Roger Sullivan
Jinnifer Jeresek Mariman
Ethan Welder
John Lacey
McGARVEY LAW
345 First Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com
jmariman@mcgarveylaw.com
ewelder@mcgarveylaw.com
jlacey@mcgarveylaw.com

Mark Lanier
Rachel Lanier
Sam Taylor II
LANIER LAW FIRM, PC
10940 W. Sam Houston Pkwy N., Ste. 100
Houston, TX 77064
Mark.lanier@lanierlawfirm.com
Rachel.lanier@lanierlawfirm.com
Sam.taylor@lanierlawfirm.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JACKSON WELLS, as Personal Representative for the Estate of THOMAS E. WELLS, deceased; and JUDITH HEMPHILL, as Personal Representative for the Estate of JOYCE H. WALDER, deceased, Plaintiffs, vs. BNSF RAILWAY COMPANY, et al. Defendants.	**CV-21-97-GF-BMM** **PLAINTIFFS' BRIEF IN SUPPORT OF CASE SPECIFIC MOTIONS *IN LIMINE***

TABLE OF CONTENTS

Page

Table of Authorities.....iii

INTRODUCTION 2

CASE SPECIFIC *IN LIMINE* REQUESTS.....3

1. Any comment or reference to philanthropy or good deeds or acts carried out by the parties or their employees (e.g., references to community service or charity work, or charitable donations made by BNSF or any of their employees, statements that BNSF is a "good corporate citizen," etc.) 3

2. Any reference to, or evidence of, the purported liability of non-parties. 5

   I. The Court should implement its rulings on the empty chair defense by prohibiting argument or comment that assigns fault to a non-party, and should rule on the content of a Rule 105 "limited admissibility" instruction. 5

   II. Evidence and argument regarding Grace's criminal trial and criminal allegations must not be allowed. 7

   III. BNSF arguments about Plaintiffs' "incidental exposures" that are "not the fault of BNSF" constitute prohibited non-party defenses and fall with the realm of Plaintiffs' present motion. 8

3. Any reference to, or evidence of, alleged knowledge of union leaders regarding the presence of asbestos at the W.R. Grace mine and/or the hazards of asbestos exposure. 9

4. Documentation of the remediation and clean-up efforts are not inadmissible as subsequent remedial measures. 10

   I. BNSF's coordination with EPA was a legal obligation pursuant to EPA's agency authority under CERLCA. 11

II. EPA and other testing documentation is offered for other purposes including impeaching BNSF's contention that the railyard was not contaminated. 14

III. Any prejudicial effect is substantially outweighed by the probative value of this evidence. 15

5. Any comment or reference to the CARD clinic, its finances, and any alleged relationship with Plaintiffs' counsel. 16

6. This Court should pre-admit selected documents to which no reasonable evidentiary objection exists. 17

7. Any argument, evidence, reference, comment, or questions regarding the manner and method of Mr. Wells's death. 22

CONCLUSION 26

Certificate of Compliance 27

TABLE OF AUTHORITIES

Case **Page(s)**

Alimenta, Inc. v. Stauffer, 598 F.Supp. 934 (N.D. Ga. 1984) 14

Ansell v. Green Acres Contracting Co., 347 F.3d 515 (3rd Cir. 2003) 4

BNSF Ry. Co. v. Asbestos Claims Court,
2020 MT 59, 399 Mont. 180, 459 P.3d 857 ..... 15, 18-19

Barnes et al. v. BNSF et al., DV-15-2016-00111-AE 17-18

Binder v. State Farm Fire & Cas. Co.,
CV 07-29-M-DWM-JCL, 2008 WL 11348718 (D. Mont. June 16, 2008) 2

Causey v. Zinke (In re Aircrash in Bali, Indonesia),
871 F.2d 812 (9th Cir. 1989).....11, 13

Cimino v. Raymark Indus., Inc., 151 F.3d 297, (5th Cir. 1998) 23

Csuha v. Best Friends Animal Soc'y, 524 F. Supp.3d 1196 (D. Utah 2021) 17

Diczok v. Celebrity Cruises, Inc.,
No. 16-21011-CIV, 2017 WL 3206327 (S.D. Fla. July 26, 2017).....4

Fansaro v. Mooney Aircraft Corp., 687 F.Supp. 482 (N.D. Cal. 1988).....14

Faulconbridge v. State, 2006 MT 198, 333 Mont. 186, 142 P.3d 777.....8

Hamilton v. Asbestos Corp., Ltd, 22Cal.4th 1127 (Cal. 2000) 23

In re Vioxx Prods. Liab. Litig.,
MDL 1657, 2005 WL 3164251 (E.D. La. Nov. 18, 2005).....5

Kath v. Burlington Northern, 441 N.W.2d 569 (Minn. Ct. App. 1989).....21

Levinson v. Westport Nat. Bank,
3:09-CV-1955 VLB, 2013 WL 2181042 (D. Conn. May 20, 2013)..... 4-5

Meredith v. Asbestos Corp. Ltd., 707 So.2d 1334 (La. App. 4 Cir. 2/18/98)..... 22-23

Miller ex rel. Miller v. Ford Motor Co.,
No. 2:01CV545FTM-29DNF, 2004 WL 4054843 (M.D. Fla. July 22, 2004) 5

