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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 **DEFENDANTS BNSF RAILWAY COMPANY AND JOHN SWING'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO ATTEND SETTLEMENT CONFERENCE THROUGH COUNSEL** Applicable to All Cases

COME NOW the Defendants, BNSF Railway Company (BNSF) and John Swing, by and through counsel of record, Knight Nicastro, LLC, and hereby files this *Response to Plaintiffs' Motion for leave to Attend Settlement Conference through Counsel*.

Defendants oppose Plaintiffs' motion to attend the settlement conference without clients present. There are several reasons for this – all related to Defendants'

concerns about Plaintiffs' apparent ongoing disregard of this Court's Order establishing the Deferred Docket. These concerns are addressed below.

BACKGROUND: THE DEFERRED DOCKET

On September 13, 2018, the Hon. Judge Eddy filed her "Order Re: Plaintiffs' Motion for Deferred Docket." **Exhibit A**. After months of clamoring for the creation of a deferred docket, Plaintiffs' wish was granted. The deferred docket was created over Defendants' objections that it would create a "legal limbo" and that Defendants' due process rights would be trampled in the process. The Court noted throughout its order that due process concerns were an important consideration. Ex. A, Order, ppg. 10-16 (Sept. 13, 2018). In fact, the Court explicitly mentioned the importance of defendants' due process rights in the final order: "The Court ***takes seriously the Defendants' concerns*** that these cases will simply be allowed to languish on the deferred ***docket in violation of the Defendants' due process rights***."

In establishing the Deferred Docket, the Court fashioned a compromise between allowing Plaintiffs to reserve cases they claim are not yet ripe for litigation and upholding the Defendants' due process rights. The Court made it clear though, that in exchange for the creation of a special docket, the Plaintiffs would be required to abide by several simple rules: "Accordingly, to remain on the deferred docket ***and avoid dismissal***, Plaintiffs and their counsel are responsible for the following…" *Id.*

Those requirements included the following conditions:

> (1) Plaintiffs must file a Master Claims List by January 1 of each year;
>
> (2) Plaintiffs must undergo an annual medical exam completed by July 1 of each year; and
>
> (3) Plaintiffs must attend a mandatory settlement conference by September 13, 2019 if they experienced an initial exposure of 30 years ago or more.

Plaintiffs have failed to satisfy each of these Court-ordered requirements. Plaintiffs' Master Claims List in this Matter was not filed until February 12, 2019. **Exhibit B**.[1] Next, Plaintiffs have clearly demonstrated that they will not undergo court-ordered medical testing by July 1, 2019. *See* **Exhibit C**, Status Report Re: Annual Medical Examination (Apr. 19, 2019). On the heels of that admission, Plaintiffs have now filed a motion stating that they do not wish to follow the Court's Order related to their participation in the settlement conference. In short, although Plaintiffs' counsel demanded the Deferred Docket the Court Order of September 13 provided, they are now violating the Order's underpinnings.

From the very beginning, the Hon. Judge Eddy questioned the utility of establishing a deferred docket:

> "If the ***majority*** of Plaintiffs' diseases ***will never progress to malignancy***, is the risk borne by the ***unfortunate minority*** worth the creation of an additional docket in an already backlogged system?"

Ex. A, Order, pg. 15 (Sept. 13, 2018). [Emphasis added].

[1]Plaintiffs had an initial due date of Oct. 15, 2018. *See* **Exhibit D**, Order (Sept. 24, 2018). Plaintiff's did not file their Master Case list until Feb. 12, 2019. Ex. B.

The Judge further noted the massive cost, time and expense involved in the creation of such a docket, despite the fact that the majority of these claims would never ripen:

> Virtually every claimant before the ACC has filed their Complaint in either the First, Eighth, Eleventh, or Nineteenth Judicial Districts, with the vast majority (over 90%) filed in the Eighth Judicial District. Even assuming the ***workload was divided evenly*** amongst the District Court Judges of these judicial districts, and they ***each tried an asbestos case every month***, it would take over ***13 years*** to resolve the pending claims.

Id. at 18, Footnote 100. [Emphasis added].

Apparently, the Court and Defendants are in accord on this point: If the creation of the deferred docket results in the expenditure of large sums of money to address the concerns of only a small minority of claimants, is any of this really worthwhile? The answer is clearly "no" if counsel is permitted to leverage symptomless cases into a cattle-call conference to settle meritless claims *en masse*. The absence of clients at this conference – and the absence of ***any*** meaningful information about these clients' medical condition required by this Court's Order - only exacerbates the problem. This outcome would fly in the face of an Order that clearly intended "to bring ***timely resolution*** to ***each of these claimants*** on an ***individual basis.***" *Id.* at 18. An individual evaluation of each claim is implicit in the Mandatory Settlement provision in this Court's Order. It must be enforced.

LEGAL STANDARD

It goes without saying that parties to any litigation must follow court orders. Courts are "invested with inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *See Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992). A Court has inherent power to order that parties attend a settlement conference. *See Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1396 (9th Cir. 1993) *citing G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 655 (7th Cir. 1989)(upholding sanctions against corporation for failure to comply with court order to have corporate representative attend settlement conference).

Ignoring court orders results in a complete breakdown of the orderly administration of justice. Ignoring a court order's specific requirement for the parties' attendance at a settlement conference can result in a situation in which "the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel." *See G. Heileman Brewing Co., Inc*, 871 F.2d at 651-652 (1989) *quoting Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir. 1961) *aff'd* 370 U.S. 626 (1962). Noncompliance with a court order becomes acutely ironic when the order itself was the product of the noncompliant party's insistence in the first

place. Plaintiffs recognize this irony, and yet they still refuse to abide by the requirements of the Order:

> MHSL Plaintiff's counsel acknowledge the substantial time and effort which this Asbestos Claims Court has devoted to resolving the challenges of these cases and the attendant 'enormous detrimental impact on the resources of Montana district courts.' [Internal citation omitted]. Likewise, we are appreciative that it was in response to our motion that this Court entered its *Order Re: Plaintiffs' Motion for Deferred Docket* on September 13, 2018. ***MHSL has directed its clients to do their best to comply with the Court's Order***. ***However…***

Ex. C, Pl.s' Status Report Re: Annual Medical Exam, pg. 5 (4/19/19). [Emphasis added].

All parties to this complex litigation are cognizant of the rule that serves as a deterrent to a party blithely treating court orders as "optional." Rule 37(b)(2)(A) sets forth the sanctions available to the trial judge for a party's failure to comply with a court order. The rule – which has been invoked by Plaintiffs in the past in this case – need not be recited in full again here. Further discussion regarding sanctions is unnecessary at this point. Defendants merely ask this Court to ensure that its Order is adhered to, as set forth below.

ARGUMENT

"Pretrial settlement of litigation has been advocated and used as a means to alleviate overcrowded dockets, and courts have practiced numerous and varied types of pretrial settlement techniques for many years." *G. Heileman Brewing Co., Inc,* 871 F.2d at 651 (1989); *Citing* Manual for Complex Litigation 2d, §§ 21.1-

21.4 (1985). Rule 16 authorizes the court to require attendance or telephone availability of persons with authority to settle "when their interests are implicated and their presence will facilitate settlement." *Id.* at 4th Ed., § 11.31, pg. 40 (2004).

There are many reasons that Courts insist that the actual parties attend settlement conferences. The primary purpose is to ensure that the real parties in interest with ultimate settlement authority are present. As noted by the Honorable Frederick B. Lacey:

> The parties too should be on hand. There need then be no delay while a lawyer says, 'I'll submit the figure to my client' (who, incidentally, will not be available for a week). Concentrated negotiations, with the client available outside chambers for a quick "yes" or "no," are the kind that lead to settlements. ***The soft and flabby conversation leads only to a waste of everyone's time***.[2]

Permitting plaintiffs' absence at the settlement conference creates a situation where claimants are nothing more than absentee strawmen on a game-board controlled entirely by plaintiffs' counsel. No clients present or participating creates a situation in which plaintiffs' attorneys unilaterally decide what happens with plaintiffs' cases. This creates precisely the situation the courts hope to avoid - a situation in which "the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel." *G. Heileman Brewing*

[2] Federal Judicial Center, *The Judge's Role in the Settlement of Civil Suits*, pg. 19 (1977). [Emphasis added]; as cited by *G. Heileman Brewing Co., Inc,* 871 F.2d at 651 (1989).

Co., Inc, 871 F.2d at 651-652 (1989) *quoting Link v. Wabash R.R.,* 291 F.2d 542, 547 (7th Cir. 1961) *aff'd* 370 U.S. 626 (1962).

