy Peterson (Interested Observer)
Asbestos Court Clerk
Helena MT 59601
Service Method: Conventional

Michael D. Plachy (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Conor A. Flanigan (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Charles J. Seifert (Attorney)
50 S. Last Chance Gulch 3rd Fl.
P.O. Box 598
Helena MT 59624
Representing: Ford Motor Company, Maryland Casualty Corporation
Service Method: Conventional

M. Covey Morris (Attorney)
390 Interlocken Crescent #100
Broomfield CO 80021
Representing: FMC Corporation
Service Method: Conventional

Fredric A. Bremseth (Attorney)
601 Carlson Parkway, Suite 995
Minnetonka MN 55305-5232
Representing: Brent Wetsch
Service Method: Conventional

Walter G. Watkins (Attorney)
210 E. Capitol Street, Ste. 2200
Jackson MS 39201
Representing: International Paper Co.
Service Method: Conventional

Jason Eric Pepe (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Peter A. Moir (Attorney)
701 Poydras Street, Suite 2200
New Orleans LA 70139-6001
Representing: International Paper Co.
Service Method: Conventional

Mark A. Johnston (Attorney)
1717 Pennsylvania Ave. NW, 12th Floor
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: Conventional

Erik H Nelson (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Michael E. Wise (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Electronically Signed By: Anthony Michael Nicastro
Dated: 05-02-2019