New Hampshire v. Elementis Chem., Inc., 887 A.2d 1133 (N.H. 2005).....13

Niver v. Travelers Indem. Co. of Ill., 433 F.Supp.2d 968, (N.D. Iowa 2006).....4

O'Dell v. Hercules, Inc., 904 F.3d 1194 (8th Cir. 1990).....11

Pau v. Yosemite Park and Curry Co., 928 F.2d 880 (9th Cir. 1991).....11

Plumb v. Fourth Jud. Dist. Court, 279 Mont. 363, 927 P.2d 1011 (1996) 9

Rocky Mountain Helicopters v. Bell Helicopters,
805 F.2d 907 (10th Cir. 1986)..... 13-14

U.S. ex rel. Kiro v. Jiaherb, Inc.,
CV 14-2484-RSWL-PLAX, 2019 WL 2869186 (C.D. Cal. July 3, 2009).....4

U.S. v. Hankey, 203 F.3d 1160 (9th Cir. 2000) 16

U.S. v. Hayes, 219 Fed.Appx. 114 (3d Cir. 2007).....4

U.S. v. McDuffie,
CR-08-102-RHW, 2009 WL 10673271 (E.D. Wash. April 24, 2009).....4

U.S. v. W.R. Grace & Co., 429 F.3d 1224 (9th Cir. 2005) 11

U.S. v. W.R. Grace et al., Cause No. CR-05-07-M-DWM (D. Mont.) 7

United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982).....24

United States v. Birdsbill, 243 F.Supp.2d 1128 (D. Mont. 2003) 23

United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) 25

United States v. Meech, 487 F.Supp.3d 946 (D. Mont. 2020) 2-3

United States v. Weber, 599 F.Supp.3d 1025 (D. Mont. April 22, 2022).....2

United States v. Spencer, 1 F.3d 742 (9th Cir. 1992).....24

Uren v. Eggers, 213 F.3d 645, 2000 WL 286160 (9th Cir. 2000).....14

Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980)..... 11, 14-15

Statutes/Rules

42 U.S.C. § 9601.....11, 12

42 U.S.C. § 9607.....12

Fed. R. Evid. 104 9

Fed. R. Evid. 105 5-6

Fed. R. Evid. 401 .....4, 5, 7, 17, 23

Fed. R. Evid. 402 .....4, 16, 19, 23,

Fed. R. Evid. 403 ..... 7, 16-17, 24

Fed. R. Evid. 407 ..... 10, 11, 13-14

Fed. R. Evid. 801 20

Fed. R. Evid. 803 20-21

Fed. R. Evid. 804 21

Fed. R. Evid. 901 19-21

Fed. R. Evid. 902 20-21

MCA § 27-1-703 8-9

RCWA § 70.245 25

RCWA § 70.245.010 23

RCWA § 70.245.040 .....23, 25

RCWA § 70.245.180 24

INTRODUCTION

Before the *voir dire* examination of the jury panel and in an effort to avoid prejudice, a possible mistrial and unnecessary trial interruptions, Plaintiffs make this motion *in limine*. *See United States v. Weber*, 599 F.Supp.3d 1025, 1038 (D. Mont. April 22, 2022) ("A motion *in limine* is a procedural mechanism to limit in advance testimony or evidence in a particular area.") (citing *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009)); *United States v. Meech*, 487 F.Supp.3d 946, 952 (D. Mont. 2020) ("Motions *in limine* are procedural devices to obtain an early and preliminary ruling on the admissibility of evidence." Such motions do not "resolve factual disputes or weight evidence" but rather focus on whether "the evidence at issue [is] 'inadmissible on all potential grounds.'"). Plaintiffs seek to increase efficiencies at trial by obtaining rulings on these matters prior to trial and outside the presence of the jury. *Binder v. State Farm Fire & Cas. Co.*, CV 07-29-M-DWM-JCL, 2008 WL 11348718 (D. Mont. June 16, 2008); ("[M]otions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible for any purpose."); *Meech*, 487 F.Supp.3d at 952 ("Typically, a party moves *in limine* when it believes that mere mention of the evidence at trial would be highly prejudicial and could not be remedied by instruction or disregard.").

Plaintiffs ask this Court to prohibit BNSF, and its counsel and witnesses, from

offering any of the following matters without first asking for a ruling from the Court, outside the jury's presence, on the admissibility of the matter. *Meech*, 487 F.Supp.3d at 952-53 ("District courts have broad discretion in considering and ruling on motions *in limine*.").

CASE SPECIFIC *IN LIMINE* REQUESTS

1. **Any comment or reference to philanthropy or good deeds or acts carried out by the parties or their employees (e.g., references to community service or charity work, or charitable donations made by BNSF or any of their employees, statements that BNSF is a "good corporate citizen," etc.).**

BNSF should not be allowed to argue or suggest at trial that BNSF is "good" (including statements such that BNSF is a "good neighbor," "good corporate citizen," "innocent actor," "necessary employer," or "employs a lot of people") or a benevolent company that benefits the Libby community, society, and donates to worthy causes. BNSF should also not be allowed to comment on, refer to, or otherwise make suggestions at trial regarding its parent company(ies) or ultimate owner that are not at issue in this case, including but not limited to Berkshire Hathaway or Warren Buffett. Any such evidence, argument, reference, comment, or implication that is unrelated to asbestos contamination and conditions at BNSF's downtown Libby railyard at issue—is not relevant to any fact at issue in this matter.