For these reasons, whether this Court decides to require plaintiffs in-person attendance at the settlement conference or client participation by some other means, Defendants respectfully request that the Court clarify its order regarding client attendance to avoid a "ghost" conference. Enforcing the Court's Order regarding client attendance will ensure a fair, just and meaningful settlement conference – not a conference-by-proxy in which the Plaintiffs' counsel are simply allowed to "run the table."

To that end, Defendants suggest that the following specific steps be taken to ensure that plaintiffs are substantially in compliance with the Court's Order by the time of the settlement conference. Each of these steps is either explicitly or implicitly set forth in the Court's Order of September 13, 2018. In order to show compliance with this Court Order, either through in-person attendance at the settlement conference or otherwise, Plaintiffs must:

1. Verify **who** is participating in the settlement conference[3];
2. Verify who is **not** participating[4];
3. Verify that each participant appears on Plaintiffs' Master Claims list[5];

[3] Ex. A, Order, pg. 18 (Sept. 13, 2018).
[4] *Id.*
[5] *Id.*

4. Dismiss any claimants due to non-participation or who do not appear on the Master Claims List[6];

5. Verify the total number of potentially settling claimants[7];

6. Verify that each plaintiff's first exposure date was at least 30 years ago[8];

7. Verify that each plaintiff underwent the required annual medical testing by July 1, 2019 and verify that the results of testing and records generated during the exam were provided to the Defendants[9];

8. Verify that each plaintiff is qualified as a "deferred docket" case based on medical condition as of the July 1, 2019 screening[10];

9. Agree to activate any claimants' cases who do not belong on the deferred docket based on medical condition;[11]

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[6] "Accordingly, to remain on the deferred docket ***and avoid dismissal,*** Plaintiff's and their counsel are responsible for the following." *Id.* at 17.

[7] "Plaintiffs' counsel is responsible for filing with the Court a Deferred Docket Master Claims List ***identifying each claim currently pending on the deferred docket***." *Id.* at 18.

[8] [E]ach Plaintiff ***with an initial exposure date of at least 30 years ago is required to attend a mandatory settlement conference*** within one year of the date of this *Order." Id.* at 18.

[9] "All Plaintiffs on the deferred docket are responsible for undergoing an annual medical exam sufficient to address the criteria outlined above as to whether a case should be moved to the active docket. Such exam must be completed by July 1 of each year, beginning in 2019. Failure to comply with this requirement will result in sanctions, up to and including dismissal. The records generated during such medical exam must also be provided to Defendants." *Id.* at 18.

[10] *Id.* at 18.

[11] ***"By establishing objective medical criteria by which cases will be 'activated' for litigation or deferred, Defendants' notice rights are protected and Plaintiffs cannot 'unilaterally decide which cases ought to be deferred, and which cases ought to be activated.'"*** *Id.* at 15.

10. Verify that each plaintiff has a credible diagnosis of nonmalignant ARD based on competent and credible evidence from a qualified medical provider pursuant to ATS guidelines and provide documentation re same[12];

11. Verify whether qualified plaintiffs on the deferred docket wish to be placed on the active docket[13];

12. Obtain releases from each plaintiff in the event of settlement[14];

Imposing these conditions on the settlement conference is not only entirely consistent with this Court's Order of September 13, 2018, compliance with these conditions ensures that Plaintiffs' counsel cannot unilaterally decide which cases ought to be deferred, which cases ought to be activated and which cases (deferred or activated) ought to be settled or dismissed. Individual assessment of plaintiffs' cases rather than settlement *en masse* are at the heart of this Court's Order. These conditions will likewise ensure that no money will be paid for settlement of a case in the absence of a credible and competent diagnosis of ARD per ATS guidelines

[12] "The parties agree that the Official Statement of the American Thoracic Society *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, adopted December 12, 2003, represents the reliable standard of care for diagnosing nonmalignant asbestos related disease." *Id.* at 3. "[I]n presenting a diagnosis of a nonmalignant ARD, the Court will expect to see competent and credible evidence from a qualified medical provider of the following… Failure to provide evidence in these three categories will result in the diagnosis being rejected." *Id.* at 17.

[13] Criteria for transfer to "active docket" includes an element of choice that can only be communicated through client participation: "The Plaintiff elects to be placed on the active docket." *Id.* at 17.

[14] Common requirement at every Settlement Conference.

with supporting medical records. Furthermore, these conditions prevent Plaintiffs' counsel from further straying from the requirements of this Court's Order, trampling Defendant's due process rights and unilaterally "running the table" at a settlement conference without meaningful court-imposed checks and balances in place.

In the event Plaintiffs refuse to comply with the steps outlined above, Defendant BNSF anticipates filing a motion to cancel mediation.

CONCLUSION

In order to work at all, the rules governing the Deferred Docket must be enforced. Enforcement of the Mandatory Settlement Conference rules in this Court's Order will ensure that an individual evaluation of each claim weeds out the majority of meritless cases in favor of resolving the minority of valid ones. This was the intended function of the Mandatory Settlement Conference provision in the first place. Without this individual assessment, Defendants will be further saddled with the costs of litigating a majority of these cases - where disease will never progress to malignancy - for the next thirteen years.

WHEREFORE, Defendants respectfully request that the Court enter an order denying Plaintiffs' motion for leave to Attend Settlement Conference through Counsel. In the alternative, Defendants request that this Court clarify that the requirements of its prior *Order Re: Deferred Docket* remain in place, and that the specific provisions outlined above are met.

DATED this 28th day of May, 2019

Respectfully submitted,

Knight Nicastro, LLC

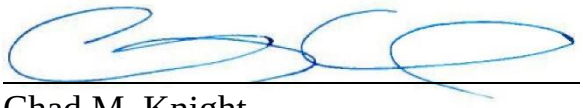

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EXHIBIT A

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases.*	Cause No. AC 17-0694 ORDER RE: PLAINTIFFS' MOTION FOR DEFERRED DOCKET[1] *MacDonald v. BNSF Railway Company*, Cascade County Cause No. DV-16-549 Judge John Parker

Pending before the Court is Plaintiff Jason MacDonald's *Motion for Deferred Docket*, filed April 12, 2018.[2] With the exception of International Paper, Defendants filed a *Collective Response*, and International Paper filed a separate *Response* on May 14, 2018. Plaintiffs filed a *Reply* on June 5, 2018. The Court received evidence and heard argument on July 24-25, 2018, when the matter came before the Court for an evidentiary hearing. Having reviewed the file and being fully apprised, the Court hereby finds as follows:

ORDER

Plaintiffs' *Motion for Deferred Docket* is GRANTED in part and DENIED in part, consistent with the below rationale.

RATIONALE

A. Factual and Procedural Background

(1) Purpose and Mandate of the Asbestos Claims Court

Pursuant to Mont. Code Ann. § 3-20-101, this Court presides only over those actions "brought for the recovery of monetary damages for personal injury, wrongful death, loss of

[1] This *Order* replaces and supersedes any document that was filed on August 30, 2018.
[2] While filed in the context of Plaintiff Jason MacDonald's case, this motion is also brought on behalf of all other claimants before the Asbestos Claims Court that are similarly situated. These are the claimants who have a nonmalignant asbestos-related disease (ARD), with a mild/normal severity level of the disease, and generally normal pulmonary function. These claimants have also been referred to as the "unimpaired" Plaintiffs. In the context of this *Order*, the Court has attempted to achieve consistency by simply referring to the "Plaintiffs."

consortium, or other injury arising out of an asbestos-related disease that is alleged to result from the mining of vermiculite, the processing of vermiculite, or the transfer, storage, installation, or removal of a product containing vermiculite." The Montana Legislature codified the Asbestos Claims Court Act at §§ 33-20-101 through -105 ("the Act") in 2001, because "it is imperative that asbestos-related claims be dealt with expeditiously in order to allow Montana citizens with life-threatening illnesses to receive a speedy resolution of their claims."[3] The Act's effectiveness was contingent on a determination by the Montana Supreme Court that, in light of the outcome of federal bankruptcy proceedings and other circumstances that the Court deemed advisable to consider, there existed a sufficient need to implement the Act's provisions.[4]

In the aftermath of the W.R. Grace bankruptcy proceedings, and in response to an impending crisis in the state district courts, the Montana Supreme Court established the Asbestos Claims Court (ACC) in 2017.[5] In its decision to activate the ACC, the Court pointed to "the need of all parties to have asbestos-related claims timely resolved, the extraordinary complexity and cost of these cases, and the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis."[6] While the ACC explicitly advances the interest of expediency and economy, the Montana and United States Constitutions protects parties' rights to equal protection, due process of law, and full legal redress.[7] Therefore, the ACC's purpose and mandate is to facilitate the speedy resolution of asbestos claims, while ensuring that parties' constitutional rights to fairness and process are not infringed.

