Attachment A

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MONTANA EIGHTH JUDICIAL DISTRICT COURT
CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, BNSF INSURANCE COMPANY, LTD., NANCY AHERN, JOHN DOES 1 THROUGH 10, Defendants.	Cause No. BDV-14-001 **ORDER DENYING PLAINTIFF'S MOTION TO COMPEL, GRANTING IN PART PLAINTIFF'S RENEWED MOTION TO COMPEL, AND DENYING IN PART DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

This matter comes before the Court on Plaintiff's Motion to Compel (March 20, 2015), Defendant BNSF Railway Co.'s Motion for Protective Order (April 6, 2015) and Plaintiff's Renewed Motion to Compel (May 19, 2015). The Court heard oral argument on each of these motions on September 29, 2015. The motions are ready to be decided. For the reasons presented below, the Court denies Plaintiff's Motion to Compel, grants in part Plaintiff's Renewed Motion to Compel, and denies in part Defendant BNSF's and Nancy Ahern's Motion for a Protective Order.

BACKGROUND

Plaintiff filed the present lawsuit on January 2, 2014, naming BNSF Railway Company (hereinafter "BNSF"), BNSF Insurance Co., Ltd., and Nancy Ahern as Defendants. Plaintiff is a former employee of BNSF. He originally sued BNSF under the Federal Employers Liability Act ("FELA") on December 6, 2010. The FELA lawsuit resulted in a verdict in favor of Plaintiff. Plaintiff's current lawsuit is for alleged bad faith in investigating, handling and negotiating the underlying FELA lawsuit.

After the present lawsuit was filed, the case was removed to Federal District Court. *Notice of Removal*, Case CV-66-GF-BMM (Sept. 10, 2014). Shortly after its removal, a Stay of Proceedings was ordered, staying all deadlines in the case. *Order Granting Pl.'s Mtn. for Stay of Proceedings*, Case CV-66-GF-BMM (Oct. 28, 2014). Ultimately, the case was remanded to this Court. The Court held a scheduling conference on February 12, 2015. *Ord. Setting Scheduling Conference* (Jan. 12, 2015). Outstanding discovery requests were discussed during the scheduling conference. Plaintiff explained:

> Discovery has been propounded but not responded to, your Honor. From Plaintiff's standpoint, we would give – let the defendant – we'll work with them as to whatever time they say that they want or need, and then that will be agreeable to us.

Transcript of Scheduling Conference, 5:6—12 (Feb. 12, 2015).

Plaintiff filed his first Motion to Compel on March 20, 2015, a little more than a month after the Court's scheduling conference. The parties then entered a Stipulation and Order allowing BNSF and Ahern until May 1, 2015, to respond to Plaintiff's First Discovery Requests. *Stipulation and Order* (Apr. 16, 2015). The record demonstrates Defendants provided discovery responses by May 1, 2015, but objected to many of the

discovery requests. BNSF and Ahern filed their Combined Motion for Protective Order and Brief in Support on May 5, 2015. *Defs. Combined Mtn. for Protective Ord. and Br. in Supp.* (May 5, 2015).

The Court has since issued a Second Amended Scheduling Order. Discovery in this matter is not set to close until May 26, 2017. *Second Am. Sched. Order*, p. 3 (June 29, 2016).

The defendants have objected to discovery on several grounds which can be grouped into two general categories: (1) privilege objections; and (2) general objections that the discovery is not relevant, too vague, broad or burdensome and therefore, need not be supplied.

STANDARD

This Court has "inherent discretionary power to control discovery and that power is based upon the District Court's authority to control trial administration." *Rocky Mountain Enter., Inc. v. Pierce Flooring*, 286 Mont. 282, 298, 951 P.2d 1326, 1336 (1997). "[T]he objective of the district court in controlling and regulating discovery is to ensure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other at a disadvantage." *Bartlett v. Allstate Ins. Co.*, 280 Mont. 63, 72, 929 P.2d 227, 232 (1996).

DISCUSSION

I. MOTION TO COMPEL

The Court concludes the Plaintiff's Motion to Compel should be denied because Defendants did not waive any discovery objections in the timing of their Responses to Plaintiff's First Discovery Requests. Initially, BNSF and Ahern's discovery obligations

were postponed by the removal of this case to Federal Court and the stay of proceedings entered in Federal Court. *See* Fed. R. Civ. P. 26(d)(1); *Pl.'s Unopposed Mtn. for Stay of Proceedings*, Case CV-66-GF-BMM (Oct. 24, 2014). Next, the transcript of the scheduling conference before this Court confirms that Plaintiff verbally provided Defendants "whatever time they say they want or need" to respond to the discovery requests. *Transcript of Scheduling Conference*, 5:6—12 (Feb. 12, 2015). And the Plaintiff offered an open-ended discovery extension on-the-record with the Court, which the Plaintiff did not withdraw before filing the March 20, 2015 Motion to Compel.

II. RENEWED MOTION TO COMPEL – PRIVILEGE OBJECTIONS

The Court finds the insurance bad faith case of *Barnard Pipeline, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 U.S. Dist. LEXIS 53778 (D. Mont. 2014) provides guidance to address the issues here. There, the plaintiff sought discovery of information similar to what Dannels seeks here. Relying on Montana law and federal discovery statutes equivalent to Montana law, the *Barnard* Court ordered discovery.

A. Attorney-Client Privilege. Communication of confidential legal advice to the client deserves high protection except under certain circumstances. *Barnard*, *6-8. Of the exceptions to the attorney-client privilege recognized in *Barnard*, the following applies here:

> To "the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply."

Barnard at *8. Therefore, the Defendants' objection to Request for Production No. 1 is overruled in part and Defendants must provide to the Plaintiff the following portions of the Law Department Guide: the complete Table of Contents and the content of the following

topics: "Bill Payment Process; BNSF Code of Conduct; Case File Summaries; Code of Conduct for BNSF Employees; FELA – Investigations – Forms; FELA, SAA, LIA, CRF, OSHA; Investigations – Statements; Medical Bill Payment – MSC; MSC – Initial Notification; MSC – Timeliness; Occupational Claims; Offers of Judgment; Statements; and Training."

B. Work-Product Privilege. Montana's work-product rule is set forth at Mont. R. Civ. P. 26(b)(3). It is a limited privilege, allowing discovery of work product if:

> The party shows it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. ... [T]he court ... must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.

Id. This exception applies in bad faith cases:

> Because an insurer's "claims file reflects a unique, contemporaneous record of the handling of the claim" that cannot be obtained elsewhere, ... and because the "strategy, mental impressions and opinion of the insurer's agents concerning the handling of the claim are directly at issue" in an insurance bad faith claim, ... the need for such materials is compelling, and both ordinary and opinion work product protection is generally overcome in bad faith litigation when asserted by the insurer's agents.

Id. at *10-11. The only work-product protection which is not lost is the opinion work product of the party's attorney:

> Opinion work product of an insurer's attorneys must be distinguished from that of the insurer's representatives responsible for denying the underlying claim. *Id,* 270 F.R.D. at 628 (citing *Dion,* 185 F.R.D. at 293). This is because unless the insurer relies on the advice of counsel defense "the insurer, not the attorneys, [make] the ultimate decision."

Id. at *11. In addition, the burden is on the defendants to show each document was "prepared or obtained because of the prospect of litigation" rather than in the ordinary

course of business. *Id.* at *7.

The Defendants may not avoid discovery the Law Department Guide based on work-product privilege, except for changes made to the Law Department Guide after the Plaintiff served his bad-faith claim. *Barnard* at *15-17.

C. Defendants' Other Objections

In addition to the privilege objection, the defendants have employed boiler-plate objections to avoid discovery. The Montana Supreme Court condemned these types of responses in *Richardson v. State*, 2006 MT 43, 331 Mont. 231, 130 P.3d 634.

1. Relevancy objections. A party is "not entitled to conceal [evidence] under the guise of a relevance objection and thereby deprive the opponent of the opportunity to evaluate the evidence and determine whether to seek its admission. Moreover, the party is not entitled to preempt the District Court's discretion regarding the admission of such evidence." "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Richardson* at ¶¶ 29-30.

2. Overly broad, unduly burdensome objections. Even if a party truly believes the information is "overly broad," its duty is to produce it and then seek exclusion of the evidence at trial. *Id.* at ¶ 38.

3. "Vague and ambiguous" objections. "When an interrogatory can reasonably be interpreted, in the context of the claims and defenses at issue, as seeking discoverable information, the recipient of the interrogatory must interpret it that way rather than imputing some meaning to the request which would render it vague, ambiguous, or objectionable in some other respect."

> If litigants were allowed to do otherwise, the discovery process would not serve its purpose.
>
> Discovery rules cannot possibly be written with the precision necessary to specify what information is discoverable in every type of case. Hence, these rules are written in general terms, imposing a broad duty of disclosure. Moreover, the Montana Rules of Civil Procedure require a good faith effort in serving discovery responses. See Rules 11 and 26(g), M.R.Civ.P.3. Simply put, recipients of discovery requests are not entitled to indulge in ... unrealistic interpretation[s].

Richardson at ¶ 52. *See also Richardson* at ¶¶ 37-38.

III. DISCOVERY REQUESTS TO BNSF

Applying *Barnard* and *Richardson*, the Court holds that BNSF's Motion for Protective Order is denied in part and Plaintiff's Renewed Motion to Compel is granted in part.

A. REQUEST FOR PRODUCTION NO. 1

This seeks information concerning BNSF's claims practices. It requests "training or educational manuals or other documents [used] by . . . claims personnel . . . to investigate and adjust claims."

1. Privilege objections. As explained in *Barnard*, a defendant's claims practices are discoverable in a bad faith lawsuit. The attorney-client privilege is construed narrowly to avoid obstructing the truth-finding process. The privilege is inapplicable to the extent attorneys are acting as claims adjuster, claims process supervisors or claims investigation monitors. *Id.* at *6-7. Applied here, BNSF admits its attorneys give "recommendations and conclusions" and "guides" on how to adjust and manage claims. *See* BNSF's brief, p. 8. As such, the attorneys are acting as claims processing supervisors or the equivalent and therefore, the attorney-client privilege does not apply to documents generated with regard

to claims practices. Therefore, as in *Barnard*, BNSF's documents revealing its claims practices are not protected by the attorney-client privilege.

Further, such documents are not protected by the work-product privilege. In a bad faith claims practices case, the plaintiff has a substantial need for materials revealing BNSF's claims practices and there is no way to obtain the substantial equivalent by other means. *Barnard* at *10-11. All of BNSF's work product, including opinion work product by its personnel, shall be produced in accordance with *Barnard*. Only opinion work product of BNSF's attorneys "as distinguished from that of the insurer's representatives" remains protected. This, however, can be overcome by exceptions to the work product and attorney-client privilege as set forth in the above discussions. Finally, claims practices training and educational documents would be documents prepared in the ordinary course of business rather than for trial.

BNSF's other privilege objections lack merit. Dannels cannot receive the substantial equivalent of the materials through depositions of the defendants' personnel. Such witnesses are adverse with a natural inclination to testify favorably for their employer. These depositions would be ineffective without documents to cross-examine the witnesses and test both their innocent lack of recollection and natural biases.

BNSF also asserts its claims practices materials should be considered confidential or proprietary. The Court disagrees. BNSF cites no authority that these types of privileges are recognized in Montana. Moreover, if BNSF is complying with its Montana duties, production of the claims practices documents cannot put them at a competitive disadvantage. If BNSF has gained a competitive advantage by failing to comply with its duties, then no court is going to recognize illegal practices as trade secrets.

Therefore, BNSF's privileges objections are overruled.