Addressing BNSF's improper motivation behind such evidence, it would constitute inadmissible character evidence used to prove conduct in conformity

therewith. However, evidence of prior or subsequent "good acts" is not permitted under Federal Rule of Evidence 404(b).[1] *See U.S. v. McDuffie*, CR-08-102-RHW, 2009 WL 10673271, *1 (E.D. Wash. April 24, 2009) (under Rule 404(b), evidence of prior good acts "must be excluded if it is offered as propensity evidence only." "The first sentence of the rule still applies: 'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.") (internal citation omitted); *U.S. ex rel. Kiro v. Jiaherb, Inc.*, CV 14-2484-RSWL-PLAX, 2019 WL 2869186, at *4 (C.D. Cal. July 3, 2009) (discussing evidence of "'good acts,' such as charitable contributions or community service performed by Defendant or its employees … is irrelevant to the alleged scheme of whether Defendant knowingly submitted false claims to CBP to receive lower duties."). [2]

[1] While Rule 404(b) is most commonly utilized to exclude "bad acts," it also applies to "good acts." *See United States v. McDuffie*, CR-08-102-RHW, 2009 WL 10673271, *1 (E.D. Wash. April 24, 2009) ("Some circuits have recognized a "reverse 404(b)" rule, allowing evidence of prior good acts "if it tends to negate the defendant's guilt of the crime charged against him.") (internal quotation omitted); *U.S. v. Hayes*, 219 Fed.Appx. 114, 116 (3d Cir. 2007) (unpublished) ("The rule prohibits evidence of good acts if that evidence is used to establish the defendant's good character."); *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 520 (3rd Cir. 2003).

[2] *See also Niver v. Travelers Indem. Co. of Ill.*, 433 F.Supp.2d 968, 994-95, 1000-01 (N.D. Iowa 2006) ("The court finds that unrelated 'good acts' simply are not relevant pursuant to Rule 401, and therefore, not admissible pursuant to Rule 402…."); *Diczok v. Celebrity Cruises, Inc.*, No. 16-21011-CIV, 2017 WL 3206327, at *2 (S.D. Fla. July 26, 2017) (excluding evidence of witness's philanthropic efforts); *Levinson*

2. Any reference to, or evidence of, the purported liability of non-parties.

Plaintiffs have filed a motion for summary judgment addressing BNSF's non-party affirmative defenses. Plaintiffs incorporate the law and argument presented in that summary judgment briefing. *See* Docs. 53-57 & 87-88. This motion seeks the necessary *in limine* order to assure the Court's rulings on the summary judgment motion are not undermined by BNSF's improper questions, comment, argument, or evidence.

I. The Court should implement its rulings on the empty chair defense by prohibiting argument or comment that assigns fault to a non-party, and should rule on the content of a Rule 105 "limited admissibility" instruction.

Eliminating the opportunity for improper assertion of evidence or comment assigning fault to non-parties is often difficult where the actions of the non-party(s) are intrinsic to the *res gestae* of the sequence of factual events. For example, W.R. Grace was involved in mining and milling of asbestos-contaminated vermiculite in Libby. Some evidence regarding Grace operations that led to BNSF's handling of asbestos will be necessary, but evidence of the conduct of the non-party Grace may

---

v. Westport Nat. Bank, 3:09-CV-1955 VLB, 2013 WL 2181042, at *4 (D. Conn. May 20, 2013) (excluding "evidence relating to the Bank's community involvement such as its charitable contributions and its practice of lending to local businesses . . . as such evidence is not relevant to any claim or defense at issue"); *In re Vioxx Prods. Liab. Litig.*, MDL 1657, 2005 WL 3164251, at *1 (E.D. La. Nov. 18, 2005) (excluding any evidence or testimony as to the defendant's good reputation and other good acts pursuant to Rule 401); *Miller ex rel. Miller v. Ford Motor Co.*, No. 2:01CV545FTM-29DNF, 2004 WL 4054843, at *4 (M.D. Fla. July 22, 2004) (precluding evidence of defendant's good acts).

not be considered by the jury for purposes of apportioning fault between BNSF and Grace, and it may not be considered by the jury as mitigation of BNSF's responsibilities. Conversely, however, BNSF's knowledge of the toxicity of the asbestos it was handling is necessary to evaluate Plaintiffs' punitive damages claim.

This Court's role, and the purpose of Plaintiffs' present motion, is to properly insulate and instruct the jury, which is unaware of the pretrial rulings striking the non-party defense, to prevent an improper assumption that one purpose of Grace evidence is to show that Plaintiffs' injuries were caused by Grace, and therefore (a) not the fault of BNSF, (b) serve to mitigate BNSF's responsibilities, and/or (c) warrant apportionment between BNSF and a non-party.

The Court should rely upon two essential tools to apply and enforce the principles at issue. First, the limitation on use and effect of evidence is protected by an instruction given pursuant to Fed. R. Evid. 105.