(2) The CARD Clinic and Diagnosing Nonmalignant Asbestos Related Disease

At the Libby Asbestos Site, disease and death rate from asbestosis and asbestos-related disease (ARD) is significantly higher than the national average. In 2002, the Center for Asbestos Related Disease (CARD Clinic) was established in in Libby in response to raised awareness of widespread asbestos exposure. Since then, the CARD Clinic's stated goal has been to provide long-term screening, health monitoring, disease diagnosis, and counseling to people exposed to Libby Amphibole asbestos. The CARD Clinic also assists in ARD research. Since establishment, the CARD Clinic has mass screened approximately 5,700 people for ARD; and, it continues to actively follow the status of 7,700 patients.

The CARD Clinic initially diagnosed virtually every person potentially impacted by the present motion. Many of those individuals' initial nonmalignant ARD has unfortunately progressed to other asbestos-related diseases, including asbestosis, mesothelioma and various cancers. Fortunately, the majority of these individuals have not progressed beyond the initial

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[3] An Act Creating the Asbestos Claims Court, 2001 Mont. Sess. Laws SB 282, Ch. 473, 2192, 2193.
[4] Mont. Code Ann. § 3-20-101 (2017) (Sec. 12 of Laws 2001, ch. 43).
[5] ACC Initial Conference Notes (Jan. 31, 2018).
[6] Order Establishing the Asbestos Claims Court and Consolidating Cases, In Re Asbestos Litigation, Cause No. AC 17-0694, 2017 WL 5949936, at *1 (Mont. Nov. 28, 2017).
[7] MONT. CONST. art. II, §§ 4, 17; U.S. CONST. amend. XIV.

nonmalignant ARD diagnosis and are not suffering from any impairment, despite the fact that 95% of them experienced their initial exposure over 30 years ago.

The parties agree that the Official Statement of the American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, adopted December 12, 2003, represents the reliable standard of care for diagnosing nonmalignant asbestos related diseases. The ATS set forth the following criteria for making these diagnoses:

- Evidence of structural pathology consistent with asbestos related disease as documented by imaging or histology;
- Evidence of causation by asbestos as documented by the occupational and environmental history, markers of exposure (usually pleural plaques), recovery of asbestos bodies, or other means; and
- Exclusion of alternative plausible causes for the findings.[8]

Significantly, "[f]unctional assessment is not required for diagnosis but is part of a complete evaluation. It contributes to diagnosis in defining the activity of disease and the resulting impairment."[9] There are numerous ARDs, including pleural plaques, asbestosis, mesothelioma, and a variety of cancers. Pertinent to the present motion is pleural thickening, and specifically the diagnosis of lamellar pleural thickening (LPT), which appears to be unique to Libby.[10]

Historically, ARD has been diagnosed through a chest x-ray and confirmed by a certified B-reader. Numerous widely accepted standards have been in place to accurately diagnose ARD in this manner. By contrast, LPT cannot be seen on an x-ray. LPT can only be diagnosed with a CT scan, and by experts trained to recognize LPT. Complicating the diagnosis is the fact that LPT does not cause a change in pulmonary function, and can be caused by numerous other conditions unrelated to asbestos exposure—making relevant the exclusion of alternative plausible causes.

Further complicating the diagnosis is the fact that the latency period appears to extend well past 40 years, and even after a diagnosis, there is no way to predict whether the patient will develop symptoms and/or any impairment related to the disease. As such, and the parties

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[8] American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, adopted December 12, 2003, American Journal of Respiratory and Critical Care Medicine, vol. 170, 691 (2004).

[9] *Id.*, at 692, Table 1.

[10] MacDonald contends this Libby diagnosis is the result of the unique composition of the asbestos in Libby. In response, the Defendants argue that while Libby asbestos does have a unique composition, it was transported all over the country and that if it caused a particular type of injury, we would still see this injury diagnosed wherever the asbestos had been distributed. Instead, LPT is only seen in Libby when diagnosed at the CARD Clinic. Defendants point out that LPT is not mentioned in the medical literature until 2014, in relation to Dr. Black's studies at the CARD Clinic.

concede, no one can establish to a reasonable degree of medical certainty which unimpaired Plaintiff's disease will or will not progress.

(3) Test Case: *Jason C. MacDonald v. State of Montana, et al*., Cascade County Cause No. DV-16-549, Judge John Parker, presiding.

In the course of organizing the ACC, it was determined there are currently 2,117 individual Plaintiffs with cases pending before the ACC, involving approximately 40 individual Defendants. In an effort to give shape to the litigation before the ACC, the Court approved master discovery requests to the Defendants, continued the process of the Plaintiffs providing releases of information for the Defendants to gather relevant information, set five test cases for trial, and approved discovery requests for those Plaintiffs whose cases had been set for trial. In setting the individual cases for trial, care was taken to set cases involving different legal issues and injuries. Pertinent hereto, the Court set the case of *Jason C. MacDonald v. State of Montana, et al*., Cascade County Cause No. DV-16-549, before the Honorable Judge John Parker.

MacDonald's case was selected as a test case because his situation is similar to that of many other Plaintiffs before the ACC. Approximately 1,224 (55%) of the total number of 2,117 Plaintiffs have a similar nonmalignant ARD diagnosis, which is rated at normal-to-mild for impairment purposes. The "mild/normal" range is the least severe category on the spectrum of asbestos-related diseases.[11] With this mild/normal level of severity, MacDonald is considered to be in the category of "unimpaired" Plaintiffs. As noted above, of these 1,224 similarly situated unimpaired Plaintiffs, 1,083 (95%) have exposures that began over 30 years ago.

MacDonald claims that between 1977 and 2001 he was a Libby-area resident and injuriously exposed to Libby asbestos.[12] In the summers of 1995 and 1996, MacDonald worked for Defendant Stimson Lumber at its logging and manufacturing operation in Lincoln County, Montana. There, MacDonald claims that he worked in an environment that exposed him to asbestos, asbestos dust, and asbestos-contaminated materials.[13] Outside of his work at Stimson Lumber, MacDonald shopped, socialized, and recreated in the town of Libby and its vicinity. He also claims there was vermiculite in his home and that he was generally exposed to asbestos at several other Libby residences.[14] Additionally, MacDonald's father and grandfather worked for W.R. Grace, and he was exposed to asbestos by way contaminants they inadvertently took home from their jobsites.[15]

MacDonald is 41 and currently lives in Anchorage, Alaska with his wife and twin daughters.[16] He is a physical education teacher and has no smoking history.[17] On July 8, 2013,

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[11] Def.'s Proposed Test Case List, 3.
[12] Compl., ¶26.
[13] *Id*., ¶¶123-24.
[14] *Id*., ¶108; Def.'s Proposed Test Case List, 6.
[15] Def.'s Proposed Test Case List, 6.
[16] Compl. ¶26; Pl.'s Comments Re: Def.'s Proposed Lead Cases, 4.
[17] Objections to Pl.'s Proposed Lead Cases, 24; Defs.' Collective Resp. Mot. Deferred Docket, 6.

he was seen at the Center for Asbestos Related Disease ("CARD Clinic") in Libby, Montana. There is no indication before the Court why MacDonald traveled to Montana to be screened at the CARD Clinic, other than he was "self-referred."[18] The medical record from his first visit at the CARD Clinic with Michelle Boltz, FNP-C, states in relevant part:

> HPI/ROS
> CC: History of Libby amphibole asbestos exposure, self-referred for initial screening.
> PULM: The patient has a dry cough a few days per month, not chronic throughout the day. He does feel short of breath with activity such as running with his kids, he is a PE teacher. He also now reports that swimming is "too extreme" for him. He relates this to deconditioning.
> * * *
> Functional Assessment:
> No change in lifestyle because of breathing
> * * *
> Activities of Libby Amphibole Asbestos Exposure:
> Lived in Libby 1977-2001. His father was a logger and worked in the plywood plant, his mother worked at the hospital. The patient helped shovel vermiculite into the yard, which was visible and he would pop it on a regular basis. He worked for 3 summers at the plywood plant. His grandfather worked at the vermiculite mine.
> * * *
> Family Hx:
> Grandmother and father with ARD . . .
> * * *
> Objective:
> VITALS: 140/92, heart rate 80, SpO2 98% on room air, weight 232 pounds
> SPIROMETRY: FVC 79% FEV1 80% ratio 80
> XRAY: Equivocal for thin pleural thickening on the left mid chest
> HRCT: Given history of exposure, patient decides to proceed
> * * *
> Assessment: History of Libby amphibole asbestos exposure—CT pending

At some point in time MacDonald went in for a CT, and on July 17, 2013, Boltz called to tell him that he had been diagnosed with ARD. The medical record generated from that phone call states in relevant part:

> Objective:
> CT: Per Dr. Black, lamellar non-calcified pleural thickening the posterior right chest on slices 36-43. Fatty liver
> Plan:
> Pharmacologic: No change
> ARD Referrals: Insurance Benefits Counseling
> Follow up: Recommend annual follow up including chest x-ray and PFT

[18] The Defendants' characterization of why MacDonald was seen at the CARD Clinic is misleading at best.