2. Other objections. BNSF also objects to Request for Production No. 1 on the general grounds that the information is overly broad, vague, unduly burdensome and not specific as to time. These objections are overruled under *Richardson*. It is the Court's function to determine what is relevant. BNSF has a broad obligation to interpret discovery requests in a manner that imputes meaning to them rather than rendering them vague, ambiguous or otherwise, objectionable. BNSF has a duty to fully respond to discovery it maintains is overly broad, allowing the Court to determine whether the information will be admissible at trial. *See Richardson* at ¶¶29-30; 37-38; 52. Finally, an objection claiming discovery is burdensome needs to be documented showing why this is so and even if it were true, it would not give BNSF a legitimate excuse to refuse to provide any information, as it has done here.

3. Order regarding Request for Production No. 1. The Court denies the protective order insofar as it attempts to conceal claims practices materials and related information. The Court grants the motion to compel according to the following limitations and procedures:

(1) BNSF shall produce the sections of the LDG referenced above. The Court has reviewed it *in camera* and concludes it is not protected.

(2) BNSF shall produce other documents containing claims practices information.

(3) If BNSF believes it has a legitimate claim of privilege pertaining to a document, it shall only redact the parts which are privileged and produce the rest.

(4) No redactions shall be made to claims practices documents which have been prepared by or shared with third-parties, as no privileges apply in such an instance.

(5) Insofar as BNSF claims a privilege, it shall create a privilege log complying with the requirement in Mont.R.Civ.P. 26(b) (6) to adequately describe the redacted portions so Dannels will know whether or not to object. This shall include the general nature and content of the redaction and the identity of authors and persons or entities who have seen the information.

(6) Should Dannels object, BNSF shall produce the entire documents in question to the Court, identifying the portion which has been redacted. Should the Court determine the documents are too voluminous to review and analyze, the Court shall appoint a special master to make the review and recommend to the Court what may be withheld. BNSF shall bear the expense of the master.

(7) Production is limited to documents used or generated over the past fifteen years.

B. REQUEST FOR PRODUCTION NO. 2

This asks for documents showing the claims practices used to adjust cumulative trauma claims. BNSF provides no information and lodges several objections similar to those made to Request for Production No. 1.

BNSF's privileges objections are overruled under *Barnard* and its remaining objections are overruled under *Richardson*.

C. INTERROGATORY NO. 2

This requests the identity of "any committees or similar groups BNSF confers with concerning claims adjustment strategy and litigation strategies, including any committee or group which include members from BNSF and any other American railroad and/or third parties." BNSF is further requested to set forth how often the groups meet; where they hold their meetings; and what the subject matters are of those meetings. Production is limited to the past 15 years.

BNSF refuses to provide any of this information, asserting the same privilege and general objections discussed previously. The objections lack merit.

First, the only thing Dannels requests is the identities of the third-parties; when and where they meet and the general subject matter of their meetings. This basic information does not constitute privileged materials. It is not privileged under the attorney-client privilege, because it requests identities of third-parties. It is not work-product for the same reason and because work-product protects documents—not information. Moreover, since BNSF claims practices and procedures are the subject matter of the litigation, the information is relevant or could lead to the discovery of admissible evidence. Therefore, BNSF shall answer the interrogatory in full.

D. REQUEST FOR PRODUCTION NO. 3

This requests materials generated because of the meetings with third parties as requested in the previous interrogatory.

BNSF, again, refuses to provide any information, asserting the same privilege and general objections. The privileges and the general objections do not apply for the same reasons discussed in Part C, above. Therefore, BNSF's objections are overruled and it is ordered to respond in full.

E. INTERROGATORY NO. 3

This requests BNSF to state whether it discusses litigation strategies with the Association of American Railroad personnel which is the trade organization of major railroads. If it does, it is requested to identify the persons involved over the past 15 years and to set forth how often the meetings take place.

Defendant refuses to provide any information, utilizing the same objections. For reasons previously discussed, the objections are overruled and BNSF is ordered to fully respond.

F. REQUEST FOR PRODUCTION NO. 4

This requests documents generated because of meetings or discussions between BNSF and the third-party, Association of American Railroads. BNSF objects to producing any documents.

BNSF's privilege and general objections are overruled for reasons discussed previously and it is ordered to fully respond.

G. INTERROGATORY NO. 4

This asks whether BNSF has any internal groups or committees who discuss or formulate claims adjustment and litigation strategies pertaining to claims made by injured workers, including claims alleging cumulative trauma. The information requested is limited to the previous 15 years.

BNSF provides no information other than to state its claims department is responsible for handling claims. BNSF's objections, along the same lines as discussed before, are overruled. To the extent a more complete answer is necessitated, BNSF shall supplement consistent with *Barnard* and *Richardson*.

H. REQUEST FOR PRODUCTION NO. 5

This requests the documents generated by BNSF groups involved in claims practices and litigation strategies over the last 15 years.

BNSF does not provide any information, but instead sets forth the litany of objections that have been previously discussed and BNSF's objections are, therefore, overruled.

BNSF shall provide all materials requested. To the extent it may have a legitimate privilege objection on parts of them, it should follow the procedures set forth in the discussion regarding Request for Production No. 1.

I. REQUEST FOR PRODUCTION NO. 6

This requests a "descriptive index of the files within your claims department which relate to the investigation, adjustment and litigation strategies employed by BNSF with regards to claims made by injured workers."

BNSF refuses to provide the index, setting forth the same type of objections it made previously.

Those objections are overruled for the reasons previously discussed by this Court.

BNSF shall provide the "descriptive index of the files within its claims department which relate to the investigation, adjustment and litigation strategies employed by BNSF with regard to claims made by injured workers." Such an index could lead to the discovery of further admissible evidence and therefore, is discoverable.

J. INTERROGATORY NO. 5

This asks if BNSF generates any reports "containing information about claims made by injured BNSF workers and the outcome of their claims over the past 15 years. It does not request any documents. It simply asks if BNSF generates these types of reports and if so, to whom the reports are distributed.

BNSF again provides no information, but lodges the privilege and general objections previously discussed. For the reasons previously discussed, those objections are overruled and BNSF will answer the interrogatory.

K. INTERROGATORY NO. 6

This asks BNSF to "explain the relationship between BNSF and BNSF Insurance Company (another defendant in the case), including but not limited to why BNSF IC was created; the purpose it serves with relation to injury claims made by BNSF workers; the identities of BNSF personnel involved in the process of creating BNSF IC and the identity of persons on BNSF IC's Board of Directors, including the identity of directors who were also employed by BNSF.

BNSF provides only a partial response, objecting to identifying the members of the Board of Directors and whether BNSF personnel are on the Board of Directors. BNSF objects on the ground the request is "overly broad and not reasonably calculated to lead to discovery of admissible evidence."

BNSF's broad obligation is to reasonably interpret the interrogatory considering the claims and defenses and provide the information requested. It is the Court's duty to determine whether the information could lead to admissibility of evidence or would be relevant. *See Richardson*. Therefore, the objection is overruled.

L. REQUEST FOR PRODUCTION NO. 8

This requests BNSF to provide "documents explaining the creation of BNSF IC and the purpose for which BNSF IC was created."

BNSF objects on the grounds of relevancy and claims the request is overly broad and unduly burdensome. It also objects that the request is vague and ambiguous. It provides no information.

BNSF's duty is to reasonably interpret this discovery request considering BNSF IC's contention that it has no connections with Montana or the adjustment of FELA claims within Montana. BNSF's affidavit in support of BNSF IC's motion to dismiss fails to provide these types of documents. The information is clearly relevant to the motion to dismiss and BNSF shall respond in full.

M. INTERROGATORY NO. 8

This requests BNSF to provide information concerning a statement in its Security and Exchange Form 10K report. This statement indicates BNSF has set aside reserves to cover cumulative trauma claims. Dannels requests the identities of persons involved in generating the statement or researching the statement and to also explain the source of information referencing "repetitive stress and other occupational trauma claims."

BNSF objects that the information is not relevant nor reasonably calculated to lead to the discovery of evidence. It makes the same general objections it has made before. It claims that at least some of the information is publicly available on the BNSF website.

BNSF's objections are overruled. One of Dannels' claims in the underlying FELA case is that he was injured through repetitive stress or cumulative trauma and that the Defendants mishandled his claim. Dannels, therefore, is entitled to discover information related to claims made for cumulative trauma as set forth in the SEC form 10K. Such information could lead to the discovery of admissible evidence. Therefore, BNSF will

respond in full. Regarding BNSF's website, if the information is available on that website, BNSF shall describe specifically how Dannels can access it.

N. REQUEST FOR PRODUCTION NO. 9

This asks for documents that back up BNSF's response to the previous interrogatory. BNSF made the same objections that it made to the previous interrogatory and for the same reasons, the objections are overruled. BNSF shall answer.

IV. DISCOVERY REQUESTS TO AHERN

Dannels served three interrogatories and five requests for production on Defendant Ahern. Only a few appear to be in dispute. Objections are overruled under *Barnard* and *Richardson.*

A. REQUEST FOR PRODUCTION NO. 1

This requests materials in Ahern's possession or control regarding Mr. Dannels' underlying FELA injury suit.

Ahern objects based on the attorney-client privilege and work product protection. She has provided redacted documents stamped BN/Dannels 00001-14633, consisting primarily of documents which are already within Dannels' possession. She has redacted virtually all documents setting forth any information exchanged between her and BNSF's attorneys or her and BNSF's claims department personnel.

Defendant Ahern's objections are overruled in part under *Barnard.* Specifically, the attorney-client privilege must be narrowly construed in bad faith suits "because it obstructs the truth-finding process." If attorneys are "acting as a claims adjuster, claims process supervisor or claims investigation monitor," the attorney-client privilege does not apply. Moreover, the attorney-client privilege does not apply to the exchange of non-

confidential information related to the investigation of the claim. The attorney-client privilege does not apply to the extent that BNSF may be claiming advice of counsel as a defense. *See Barnard* at *6-8.

The attorney-client privilege also does not apply insofar as the communication between attorney and client had the purpose of violating any of the duties in Montana's Unfair Settlement Practices Act or to information waived because it has been shared with third parties.

As stated in *Barnard,* a determination of whether the exceptions apply must be done "document by document... mindful that the privilege must be construed narrowly so as not to obstruct the truth-finding process." *Id.* at *7.

The work product privilege is also limited under *Barnard.* In a bad faith suit, like this one, plaintiff has a substantial need for the materials and the equivalent cannot be obtained by other means. As such, all work product generated by BNSF personnel, including opinion work product, must be produced. *See Barnard* at *10-11. Opinion work product generated by BNSF's attorneys, however, is protected, unless it falls into one of the exceptions set forth in *Barnard.*

Therefore, defendant Ahern will respond to this discovery request. She may employ the procedures outlined in this Court's Order regarding Request for Production No. 1 to BNSF in the event a legitimate privilege may apply. Only the privileged portion of documents, however, may be redacted and non-privileged portions must be produced.

B. REQUEST FOR PRODUCTION NO. 2

This asks defendant Ahern for copies of training materials she has received from BNSF or other sources "concerning the manner in which you are to perform your

investigations in adjustment of claims."

Ahern objects on the grounds of attorney-client privilege and work product. She makes general objections that the request is vague and ambiguous and that confidential and proprietary information is requested. She states she has access to BNSF's LDG which has been discussed above.

Defendant Ahern's objections are overruled. As set forth in *Barnard,* documents showing claims practices – even if an attorney was involved in creating them – are not privileged. Regarding her general objections that she doesn't understand the discovery request or it is overly broad, the defendant's duty is to reasonably interpret the discovery request considering the claims and defenses and fully respond thereto. She is not entitled to place a construction on the discovery requests which makes them ambiguous or overly broad. The Court will decide what is relevant at the time of trial.

C. REQUEST FOR PRODUCTION NO. 3

This requests any and all documents "describing the cumulative trauma process as it pertains to BNSF railroad workers or other railroad workers."

Defendant Ahern objects on the attorney-client privilege and work product protection. She claims that documents describing cumulative trauma are confidential and proprietary and would not lead to the discovery of admissible information.

Considering the above discussions, defendant Ahern is ordered to respond because Dannels has made claims that he suffered cumulative trauma. What Ms. Ahern knows about this could lead to admissible evidence in this bad faith suit.