In advance of the limiting instruction(s) that will need to be specifically tailored in the face of each distinct non-party after the Court's ruling on the summary judgment motion, this Court should rule now that: (a) limiting instruction(s) must be given, (b) the instruction(s) must clearly state that the jury is not to apportion fault or liability to non-parties for their actions or failures, and is not to mitigate the independent duty and strict liability owed by BNSF, and (c) the instruction(s) must clearly state that the jury may only consider evidence related to the conduct of non-

parties for the purposes of evaluating whether BNSF's conduct caused Plaintiffs' injuries, and/or BNSF met its own duties in the circumstances.[3]

The second tool for addressing the non-party defense issue is a ruling *in limine* preventing counsel from making any comment, suggestion, or argument—in any stage of trial—that has the effect of leading the jury to believe that BNSF's duty and liability is mitigated, or that the jury may assign an apportioned responsibility to the non-party. To do otherwise would be highly prejudicial and undermine the Court's legal ruling made in preservation of a constitutional due process right.

II. Evidence and argument regarding Grace's criminal trial and criminal allegations must not be allowed.

Certain kinds of Grace evidence must not be allowed in this case for any reason, particularly any evidence of criminal proceedings involving Grace.[4]

While Grace activities may be relevant in this case pursuant to Fed. R. Evid. 401, nothing about criminal proceedings initiated against Grace decades later is relevant. Even if by some extreme Grace's criminal proceedings were deemed relevant to this case, the evidence (and even mere reference to such proceedings) should be excluded pursuant to Fed. R. Evid. 403.

---

[3] Plaintiffs anticipate submitting proposed limiting instructions in accordance with the Court's forthcoming order on all non-party issues.

[4] *See U.S. v. W.R. Grace et al.*, Cause No. CR-05-07-M-DWM (D. Mont.) (involving alleged criminal activity under the federal Clean Air Act).

First, subsequent criminal proceedings against Grace have only minimal probative value in this case. Second, given the distinct criminal and civil standards involved, the danger of unfair prejudice and confusion of the jury greatly outweighs that potential probative value. Even an allegation of criminal conduct imparts a level of blame upon a non-party that in this case would be inflammatory and unfairly prejudicial to Plaintiffs.

III. BNSF arguments about Plaintiffs' "incidental exposures" that are "not the fault of BNSF" constitute prohibited non-party defenses and fall with the realm of Plaintiffs' present motion.

BNSF has recently confirmed its intent to introduce the Plaintiffs' purported "incidental exposures," or "lifetime of exposures, though not the fault of BNSF[.]" *Defendant BNSF Railway Company's Brief in Support of Its Motion to Sever Plaintiffs' Claims*, Doc. 101, at 13-15, "Incidental Exposures." For example, BNSF's admitted intention to argue that (a) Ms. Walder suffered asbestos exposure from the Libby lumber mill where her father and brother worked, *see id.*, p.14, and (b) Mr. Wells suffered exposure from asbestos-containing auto parts, *id.*, are the exact embodiment of prohibited empty-chair defenses respectively involving the non-party lumber mill and asbestos auto-parts manufacturers that Montana law and § 27-1-703, MCA, prevent. *See also Faulconbridge v. State*, 2006 MT 198, ¶ 81, 333 Mont. 186, 142 P.3d 777 ("A defendant may not, however, introduce such non-party conduct in an attempt to diminish its own responsibility, for this would

constitute an attempt to apportion fault to a non-party, in violation of *Plumb* [*v. Fourth Jud. Dist. Court*, 279 Mont. 363, 927 P.2d 1011 (1996)].") BNSF has done nothing to comply with the requirements of § 27-1-703, MCA, as applied to the non-party lumber mill, auto parts manufacturer(s), or any of the other "incidental" sources of alleged exposure. Accordingly, argument and evidence regarding "incidental exposures" are within the scope of both Plaintiffs' summary judgment briefing, see Docs. 53-57 & 87-88, and the present motion. No such reference, argument or evidence regarding these other alleged exposures to such identifiable "incidental" asbestos should be permitted.

3. Any reference to, or evidence of, alleged knowledge of union leaders regarding the presence of asbestos at the W.R. Grace mine and/or the hazards of asbestos exposure.

Evidence, assuming any exists, of alleged knowledge of union leaders regarding the presence of asbestos at the W.R. Grace mine is not admissible to demonstrate knowledge of the asbestos hazard that *might* have been held by Plaintiffs, two community members who never set foot in the mine. "When the relevance of evidence depends on whether a fact exists," proof sufficient to support a finding that the fact does exist *must* be introduced. Fed. R. Evid. 104(b). Here, any admission of evidence or argument regarding union knowledge requires that BNSF first introduce sufficient evidence to establish the following facts: (a) that the union leadership had knowledge of the excessive asbestos exposures and high disease rates

to workers and the Libby community, (b) that this information was actually conveyed to the union membership, and (c) that this information was then transmitted to the community at large, and Plaintiffs personally.

Here, there is zero evidence that Plaintiffs personally, or any members of their family, received any information from union leadership, W.R. Grace, or the State of Montana about the risks of airborne asbestos and resulting disease. Neither Plaintiffs nor any of their family members were W.R. Grace workers, let alone union leaders. Any evidence regarding union knowledge is irrelevant to the Plaintiffs' claims in this case.

4. Documentation of the remediation and clean-up efforts are not inadmissible as subsequent remedial measures.

Under Fed. R. Evid. 407, evidence of remedial measures taken by a party subsequent to the event or injury in question may be inadmissible to prove negligence or culpability. However, the Rule allows admission of this evidence for another purpose, such as impeachment, ownership, or control. Here, the EPA mandated clean-up and remediation efforts, including soil and air monitoring in and around the downtown Libby railyard, were not voluntary subsequent remedial measures, and therefore such evidence fall outside the letter and intent of the Rule. Moreover, this evidence is admissible to the extent it is not being admitted to prove BNSF's negligence, but rather as substantially probative evidence of the condition and exposures to which Plaintiffs' were exposed during their years in Libby.