Patient Education: Encouraged continued physical activity, medication and chronic disease monitoring.

As evidenced above, although MacDonald's pulmonary function tests were within the normal range for a healthy man of his age,[19] and no disease was apparent on his chest x-ray, the CARD Clinic diagnosed him with "Asbestos Related Pleural Disease" based on his exposure history and Dr. Black's reading of his chest CT.

In order to preserve the statute of limitations, MacDonald filed his *Complaint and Demand for Jury Trial* on June 22, 2016, just shy of the three-year statute of limitations. MacDonald brought claims against 15 separate Defendants for negligence, violation of the Montana Constitution, common law strict liability, strict products liability, and safe place to work violations.[20] MacDonald alleged in his *Complaint* that he "has suffered and will suffer":

a. Loss of enjoyment of established course of life;
b. Loss of services which can no longer be performed;
c. Loss of earnings and/or earning capacity;
d. Physical, mental and emotional pain and suffering;
e. Medical expenses, rehabilitation expenses and related expenses;
f. Loss of insurability for medical coverage; and
g. Great grief and sorrow.[21]

Despite alleging he has currently suffered the above harms, MacDonald now asks the Court to place his case, and similarly situated cases, on a deferred docket. MacDonald asserts he only filed his *Complaint* to preserve the statute of limitations after his diagnosis, but that he is entitled to have his litigation stayed pending actual disease progression and impairment.

B. Position of the Parties

(1) MacDonald and Similarly Situated Plaintiffs

Plaintiffs asserts they had no reason or desire to file their claims aside from the necessity to preserve the claims from expiration of a statute of limitations.[22] Now these Plaintiffs seek to defer determination of their claims until such time as all of their claims "ripen."[23] Because a deferred docket would prevent surprise, thereby allowing defendants to preserve evidence, memories, and witnesses, Plaintiff argues it would fulfill the overarching purpose of statutes of limitations.[24] He contends that as long as defendants have notice and the opportunity to preserve

[19] Pl.'s Comments Re: Def.'s Proposed Lead Cases, 4.
[20] Compl., ¶¶93, 101, 107, 115, 121, 134, 138, 147,159, 168.
[21] *Id*., ¶¶87, 92, 100, 106, 114, 120, 133 ("suffered" from asbestos-related injuries), 137, 146 ("suffered" from asbestos-related injuries), 158, 167, 174.
[22] Pl.'s Br. Supp. Mot. Deferred Docket, 10.
[23] Pl.'s Reply Br. Supp. Mot. Deferred Docket, 3.
[24] Pl.'s Br. Supp. Mot. Deferred Docket, 11.

evidence, the purpose of statutes of limitations is advanced.[25] However, Plaintiff does not address how a deferred docket would further the overarching policy of repose, designed to protect defendants and "characteristically embod[ied]" by statutes of limitations.[26]

Nonetheless, Plaintiffs assert that a deferred docketing system will fulfill the interests of all parties.[27] The deferred docket would act as a quasi-registry for claims in which the ultimate manifestation of an asbestos-related disease is yet unknown, as is the case for these Plaintiffs. Filing and placement on the deferred docket would toll the statutes of limitations, and consideration on the merits of the claim would be deferred until any disabling injuries manifest.[28]

(2) International Paper

Defendant International Paper (IP) takes the position that while there has been a diagnosis arising from a mass screening effort, these Plaintiffs legal causes of action have not accrued because they has not suffered any impairment, and, therefore, no damages. Accordingly, IP advocates for dismissal of all such claims until such harm accrues. Of course, such dismissal would beg the question of when does a plaintiff become sick enough for the element of harm to accrue? To answer this question IP proposes the Court adopt specific medical criteria for significant injury that a plaintiff would have to meet prior to being able to file an action. IP points to federal maritime and FELA claims, and various states' jurisprudence to find a Plaintiff's cause of action for an ARD does not accrue absent specific medical criteria, because there is no cognizable injury. IP asserts the "nationwide trend [is] toward the treatment of pleural plaques and pleural thickening as non-cognizable, unless and until plaintiffs exhibit physical impairments or malignancies."[29]

IP argues that a deferred docket system will merely create unnecessary administrative cost and chaos that dismissal without prejudice would avoid.[30]

Plaintiffs vehemently objects to the Court adopting such medical criteria.[31] More significant however is their position that a:

> blanket judicial finding that the Plaintiffs have no cognizable injury until their condition progresses to serious pulmonary impairment, cannot be reconciled to well-established law. In the absence of pulmonary impairment, an asbestos disease diagnosis supports a cause of action for present injuries even though future injuries are yet unknown. Such compensable "present" injuries include those arising from the strong association between asbestos disease diagnoses and asbestos-related lung cancers.[32]

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[25] Pl.'s Br. Supp. Mot. Deferred Docket, 11.
[26] *Anderson v. BNSF Railway*, 2015 MT 240, ¶ 42, 380 Mont. 319, 354 P.3d 1248.
[27] Pl.'s Br. Supp. Mot. Deferred Docket, 2-5.
[28] *Id*.,, 5.
[29] Def. Int'l Paper Co.'s Resp. Pl.'s Mot. Deferred Docket, 5.
[30] *Id*., 12.
[31] Pl.'s Reply Br. Supp. Mot. Deferred Docket, 1-3.
[32] *Id*., 3.

Plaintiffs briefing goes on to delineate various categories of harm MacDonald and others similarly situated may have incurred—fear of cancer, medical monitoring, lost or diminished insurability, foreshortened life expectancies, and increased expense of economic preparedness. As previously recognized by the Court, these are not "no injury" cases.[33] Thus, not only did MacDonald allege a present injury in his *Complaint*, he continues to allege in the context of this motion that he suffers these types of injuries presently, as do these other Plaintiffs. Of course, this is the point made by the Defendants—these Plaintiffs have a present and cognizable injury ripe for adjudication.

(3) Collective Defendants (not including International Paper)

With the exception of IP, the Defendants vehemently argue that having alleged a present injury, both in their *Complaint* and in briefing before this Court, there is no legal or public policy basis to delay resolution of these claims. The Defendants collectively argue that indefinitely deferring or dismissing these claims without prejudice, many of which allege initial exposures beyond 30 years ago, defeats the purpose of the statute of limitations and will inhibit their ability to mount an effective defense.[34] Driving this position is not only settled Montana law, discussed below, but also the fervent belief that the LPT diagnoses coming from the CARD Clinic are inherently unreliable and lack credibility, and that these Plaintiffs do not in fact have an ARD, nor have they suffered any harm. The issue of the unreliability and lack of credibility of the CARD Clinic diagnoses will be discussed in a separate *Order*.

Defendants argue that a deferred docket would merely create the illusion of addressing the legislative mandate of the ACC—to resolve all of the currently pending asbestos cases.[35] Defendants also point out that Plaintiff MacDonald's case was chosen as a test case so it could proceed to trial and issues could be resolved for a greater class of cases like his. But, instead of clearing the backlog and resolving broad issues, Defendants contend that a deferred docket would allow cases to sit dormant until Plaintiffs unilaterally determine adjudication is proper.

C. Legal Analysis

As demonstrated below, a traditional tort analysis as defined by Montana law does not meet the demands of managing this category of litigation.