D. REQUEST FOR PRODUCTION NO. 4

This requests reports Ms. Ahern made to BNSF personnel about Dannels'

underlying FELA claim.

Defendant Ahern objects on attorney-client privilege and work product protection. She refers Dannels to the documents she produced, but those documents do not show her reports.

As stated in *Barnard*, the work product and opinion work-product documents generated by BNSF employees – as opposed to attorneys – is fully discoverable in a bad faith suit. Therefore, defendant Ahern is ordered to produce her reports.

To the extent that her reports may include discussions with BNSF attorneys, the information may or may not be discoverable for reasons set forth in *Barnard*. Therefore, defendant Ahern may redact those portions and follow the procedures set forth in this Court's Order regarding Request for Production No. 1 served on BNSF.

E. REQUEST FOR PRODUCTION NO. 5

This requests reports made to defendant Ahern by other employees or managing personnel at BNSF concerning Dannels' claims. For the reasons set forth previously, Ahern's objections to this discovery request are overruled. She shall provide the reports. She can redact any attorney work product information following the procedures ordered by this Court in the discussion regarding Dannels' Request for Production No. 1 served upon BNSF.

V. DANNELS' MOTION THAT DEFENDANTS WAIVED ALL OBJECTIONS

Dannels' motion of waiver is based upon the following contentions. Dannels filed these discovery requests with his Complaint in January 2014, now over 3 years ago, and they still have not been answered. He contends the defendants ignored the discovery

requests for 11 months and that they were given a second chance to responsibly respond in May 2015, but instead, asserted boilerplate objections to further delay discovery. Defendants respond their objections are legitimate and that the plaintiff created the delay by misleading them concerning extensions on their responses.

"It is well-established that a failure to object to discovery requests within the time required constitutes a waiver of objection." *Richmark Corp. v. Timber Fall & Consultants,* 959 F.2d 1468, 1473 (9th Cir. 1992). "The reason for requiring timely objection to discovery requests is to give the propounding party an opportunity to file a motion to compel to address inadequate objections." *Medina v. County of San Diego,* Civil No. 08 CV 1252 BAS (RBB) (S. D. Cal. 2014).

The situation is aggravated if the party causes delay using boilerplate objections:

> Defendant's responses often included improper boilerplate objections... Or appeared to be the result of insufficient effort at best or games playing rather than good faith efforts to respond, at worst.

Long v. FedEx Ground Packaging System, Inc., 2011 WL2532476, 1 (D. Mont.). "Boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege." *Smith v. Guerrilla, Inc.*, 2010 WL4286246, 5 (D. Mont.).

BNSF has been reprimanded in the past for using boilerplate objections which have delayed discovery. This resulted in waiver of the objections, including privilege objections. *Burlington Northern & Santa Fe Ry. v. District Court of Montana*, 408 F.3d 1142 (9th Cir. 2005). On appeal, the Ninth Circuit made the following comments concerning BNSF's conduct:

> The spirit of the rules is violated when advocates attempt to use discovery

> tools as tactical weapons rather than to expose the facts and illuminate the issues....

Id. at 1148–1149. Boilerplate objections are insufficient to assert a privilege. *Id.*

Furthermore:

> Burlington is a sophisticated corporate litigant and a repeat player.... The claim that responding in a timely fashion would have been impossible or overly burdensome is hard to justify....

Id. at 1150.

In *Anderson v. BNSF*, 2015 MT 240, a concurring Justice noted that BNSF cases over several years display a "pattern of trying to win trials by misconduct rather than merit." Much of the misconduct involved discovery abuse. *Anderson* at ¶¶ 84-87.

Based on the above, the Court finds that a substantial factor for the delay has been the defendants' conduct. Moreover, many of the defendants' objections are not justified. At least, partial substantive responses should have been provided, rather than refusing to produce virtually anything. The Court, therefore, finds that the defendants have not responded in good faith at least contributing to the long delay.

The Court, therefore, finds that all of BNSF's objections, except for privilege objections, have been waived. This provides an alternative ground for denying those objections as the Court has done above.

Concerning the privileges objections, the Court has already limited their use in accordance with the rules set forth in *Barnard.* In the alternative, the limitations are supported by waiver imposed due to the defendants' improper objections and delay.

VI. MOTION FOR SANCTIONS

Dannels has requested that the Court consider sanctions.

At the current time, sanctions are limited to payment of all of Dannels' attorney fees and costs incurred because of the delay and these disputes.

Despite the recommendations in *Anderson*, the Court is not currently inclined to award harsher sanctions. If, however, the defendants choose to disobey these discovery orders or evade further discovery, harsh sanctions authorized by Rule 37 (b) (2) shall be imposed.

VII. ORDER

IT IS HEREBY ORDERED defendants are to comply with the directions set forth above within 30 days. Unjustified substantial non-compliance shall result in sanctions under Rule 37 (b).

IT IS FURTHER ORDERED the defendants shall pay attorney fees and costs associated with this dispute. Dannels shall submit his cost bill within 30 days. Response and reply briefs shall be filed within the time limits set forth in the Montana Rules of Civil Procedure.

Dated this 26th day of January, 2017.

Katherine M. Bidegaray
DISTRICT JUDGE

Attachment B

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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, NANCY AHERN, and JOHN DOES 1 THROUGH 10, The Defendants.	Cause No. BDV-14-001 Honorable Katherine Bidegaray **ORDER ON PLAINTIFF'S MOTION TO COMPEL**

On January 18, 2018, Plaintiff Robert Dannels filed his Motion to Compel, Motion for Sanctions and Brief in Support. On February 2, 2018, The Defendants BNSF Railway Company ("BNSF") and Nancy Ahern filed their answer brief. Plaintiff filed his reply brief on February 9, 2018. Plaintiff also filed Notice of Supplemental Authority on February 9, 2018. The Court heard oral argument on the motion on February 12, 2018. On February 14, 2018, the Court issued an Order for *In Camera* Review, pursuant to which the parties submitted documents electronically to the Court, which the Court has not reviewed. Accordingly, Plaintiff's motion is ripe for ruling.

Dannels asked this Court for its order compelling The Defendants to produce: (a) the entire claim file and all documents directly related to the handling, evaluation, and settlement of Dannels' underlying claim; (b) the monthly summaries of Charles

Shewmake ("Shewmake") and Eric Hegi ("Hegi") reporting to their superiors the results obtained in FELA cases; and (c) all documents setting forth the procedures and methodologies the railway utilizes in setting reserves in FELA cases; and for its order entering a default judgment for Dannels and against The Defendants on Dannels' bad faith liability claims.

Dannels also asked to compel the production of the non-disparagement clauses of all former employees listed as witnesses and the contractual consequences of making a disparaging statement, but this is rendered moot by BNSF's agreement to produce those clauses.

This bad faith case and Plaintiff Robert Dannels' ("Dannels") claims for general and punitive damages arise out of the claims handling of an underlying FELA claim against BNSF Railway Company ("BNSF"), Cause No. BDV-10-1119 in the Montana Eighth Judicial District Court, Cascade County.

In the underlying case, under the FELA, 45 USC § 51, *et seq.*, Dannels alleged that he suffered an acute job-related injury on May 17, 2010, while operating heavy equipment to remove snow from the Havre yard with a skid steer as a BNSF employee. Dannels. A jury entered a verdict in Dannels' favor for $1,700,000 on February 13, 2013; and the parties settled the underlying claim on June 26, 2013.

On January 2, 2014, Dannels filed this case against The Defendants. He contends The Defendants committed bad faith and acted unreasonably in adjusting his FELA claim in violation of Montana's Unfair Trade Practices Act ("UTPA"), § 33-18-201, MCA, *et seq.*, including its provisions that a person may not:

> (4) refuse to pay claims without conducting a reasonable investigation based upon all available information; or

(6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

Dannels claims liability was reasonably clear in the FELA case and a reasonable investigation based upon all available information would have shown the requirements of the FELA had been satisfied with damages due; and BNSF breached its duty under *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 287 (1997), to promptly pay and advance Dannels' lost wages. Dannels asks that a jury assess punitive damages against BNSF for its bad faith claims handling practices that constitute actual fraud and malice as defined under § 27-1-221, MCA. He claims BNSF routinely instigates the same illegal and deceitful settlement practices he suffered against other injured FELA workers to pressure them emotionally and financially into compromising their claims for less than reasonable damages, thereby increasing BNSF profits. Dannels contends this tactic unfairly allows BNSF to write off the reserves set on FELA claims from its income and earn profit on the float created by those reserves.

The goal of every trial is "a search for the truth." *Finstad v. W.R. Grace & Co.*, 2000 MT 228, ¶ 38, 301 Mont. 240, 8 P.3d 778. This search is promoted by Rules 1 and 26 of the Montana Rules of Civil Procedure. Under Rule 1, the Rules "... should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Under Rule 26(b)(1), "... Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter..."

Under Article II, Section 16 of the Montana Constitution, Dannels has the right to a speedy trial. "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. . . Right and justice shall be administered without sale, denial, or delay."

This case has been fraught with delay and discovery conflict. On January 26, 2017, this Court entered its Order Denying Plaintiff's Motion to Compel, Granting in Part Plaintiff's Renewed Motion to Compel, and Denying in Part the Defendants' Motion for Protective Order. There, this Court observed its "inherent discretionary power to control discovery and that power is based upon the District Court's authority to control trial administration." *Rocky Mountain Enter., Inc. v. Pierce Flooring,* 286 Mont. 282,298,951 P.2d 1326, 1336 (1997); and that "[T]he objective of the district court in controlling and regulating discovery is to ensure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other at a disadvantage." *Bartlett v. Allstate Ins.* Co., 280 Mont. 63, 72, 929 P.2d 227, 232 (1996). Order, p. 3.

Dannels served discovery requests with his Complaint in January 2014, and over three years later, they still had not been answered. The Defendants asserted claims of attorney-client and work product privilege in refusing to produce Dannels' entire claim file and all documents directly related to the handling, evaluation, and settlement of Dannels' underlying claim. The Court found the insurance bad faith case of *Barnard Pipeline, Inc. v. Travelers Prop.* Cas. Co. *of* Am., 2014 U.S. Dist. LEXIS 53778 (D. Mont. 2014) provided guidance to address the issue of the attorney-client and work product protection in an insurance bad faith case. In this Court's January 26, 2017, Order, it applied the following *Barnard* standard:

> To "the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply."

Id. at *10-11

As explained in *Barnard,* the attorney-client privilege is construed narrowly to avoid obstructing the truth-finding process. The privilege is inapplicable to the extent attorneys are acting as claims adjuster, claims process supervisors or claims investigation monitors. *Id.* at *6-7. Its representatives, including inside and outside attorneys give "recommendations and conclusions" and "guides" on how to adjust and manage claims. As such, the attorneys acted as claims processing supervisors or the equivalent and, the attorney-client privilege does not apply to documents generated in the claim file or directly related to the handling, evaluation, and settlement of Dannels 'claim. Further, such documents are not protected by the work-product privilege. In a bad faith claims practices case, the plaintiff has a substantial need for materials revealing BNSF's claims practices and there is no way to obtain the substantial equivalent by other means. *Barnard* at *10-11.

Accordingly, this Court ruled:

> All of BNSF's work product, including opinion work product by its personnel, shall be produced in accordance with *Barnard.* Only opinion work product of BNSF's attorneys "as distinguished from that of the insurer's representatives" remains protected. This, however, can be overcome by exceptions to the work product and attorney-client privilege as set forth in the above discussions.
>
> ...BNSF's other privilege objections lack merit. Dannels cannot receive the substantial equivalent of the materials through depositions of the Defendants' personnel. Such witnesses are adverse with a natural inclination to testify favorably for their employer. These depositions would be ineffective without documents to cross-examine the witnesses and test both their innocent lack of recollection and natural biases.