I. BNSF's coordination with EPA was a legal obligation pursuant to EPA's agency authority under CERLCA.

Rule 407 is not applicable where remedial actions are performed at the direction of the government rather than being voluntary efforts of the party. *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880, 888 (9th Cir. 1991); *Causey v. Zinke (In re Aircrash in Bali, Indonesia)*, 871 F.2d 812, 817 (9th Cir. 1989), *cert. denied*, 493 U.S. 917(1989); *see also*, *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 859-60 (4th Cir. 1980) (holding Rule 407 should not be interpreted to discourage entities from engaging in "early action on their own."). An exception to Rule 407 is recognized for evidence of remediation mandated by a superior authority because "the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence." *O'Dell v. Hercules, Inc.*, 904 F.3d 1194, 1204 (8th Cir. 1990).

Relevant here, the EPA's asbestos remediation effort in the Libby area began in 1999. Since that time, the EPA heavily regulated and oversaw the clean-up efforts according to CERCLA authority under 42 U.S.C. § 9601 et seq. *See generally U.S. v. W.R. Grace & Co.*, 429 F.3d 1224 (9th Cir. 2005). As part of that effort, the EPA categorized BNSF-owned properties as a stand-alone Operable Unit ("OU6") within the larger Libby Superfund site. In its Initial Pollution Report for OU6, the EPA determined that:

A. <u>Situation</u>

> Asbestos contaminated materials were hauled and shipped through the railyard, and spilled into the soil for decades. The soil around the tracks and under the ballast is contaminated and needs to be removed. BNSF has agreed to perform the cleanup at the Libby railyards and its tracks under an Administrative Order on Consent (AOC) to address the high levels of asbestos. …
>
> **B. Enforcement**
>
> An Administrative Order on Consent (AOC) was entered into between the U.S. EPA and the Burlington Northern and Santa Fe Railway Company (BNSF) effective August 19, 2002. This AOC provides for the performance of a removal action by BNSF and the reimbursement of certain response costs incurred by the United States at or in connection with the BNSF property comprising the Libby railyard in Libby. Montana.

Declaration of Jinnifer Mariman, Exhibit 1[5] (Initial Pollution Report for OU6) (underlining added). Further, the EPA's Administrative Order on Consent, in place well before BNSF began remediation, provides:

> d. [BNSF] is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607 (a), and is jointly and severally liable for performance of response actions and for response costs incurred and to be incurred at the Site. …
>
> e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).
>
> f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment …

[5] Cites to "Exhibit" hereafter refer to the Exhibits attached to the *Declaration of Jinnifer Jeresek Mariman in Support of Plaintiffs' Case Specific Motions in Limine* filed herewith.

Exhibit 2 (Administrative Order on Consent) (underlining added). The record is clear that railyard cleanup was deemed necessary and was enforced by the EPA. BNSF's consent to the EPA ordered cleanup does not render this action voluntary. Rather, it was a legally imposed obligation—with direct EPA oversight and protracted negotiation on remediation procedures between BNSF and EPA. While BNSF subsequently decided to perform the cleanup in-house rather than reimbursing the EPA for cleanup costs, the EPA maintained its authority, oversight, and enforcement of the remediation.

BNSF made no efforts to initiate clean-up of its railyard until well after the EPA's authority and oversight of the Libby Superfund clean-up was underway. Unlike *New Hampshire v. Elementis Chem., Inc.*, 887 A.2d 1133 (N.H. 2005), wherein the party initiated clean-up of its site as part of relocating its operations prior to agency involvement, here, BNSF was clearly acting pursuant to a legal obligation under the EPA's overarching CERCLA authority. Therefore, BNSF's clean-up efforts were a legal obligation and fall outside of the scope of Rule 407. *See Causey*, 871 F.2d at 817 ("although to be commended for its cooperation, [the defendant] was nonetheless legally obligated to cooperate with [agency's] investigation.").

Further, Plaintiffs seek to admit soil and air testing performed at OU6. Subsequent remedial measures do not include post-injury or event testing to determine "whether remedial measures are called for." *Id.* at fn.3; *see also Rocky*

Mountain Helicopters v. Bell Helicopters, 805 F.2d 907, 918-19 (10th Cir. 1986) ("It would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests."); *Fansaro v. Mooney Aircraft Corp.*, 687 F.Supp. 482, 487 (N.D. Cal. 1988); *but see Alimenta, Inc. v. Stauffer*, 598 F.Supp. 934, 940 (N.D. Ga. 1984). Thus, any exclusion under Rule 407 cannot include the testing used to determine what remedial measures were necessary.

II. EPA and other testing documentation is offered for other purposes including impeaching BNSF's contention that the railyard was not contaminated.

Even if evidence of remediation and clean-up efforts did fall under Rule 407, this rule of evidence is not an absolute bar. For example, subsequent remedial measure evidence can come in for impeachment purposes, and to controvert BNSF's repeated assertions about the extent of contamination at the Libby railyard.