(1) Statute of Limitations

An action for personal injury must be commenced within three years from the time that the claim or cause of action accrues.[36] A claim or cause of action accrues "when all elements of

[33] Pl.'s Reply Br. Supp. Mot. Deferred Docket, 6.
[34] Def.s' Collective Resp. Mot. Deferred Docket, 8.
[35] *Id*., 3.
[36] Mont. Code Ann. §27-2-204.

the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action."[37]

> Usually, all of the elements of a negligence claim occur in rapid succession. A duty is breached and the plaintiff is immediately injured as a result. With [ARD], the paradigm is far different. There is no dispute that [ARD] can take years to manifest. One person exposed to the toxins in the Libby Mine may become ill within months of exposure while another may remain symptom-free for decades. Some may never become ill at all.[38]

The parties agree that an ARD is a latent disease that is generally progressive. For this reason, most cases in Montana involving the statute of limitations for an ARD implicate the discovery doctrine to determine when the plaintiff should have realized they suffered from the disease.

Generally, lack of knowledge by the Plaintiff of the claim or cause of action, or its accrual, does not postpone the beginning of the period of limitations.[39] "However, when the facts constituting the claim are by their nature concealed or self-concealing, the period of limitations does not commence 'until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party. . . .'"[40] *Kaeding v. W.R. Grace* recognized that "[a]sbestosis is a latent disease that is, by its nature, self-concealing. Thus, the inquiry in this case is when [the plaintiff] discovered or, in the exercise of due diligence, should have discovered that he had asbestosis."[41] *Kaeding* found that despite the plaintiff's lack of actual knowledge about having asbestosis, he should have discovered he had asbestosis when his treating physician diagnosed him with asbestosis and communicated that information to his attorney for purposes of settlement with W.R. Grace.[42]

Against this backdrop, and as a result of mass screenings at the CARD Clinic, these Plaintiffs have a diagnosis of an ARD that has been communicated to their lawyers. Pursuant to *Kaeding*, they had no option but to file their *Complaints* to toll the statute of limitations.[43] However, completely distinguishable from *Kaeding*, these Plaintiffs generally were not suffering from any symptoms of an ARD that lead them to seek medical treatment. Instead, consistent with their exposure histories, the experiences of their family and community members, and at the behest of the CARD Clinic, they took advantage of early precautionary screening opportunities. They now have a diagnosis, and attendant fear and anxiety regarding that diagnosis, but the ARD has not manifested in any physical symptoms or impairment.

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[37] Mont. Code Ann. §27-2-102(1)(a).
[38] *Orr v. State*, 2004 MT 354, ¶72, 324 Mont. 391, 106 P.3d 100.
[39] Mont. Code Ann. §27-2-102(2).
[40] *Kaeding v. W.R. Grace & Co*., 1998 MT 160, ¶17, 289 Mont. 343, 961 P.2d 1256 (quoting Mont. Code Ann. §27-2-102(3)).
[41] *Id*.
[42] *Id*., ¶27.
[43] Additionally, even in this context, the Defendants are still asserting the statute of limitations defense against these claimants—arguing that taking into consideration their exposure history they should have been screened earlier.

(2) Manifestation of Injury

A cause of action accrues "when all elements of the claim . . . exist or have occurred."[44] In *Orr*, the Montana Supreme Court found the "causes of action of the surviving Miners did not accrue until damage could be proven. And no damage could be proven until their injuries were manifest."[45] In the present cases, these Plaintiffs generally have limited exposure histories, normal pulmonary function, and are essentially asymptomatic. Without the screening diagnoses from the CARD Clinic, it would be an unusual circumstance for it to be said these Plaintiffs have suffered a cognizable injury sufficient for a claim to accrue and trigger the statute of limitations.

Having received the ARD diagnosis though, these Plaintiffs have attendant fear, worry and anxiety, even if the ARD has not manifested into any physical symptoms or impairment. For this reason, the Plaintiffs have alleged a present injury which is cognizable under Montana law. While they have alleged a cognizable injury, and would be entitled to go forward to trial if they chose to do so, they argue that by forcing them to do so now, the Court would cut off any avenue to be compensated for any future impairment related to ARD, which is their largest potential category of loss. Montana law does of course allow a jury to consider future damages, when such damages are reasonably certain to occur:

> In holding, as we do, that future damages need only be reasonably certain under the evidence, it must be granted that in determining an award for future damages, a jury, or an expert testifying on the subject, must to some degree engage in conjecture and speculation. When the conjecture and speculation is based upon reasonably certain human experience as to future events, the jury or trier of fact is entitled to rely on that degree of reasonable certainty in fixing and awarding future damages. From that viewpoint, since no man has the gift of knowledge of the future, it is possibly less confusing to a jury, given the task of determining future damages, to be instructed that it may not rely "solely" on speculation or conjecture, but may utilize the reasonable certainty the evidence presents with respect to those damages.[46]

Additionally, when determining future damages associated with medical conditions, such a determination must be based on a qualified medical evidence.[47] In these cases, the parties agree there is no witness who can testify to a reasonable degree of medical certainty when, or whether, any particular Plaintiff's ARD diagnosis will progress to impairment. As such, these Plaintiffs would be foreclosed at trial from making a claim for future damages based on a future impairment as a matter of law.

For this reason, Plaintiffs argue that forcing them to trial at this stage of disease violates their constitutional right to be made whole, their constitutional right to a jury trial and their constitutional rights of equal protection and due process. In response, the Defendants counter

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[44] Mont. Code Ann. §27-2-102(1)(a).
[45] *Orr*, ¶76.
[46] *Frisnegger v. Gibson*, 183 Mont. 57, 71, 598 P.2d 574, 582 (1979).
[47] *Moralli v. Lake County*, 255 Mont. 23, 29-30, 839 P.2d 1287, 1291 (1992).

that indefinitely delaying these cases on a deferred docket violates their right to due process. These arguments will be addressed in turn.

(3) Full Legal Redress, Trial by Jury, Equal Protection and Due Process Considerations

(i) Right to be Made Whole

Plaintiffs argue that a deferred docket will protect their constitutional right to remedy every injury inflicted by Defendants' alleged wrongful conduct.[48] Under Article II, Section 16 of the Montana Constitution, courts must afford a "speedy remedy . . . for every injury of person, property, or character.[49] Plaintiffs argue that their constitutional "right to be made whole again by what the law defines as a cause of action" would be infringed if they are forced to a premature adjudication of asbestos-related injuries that have not yet manifested.[50] Unless they are permitted to first prosecute claims based on their mild or normal diagnoses, while claims for prospective, severe injuries are preserved until they manifest,[51] Plaintiffs assert that forcing adjudication of potentially progressive illnesses would deprive them of their right under Article II, Section 16.[52]

Because less than fifty percent of these Plaintiffs may progress to severe disease, Plaintiffs argue that adjudication of such claims would infringe the constitutional guarantee to be made whole.[53] Montana Code Annotated §27-1-203 provides that "damages may be awarded in a judicial proceeding for detriment . . . certain to result in the future." Interpreting the future damages statute, the Montana Supreme Court stated in *Frisnegger v. Gibson*[54] that "future damages need only be reasonably certain, and not absolutely certain as the statute seems to imply."[55] To determine whether damages are appropriate for an injury not yet suffered, and "since no man has the gift of knowledge of the future," the trier of fact may rely on "reasonably

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[48] Pl.'s Br. Supp. Mot. Deferred Docket, 12.
[49] MONT. CONST. art. II, § 16.
[50] Pl.'s Br. Supp. Mot. Deferred Docket, 14 (*citing Meech v. Hillhaven West, Inc*., 238 Mont. 21, 37, 776 P2d 488, 298 (1989).
[51] This is referred to as the "second injury rule." Because these courts reject claims by asbestos victims for increased risk of cancer, on the ground that they are too speculative, the right to recover independently arises should a second injury (i.e. lung cancer or mesothelioma) develop. "It would be unfair to prohibit claims for increased risk of cancer for asbestosis sufferers and at the same time, hold that failure to bring a suit against any or all defendants when a plaintiff is suffering from asbestosis acts as a time bar to a future cancer claim. To ameliorate that potential unfairness, it has been held that the time to commence litigation does not begin to run on a separate and distinct disease until that disease becomes manifest." *Fusaro v. Porter-Hayden Co*., 145 Misc.2d 911,917, 548 N.Y.S.2d 856, 860 (N.Y. Sup. Ct. 1989).
[52] Pl.'s Br. Supp. Mot. Deferred Docket, 14 (*citing Fusaro*, 145 Misc.2d at 917, 548 N.Y.S.2d at 860; *Miller v. Armstrong World Indus., Inc*., 817 P.2d 111, 113 (Colo. 1991)).
[53] Pl.'s Br. Supp. Mot. Deferred Docket, 14.
[54] 183 Mont. at 71, 598 P.2d at 582.
[55] *Id.* at 71, 598 P.2d at 582.

certain human experience as to future events . . . in fixing and awarding [future] damages."[56] In contrast to reasonably certain future damages, "speculative damages may not be recovered."[57]

Plaintiffs' concern lies in their inability to prove with the requisite "reasonable degree of certainty" that their mild or normal ARD will progress to a severe sickness like lung cancer or mesothelioma,[58] because the majority of patients with non-malignant ARD do not develop cancer.[59]

Defendants' *Collective Response* addresses this concern only by stating "future damages adequately account for this phenomenon" and that Plaintiff pled for them in his *Complaint*.[60] But, as discussed above, these Plaintiffs likely cannot recover future damages for the risk of a severe illness—it is not reasonably certain their diseases will progress to lung cancer or mesothelioma. A deferred docket, Plaintiffs assert, provides the opportunity for those who may become severely ill to recover fully if their unimpaired condition progresses to cancer or mesothelioma.[61]

The Court agrees.