Despite the recommendations in *Anderson v. BNSF Railway,* 2015 MT 240, 380 Mont. 319, 354 P.3d 1248, the Court was not then inclined to award harsher sanctions than attorney fees. This Court cautioned the Defendants, however, that if they "choose to disobey these discovery orders or evade further discovery, harsh sanctions authorized by Rule 37 (b) (2) shall be imposed." Order, p. 22. The Court gave this warning because BNSF had been reprimanded in the past for using boilerplate objections which delayed discovery, which resulted in waiver of the objections, including privilege objections. *Burlington Northern & Santa Fe Ry. V. District Court of Montana,* 408 F.3d 1142 (9th Cir. 2005). On appeal, the Ninth Circuit commented: "The spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues...." *Id.,* at 1148-1149. "Burlington is a sophisticated corporate litigant and a repeat player.... The claim that responding in a timely fashion would have been impossible or overly burdensome is hard to justify...." *Id.,* at 1150. In his concurrence opinion in *Anderson*, Justice Wheat noted that BNSF cases over several years display a "pattern of trying to win trials by misconduct rather than merit." Much of the misconduct involved discovery abuse. *Anderson*, ¶¶ 84-87.

Since the January 26, 2017, Order, Dannels asserts that the Defendants have continued to violate the spirit of the rules by attempting to use discovery tools as tactical weapons and a sword and shield rather than to expose the facts and illuminate the issues. In support of this assertion, Dannels notes that the Defendants, in their Lay and Expert Witness Disclosure of November 20, 2017, identified Shewmake, Hegi, and Rick Lifto ("Lifto") as lay and expert witnesses. Shewmake was General Counsel and Assistant Vice President of Legal for BNSF during the claims handling of Dannels' FELA claim. He

was involved with and had the duty of overseeing Dannels' claim. In 2016, Shewmake, who is a lawyer, left BNSF and went into private practice. Hegi, who is not a lawyer, replaced Shewmake as Assistant Vice President of Claims. Hegi was designated by BNSF as its Rule 30(b)(6) witness to speak on behalf of the corporation on topics related to Dannels' bad faith claims. Lifto was Assistant Vice President of Claims for BNSF during the claims handling of Dannels' FELA claim, up until September 2012, when he retired. The Defendants disclose Shewmake, Hegi and Lifto as having opinions that the claims handling practices used by the claims personnel of BNSF in investigating, evaluation, and attempting to settle Dannels' claim were reasonable and appropriate; that the claim of Dannels was evaluated reasonably; that the railroad made reasonable offers, given the facts of the claim; and that liability was never reasonably clear for the single traumatic event alleged by Dannels. BNSF expects these witnesses to testify that at no time did it appear there was any malicious motive on the part of the claim representatives, and that it appears they were at all times motivated to do their jobs using effective, good faith claims practices. Dannels deposed Lifto on November 29, 2017; Shewmake on November 30, 2017; and Hegi on December 19, 2017.

On September 19, 2017, Dannels served BNSF with a Notice of Corporate Depositions, Request for Production, and Subpoena. Dannels requested under Rule 30(b)(6), M.R.Civ.P., that BNSF designate one or more officers, directors, managing agents, or other designated persons to testify about information known or reasonably available to BNSF on topics including:

> **TOPIC NO. 10**: The methods and criteria BNSF uses for reserving losses related to FELA claims.

TOPIC NO. 17: BNSF's evaluation of its claim handling of Plaintiff's claims.

The request for production and subpoena noticed that under Rules 34 and 45, M.R.Civ.P., that the deponent was required to produce for inspection and copying at the commencement of the depositions all documents that in any way relate to the above topics, including the following Requests for Production to which The Defendants responded on November 17, 2017.

* * *

REQUEST FOR PRODUCTION NO. 12: All information technology and technical manuals related to:

* * *

(d) FELA accounting; ...

RESPONSE: ... As with respect to the prior requests, BNSF objects to this request to the extent the documents sought are protected by the attorney-client privilege and the work-product doctrine and are proprietary trade secrets and confidential in nature. BNSF objects to producing work product outside the scope of the rulings of the Court on the LDG. ... The information requested concerning "FELA accounting" is not relevant or reasonably calculated to lead to admissible evidence.

* * *

REQUEST FOR PRODUCTION NO. 16: Any and all documents generated since 2007 relating to any study or review of BNSF's FELA claims handling practices or procedures and/or amounts paid out on FELA claims conducted by Gibson Dunn & Crutcher, McKenzie & Co., Ernst & Young, NERA or other consulting company, including all reports, recommendations, correspondence, communications, and documents provided to, reviewed or relied upon by BNSF, and the consultants (including their employees, agents or contractors).

RESPONSE: Objection to the extent this request seeks work product or attorney-client privileged communications. BNSF has retained no outside company to study or review claims handling practices or procedures as they relate to the investigation and evaluation of FELA claims. BNSF objects to request as overbroad and irrelevant and immaterial to the extent it calls for

documents to or from consultants like Ernst Young, NERA and others who may have assisted in accounting for pay outs related to FELA claims. Moreover, BNSF objects to the extent this request seek documents which are proprietary, confidential and contain trade secrets.

REQUEST FOR PRODUCTION NO. 17: Any documents reflecting the scope of BNSF's retention of a consulting companies concerning claims handling practices or procedures, reserves and/or amounts paid out on FELA claims.

RESPONSE: BNSF objects to this request as repetitive to and included within Request for Production 16. Objection to the extent this request seeks work product or attorney-client privileged communications. BNSF has retained no outside company to study or review claims handling practices or procedures as they relate to the investigation and evaluation of FELA claims. BNSF objects to request as overbroad and irrelevant and immaterial to the extent it calls for documents to or from consultants like Ernst & Young, NERA and others who may have assisted in accounting for pay outs related to FELA claims. Moreover, BNSF objects to the extent this request seek documents which are proprietary, confidential and contain trade secrets.

* * *

REQUEST FOR PRODUCTION NO. 24: Any and all documents showing the methods and criteria The Defendant used for reserving or accruing losses related to its FELA claims from January 1, 2007 the present.

RESPONSE: Objection, how reserves are set is not relevant or reasonably calculated to lead to admissible evidence. This request is also objectionable as overly broad and unduly burdensome because it is an omnibus request. Any document "showing the methods and criteria" could include any reserve document from every claims file. This request is objectionable to the extent it seeks attorney-client communications. It also objectionable to the extent it seeks a party's litigation work product and proprietary trade secrets and trade secrets and exceeds the scope of the Court's ruling on LDG topics. Without waiving these objections, the following non-privileged documents will be produced upon entry of a Protective Order:

- BNSF PowerPoint "Setting Reserves", presented by James E. Roberts (February 14, 2012)
- Case Evaluation and Reserve Form
- Request for PELA Authority

REQUEST FOR PRODUCTION NO. 25: Any and all documents relating in any way to the claim(s) of Robert Dannels, or benefits paid to Robert Dannels which would include but not be limited to:

(a) Electronic data not included in the hard copy files, including emails, notes or other electronically stored information or computerized data including in electronically eCF/LDFS network drives, share points, etc.;

(b) Copies of the file jackets containing documents that relate to Plaintiff, as well as any telephone slips, post-it notes, hand-written notes, or other removable materials that have ever been in or associated with any of the files relating to Plaintiff;

(c) Any and all claims files, claim committee notes, is memos, or documents of any kind relating to the 2 claim(s) of the Plaintiff;

(d) Any and all case write-ups or summaries when Plaintiff's case or file was transferred to outside counsel;

(e) Payment records; and

(f) SOX audit records of all BNSF employees involved in handling or supervising the claims processing and handling of Plaintiff's FELA claims.

RESPONSE: BNSF objects that this request is identical to or encompassed within Requests for Production Nos. 1-3 and 5 of Plaintiff's First Discovery Requests, which have already been responded to and the scope of which have already been adjudicated by the Court. As with respect to the prior requests, BNSF objects to this request to the extent the documents sought are protected by the attorney-client privilege and the work-product doctrine and are proprietary trade secrets and confidential in nature. BNSF objects to producing work product outside the scope of the rulings of the Court on the LDG. Notwithstanding these objections, BNSF has produced responsive documents as ordered by the Court in its January 2017 Order, and continues to supplement as additional responsive materials are discovered. To the extent work product or proprietary trade secrets or confidential information has been produced or will be produced, it should be subject to the terms of the proposed stipulated protective order attached hereto. Subject to and without waiving the foregoing objections, you are referred to materials produced in response to Requests for Production Nos. 1-3, 5 of Plaintiffs First Discovery Requests. In addition, BNSF supplements its prior responses with the following documents:

- October 18, 2002 Record of Authority

- LDFS Incident Notes History
- Claims Audit checklists

...

As required by Rule 45(a)(1)(A)(iv), M.R.Civ.P., Rule 45(d) and (e) were set out in the September 19, 2017, subpoena. These rules set out how a person may be protected subject to subpoena and the command to produce materials. They provide in pertinent part:

> Rule 45(d)(2)(B):
>
> Objections. A person commanded to produce designated materials or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the designated materials or to inspecting the premises – or to producing electronically-stored information in the form or forms requested. **The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.** If an objection is made, the following rules apply:
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> ...
>
> Rule 45(d)(3):
>
> Quashing or Modifying a Subpoena.
>
> (A) When Required. **On timely motion**, the issuing court must quash or modify a subpoena that:
>
> * * *
>
> (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies ...
>
> (B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:
>
> (i) disclosing a trade secret or other confidential research, development, or commercial information...
>
> * * *
>
> Rule 45(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically-Stored Information. These procedures apply to producing documents or electronically-stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

On November 20, 2017, the Defendants sent to the Clerk of the District Court for the Eighth Judicial District a document identified as a "Stipulated Protective Order to be attached to the back of The Defendant BNSF's Responses... that was filed Friday, November 17, 2017." *See* Exhibit A. In an email later sent to this Court that same day, BNSF clarified the Protective Order was proposed and not agreed to by Dannels. *See* Exhibit B. The Defendants made no motion for a protective order or to quash production on the topics or documents requested and subpoenaed before the Rule 30(b)(6) deposition. Since then, BNSF has not moved for a protective order or objected to the sufficiency of the notice, request or subpoena. BNSF simply stands on the objections made in its November 17, 2017, Response.

The Defendants note they offered to produce information if Dannels agreed to a protective order. The Defendants argue that since Dannels has not agreed to a stipulated protective order, "BNSF cannot be blamed for Plaintiff's failure to follow the proper procedure for Rule 34 Requests for Production." The Defendants' Response Brief, p. 17. The Defendants' argument makes no sense.

Dannels served specific requests for reserve information under Rule 34. The Defendants refused to produce information and insisted they would not do so unless Dannels agreed to a stipulated protective order regarding purported privileges that apply

to documents Dannels has never seen. The Defendants then, without moving for a protective order, claim Dannels failed to follow the proper discovery procedures.

The Montana Supreme Court has rejected a similar tactic by BNSF. In *Anderson v. Montana First Judicial District Court*, Montana Supreme Court Cause No. 09-0176 (May 27, 2009), the Montana Supreme Court, on a writ of supervisory control, rejected BNSF's attempt to unilaterally determine privilege. The Court noted that a district court may issue a protective order upon a showing of good cause. However, the party seeking the protective order must show that the requested discovery is privileged and satisfy the good cause predicate Placing the confidentiality determination in the hands of BNSF, instead of requiring BNSF to show good cause for a protective order under Rule 26, is improper.

As the Montana Supreme Court held in *Anderson*, BNSF cannot unilaterally make the privilege determination. If it wished to protect the documents and questioning of its Rule 30(b)(6) designated witness about those documents, it had to follow the mandate of Rule 26 to obtain protection. It did not do so and cannot now impute its obligations to Dannels. The Montana Supreme Court rejected BNSF's unilateral approach in 2009 and this Court will not allow BNSF an end-run around its discovery obligations now.