In *Werner*, a case cited by BNSF it its *Motion in Limine re Various Evidentiary Issues* (Doc. 124, p.9), the court reversed a lower court's decision to admit the defendant's adoption of an updated warning label recommended by the FDA. However, that court clarified that such evidence can be used to rebut conflicting statements made by the defendant. *Werner*, 628 F.2d at 857. In *Uren v. Eggers*, 213 F.3d 645, 2000 WL 286160 at *3 (9th Cir. 2000), for example, a party's removal of foliage subsequent to a motor vehicle accident was admissible for purposes of impeaching expert testimony regarding visibility at the intersection.

Here, BNSF has repeatedly contended that the downtown railyard's contamination was negligible to non-existent. *See, e.g.*, BNSF's *Resp. to Pls' Mot. for Partial Summ. J. re: Limited Scope of the Common Carrier Def. to BNSF's Abnormally Dangerous Activity*, Doc.70, p.9 (citing *Aff. of John Kind*, ¶27-37, *Aff. of Scott Carney*, ¶33). Despite the Montana Supreme Court's clear ruling that "[i]t is beyond dispute that extensive asbestos existed, at high levels, on BNSF's properties," *BNSF Ry. Co. v. Asbestos Claims Court* ("*BNSF*"), 2020 MT 59, ¶ 23, 399 Mont. 180, 459 P.3d 857, BNSF still disputes the toxic nature of its downtown Libby Railyard. To the extent the toxicity of BNSF's railyard is relitigated in this case, Plaintiffs must be allowed to offer evidence of the extent of the contamination and attendant cleanup as evidenced in records during the remediation to controvert BNSF's contentions. While the *Werner* court rejected the attempt to allow evidence of a subsequent remedial measure when other purposes such as feasibility were not at issue in the case (628 F.2d at 854-55), here, the condition of the railyard and the resultant degree of asbestos exposure Plaintiffs suffered is a central issue.

III. Any prejudicial effect is substantially outweighed by the probative value of this evidence.

Evidence of the conditions and extent of cleanup at the Libby railyard is highly probative to the degree of Plaintiffs' asbestos exposures, irrespective of any negligence or culpable conduct of BNSF. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative

value" that may be excluded under Fed. R. Evid. 403. *U.S. v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (quoting *U.S. v. Mills*, 704 F.2d 1153, 1559 (11th Cir. 1983)). Rather than allowing the parties to portray "unreal facts tailored and sanitized for the occasion," the application of Rule 403 "must be cautious and sparing." *Id.*

While it is potentially prejudicial to BNSF for the jury to hear that substantial asbestos contamination was still present at the railyard more than a decade after vermiculite shipment ceased, submission of such evidence does not result in unfair prejudice and is substantially outweighed by the eminently probative value in this case. Exclusion of evidence of BNSF's testing and resultant EPA mandated clean-up occurring after Plaintiffs' years of exposure in Libby is not appropriate in this case.

5. Any comment or reference to the CARD clinic, its finances, and any alleged relationship with Plaintiffs' counsel.

Evidence or argument related to the CARD Clinic, its finances, and any alleged "relationship" with Plaintiffs' counsel must be precluded. There is no evidentiary basis to permit such evidence or argument because (a) Plaintiff Thomas Wells never sought medical treatment at the CARD Clinic, and (b) Plaintiff Joyce Walder never sought medical treatment at the CARD Clinic for her mesothelioma, the condition at issue here.

Irrelevant evidence is never admissible. Fed. R. Evid. 402. To be relevant, evidence must have a tendency to make a fact of consequence in the action more or

less probable. Fed. R. Evid. 401. A fact is of consequence if it is offered to prove or disprove an "issue that is necessary to a verdict." *Csuha v. Best Friends Animal Soc'y*, 524 F. Supp.3d 1196, 1198 (D. Utah 2021) (citations omitted). Here, none of Plaintiffs' claims are related to treatment received at the CARD clinic, and no CARD witnesses will be called as witnesses at trial by Plaintiffs. Any introduction of this type of evidence or argument would be unfairly prejudicial to Plaintiffs, waste time, and confuse the jury—all without probative value. *See* Fed. R. Evid. 403.

6. This Court should pre-admit selected documents to which no reasonable evidentiary objection exists.

Plaintiffs ask this Court to address the pre-admission at trial of certain documents pertinent to Plaintiffs' case against BNSF. This section of the motion is intended to facilitate resolution of time-consuming presentation of foundation, authenticity evidence and such unwarranted objections at trial, and ultimately to secure the proper foundation necessary to allow admissibility of these groups of relevant documents. This motion involves several categories of pertinent documents: (1) Agency Documents; (2) BNSF (or predecessor) Documents; (3) W.R. Grace Documents; (4) Periodical Publications; and (5) AAR Documents and Alton Documents. All of these documents have been produced to or by BNSF during the discovery in this,[6] and previous cases, in many instances with support for their

[6] BNSF and Plaintiffs have stipulated to the identity and authenticity of "Liability Documents" previously disclosed in *Barnes et al. v. BNSF et al.*, DV-15-2016-

authenticity and foundation. Nonetheless, it is expected that BNSF will again refuse to resolve authenticity, foundation, and hearsay objections over these documents.

As an initial and indeed controlling matter, this Court's Scheduling Order states that:

> The parties stipulate as to identification and authenticity for all written documents produced in pretrial disclosure and during the course of discovery, except as provided in this paragraph. If a party objects to either the identification or the authenticity of a particular document produced by another party, the objecting party must make and serve a specific objection upon all other parties within 30 days of receipt of the document. If a document is produced and the producing party objects either to identification or authenticity, the producing party shall so state, in writing, to all other parties at the time of production. All other objections are reserved for trial.

