

Chad M. Knight
 Anthony M. Nicastro
 Nadia Patrick
 KNIGHT NICASTRO MACKAY, LLC
 304 W. 10th Street
 Kansas City, Missouri 64105
 Email: knight@knightnicastro.com
nicastro@knightnicastro.com
npatrick@knightnicastro.com
 Telephone: (720) 770-1235
 Facsimile: (816) 396-6233
Attorneys for BNSF Railway Company and John Swing

IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

<p>IN RE ASBESTOS LITIGATION,</p> <p><i>Consolidated Cases</i></p>	<p>Cause No. AC 17-0694</p> <p>DEFENDANT BNSF RAILWAY COMPANY'S RENEWED RULE 41(b) MOTION TO DISMISS AND BRIEF IN SUPPORT</p> <p>Applicable to All Cases</p> <p>THIS DOCUMENT RELATES TO: <i>1,242 MHSL Plaintiffs on the Deferred Docket</i></p>
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COMES NOW, Defendant, through counsel, and respectfully renews its Motion to Dismiss all plaintiffs on the deferred docket who remain in violation of this Court's Order to obtain annual medical examinations and share medical records with the defense, pursuant to Mont. R. Civ. P. 41(b).¹

¹ Defendant does not concede that any of these plaintiffs complied with the Court's order requiring proof of competent and credible evidence of a diagnosis from a qualified medical provider establishing the three criteria outlined in the Court's Order Regarding the Deferred Docket. The purpose of this motion to address those plaintiffs

BACKGROUND

On September 13, 2018, this Court ordered that all plaintiffs on the Deferred Docket must obtain a medical examination by July 1st of each year. The Order further required plaintiffs to forward medical records from those annual exams to the defense:

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.”

Exhibit 1. *Order re: Deferred Docket*, p. 18 (Sept. 13, 2018) [emphasis added].

Last year, when it appeared that plaintiffs were not following this Order, the defense brought it to the Court’s attention through a motion. **Exhibit 2**, *Defendants’ Motion to Dismiss* (May 13, 2019). That motion offered a reminder of the Court’s caution that the defendants’ due process rights were not going to be trampled:

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*, Plaintiff’s and their counsel are responsible for following...”

Id., at p. 17 [emphasis added].

who have clearly violated the annual exam requirement and have been previously warned by the Court that such violation may result in dismissal.

In their response to the defendants' motion, the plaintiffs themselves offered the Court assurances that its Order was not being ignored. Plaintiffs asked the Court to defer any sanctions ruling and, instead, have a broader conversation about the management of the Deferred Docket at a later date:

The court should deny this motion and instead set a time to address outstanding docket management and logistical issues at a later date. As stated by the Court, "So let's get these test cases tried and get going on these, and we'll be having a broader conversation about management of the deferred docket". ACC Hearing 10/3/18, p. 30:2-5.

Exhibit 3, *Pl. 's Response to Def. 's Combined Motion re: Deferred Docket Issues*, p. 9 (Nov. 21, 2018).

The Court issued a follow-up Order on the related issue of a mass settlement conference. In that Order, the Court held off on the ultimate sanction of dismissing the cases that were out of compliance. However, the Court did offer the following stern warning:

As BNSF correctly points out, the Plaintiffs filed the *Deferred Docket Master Claims List* on February 12, 2019—six weeks after the deadline to do so. While the Court will not tolerate this type of delay moving forward, the six-week delay did not prejudice BNSF as the *Master Claims List* that was filed was substantially similar to previous versions.

...

While the Court understands the Plaintiffs' concerns regarding the annual medical exam, ***the Court's expectations are clear. The Plaintiffs have had nine months to obtain these examinations. Should any Plaintiff not obtain the required medical exam, the Court will determine the appropriate sanction.***

Exhibit 4. *Order Granting Plaintiffs’ Motion for Leave to Attend Settlement Conference Through Counsel*, p. 2 (June 18, 2019) [emphasis added].

The Montana Supreme Court issued its opinions in the *Barnes* matter on March 11, 2020, thereby lifting the stay applicable to cases before this Court. During that interim period of nearly nine months, plaintiffs have had ample time to ensure that any problems with compliance with the Court’s Order regarding obtaining medical exams were remedied. Unfortunately, this does not appear to be the case.

ARGUMENT

Mont. R. Civ. P. 41(b) authorizes this Court to dismiss these noncompliant plaintiffs’ cases for failure to comply with a Court Order. “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” *Id.* (emphasis added).

In *Vermeer of Washington, Inc. v. Jones*, 2004 MT 77, ¶ 14, 320 Mont. 435, 87 P.3d 516, the court acknowledged that Rule 41 (b), Mont. R. Civ. P. authorizes a district court to dismiss an action for failure to comply with a court order. The court set out four factors to consider in this analysis: (1) the plaintiff’s **diligence** in prosecuting the claim; (2) the **prejudice** to the defense; (3) the availability of **alternate sanctions**; and (4) the existence of a **warning** to the plaintiff that the case may be dismissed. All of these factors currently weigh in favor of dismissal.

Plaintiffs updated their Master Case Lists in December of 2019. **Exhibit 5**, *Pls’ Notice Re: Filing of MHSL Pls’ Master Claims List* (December 19, 2019).

Those lists show that many plaintiffs are still not in compliance with this Court's Order. According to the "MHSL Master Claims List and Deferred Docket – 12/19/19," there were 1,242 plaintiffs on the Deferred Docket for the McGarvey, Heberling, Sullivan and Lacey law firm². Of those plaintiffs, hundreds failed to comply with the Court's original deadline of July 1, 2019. Hundreds are still today in violation of the Court Order. These noncompliant plaintiffs fall into two main categories, described below.