Given the breadth of the discovery, Dannels argued at the hearing that the Defendants asked, and Dannels agreed, to an extension for the production of documents requested and subpoenaed, with the Rule 30(b)(6) deposition of Hegi to follow. Attorneys for both sides revealed there was some discussion of meeting to confer on anticipated discovery disputes in Texas when they would be there to take the BNSF's Rule 30(b)(6) deposition of Hegi.

Dannels asserts the earlier depositions of Lifto and Shewmake highlighted the need for complete production of the claims file and all documents directly relating to the handling, evaluation and settlement of Dannels' underlying claim; and the monthly summaries reporting results obtained in FELA cases. In his deposition, Shewmake acknowledged that outside counsel had complete access to the claim file in the underlying FELA matter. The claims department would collaborate with outside counsel to exchange information about the railroad. Outside counsel reported the factual development to the claims and law departments as the information materialized. Shewmake, in his role as supervisor, relied on this information and the information generated by in-house attorneys who collaborated with the claims department and outside counsel. Outside counsel would generate reports on the status of FELA claims—e.g., initial case summaries, pre-trial reports, factual analyses, strengths/weaknesses, damages assessments, etc. These same general principles and transactions applied to Dannels' underlying FELA claim. Here, BNSF and its agents would have generated several reports discussed among BNSF employees, regional attorneys, and in-house attorneys. Shewmake, for example, participated in a conference call on Dannels' case with the claims department, the law department, and outside counsel several weeks before trial. When asked about the content of the calls or the claims file in Dannels' case, counsel for the railroad objected, asserted attorney-client privilege, and instructed Shewmake not to answer. Shewmake admitted that he expected a report on the strengths and weaknesses of FELA cases by outside counsel and their assessment of damages. This factual analysis was important to him to figure out the best course of action. Critically, in forming his opinions about the case,

Shewmake considered all the foregoing information, including reports from outside counsel on the strengths and weaknesses, which The Defendants now shield from Dannels under a claim of privilege. Given Shewmake's consideration and reliance on information coming from outside counsel in forming his opinions on good faith handling practices in this case, Dannels has a substantial need for the foregoing information. Shewmake acknowledged there is no place for Dannels to obtain the equivalent by other means other than from the claims department files.

At his deposition, Hegi testified that he reviewed the "entire Dannels' file" to familiarize with this case and prepare for his Rule 30(b)(6) deposition. This information contained reports from outside counsel about the strengths and weaknesses of Dannels' underlying case. However, BNSF's counsel instructed Hegi not to discuss the contents of the reports. Hegi considered reports from outside counsel in formulating his opinions. Based on his review of the entire file, Hegi testified the claim was handled fairly and he would do nothing differently. Hegi refused to answer all questions directly related to the handling, evaluation, and settlement of Dannels' underlying claim and the Rule 30(b)(6) topics he was designated to address whenever the railway claimed privilege. Hegi refused to produce the documents subpoenaed and requested under Request Nos. 12, 17, 24 and 25.

At the end of the Rule 30(b)(6) deposition, Dannels placed on the record, with The Defendants' counsel's agreement, that no motion for protective order was made concerning the deposition or what was noticed in the deposition and that BNSF's designated witness, on advice of counsel, would refuse to answer any questions on matters objected to in The Defendants' November 17, 2017, Responses to Plaintiff's Rule

30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena. BNSF did bring part of the claims file to the deposition with a privilege log attached as Exhibit A to this Order. The privilege log identifies no documents generated after Dannels filed his bad faith claim on January 2, 2014. It describes generic forms of privilege relating to the claims file and all documents directly relating to the handling, evaluation, and settlement of Dannels' underlying claim.

The foregoing suggests that BNSF used the purportedly privileged information as a sword in defending against Dannels' claims, while simultaneously hiding behind the privilege as a shield when Dannels attempts to discover and cross-examine witnesses about the information. Courts rejects this sword and shield tactic. A party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party. *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2nd Cir. 2000). When a party affirmatively relies on privileged information, the information is automatically placed into issue and any privilege that would otherwise attach is impliedly waived:

> As succinctly explained in one of the leading treatises on the attorney-client privilege and the work-product doctrine:
>
> > We are told that we cannot have our cake and eat it too. What this means in the privilege context is that a litigant cannot at one and the same time place privileged matters into issue and also assert that what has been placed into issue nonetheless remains privileged and not subject to full discovery and exploration.
>
> Edna Selan Epstein, The Attorney–Client Privilege and the Work–Product Doctrine, 343, 4th ed. 2001).

QBE Ins. Corp. v. Jorda Enterprises, Inc., 286 F.R.D. 661, 664-65 (S.D. Fla. 2012). "The waiver-by-affirmative-reliance doctrine arises in both the attorney-client privilege and work-product doctrine scenarios, and both federal and state courts recognize the waiver-by-voluntary-disclosure rule." *QBE Ins. Corp.*, 286 F.R.D. at 664-65, citing *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed.Cir.2006); *Chavis v. North Carolina*, 637 F.2d 213, 223–24 (4th Cir.1980); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1206 (8thh Cir.1982); *Chiron Corp. v. Genentech, Inc.*, 179 F.Supp.2d 1182, 1186 (E.D.Cal.2001); *Abbott Labs. V. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 411 (N.D.Ill.2001); *Hoyas v. State*, 456 So.2d 1225 (Fla. 3d DCA 1984); see also *Patrick v. City of Chicago*, 154 F.Supp.3d 705, 710-11 (N.D. Ill. 2015).

The waiver-by-affirmative-use doctrine flows from a notion of fundamental fairness—"to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable." *Century Aluminum Co. v. AGCS Marine Ins. Co.*, 285 F.R.D. 468, 471 (N.D.Cal.2012). If a party could use the privilege as both a sword and a shield, then the party "could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way, kidnap the truth-seeking process." *QBE Ins. Corp.*, 286 F.R.D. at 664-65, citing *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24 (1st Cir.2003); *Patrick*, 154 F.Supp.3d at 710-11 (a party may not use privilege as a tool for manipulation of the truth-seeking process).

Montana courts have followed the foregoing waiver principles. In *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288 (D. Mont. 1998), where Judge Hatfield rejected Nationwide's privilege arguments.

Regarding the work-product doctrine, Judge Hatfield noted that information is not immune from discovery simply because it was prepared in anticipation of litigation. *Dion*, 185 F.R.D. at 292. A party may obtain work product material upon demonstrating a substantial need for the material and an inability to obtain the equivalent by other means. *Dion*, 185 F.R.D. at 292. Judge Hatfield recognizes that the law provides heightened protection for opinion work product, however. Opinion work product is discoverable when mental impressions are directly at issue and the need for the material is compelling. *Dion*, 185 F.R.D. at 292. Judge Hatfield found the work product doctrine insufficient to protect the claim file because:

> In order to prevail upon her claim under the Montana Unfair Trade Practices Act, Dion must establish Nationwide lacked reasonable justification for refusing payment of her claim for underinsured motorist benefits. See, Mont.Code Ann. § 33–18–201 (1995). Accordingly, the nature of Dion's claim necessarily places the strategy, mental impressions and opinions of Nationwide's agents regarding the underlying claim directly in issue. Because the claims file contains a detailed history of how Nationwide processed and considered Dion's claim, the documents therein are certainly relevant to the issues raised by Dion's complaint.
>
> The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived . . . . Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.
>
> The processing of a claim by an insurer is almost entirely an internal operation and its claims file reflects a unique, contemporaneous record of the handling of the claim. The need for such information "is not only substantial, but overwhelming." Accordingly, Dion's claim herein, i.e., violation of the Montana Unfair Trade Practices Act, necessarily creates a

compelling need to discover the full context in which the insurer handled the underlying claim.

* * *

[T]he ordinary and opinion work product of Nationwide's agents, who made the decision regarding Dion's claim for benefits, are clearly discoverable. In addition, the court concludes Nationwide, in naming Paul Meismer as an expert witness, has necessarily waived the right to assert the work product privilege with respect to the remainder of the claims file. Meismer was Nationwide's attorney of record while Dion's claim for underinsured motorist benefits was litigated. Because Nationwide has named Meismer as an expert witness, Dion has a particularized and compelling need to discover Meismer's opinion work product. Without said discovery, Dion will be unable to ascertain the basis and facts upon which Meismer's opinions are based and, as a result, her ability for effective cross-examination on crucial issues will undoubtedly be impaired.

Dion, 185 F.R.D. at 292-93.

Judge Hatfield similarly rejected Nationwide's attorney-client privilege assertion. He concluded:

An implied waiver of the attorney/client privilege occurs when (1) the party asserts the privilege as a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense. The doctrine of waiver by implication reflects the notion that the attorney-client privilege "was intended as a shield, not a sword." In other words, "[a] the Defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." When confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of the privilege.

. . . . To permit Nationwide to offer Meismer's conclusions and expert opinions regarding the underlying claim, where such conclusions and opinions serve Nationwide's purposes, without permitting Dion access to all the communications between Meismer and Nationwide, would unduly prejudice Dion in the prosecution of the present action.

Dion, 185 F.R.D. at 295 (citations omitted). The Montana Supreme Court adopted this *Dion* analysis in *In re Marriage of Perry*, 2013 MT 6, ¶¶ 37-39, 368 Mont. 211, 293 P.3d 170.

BNSF has identified expert witnesses, including Lifto, Shewmake, and Hegi, who intend to testify that BNSF did not act in bad faith. These opinions are premised on unfettered access to all information in BNSF's possession, including the considerable information (claims file, reports, etc.) BNSF unjustifiably withholds from production. Dannels has no way to obtain this information other than through BNSF. Without all information contained in the claims file and documents directly related to the handling, evaluation and settlement of Dannels' underlying claim, Dannels cannot meaningfully cross-examine and/or challenge these witnesses, their opinions, and The Defendants' defenses. An implied waiver of opinion work product at a minimum has occurred.

There is no dispute that the head of the BNSF Claims Department produces to their superiors monthly summaries reporting the results obtained in FELA cases. This is done in the ordinary course of business. Shewmake admitted:

> Q. Now, one of the things that you told us about is how you reported, in the ordinary course of your practice, the results of FELA cases to your superior. Do you recall telling us about that?
>
> A. Yes, sir.
>
> Q. I take it that this case would've been no exception and you would've reported in summary forms its results to your superior?
>
> A. Yes, sir.

Shewmake Deposition, 157:1-9.

Hegi admitted to continuing the practice of reporting results obtained in FELA cases after taking over Shewmake's job duties.

Q. The railroad, Mr. Shewmake tells us that each month he would report to his superiors above him a summary of the outcome of FELA claims including jury verdicts.

A. The summary of jury verdicts, yeah. I would say yes, he would do that.

Q. Okay. Do you do that?

A. Yeah. I provide Roger a report that says here is what happened inside this verdict or this case.

Hegi Deposition, 70:10-18.

Within days of Shewmake's deposition, and before taking Hegi's deposition, Dannels served on The Defendants his Request for Production No. 24:

> **REQUEST FOR PRODUCTION NO. 24**: Please produce all FELA claims summaries produced by Charles Schewmake to his superiors reporting the results obtained in FELA cases as described in the deposition of Mr. Schewmake taken on November 30, 2017.

This discovery was propounded to test the testimony of Shewmake and Lifto on BNSF's good faith handling of claims and its winning record in FELA cases. According to Lifto, during the time of Dannels claim, "70 percent of our MSC [musculoskeletal claims – cumulative trauma claims] cases were defense verdicts zeros ..." Lifto Deposition, 90:3-4. According to Shewmake, BNSF "won, you know, close to 50 percent of the acute injury cases that we tried where there was some question about the employee's responsibility for the accident, *vis-a-vis* the railroad. So we didn't expected to lose." Shewmake Deposition, 141:1-5.

The Hegi deposition highlighted the need for the monthly summaries reporting results obtained in FELA cases. According to Hegi, over the last "20 years" BNSF has "won at least 70 percent of in cumulative trauma cases." Hegi Deposition, 101:20-102:3. Hegi has handled "thousands" of FELA claims. According to Hegi, BNSF will probably

lose a FELA case in terms of liability and causation only about five percent of the time. "If you're talking thousands, then I would say less than five percent." Hegi Deposition, 39:11-12, and at pages 39 through 48.