(Doc. 18, ¶ 7). BNSF has not objected to the foundation or authenticity of any of these documents and has, therefore, waived any objection to their identity or authenticity.

BNSF is further collaterally estopped from relitigating the authenticity and foundation of the same documents considered and heavily relied upon by the Asbestos Claims Court and Montana Supreme Court in opinions finding BNSF's "handling of asbestos" as an abnormally dangerous activity. For example, air and soil sampling records from the EPA, W.R. Grace and BNSF were relied upon

---

00111-AE, subject to this Court's Scheduling Order governing identity or authenticity objections. *See* Exhibit 3 (Plaintiff's Initial Disclosures), p. 3.

throughout the documentary record, briefing, and oral argument in *BNSF Ry. Co. v. Asbestos Claims Court*, 2020 MT 59, ¶ 39, 459 P.3d 857.[7]

Moreover, there are several federal rules of evidence that provide this Court with a clear path to allow admission of these relevant and probative documents. Documentary evidence requires foundation to be laid that the document is (a) relevant and (b) properly identified and authenticated. Rules 402, 901. The relevance of the documents at issue is self-evident in that they directly establish the state of knowledge, the conditions present, or relevant activities during the time frames at issue. As to identification and authentication, Rule 901 provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, there is no real dispute regarding the genuine nature of any of the documents at issue. Moreover, these groups of documents fall squarely within one or more of the defined "examples of authentication or identification conforming with the requirements of this rule:"

> (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
>
> (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create

[7] Discussed in detail at Doc. 89, pp. 8-11.

> no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Rule 901. Many of the documents are additionally self-authenticating per Rule 902.

Moreover, these documents survive any potential hearsay objection under various rules including Rule 801(d)(1), prior statement of BNSF, Rule 801(d)(2) admission by party-opponent, Rule 803(6) record of regularly conducted activity, 803(8) public records, and Rule 803(16) statements in ancient documents.

Each of the referenced documents have been previously produced on multiple occasions and all fall into one of the following categories of documents:

1. Agency Documents: all of these documents were created by, submitted to, and/or are on file with a State or Federal Agency. All are public records under Rule 901(b)(7) and many are ancient documents under Rule 901(b)(8). Many are additionally self-authenticating pursuant to Rule 902(1), (2), or (4). The Agency Documents are excepted from the hearsay rule pursuant to Rule 803(6) Records of Regularly Conducted Activity, (8) Public records, and/or (16) Statements in Ancient Documents.

2. BNSF Documents: all of these documents were obtained from BNSF in discovery or from the corporate archives of BNSF's predecessor Great Northern Railway. All are ancient documents under Rule 901(b)(8), and the documents obtained from the corporate archives of the Great Northern Railway are self-authenticating as acknowledged documents pursuant to Rule 902(8) (*see* Exhibit 4 (Affidavit of Michael J. Fox, Assistant Director of the Minnesota Historical Society)). The BNSF Documents are not hearsay as they constitute an admission by party-opponent pursuant to Rule 801(c)(2) and are excepted from the hearsay rule pursuant to Rule 803(6), (15) Statements in Documents Affecting an Interest in Property, and/or (16).

3. W.R. Grace Documents: all of these documents were obtained from the W.R. Grace document repository through discovery and formal request. All are ancient documents under Rule 901(b)(8), and the discovery requests and formal requests to the W.R. Grace repository are documented (*see, e.g.*, Exhibit 5 (10/30/2001 correspondence with W.R. Grace Counsel regarding search of the Grace Document Repository resulting in the production of the documents). The W.R. Grace Documents are excepted from the hearsay rule pursuant to Rule 803(6), (15), (16) and pursuant to Rule 804(b)(3) Statements Against Interest.

4. Periodical Publications: all of these documents were published in a newspaper or other periodical publication. All are self-authenticating pursuant to Rule 902(6) regarding newspapers or periodicals and are ancient documents under Rule 901(b)(8). The Periodical Publications are all excepted from the hearsay rule pursuant to Rule 803(16).

5. AAR and Alton Documents: all of these documents come from documented historical archives and have been consistently authenticated and admitted before numerous courts including in cases against BNSF. *See, e.g.*, *Kath v. Burlington Northern*, 441 N.W.2d 569, 575 (Minn. Ct. App. 1989). All satisfy authenticity requirements and are excluded from the hearsay rule of Montana Rule of Evidence as ancient documents per Rule 901(b)(8) and Rule 803(16).

Each of these documents is identified in the chart submitted herewith as Exhibit 6, which notes the basis for authenticity and exemption from the hearsay rule.[8] The relevance of all these documents is obvious and BNSF has not objected to their foundation or authenticity as required by this Court's Scheduling Order. In addition,

[8] If deemed necessary, further information regarding the source and circumstances of receipt for any of the referenced documents can be produced upon request.

they all fall outside any reasonable hearsay objection. Accordingly, in the interest of judicial efficiency, these documents should be deemed to have the necessary foundation and authenticity for admission at the time of trial.