(ii) Right to Jury Trial

In addition to their contention that adjudication of Plaintiffs' claims will prohibit full recovery of damages, Plaintiffs also contend that trying these cases before severe illnesses manifest will infringe on the constitutional right to trial by jury.[62] In Montana, "the right to trial by jury is secured to all and shall remain inviolate."[63] Similarly, the U.S. Constitution preserves the right to trial by jury in civil trials.[64]

In support of this argument, Plaintiffs cite to an insurance bad faith case in which the insured elected to pursue a remedy for his claim in tort rather than in contract, while the insurer sought to bifurcate the trial to address various evidentiary issues.[65] The Montana Supreme Court held that bifurcation "would have converted [the insured's] claim for tort to one for breach of contract . . . [and] would then have been precluded from presenting any evidence as to the

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[56] *Id.* at 71, 598 P.2d at 582.
[57] *Walton v. City of Bozeman*, 179 Mont, 351, 357, 588 P.2d 518, 522 (1978).
[58] Pl.'s Br. Supp. Mot. Deferred Docket, 14.
[59] American Thoracic Society Documents, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, OFFICIAL STATEMENT OF THE AMERICAN THORACIC SOCIETY (Dec. 12, 2003).
[60] Def.s' Collective Resp. Mot. Deferred Docket, 11.
[61] Pl.'s Br. Supp. Mot. Deferred Docket, 14.
[62] Pl.'s Br. Supp. Mot. Deferred Docket, 15 (*citing* MONT. CONST. art. II, § 26; U.S CONST. amend. VII).
[63] MONT. CONST. art. II., § 26.
[64] U.S CONST. amend. VII.
[65] *Britton v. Farmers Ins. Group*, 221 Mont. 67, 92, 721 P.2d 303, 319 (1986).

consequential damages for the tort."[66] Therefore, bifurcation would deny the insured his right to trial by jury for his tort claim.[67] Here, Plaintiffs contend that because they are currently unable to present evidence of damages that have not occurred, final adjudication at this stage will similarly deprive them of their right to trial by jury on the entirety of their claims.[68]

This Court rejects this claim. Regardless of when or how Plaintiffs presents their claim, it will be before a jury.

(iii) Equal Protection

By trying these claims prior to manifestation of a malignant illness, Plaintiffs argue that their right to equal protection is violated.[69] The Montana Supreme Court has succinctly stated that: "the basic rule of equal protection 'is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment.'"[70]

Plaintiffs argue that they and Plaintiffs with malignant diseases are similarly situated based on their "identical asbestos injuries"—these Plaintiffs' respective injuries simply have yet to manifest.[71] They assert adjudication of their claims violates the guarantee of equal protection, because unlike the other members of the class of "identical asbestos injuries," they are forced to try their cases before their diseases are sufficiently manifest for an evaluation of full damages.[72] Plaintiffs see no governmental purpose in pushing these cases to trial prior to disease manifestation. Plaintiffs do not then analyze whether adjudicating all claims in the ACC regardless of the respective severity of Plaintiffs' illnesses is rationally related to a legitimate governmental purpose.[73] They simply conclude that a deferred docket system would allow all members of the class to proceed to trial at the same stage—when their respective diseases progress to a point at which the outcome is provable.[74]

Plaintiffs' equal protection argument is not well taken, and the inaccuracy of their descriptor of the group in question requires comment. Plaintiffs assert they suffer from "identical asbestos injuries" from which Plaintiffs with malignant disease suffer.[75] However, Plaintiffs admit earlier their illnesses may not progress to malignancy.[76] Indeed, the American Thoracic Society has said that, while the presence of nonmalignant disease correlates closely to

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[66] *Britton*, 221 Mont. at 93, 721 P.2d at 319.
[67] *Id.* (*citing* MONT. CONST. art. II, § 26; U.S CONST. amend. VII).
[68] Pl.'s Br. Supp. Mot. Deferred Docket, 15.
[69] *Id*., (*citing* U.S. CONST. amend. XIV, § 1; MONT. CONST. art. II, § 4.)
[70] *Oberson v. U.S. Dept. of Ag., Forest Svc*., 2007 MT 293, ¶ 19, 339 Mont. 519, 525, 171 P.3d 715, 720 (*quoting Rausch v. State Compensation Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 277, 114 P.3d 192, 195).
[71] *Id*., 15.
[72] *Id*., 16.
[73] *Id*., 17.
[74] *Id*., 16.
[75] *Id*., 15.
[76] *Id*., 5.

the risk of malignancy, the majority of patients with non-malignant asbestos-related disease do not develop cancer.[77] Therefore, these Plaintiffs do not suffer from "identical asbestos injuries" to cancer and mesothelioma Plaintiffs. These Plaintiffs' ARDs are distinct from cancer and mesothelioma until and unless they progress to the same. There is no viable equal protection claim on this basis.

(iv) Due Process

Plaintiffs' final constitutional argument is grounded in due process rights guaranteed by the Montana and United States Constitutions.[78] Under both documents, the state cannot deprive a person of "life, liberty, or property without due process of law."[79] A cause of action is a property right, and its deprivation triggers due process protection.[80]

Plaintiffs contend that pushing them to adjudication at this point will result in violations of both procedural and substantive due process rights.[81] Essentially, though, Plaintiffs argue that the *procedure* of pushing trial prior to the manifestation of an impairment results in the deprivation of a property interest; therefore, the analysis relies on the procedural due process test in *Mathews v. Eldridge.*[82]

Mathews sets forth three factors to consider in determining whether due process has been violated procedurally:

(1) The private interest that will be affected by the official action;
(2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
(3) The government's interest.[83]

Plaintiffs urge the Court to find that the "private interest" at stake is "the substantive right to compensation for wrongful injury, their access to the judicial remedy prescribed by law, and their right to jury trial."[84] The Plaintiffs argue that trial prior to disease manifestation will deprive them of their private interest in their cause of action, because the jury will not be able to assess compensation for a severe disease that may, but likely will not, manifest.[85]

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[77] American Thoracic Society Documents, *supra* note 39.
[78] Pl.'s Br. Supp. Mot. Deferred Docket, 17 (*citing* MONT. CONST. art. II., § 17; U.S CONST. amend. XIV).
[79] MONT. CONST. art. II., § 17; U.S CONST. amend. XIV
[80] Pl.'s Br. Supp. Mot. Deferred Docket, 17 (*citing Tax Lien Servs. v. Hall*, 227 Mont. 126, 131, 919 P.2d 396, 399 (1996)).
[81] Pl.'s Br. Supp. Mot. Deferred Docket, 18.
[82] *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976).
[83] *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.
[84] Pl.'s Br. Supp. Mot. Deferred Docket, 19.
[85] *Id*., 19.

While the second prong of the *Mathews* test balances the risk of erroneous deprivation against the cost of a safeguard, the Plaintiffs simply state that the value of the safeguard—the deferred docket—will be in the complete adjudication of claims only when they are ripe.[86] Plaintiffs do not address the risk of erroneous deprivation. If the majority of Plaintiffs' diseases will never progress to malignancy, is the risk borne by the unfortunate minority worth the creation of an additional docket in an already backlogged system?