The Defendants concede they did not disclose the summaries reporting results obtained in FELA cases after this Court ordered them to meaningfully respond to the discovery. Because of The Defendants' silence, Dannels first learned of the monthly summaries during Shewmake's deposition on November 30, 2017. Dannels served written discovery specifically seeking these reports and asked The Defendants to confer about this discovery. The Defendants refused to produce them. BNSF tries to justify its nondisclosure by claiming the reports "are clearly about pending cases, including FELA claims, and were provided within the context of giving legal advice in his role as general counsel and assistant vice president of legal." The Defendants' Response Brief, p. 10. The Defendants' response highlights the inequities here. Shewmake's and Hegi's testimony confirms otherwise. Hegi, who continues to provide monthly report results obtained in FELA cases to his superiors after replacing Shewmake, is not even an attorney. As for the legal advice contention, the Montana Supreme Court rejected this argument in *Kuiper v. District Court of Eighth Judicial Dist. Of State of Mont.*, 193 Mont. 452, 460-61, 632 P.2d 694, 699 (1981). Kuiper sought compilations of case history results prepared by in-house counsel for his superiors at Goodyear. Shewmake and Hegi similarly acknowledge compiling and providing to their superiors monthly results obtained in FELA cases. In *Kuiper*, the Montana Supreme Court rejected Goodyear's privilege objections and ordered the monthly results summaries be produced. *Kuiper*, 193 Mont. At 461-62, 632 P.2d at 699-701. Under the reasoning of *Kuiper*, the

summaries are not attorney client communications and because, as in *Kuiper*, they deal with results obtained in litigation, they are not protected by work product privilege. . The summaries are relevant to impeach The Defendants' witnesses on how hard it is to win an FELA claim, the reasonableness of The Defendants' claims handling practices (including timing of offers and settlement of litigated FELA cases), and lack of malicious motive by the BNSF Claims Department which claims to always do its job in following effective, good faith claims practices. The summaries must be produced.

At the hearing, Dannels' attorneys raised the issue that BNSF each year must file a 10-K form with the United States Securities and Exchange Commission detailing its financial position under the Sarbanes-Oxley Act ("SOX") of 2002. Under its accounting practices, BNSF writes off from its income and records an undiscounted liability for personal injury and FELA claims where the expected loss is both probable and reasonably estimable.

In its 2013 10-K report, BNSF noted that it had obtained insurance coverage for certain claims with BNSF Insurance Company, Ltd., a Bermuda company and wholly-owned subsidiary of BNSF. In 2013, BNSF had a beginning balance of $462,000,000 set aside in reserves and an ending balance of $387,000,000. This money is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid. Based on the 10-K disclosure it is Dannels' understanding that Ernst & Young handles the accounting relative to BNSF's reserves and profits generated from the reserves. In its 2013 10-K form, BNSF reported that on February 12, 2010, Berkshire Hathaway Inc., a Delaware corporation ("Berkshire"), acquired 100% of the outstanding shares of

Burlington Northern Santa Fe Corporation common stock that it did not already own. The acquisition was completed through the merger of a Berkshire wholly-owned merger subsidiary and Burlington Northern Santa Fe Corporation with the surviving entity renamed Burlington Northern Santa Fe, LLC (BNSF). Dannels claims and the Court takes judicial notice that Berkshire Hathaway is known for making money on investments where insurance premiums have been prepaid, or reserves established. See, for example, http://www.businessinsider.com/warren-buffett-insurance-float-2017-4. Defendants have claimed trade secret protection on production of testimony documents to and relating to the setting and investing of reserves.

Dannels asked the Defendants to identify someone to testify on BNSF's behalf regarding the complete history of loss reserves for Dannels' FELA claims. The Defendants identified Hegi. But, as for the specifics of setting reserves, Hegi testified his understanding of how reserves are set is limited to on-the-job-training. Hegi is not familiar with financial accounting standards Rule 5 which governs reserves. And, Hegi is uncertain whether BNSF had a claims accreditation program on setting reserves. When questioned about Dannels' Rule 30(b)(6) notice, Hegi testified that, to the extent the Defendants have refused to produce requested information based on privilege (like it did in response to the reserves discovery request), he would disclose none of that information. The Defendants stonewalled all discovery into this matter

Under Rule 30(b)(6) of the Federal and Montana Rules of Civil Procedure, the persons designated "must testify about information known or reasonable available to the organization." A Defendant has an obligation to educate its designee so he can testify on behalf of the corporation and provide binding answers to the matters in the notice. A

Defendant may not after the fact attempt to excuse its inadequate preparation of the designee by pointing to problems it now sees in the Notice. To countenance such behavior would be to invite or to encourage discovery games and gamesmanship. *Pioneer Drive, LLC v. Nissan Diesel Am., Inc.*, 262 F.R.D. 552, 559 (D. Mont. 2009). In *Pioneer*, the Defendant's designee was not knowledgeable about the noticed matters nor was he prepared to give complete and binding answers on behalf of the organization and the Defendant failed its obligation to produce a witness under 30(b)(6). In *Pioneer* the court held that sanctions should be imposed to deter the Defendant's conduct, and remedy any prejudice it caused Plaintiff. The Defendant was ordered to pay plaintiff's reasonable costs and attorney fees in bringing the motion. The court further ordered that the Defendant must designate a person or persons to be deposed by Plaintiff on the matters listed in its prior Rule 30(b)(6) Notice, at a location of Plaintiff's choosing and the Defendant must pay Plaintiff's travel costs and expenses, as well as one attorney's fees necessitated by the retaking of the Rule 30(b)(6) deposition.

In his proposed order, Dannels asserted that, on December 15, 2017, Defendants supplemented their lay and expert witness disclosures and for the first time disclosed that if there is a punitive damage phase to the trial, they would call Kristi Radford, BNSF General Director, who will testify about issues relevant to punitive damages, including financial condition and assets of the BNSF. Dannels has no objection to this disclosure providing she is presented for deposition before trial with the documents she intends to rely on for her testimony. Although requested, no deposition date has been set yet and the documents she intends to rely on have not been identified or produced.

Having made the above Findings of Fact and Conclusions of Law, **IT IS HEREBY FOUND AND ORDERED**:

1. Except for those Bates pages from Dannels' claims file1, the Defendants shall immediately produce to Dannels the claim file and all documents directly related to the handling, evaluation, and settlement of Dannels' underlying claim, except for documents that legitimately meet Montana's definition of attorney-client privilege. The Court, having found all work product privileges being waived, continues to take under consideration whether attorney-client communications have also been waived. Accordingly, the Court will allow the Defendants to withhold those documents from the claim file listed on the attached Exhibit C and continue its *in camera* inspection of all documents the Defendants claim are protected by the attorney-client communication privilege. The Defendants shall, on or before February 26, 2018, highlight in yellow those parts of the documents the Court is allowing the Defendants to withhold at this time that the Defendants continue to claim are privileged.

2. Concerning the Defendants' privilege logs related to privilege, all documents privileged under the logs generally relate to the handling, evaluation, and settlement of Dannels' underlying claim, and privilege has been waived. Where the Defendants claim these documents do not relate to the handling, evaluation, and settlement of Dannels' underlying claim, they shall, on or before February 26, 2018, specify which of those documents they claim are not within the category of documents ordered produced. Those parts of the documents where claimed privilege still exists should be highlighted in yellow.

---

1 However, if the bates pages listed in Exhibit A were ones that Shewmake, Hegi, or Lifto considered in their claims handling, they must be produced.

3. Upon further *in camera* inspection, the Court will consider whether The Defendants have made valid continuing claims of privilege given this Court's finding that all work product claims have been waived.

4. The Defendants shall immediately produce to Dannels the monthly summaries of Charles Shewmake, Eric Hegi, and their predecessors reporting to their superiors the results obtained in FELA cases over the last twenty (20) years.

5. Documents responsive to Request for Production Nos. 12(d), 16, 17, 24 and 25 shall be produced within five (5) days of this Order, under the protective order, attached as Exhibit D. After the documents have been produced and inspected, Dannels may challenge the Defendants' rights to their continued protection under the good cause standard of the Montana Uniform Trade Practices Act. This Order is not limited to documents already identified and claimed privileged. At a minimum, it includes documents disclosing how money set aside for the reserves is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF.

6. The Defendants shall work with Dannels to identify a date and time for the deposition of Kristi Radford.

7. Given past difficulties with BNSF, this Court is seriously considering sanctions and the types of sanctions that may be appropriate in this case. Within one (1) week after this Order, the parties shall submit proposed orders on the sanctions this Court should consider entering.

Dated this 22nd day of February, 2018.

Katherine M. Bidegaray
District Court Judge

Ihde, Kelly

From: Kelly Graf <kgraf@hedgerlaw.com>
Sent: Monday, November 20, 2017 9:26 AM
To: Bidegaray, Katherine; Ihde, Kelly
Cc: Erik B. Thueson (erik@thuesonlawoffice.com); Dennis Conner; kitty@connermarr.com; Clari Davis; Elayne (elayne@thuesonlawoffice.com); Leslie Anderson; Jeff Hedger; Lisa C. Driscoll (lcdriscoll@GARLINGTON.COM); Dawn L. Hanninen (dlhanninen@GARLINGTON.COM); rjphillips@GARLINGTON.COM; Kelly Graf
Subject: RE: Dannels v. BNSF
Attachments: 2017-11-20 Dannels-Stipulated Protective Order.pdf

9 pgs

Good morning Judge Bidegaray-
Attached is the Stipulated Protective Order that was accidentally not attached to BNSF's Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena that was filed on Friday, November 17th. I apologize for this oversight.
Thank you,
Kelly Graf
Hedger Friend, PLLC

From: Kelly Graf
Sent: Friday, November 17, 2017 3:58 PM
To: Bidegaray, Katherine; kihde@mt.gov
Cc: Erik B. Thueson (erik@thuesonlawoffice.com); Dennis Conner; kitty@connermarr.com; Clari Davis; Elayne (elayne@thuesonlawoffice.com); Leslie Anderson; Jeff Hedger; Lisa C. Driscoll (lcdriscoll@GARLINGTON.COM); Dawn L. Hanninen (dlhanninen@GARLINGTON.COM); rjphillips@GARLINGTON.COM; Kelly Graf
Subject: RE: Dannels v. BNSF

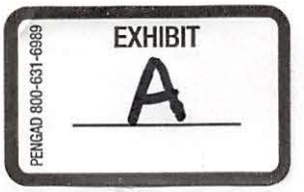
Good afternoon Judge Bidegaray-

Attached is a courtesy copy of BNSF's Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production, and Subpoena in the above referenced matter.

Hard copy will follow by U.S. Mail.

Thank you,

Kelly Graf
Hedger Friend, PLLC



Electronic Communications Privacy Act

NOTICE: This communication is covered by the Electronic Communications Privacy Act, found at 18 USC 2510 et seq. and is intended to remain confidential and is subject to applicable attorney/client and/or work product privileges. If you are not the intended recipient of this message, or if this message has been addressed to you in error, please immediately alert the sender by reply e-mail and then delete this message and all attachments. Do not deliver, distribute or copy this message and/or any attachments and if you are not the intended recipient, do not disclose the contents or take any action in reliance upon the information contained in this communication or any attachments.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, v. BNSF RAILWAY COMPANY, BNSF INSURANCE COMPANY, LTD., NANCY AHERN, JOHN DOES 1-10, Defendants.	Cause No. BDV-14-001 **THE HONORABLE KATHERINE BIDEGARAY** STIPULATED PROTECTIVE ORDER

Defendants BNSF Railway Company ("BNSF") and Nancy Ahern, and Plaintiff Robert Dannels (each individually a "Party" and collectively "the Parties"), by and through their respective counsel, have jointly stipulated to the terms of the following Protective Order:

SCOPE

1. This Protective Order applies to all disclosures, affidavits and declarations and exhibits thereto, deposition testimony and exhibits, discovery responses, documents, electronically stored information, tangible objects, information, and other things produced, provided or disclosed in the course of this action by BNSF and/or Ahern (also referred to as "Producing Party") which may be subject to restrictions on disclosure under this Protective Order, and information derived directly therefrom (all such information hereinafter referred to as "Material"). This Protective Order also applies to all information, documents, and things derived

from the Material, including, without limitation, copies, summaries, or abstracts. This Protective Order is subject to the Montana Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. This Protective Order has no effect upon, and does not apply to, a Party's use of its own confidential information for any purpose.