Category 1 – Noncompliant Plaintiffs listed as “See Declaration”

There are 94 plaintiffs on MHSL's list who are listed as “See Declaration.”

Exhibit 6. These plaintiffs have refused to obtain annual medical exams for a variety of reasons. These plaintiffs are in stark, ongoing violation of this Court's Order. They should be dismissed.

Category 2 – Noncompliant Plaintiffs who Failed to Obtain a Medical Appointment

There are 427 plaintiffs on MHSL's list who show dates for medical appointments beyond the July 1, 2019 deadline. **Exhibit 7.** Of those, 171 report scheduling the examination between October 1, 2019 and March 17, 2020. *Id.* In a completely separate group, 44 plaintiffs note their exam as “TBD.” Finally, 6 plaintiffs report nothing at all to this Court.

² It is worth noting that not all of these claims are against BNSF. It is anticipated that other Defendants may join this motion. Some facts regarding these claimants may have changed since plaintiffs filed their Master Claims Lists. These issues will be addressed in reply briefing.

These 427 plaintiffs failed to comply with the Court's Order. The Court ordered that they undergo a medical examination and provide a report of that examination to the defendants by July 1, 2019. Through their counsel, they asked for additional time to comply for a variety of reasons. All of the dates for appointments scheduled have since passed, yet none of the plaintiffs have provided reports reflecting results of the examination, or even evidence that the examination occurred. Thus, these plaintiffs have violated the Court's order a second time. Fifty plaintiffs show no indication of complying with the Court's order whatsoever.

521 Plaintiffs Should be Dismissed for Noncompliance

At the time this motion is filed, annual exams for 2020 are due in less than three months. The plaintiffs from the two categories above who have not obtained an annual exam, and asserted so by indicating "See Declaration" (Ex. 6), or who have not obtained an annual exam and have indicated so with a "TBD", blank entry or date beyond the July 1, 2019 deadline (Ex. 7), have failed to comply with the Court's Order. These 521 plaintiffs have demonstrated an unwillingness to comply with the Court's Order even into the second year of mandatory annual exams.³ A list of these plaintiffs is included for the convenience of the Court. *Id.*

³ The Court created the annual exam requirement on September 13, 2018. Within that 18 month period 50 have done nothing to comply with the Court's order.

It is anticipated that many of these plaintiffs have not fulfilled the requirement for their required annual medical appointment. What is certain is that none of these plaintiffs has forwarded their medical records to the defense. Any plaintiffs who have still failed to obtain a medical exam at this point are also in stark, ongoing violation of this Court's Order. They should be dismissed.

CONCLUSION

Hundreds of MHS� plaintiffs on the Deferred Docket remain in violation of this Court's order related to obtaining annual medical exams. *See Exs. 6 & 7.* Nearly all of them are in violation of the Order for failure to share those examination results with the defense. Ongoing, flagrant violations of the Court Order should not be permitted. These cases should be dismissed.

Accordingly, pursuant to Mont. R. Civ. P. 41(b) defendant respectfully renews its prior motion to dismiss any plaintiff on the Deferred Docket who is out of compliance with this Court's Order of September 13, 2018.

DATED this 16th day of April, 2020.

KNIGHT NICASTRO MACKAY, LLC

/s/ Chad M. Knight

Chad M. Knight

Anthony M. Nicastro

Nadia Patrick

*Attorneys for BNSF Railway Company and
John Swing*

CERTIFICATE OF SERVICE

I, Chad M. Knight, hereby certify that I have served true and accurate copies of the foregoing Motion - Dismiss - Partial to the following on 04-16-2020:

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

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)

2419 Mullan Road

Suite B

Missoula MT 59808

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

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

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
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, Borg Warner Morse Tec LLC
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, Borg Warner Morse Tec LLC
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 Johnson, 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

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

Anthony Michael Nicastro (Attorney)
27 Shiloh Road, Ste 10
Billings MT 59106
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

Nathan Andrew Huey (Attorney)
201 West Main Street
Suite 101
Missoula MT 59802
Representing: Robinson Insulation Company
Service Method: eService

Mark S. Williams (Attorney)
235 East Pine
PO BOX 9440
Missoula MT 59807-9440
Representing: Ace Fire Underwriters Companyh
Service Method: eService

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

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

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

Mike McMahon (Other)
227 Broadway, Second Floor
Helena MT 59601
Service Method: Conventional

Jon A. Oldenburg (Other)
P.O. Box 1124
Lewistown MT 59457
Service Method: Conventional

John W. Parker (Other)
Cascade County Courthouse
325 2nd Avenue North
Great Falls MT 59401
Service Method: Conventional

Greg Pinski (Other)
415 2nd Ave N
Great Falls MT 59401
Service Method: Conventional

Dan Wilson (Other)
Flathead County District Court
920 South, Main, Suite 210
Kalispell MT 59901
Service Method: Conventional

Jon L. Heberling (Attorney)
345 First Avenue East
Kalispell MT 59901
Representing: Adams, et al
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 I-88
Broomfield CO 80021
Representing: FMC Corporation
Service Method: Conventional

Tracy H. Fowler (Attorney)
15 West South Temple, Ste. 1200
Salt Lake City UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: Conventional

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

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

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

Nancy M. Erfle (Attorney)
Gordon Rees LLP
121 SW Morrison St., Suite 1575
Portland OR 97204
Representing: Robinson Insulation Company
Service Method: Conventional

Electronically signed by Andrea Laine on behalf of Chad M. Knight

Dated: 04-16-2020