Finally, Plaintiffs assert that the third prong of the *Mathews* test is clear: the government interest in staying the litigation until malignancy is five-fold. First, the government can provide effective administration of justice for all asbestos litigants, not merely for the sickest. Second, court resources will be conserved by trying only cases that are prepared to fully adjudicate. Third, these Plaintiffs whose diseases never progress will not waste court resources by trying cases that otherwise would not be. Fourth, the sickest Plaintiffs' trials will not be delayed by the trials of the unimpaired. Finally, complex litigation procedures can be employed to efficiently and effectively resolve these claims by way of rulings in the cases of the sick.[87]

In contrast, the collective Defendants argue that it is their right to due process that would be jeopardized by delayed litigation. Because these Plaintiffs have alleged present diagnoses of present illnesses and pled present damages, Defendants reject Plaintiffs' concern that asking them to litigate their claims presently poses any due process violation. Instead, forcing Defendants to indefinitely wait to litigate claims against them violates their due process right to be "inform[ed] . . . of proceedings which may directly affect their legally protected interests."[88]

However, Defendants concede that a deferred docketing system may address their due process concerns if the parties can agree on specific medical criteria for determining asbestos-related "impairment" other than simply a diagnosis from the CARD Clinic.[89] And, while IP advocates for dismissal without prejudice, it agrees that if the Court chooses the deferred docket avenue, setting specific medical criteria would provide parties clarity and protect its constitutional rights.[90] By establishing objective medical criteria by which cases will be "activated" for litigation or deferred, Defendants' notice rights are protected and Plaintiffs cannot "unilaterally decide which cases ought to be deferred, and which cases ought to be activated."[91]

If a deferred docketing system is created, Defendants point to various deferred docket jurisdictions and urge the court to adopt the specific medical criteria used in Texas to activate cases.[92] Defendants also reference other jurisdictions, like New York City, that require certain

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[86] Pl.'s Br. Supp. Mot. Deferred Docket, 19.
[87] *Id*., 19-20.
[88] Def.s' Collective Resp. Mot. Deferred Docket, 19 (*citing Pickens v. Shelton-Thompson*, 2000 MT 131, ¶15, 300 Mont. 16, 3 P.3d 603).
[89] *Id*., 19.
[90] Def. Int'l Paper Co.'s Resp. Pl.'s Mot. Deferred Docket, 9.
[91] Def.s' Collective Resp. Mot. Deferred Docket, 19-20.
[92] *Id*., 21 (*citing* TEX. CIV. PRAC. & REM. CODE. ANN. § 90.003(a) (2015)).

medical diagnoses prior to activation, but are more general than Texas' requirements.[93] However, Defendants' priority, which corresponds with its concerns about the validity of CARD Clinic diagnoses, is that certified B readers examine Plaintiffs' x-rays prior to activation.[94]

The Court finds the procedural and substantive due process concerns raised by the parties are appropriately addressed by a deferred docket, which includes certain safeguards.

C. Establishment of a Deferred Docket System

The Asbestos Claims Court possesses "the inherent power to do those acts necessary to ensure [its] proper functioning."[95] Section 3–1–113, Montana Code Annotated codifies the concept of inherent power and "provides that when jurisdiction is conferred on a court or judicial officer, all the means necessary for the exercise of that jurisdiction are also given."[96] A docketing system in which the sickest plaintiffs' claims are prioritized and objective medical criteria is required for claim activation advances the ACC's legislative and constitutional mandates of efficiency and equity. In so ruling, the Court finds this determination properly balances the competing practical and constitutional interests of the parties within the context of existing Montana law.

While some legislatures have created medical criteria statutes like the one Defendants advance to respond to the instant issue, many courts have also created inactive or deferred systems whereby the claims of the unimpaired are set aside.[97] Courts in New York City, Cleveland, Seattle, Baltimore, Minnesota, and Massachusetts, among others, have created deferred docketing systems to manage the "elephantine mass of asbestos cases" that "defies customary judicial administration" and the issue of "unimpaired" Plaintiffs.[98]

(1) Identification of Deferred Docket Cases

Referring to the Plaintiff's Master Claim List, the following cases will be placed on the deferred docket:

(a) The Plaintiff has been diagnosed with a nonmalignant ARD; and
(b) The Plaintiff has a mild or normal disease severity.

In addition, all subsequently filed cases meeting the above criteria will automatically be placed on the deferred docket after a Complaint and Demand for Jury Trial have been filed in district court.

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[93] Def.s' Collective Resp. Mot. Deferred Docket, 20.
[94] *Id*., 24.
[95] *Clark v. Dussault*, 265 Mont. 479, 486, 878 P.2d 239, 243 (1994).
[96] *Id.*
[97] Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 SW. U. L. REV. 671, 676–77 (2008).
[98] Sanders, *supra* 97, at 677; *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 821 (2003).

(2) Transfer to Active Docket

A case on the deferred docket is "activated" and will be placed on the active docket when the Plaintiff meets the following criteria:

(a) The Plaintiff receives a diagnosis of a malignant ARD;

(b) The Plaintiff dies and there is competent and credible medical evidence that an ARD was a substantial factor in the cause of death;

(c) The Plaintiff has a diagnosis of a nonmalignant ARD; and
  (i) a Total Lung Capacity (TLC) measurement of less than 80% of predicted, or
  (ii) a Forced Vital Capacity (FVC) of less than 80% of predicted, and a FEV1/FVC ratio greater or equal to 65%; or

(d) The Plaintiff elects to be placed on the active docket.

This Court will not impose nonmalignant ARD diagnostic criteria that is more specific than that endorsed by the American Thoracic Society. However, in presenting a diagnosis of a nonmalignant ARD, the Court will expect to see competent and credible evidence from a qualified medical provider of the following:

(a) Evidence of structural pathology consistent with asbestos related disease as documented by imaging or histology;

(b) Evidence of causation by asbestos as documented by the occupational and environmental history, markers of exposure (usually pleural plaques), recovery of asbestos bodies, or other means; and

(c) Exclusion of alternative plausible causes for the findings.[99]

Failure to provide evidence regarding these three categories will result in the diagnosis being rejected.

(3) Management of Deferred Docket

The Court takes seriously the Defendants' concerns that these cases will simply be allowed to languish on the deferred docket in violation of the Defendants' due process rights. Accordingly, to remain on the deferred docket and avoid dismissal, Plaintiffs and their counsel are responsible for the following:

[99] American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, *supra* note 7.

(a) By January 1 of each year Plaintiffs' counsel is responsible for filing with the Court a Deferred Docket Master Claims List identifying each claim currently pending on the deferred docket.

(b) All Plaintiffs on the deferred docket are responsible for undergoing an annual medical exam sufficient to address the criteria outlined above as to whether a case should be moved to the active docket. Such exam must be completed by July 1 of each year, beginning in 2019. Failure to comply with this requirement will result in sanctions, up to and including dismissal. The records generated during such medical exam must also be provided to the Defendants.

(4) Mandatory Settlement Conferences

In an effort to efficiently bring resolution to largest number of Plaintiffs, and candidly acknowledging that the judicial system is ill-equipped to bring timely resolution to each of these claimants on an individual basis[100], each Plaintiff with an initial exposure date of at least 30 years ago is required to attend a mandatory settlement conference within one year of the date of this *Order*. As demonstrated below, targeting a 30-year latency period before being required to attend a settlement conference is supported by the medical literature.

Defendants have advocated against a deferred docketing system, in part, because Plaintiff MacDonald's alleged initial exposure to asbestos was 41 years ago, and this is a sufficient latency period for disease development. However, in 2018, the Mayo Clinic estimated the latency period for asbestosis is ten to forty years after the initial exposure.[101] The steadily increasing latency period is attributed to regulations that have progressively diminished permissible asbestos exposure levels.[102] For example, in work sites that satisfy modern recommended asbestos-control levels, clinical asbestosis in workers is a less severe disease that manifests after a longer latency period.[103] Meanwhile, mesothelioma arises typically from short-term, high-level asbestos exposures or chronic low-level asbestos exposures, especially to amphibole asbestos.[104] Relatively short-term asbestos exposures of one or two years have been

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[100] Virtually every claimant before the ACC has filed their Complaint in either the First, Eighth, Eleventh, or Nineteenth Judicial Districts, with the vast majority (over 90%) filed in the Eighth Judicial District. Even assuming the workload was divided evenly amongst the District Court Judges of these judicial districts, and they each tried an asbestos case every month, it would take over 13 years to resolve the pending claims.

[101] Mayo Clinic, *Asbestosis*, MAYOCLINIC.ORG (March 7, 2018), https://www.mayoclinic.org/diseases-conditions/asbestosis/symptoms-causes/syc-20354637 (last visited June 21, 2018).

[102] Brooke T. Mossman & Andrew Chung, *Mechanisms in the Pathogenesis of Asbestosis and Silicosis*, 157 AM. THORACIC SOC. JOURNALS 1666, 1667 (1998).

[103] American Thoracic Society Documents, *supra* note 58 at 697.