3. All Material designated in the course of the above-captioned litigation ("Litigation") as "Confidential," as that term is defined in Paragraph 5, is to be used only for the purpose of preparation and trial of this Litigation, and any appeal therefrom, and is not to be used, directly or indirectly, for any other purpose whatsoever, and should not be disclosed to any person, corporation, partnership, joint venture, association, joint stock company, limited liability company, trust, unincorporated organization, government body or other entity (collectively "Person") except in accordance with the terms hereof.

4. The attorney-client privilege, work product protection, or any other applicable privilege or doctrine is not waived by disclosure of Material in this litigation, and any such disclosure shall also not constitute a waiver in any other federal or state proceeding.

DEFINITIONS

5. "Confidential" means Material that the Producing Party has treated as confidential in the ordinary course of business, which must not have been disclosed publicly, and which the Producing Party has made a good faith determination that the Material contains information protected from disclosure by statute or that should be protected from disclosure as confidential business or personal information, medical or psychiatric information, trade secrets, personnel records, or such other sensitive commercial information that is not publicly available. Such information is only to be disclosed to Qualified Persons as defined in Paragraph 6 below.

6. With respect to Confidential Material, "Qualified Persons" means:

(a) Judges and court personnel of this Court; judges and personnel of any other court where disclosure is necessary in connection with a motion or other matter relating to this litigation (including any appeal); and certified court reporters acting as such (along with videographers);

(b) Counsel of record for the Parties in this litigation and employees in those law firms whose functions require access to Materials produced pursuant to this Protective Order;

(c) Any current director, officer, trustee, principal, manager or employee of BNSF, who is not otherwise prohibited by this Protective Order from seeing Confidential Material;

(d) Any former director, officer, trustee, principal, manager or employee of BNSF, who is not otherwise prohibited by this Protective Order from seeing Confidential Material, subject to the execution by each such former director, officer, trustee, principal, manager or employee of the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A;

(e) Any independent expert or consultant engaged by a Party or any attorney described in Paragraph 7(b) solely to assist in this litigation, including the expert or consultant's administrative and clerical personnel, subject to the execution by each independent expert or consultant of the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A;

(f) Any Person who authored and/or was an identified original recipient of the Confidential Material sought to be disclosed to that Person; or

(g) Any other Person whom the Producing Party agrees in writing may be provided with Material protected by this Protective Order.

DESIGNATION AS "CONFIDENTIAL"

7. The designation as "Confidential" for purposes of this Protective Order is to be made in the following manner by the Producing Party:

(a) Paper Documents and Physical Exhibits: Affixing the legend "Confidential" to each page containing confidential information.

(b) Magnetic or Optical-Media Documents: Including the designation on each image.

(c) Depositions: By indicating on the record at the deposition that the testimony is Confidential and to be treated in accordance with this Protective Order. In that case, the reporter is to mark the cover page of the transcript "Confidential" (or, where appropriate, particular page numbers and lines). If a designation is not marked on the record, all Parties are to treat the transcript as having been designated Confidential for a period of thirty (30) days following receipt of the transcript. During that thirty (30) day period, any Party may designate testimony as Confidential by notifying all other Parties and the court reporter in writing of the specific pages and lines to be designated.

(d) Responses to Written Discovery: Responses to Interrogatories and Requests for Admission containing Confidential Material shall be labeled "Confidential."

8. Other than court personnel, the recipient of any Confidential Material is to maintain such Material in a secure and safe area to which access is limited, or otherwise use available methods to restrict access to Qualified Persons only. Confidential Material should not be copied, reproduced, summarized or extracted, except to the extent that such copying, reproduction, summarization or extraction is reasonably necessary for the conduct of this litigation. All such copies, reproductions, summaries and extractions are subject to the terms of this Protective Order, and must be labeled Confidential.

9. When Confidential Material (or any pleading, motion or memorandum referring to such Material) is to be filed with the Court, the Confidential Material must be filed under seal, and the Party making the filing must submit an appropriate motion and proposed order in accordance with the applicable rules. In lieu of or in addition to filing papers under seal that include or otherwise reveal Confidential Material, a Party may file a redacted version to remove Confidential Material. A Party choosing to do so, however, must first confirm with counsel for the Producing Party that the redactions are sufficient.

CHALLENGES TO DESIGNATIONS

10. At any time after the receipt of any Material designated "Confidential," counsel for a Receiving Party may challenge the designation by providing written notice of such challenge to counsel for the Producing Party. Such notice must identify the Material that the challenging Party claims should not be afforded the specified confidential treatment and the reasons supporting the challenge. After notice of the challenge, the Parties are to confer and in

good faith attempt to resolve the challenge. If the Parties are unable to resolve the challenge, the Receiving Party may move the Court for appropriate relief. The Party(ies) seeking a designation as Confidential bears the burden of establishing that any Material in dispute is entitled to protection from unrestricted disclosure and to such designation. All Material that a Party designates as Confidential is to be accorded such status pursuant to the terms of this Protective Order unless and until the Parties agree in writing to the contrary or a determination is made by the Court as to the confidential status.

11. If a Receiving Party receives a subpoena, discovery request (other than a request propounded in this Litigation), an administrative or regulatory demand or court order requiring the disclosure of Confidential Material produced pursuant to this Protective Order, the Receiving Party is to provide notice to the Producing Party within five (5) business days.

INADVERTENT PRODUCTION AND DISCLOSURE

12. The Producing Party is to make a good faith effort to designate Material properly at the time of production. However, inadvertent or unintentional disclosure by any Party of Material without any designation will not be deemed a waiver of a Party's claim of confidentiality, privilege, or any other protection, either as to the specific document or information contained therein, and the Parties, upon notice thereafter, are to treat such Material as Confidential. A Receiving Party is to make a good faith effort to locate and mark appropriately any Material upon receipt of such notice. If, between the time of production and notification, the subject Material was provided by a Receiving Party to persons other than Qualified Persons as defined herein, the Receiving Party shall promptly notify all non-Qualified Persons to whom the subject Material had been disclosed of such material's Confidential designation and request that all such non-Qualified Persons return such Material to the Receiving

Party or execute the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A. In the event that any non-Qualified Person to whom such Material had been disclosed fails or declines to return the Confidential Material or execute Exhibit A, the Receiving Party shall promptly notify the Producing Party and not oppose any reasonable efforts by the Producing Party to retrieve the Confidential Material from the non-Qualified Person or obtain the non-Qualified Person's agreement to abide by the terms of this Protective Order.

CONFIDENTAL MATERIAL AFTER TERMINATION OF LITIGATION

13. After termination of this Litigation, including any appeals, the provisions of this Protective Order will continue to be binding, except with respect to those documents and information that become a matter of public record. This Court retains jurisdiction over the Parties and recipients of the Confidential Material for enforcement of the provisions of this Protective Order following termination of this Litigation.

DUTY TO COMPLY WITH THE PROTECTIVE ORDER

14. Any Party designating any person as a Qualified Person has a duty to reasonably insure that such Person observes the terms of this Protective Order and, upon a judicial finding of good cause, may be held responsible upon breach of such duty for the failure of any Person to observe the terms of this Protective Order.

15. By stipulation, the Parties may provide for exceptions to this Protective Order, and any Party may seek an order of this Court modifying the Protective Order.

PERSONS BOUND

16. This Protective Order shall take effect when entered and shall be binding upon all counsel and their law firms, the Parties, and persons made subject to this Protective Order by its terms.

THE PARTIES SO STIPULATE and agree to abide by the terms of this Protective Order.

Dated: _____, 2017

_____
Attorney for Defendant
BNSF Railway Company

_____
Attorney for Defendant
Nancy Ahern

_____
Attorney for Plaintiff
Robert Dannels

SO ORDERED:

_____
THE HONORABLE KATHERINE BIDEGARAY
District Court Judge

EXHIBIT A

CONFIDENTIALITY AGREEMENT

I, the undersigned, hereby acknowledge that I have received and read a copy of the Protective Order ("Order") entered in *Robert Dannels v. BNSF Railway Company, et al., Cause No. BDV-14-001, Montana Eighth Judicial District Court, Cascade County* (hereinafter the "Action"), and understand the terms and conditions of the Order and agree to be bound by the Order.

I further acknowledge and understand that any documents and other information produced in the Action (*i.e.,* documents, testimony, written discovery responses and other information provided in the course of pretrial discovery and any information contained therein or derived therefrom) and designated or marked "Confidential" pursuant to the Order may not be disclosed to anyone, except as authorized by the Order, and may not be used for any purpose other than the purposes of the Action. I agree to return (or, upon request, destroy) any Confidential Material at the conclusion of the Action.

Dated: _____

_____
Print Name

Ihde, Kelly

From: Kelly Graf <kgraf@hedgerlaw.com>
Sent: Monday, November 20, 2017 10:41 AM
To: Bidegaray, Katherine; Ihde, Kelly
Cc: Erik B. Thueson (erik@thuesonlawoffice.com); Dennis Conner; kitty@connermarr.com; Clari Davis; Elayne (elayne@thuesonlawoffice.com); Leslie Anderson; Jeff Hedger; Lisa C. Driscoll (lcdriscoll@GARLINGTON.COM); Dawn L. Hanninen (dlhanninen@GARLINGTON.COM); rjphillips@GARLINGTON.COM; Kelly Graf
Subject: RE: Dannels v. BNSF

Judge Bidegaray-
Just to be clear regarding the Stipulated Protective Order that I just emailed to you.
It is a Proposed Protective Order. Plaintiff's counsel has not agreed to the Proposed Protective Order.
Thank you,

Kelly Graf
Hedger Friend, PLLC
Electronic Communications Privacy Act

From: Kelly Graf
Sent: Monday, November 20, 2017 9:26 AM
To: Bidegaray, Katherine; kihde@mt.gov
Cc: Erik B. Thueson (erik@thuesonlawoffice.com); Dennis Conner; kitty@connermarr.com; Clari Davis; Elayne (elayne@thuesonlawoffice.com); Leslie Anderson; Jeff Hedger; Lisa C. Driscoll (lcdriscoll@GARLINGTON.COM); Dawn L. Hanninen (dlhanninen@GARLINGTON.COM); rjphillips@GARLINGTON.COM; Kelly Graf
Subject: RE: Dannels v. BNSF

Good morning Judge Bidegaray-
Attached is the Stipulated Protective Order that was accidentally not attached to BNSF's Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena that was filed on Friday, November 17th. I apologize for this oversight.
Thank you,
Kelly Graf
Hedger Friend, PLLC

Electronic Communications Privacy Act

From: Kelly Graf
Sent: Friday, November 17, 2017 3:58 PM
To: Bidegaray, Katherine; kihde@mt.gov
Cc: Erik B. Thueson (erik@thuesonlawoffice.com); Dennis Conner; kitty@connermarr.com; Clari Davis; Elayne (elayne@thuesonlawoffice.com); Leslie Anderson; Jeff Hedger; Lisa C. Driscoll (lcdriscoll@GARLINGTON.COM); Dawn L. Hanninen (dlhanninen@GARLINGTON.COM); rjphillips@GARLINGTON.COM; Kelly Graf
Subject: RE: Dannels v. BNSF

Good afternoon Judge Bidegaray-

Attached is a courtesy copy of BNSF's Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production, and Subpoena in the above referenced matter.

Hard copy will follow by U.S. Mail.