7. Any argument, evidence, reference, comment, or questions regarding the manner and method of Mr. Wells's death.

Any argument, evidence, reference, comment, or questions, as to the manner and method of Mr. Wells's death should be excluded. This includes, but is not limited to, argument, evidence, reference, comment, or questions to: Seattle Death with Dignity Act, death with dignity, suicide, assisted suicide, physician assisted suicide, I-1000, mercy killing, euthanasia, secobarbital, seconal, pentobarbital, nembutal, end of life decision(s), medical aid and dying, wish to die a humane or dignified death, discussions with physicians regarding same, medical records discussing same, discussions with family members or friends regarding same, discussions regarding or steps taken to follow the mandates of any legally applicable act, filling and obtaining the prescribed medication of any legally applicable act, taking the prescribed medication of any legally applicable act, and the process or presence of family members or friends.

Tom Wells legally elected to depart this world utilizing Washington's Death with Dignity Act, RCW 70.245, *et seq.*, after his terminal malignant mesothelioma diagnosis. Persons diagnosed with mesothelioma typically have a life expectancy of six to twelve months. *Meredith v. Asbestos Corp. Ltd.*, 707 So.2d 1334 (La. App. 4

Cir. 2/18/98) (Mesothelioma is the fatal, signature disease, unquestionably caused by asbestos inhalation.); *Hamilton v. Asbestos Corp., Ltd*, 22Cal.4th 1127, 1136 (Cal. 2000) (Malignant mesothelioma is incurable and inevitably fatal, giving the victim an average survival of under a year from the time of diagnosis.); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 304, n. 12 (5th Cir. 1998) ("Malignant mesothelioma, a usually rapidly-fatal form of cancer, is caused almost exclusively by asbestos."); *see also* RCWA § 70.245.010(13) ("'Terminal disease' means an incurable and irreversible disease that has been medically confirmed and will, within reasonably medical judgment, produce death within six months.").

Mr. Wells's death certificate accurately reflects the cause of his death, malignant mesothelioma. RCWA § 70.245.040(2) ("…the patient's death certificate…shall list the underlying terminal disease as the cause of death.").

The manner or method Mr. Wells chose to depart this world and any argument, evidence, reference, comment, or questions as to same are not relevant to any issue to be decided in this case and must be excluded. "[E]vidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Birdsbill*, 243 F.Supp.2d 1128, 1131 (D. Mont. 2003) (quoting Fed. R. Evid. 401). "Irrelevant evidence is not admissible." Fed. R. Evid. 402. The manner or method Mr. Wells chose to depart this world is irrelevant

to any issue in this case, including, but not limited to, issues of liability, life-expectancy, or cause of death per the death certificate. Further, Washington's Death with Dignity Act specifically provides "[a]ctions taken in accordance with this chapter do not, for any purpose, constitute suicide, assisted suicide, mercy killing, or homicide, under the law." RCWA § 70.245.180(1).

Even if the Court were to find that such evidence had relevancy, it must be excluded as any probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and wasting time. *See* Fed. R. Evid. 403. "Rule 403 requires the district court to weigh the probative value of evidence against the effect of its non-probative aspect and to assess the danger that admission of the evidence will unfairly prejudice the [non-offering party]." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982). "When the effect on the jury of the non-probative aspect of the evidence is likely to be substantially greater than the effect of the probative aspect, the evidence should be excluded under Rule 403." *Id*. This Court has "'wide latitude' when it balances the prejudicial effect of proffered evidence against its probative value." *United States v. Spencer*, 1 F.3d 742, 744 (9th Cir. 1992).

"'Unfair prejudice' in the context of balancing evidence means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' Evidence is prejudicial if it 'appeals to the jury's

sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action. . . .' It is particularly prejudicial when … 'the proffered evidence connects a party with a highly charged public issue. . . .'" *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995). The manner and method Mr. Wells chose to depart this world *is* "a highly charged public issue," extensively debated from legislative floors, to places of worship, to kitchen tables, directly connected to Mr. Wells, a party in this case. It is particularly prejudicial and substantially outweighs any purported probative value of the evidence. Exclusion is warranted on this basis alone.

Evidence of the manner and method Mr. Wells chose to depart this world is substantially outweighed by concerns of confusing the issues, misleading the jury, and wasting time. Introduction of such evidence would necessitate a mini-trial regarding the statutorily mandated steps required, including, but not limited to, findings that the patient: has a terminal disease, was competent, made the request voluntarily, established residency, was making informed decision, understood risks associated with the medication, understood feasible alternatives, undertook counseling, notified of next of kin, and knew of their opportunity to rescind. RCWA § 70.245, *et seq.*; *see also* RCWA § 70.245.040,

The manner or method Mr. Wells chose to depart this world and any argument, evidence, reference, comment, or questions as to same should be excluded.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Case Specific *in Limine* Requests to prevent BNSF from arguing on the basis of, or submitting testimony or evidence regarding, the various evidentiary issues addressed herein.

Respectfully submitted this 14th day of April, 2023.

McGARVEY LAW

/s/ Jinnifer Jeresek Mariman____
JINNIFER JERESEK MARIMAN
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this *Brief* complies with the requirements of Local Rule 7.1(d)(2). The lines in this document are double-spaced, except for footnotes and quoted and indented material, and the document is proportionally spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 6,145 words, excluding caption, certificates of services and compliance, and table of contents and authorities.

DATED this 14th day of April, 2023.

McGARVEY LAW

/s/ Jinnifer Jeresek Mariman
JINNIFER JERESEK MARIMAN
Attorney for Plaintiffs