[104] Agency for Toxic Substances & Disease Regulation, *Environmental Health and Medicine Education: Asbestos Toxicity*, ATSDR.CDC.GOV (Jan. 29, 2014),

linked to the development of mesothelioma twenty to twenty-five years later, and the risk peaks approximately thirty-five years after initial exposure.[105] Still, the latency period can extend to approximately sixty years after initial exposure.[106]

DATED this 13th day of September, 2018.

/s/ Amy Eddy

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Amy Eddy, Asbestos Claims Court Judge

https://www.atsdr.cdc.gov/csem/csem.asp?csem=29&po=11 (last visited June 19, 2018) (*citing* The American Thoracic Society).

[105] Jean D. Wilson, et al., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 1058 (12th ed. 1991).

[106] ATSDR.CDC.GOV, *supra* note 111.

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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 NOTICE RE: FILING OF MASTER CLAIMS LIST *Applicable to All Cases*

Per the Court's order on September 24, 2018, MHSL Plaintiffs file this updated Master Claims list that includes (1) a delineated category of severity; and (2) the identification of whether an individual is on the deferred or active docket.

The placement of an individual on the deferred docket requires the individual to fall within the "Normal" or "Mild" category per this Court's order of September 13, 2018.

The categories on the Master Claims list are determined by the following rules:

Normal	≥ 80% of FVC, TLC, DLCO;
Mild	70%-79% of FVC, TLC, DLCO;
Moderate	60%-69% of FVC, TLC, DLCO;
Severe	≤ 59% of FVC, TLC, DLCO

These definitions follow the categories utilized in previous settlements with the State, IP and BNSF, and are based on accepted medical criteria such as the American Thoracic Society and the American Medical Association Guides to Permanent Impairment. *See* American Thoracic Society, *Lung Function Testing: Selection of Reference Values and Interpretative Strategies*, Am Rev Respir Dis, 144:1002-1218 (1991), Table 13. *See also* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th Edition 2009), Table 5-4.

Respectfully submitted this 12th day of February 2019.

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By: /s/ Dustin Leftridge
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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 MHSL PLAINTIFFS' STATUS REPORT RE: ANNUAL MEDICAL EXAMINATION Applicable to All Cases

The Court entered its *Order Re: Plaintiffs' Motion for Deferred Docket* on September 13, 2018 ("Order"). MHSL Plaintiffs provide this *Status Report* to the Court regarding the Court's requirement that:

> All Plaintiffs on the deferred docket are responsible for undergoing an annual medical exam sufficient to address the criteria outlined above as to whether a case should be moved to the active docket. Such exam must be completed by July 1 of each year, beginning in 2019. Failure to comply with this requirement will result in sanctions, up to and including dismissal. The records generated during such medical exam must also be provided to Defendants.

Order, p. 18.

MSHL Plaintiffs' counsel informed its 1,171 MSHL Plaintiffs on the deferred docket of the above requirement. Over half (i.e. 633) of those MHSL Plaintiffs reside in Libby or Troy, Montana. The CARD Clinic is the only provider of full PFTs (i.e. spirometry, DLCO, and lung volumes) in Lincoln County. Declaration of Tracy McNew ("McNew Dec."), ¶ 2.

Regardless of where they live, MHSL Plaintiffs have been scheduling first available medical examinations with complete PFTs. For those patients scheduling their examinations at the CARD Clinic, the first available examination is now after the Court's July 1, 2019, deadline. McNew Dec., ¶ 3. Due to the influx of patients seeking annual medical examinations and PFTs pursuant to the Court's *Order*, all previously available pre-July 1, 2019, appointments at the CARD Clinic have been filled. *Id.* The CARD Clinic has attempted to accommodate that influx of patient needs by opening additional appointments previously reserved for provider dictation and other paperwork needs, and by opening intermittently on Fridays (a day the CARD Clinic is normally closed). *Id.*, ¶ 4. Despite those efforts, there are many MHSL Plaintiffs who will not be able to complete the required medical examinations and complete PFTs prior to July 1, 2019.

Additionally, there are some MHSL Plaintiffs for whom the cost of the annual medical examination and PFTs will present an exceptional financial burden. Specifically, some MHSL Plaintiffs are not enrolled in Medicare Part A (i.e. Libby Medicare) because their employer provides health insurance, they receive medical benefits through other means, etc. For claimants who have not yet met their deductible, they will have to pay $653.41 each year to obtain an annual medical examination and complete PFTs at the CARD Clinic. *Id.*, ¶ 5.

For those Plaintiffs on the deferred docket with limited financial means, the costs associated with the annual medical examination and complete PFTs is an obstacle to their ability to maintain their claims. Because these individuals have mild or normal lung function (i.e. on the deferred docket), many face the difficult decision of spending what limited money they have for their necessities of daily living in order to comply with this Court's *Order*. Because many individuals may not progress for many years, if at all, they are facing this ongoing financial

burden with the possibility they may never recover these costs. The following are a few examples of the financial burden of the annual medical examination and complete PFTs:

1. Travis Stoltenberg (D-1005) – Travis cannot afford the cost of the annual medical examination and complete PFTs. It will cost Travis over $500 to get his annual medical examination and complete PFTs. He is barely making ends meet and this cost is a significant financial burden, particularly because this is a recurring annual cost if/until Travis becomes eligible for the active docket.
2. Stephen Tralles (DD-1066) – He does not have Medicare A as he has his own insurance through his employer. It has a $3,000 deductible so the entire cost of the examination will be out-of-pocket, which will be burdensome for him.

Even for those who are not of limited means, because they are mild or normal and asymptomatic, some of those individuals would not normally seek annual medical care for their asbestos disease. As a result, they too are faced with a decision of paying for potentially unnecessary medical treatment in order to comply with this Court's *Order* so they can maintain their claim in the event their medical condition progresses. Examples of those individuals include:

3. Lenora Reckin (D-874) – She is a retired teacher and has normal lung function. She prefers not to seek medical care, unless she is symptomatic or it is medically necessary.
4. Brian Thompson (D-1043) – He has spoken with his insurance provider and the annual medical examination and complete PFT will cost him around $450 a year. For him, this is a lot of money annually just to see if his case can be activated and

eligible for Court resolution and associated compensation and particularly troubling because there is no timeline to know whether he will progress or not.

Finally, there are individuals who are physically unable to get an annual medical examination and complete PFTs. Those individuals are bedridden, in long-term care facilities, have dementia, on hospice, etc. and include the following examples:

5. David Chapel (D-189, 60 years old) – He has gone to CARD Clinic every year until 2018, but he can no longer go because he cannot walk and is completely homebound.
6. Larry Fairbrother (D-331, 72 years old) – He has recently been in the emergency room, now has a new pacemaker, but is not doing well. He cannot do a PFT.
7. Maxine Foote (D-348, 89 years old) – She is 89 years old, may be getting dementia, and does not believe she can complete PFT.
8. James Holder (D-468, 75 years old) – He is unable to perform the respiratory maneuvers associated with PFTs due to dementia.
9. Paulette Nosler (D-775, 74 years old) – She may be getting dementia and does not believe she can complete PFT.
10. Charles Pickering (D-842, 73 years old) – He may be getting dementia and does not believe he can complete PFT.
11. Judith Rayome (D-867, 78 years old) – She is in a nursing home and is unable to perform the respiratory maneuvers associated with PFTs due to dementia.
12. Shirley Totten (D-1055, 66 years old) – She is in a nursing home in Eureka and is unable to perform the respiratory maneuvers associated with PFTs.

MHSL Plaintiffs' counsel acknowledge the substantial time and effort which this Asbestos Claims Court has devoted to resolving the challenges of these cases and the attendant "enormous detrimental impact on the resources of Montana district courts." *See* Montana Supreme Court's Order Establishing the Asbestos Claims Court and Consolidating Cases (November 28, 2017), p. 1. Likewise, we are appreciative that it was in response to our motion that this Court entered its *Order Re: Plaintiffs' Motion for Deferred Docket* on September 13, 2018. MHSL has directed its clients to do their best to comply with the Court's *Order*. However, we respectfully provide the Court with this update of MHSL Plaintiffs' efforts to comply with this Court's *Order*, the complications posed thereby, and in particular the difficulties encountered in complying with the provision of the *Order* requiring annual medical examinations.

Respectfully submitted this 19th day of April, 2019.

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*.	Cause No. AC 17-0694 ORDER RE: MASTER CLAIMS LIST

Plaintiffs' counsel is directed to file an updated Master Claims List by October 5, 2018, which separately identifies which cases remain on the Court's Active Docket, and which cases have been transferred to the Court's Deferred Docket.

DATED this 24th day of September, 2018.

/s/ Amy Eddy
_____
Amy Eddy, District Judge

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