Thank you,

Kelly Graf
Hedger Friend, PLLC

Provide all documents withheld from Dannels' claims file documents except:

Bates 165, 166, 171, 172

Emails from Jayne to Wunker 6/7/13 8:12 AM on Bates 175 and 7:12 AM on Bates 177

Email from Ahern to Stearns 6/14/13 8:21 AM on Bates 179 Email from Ahern to Stearns 6/14/13 8:21 AM on Bates 179, 338, 352 (7:21 AM), 366, 379, 762

Bates 231, 232, 235, 236, 237

Email from Ahern to claims people 6/19/13 3:38 PM on Bates 244, 266, 272, 276, 1039, 1043

Email from Stearns to Ahern 6/18/13 3:14 PM Bates 246, 247, 250, 251, 260, 261, 265, 267, 268, 271, 275, 279, 282, 283, 286, 287, 289, 303, 307, 1042, 1046, 1095, 1098

Email from Ahern to Claims people on 6/19/13 4:38 PM updating what Stearns is doing on Bates 244, 262, 272, 276, 1039, 1043

Email from Wunker to Flatten 6/19/13 4:48 PM on Bates 272, 3:49 PM on Bates 276

Email from Ahern to Flatten 6/19/13 4:38 on Bates 244, 262, 272, 276, 1039, 1043

Email from Wunker to Flatten 6/19/13 3:49 PM on Bates 276

Email from Stearns to Ahern 6/21/13 10:10 AM on Bates 324

Bates 397-402 and 446-451

Email from Stearns to Jayne 5/16/13 3:07 PM on Bates 420

Bates 444-445

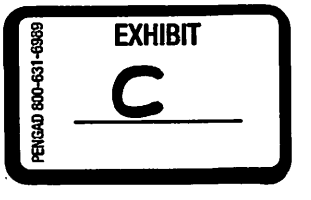
Email from Flatten to Stearns 5/30/13 12:46 PM on Bates 236, 444

Email from Ahern to Wunker 6/3/13 12:51 on Bates 453-454

Email from Stearns to Jayne 6/3/13 11:54 AM on Bates 166, 171-172, 455, 1070, 1072, 1074, 1076,

Bates 465, 526-529, 554, 700, 701, 702

Release and Settlement Drafts Bates 96-118, 252-259, 290-297, 309-318, 325-333, 746-755, 1100-1117, 1146-1155, 1157-1174



Case Evaluation Bates 688-699

Email from Ahern to Stearns 5/30/13/ 5:14 PM on Bates 768

Email from Stearns to Ahern 6/21/13 10:10 AM on Bates 1064, 1065, 1066, 1067,

Bates 1077, 1078, 1079, 1080, 1081, 1082, 1084, 1085, 1086, 1088, 1089, 1092, 1093

Discovery correspondence Bates 1215, 1236-1237, 1239-1245, 1250-1253

Katherine M. Bidegaray
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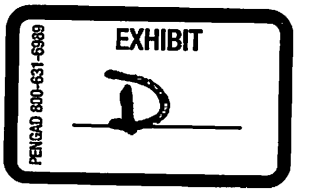
MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, v. BNSF RAILWAY COMPANY, BNSF INSURANCE COMPANY, LTD., NANCY AHERN, JOHN DOES 1-10, Defendants.	Cause No. BDV-14-001 **THE HONORABLE KATHERINE BIDEGARAY** PROTECTIVE ORDER

The Court orders the following Protective Order, as relates only to those documents produced in compliance with the Order to which it is attached:

SCOPE

1. This Protective Order applies to all disclosures, affidavits and declarations and exhibits thereto, deposition testimony and exhibits, discovery responses, documents, electronically stored information, tangible objects, information, and other things produced, provided or disclosed in the course of this action by BNSF and/or Ahern (also referred to as "Producing Party") which may be subject to restrictions on disclosure under this Protective Order, and information derived directly therefrom (all such information hereinafter referred to as "Material"). This Protective Order also applies to all information, documents, and things derived from the Material, including,



without limitation, copies, summaries, or abstracts. This Protective Order is subject to the Montana Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. This Protective Order has no effect upon, and does not apply to, a Party's use of its own confidential information for any purpose.

3. All Material designated in the course of the above-captioned litigation ("Litigation") as "Confidential," as that term is defined in Paragraph 5, is to be used only for the purpose of preparation and trial of this Litigation, and any appeal therefrom, and is not to be used, directly or indirectly, for any other purpose whatsoever, and should not be disclosed to any person, corporation, partnership, joint venture, association, joint stock company, limited liability company, trust, unincorporated organization, government body or other entity (collectively "Person") except in accordance with the terms hereof.

4. The attorney-client privilege, work product protection, or any other applicable privilege or doctrine is not waived by disclosure of Material in this litigation, and any such disclosure shall also not constitute a waiver in any other federal or state proceeding.

DEFINITIONS

5. "Confidential" means Material that the Producing Party has treated as confidential in the ordinary course of business, which must not have been disclosed publicly, and which the Producing Party has made a good faith determination that the Material contains information protected from disclosure by statute or that should be protected from disclosure as confidential business or personal information, medical or

psychiatric information, trade secrets, personnel records, or such other sensitive commercial information that is not publicly available. Such information is only to be disclosed to Qualified Persons as defined in Paragraph 6 below.

6. With respect to Confidential Material, "Qualified Persons" means:

(a) Judges and court personnel of this Court; judges and personnel of any other court where disclosure is necessary in connection with a motion or other matter relating to this litigation (including any appeal); and certified court reporters acting as such (along with videographers);

(b) Counsel of record for the Parties in this litigation and employees in those law firms whose functions require access to Materials produced pursuant to this Protective Order;

(c) Any current director, officer, trustee, principal, manager or employee of BNSF, who is not otherwise prohibited by this Protective Order from seeing Confidential Material;

(d) Any former director, officer, trustee, principal, manager or employee of BNSF, who is not otherwise prohibited by this Protective Order from seeing Confidential Material, subject to the execution by each such former director, officer, trustee, principal, manager or employee of the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A;

(e) Any independent expert or consultant engaged by a Party or any attorney described in Paragraph 7(b) solely to assist in this

litigation, including the expert or consultant's administrative and clerical personnel, subject to the execution by each independent expert or consultant of the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A;

(f) Any Person who authored and/or was an identified original recipient of the Confidential Material sought to be disclosed to that Person; or

(g) Any other Person whom the Producing Party agrees in writing may be provided with Material protected by this Protective Order.

DESIGNATION AS "CONFIDENTIAL"

7. The designation as "Confidential" for purposes of this Protective Order is to be made in the following manner by the Producing Party:

(a) Paper Documents and Physical Exhibits: Affixing the legend "Confidential" to each page containing confidential information.

(b) Magnetic or Optical-Media Documents: Including the designation on each image.

(c) Depositions: By indicating on the record at the deposition that the testimony is Confidential and to be treated in accordance with this Protective Order. In that case, the reporter is to mark the cover page of the transcript "Confidential" (or, where appropriate, particular page numbers and lines). If a designation is not marked on the record, all Parties are to treat the transcript as having been designated Confidential for a period of thirty (30) days following

receipt of the transcript. During that thirty (30) day period, any Party may designate testimony as Confidential by notifying all other Parties and the court reporter in writing of the specific pages and lines to be designated.

(d) Responses to Written Discovery: Responses to Interrogatories and Requests for Admission containing Confidential Material shall be labeled "Confidential."

8. Other than court personnel, the recipient of any Confidential Material is to maintain such Material in a secure and safe area to which access is limited, or otherwise use available methods to restrict access to Qualified Persons only. Confidential Material should not be copied, reproduced, summarized or extracted, except to the extent that such copying, reproduction, summarization or extraction is reasonably necessary for the conduct of this litigation. All such copies, reproductions, summaries and extractions are subject to the terms of this Protective Order, and must be labeled Confidential.

9. When Confidential Material (or any pleading, motion or memorandum referring to such Material) is to be filed with the Court, the Confidential Material must be filed under seal, and the Party making the filing must submit an appropriate motion and proposed order in accordance with the applicable rules. In lieu of or in addition to filing papers under seal that include or otherwise reveal Confidential Material, a Party may file a redacted version to remove Confidential Material. A Party choosing to do so, however, must first confirm with counsel for the Producing Party that the redactions are sufficient.

CHALLENGES TO DESIGNATIONS

10. At any time after the receipt of any Material designated "Confidential," counsel for a Receiving Party may challenge the designation by providing written notice of such challenge to counsel for the Producing Party. Such notice must identify the Material that the challenging Party claims should not be afforded the specified confidential treatment and the reasons supporting the challenge. After notice of the challenge, the Parties are to confer and in good faith attempt to resolve the challenge. If the Parties are unable to resolve the challenge, the Receiving Party may move the Court for appropriate relief. The Party(ies) seeking a designation as Confidential bears the burden of establishing that any Material in dispute is entitled to protection from unrestricted disclosure and to such designation. All Material that a Party designates as Confidential is to be accorded such status pursuant to the terms of this Protective Order unless and until the Parties agree in writing to the contrary or a determination is made by the Court as to the confidential status.

11. If a Receiving Party receives a subpoena, discovery request (other than a request propounded in this Litigation), an administrative or regulatory demand or court order requiring the disclosure of Confidential Material produced pursuant to this Protective Order, the Receiving Party is to provide notice to the Producing Party within five (5) business days.

INADVERTENT PRODUCTION AND DISCLOSURE

12. The Producing Party is to make a good faith effort to designate Material properly at the time of production. However, inadvertent or unintentional disclosure by any Party of Material without any designation will not be deemed a waiver of a Party's

claim of confidentiality, privilege, or any other protection, either as to the specific document or information contained therein, and the Parties, upon notice thereafter, are to treat such Material as Confidential. A Receiving Party is to make a good faith effort to locate and mark appropriately any Material upon receipt of such notice. If, between the time of production and notification, the subject Material was provided by a Receiving Party to persons other than Qualified Persons as defined herein, the Receiving Party shall promptly notify all non-Qualified Persons to whom the subject Material had been disclosed of such material's Confidential designation and request that all such non-Qualified Persons return such Material to the Receiving Party or execute the Confidentiality Agreement to be bound by the terms of this Protective Order attached hereto as Exhibit A. If any non-Qualified Person to whom such Material had been disclosed fails or declines to return the Confidential Material or execute Exhibit A, the Receiving Party shall promptly notify the Producing Party and not oppose any reasonable efforts by the Producing Party to retrieve the Confidential Material from the non-Qualified Person or obtain the non-Qualified Person's agreement to abide by the terms of this Protective Order.

CONFIDENTAL MATERIAL AFTER TERMINATION OF LITIGATION

13. After termination of this Litigation, including any appeals, the provisions of this Protective Order will continue to be binding, except with respect to those documents and information that become a matter of public record. This Court retains jurisdiction over the Parties and recipients of the Confidential Material for enforcement of the provisions of this Protective Order following termination of this Litigation.

DUTY TO COMPLY WITH THE PROTECTIVE ORDER

14. Any Party designating any person as a Qualified Person has a duty to reasonably insure that such Person observes the terms of this Protective Order and, upon a judicial finding of good cause, may be held responsible upon breach of such duty for the failure of any Person to observe the terms of this Protective Order.

15. By stipulation, the Parties may provide for exceptions to this Protective Order, and any Party may seek an order of this Court modifying the Protective Order.

PERSONS BOUND

16. This Protective Order shall take effect when entered and shall be binding upon all counsel and their law firms, the Parties, and persons made subject to this Protective Order by its terms.

THE COURT ORDERS the terms of this Protective Order.

DATED this 22nd day of February, 2018,

SO ORDERED:

THE HONORABLE KATHERINE BIDEGARAY
District Court Judge

EXHIBIT A

CONFIDENTIALITY AGREEMENT

I, the undersigned, hereby acknowledge that I have received and read a copy of the Protective Order ("Order") entered in *Robert Dannels v. BNSF Railway Company, et al., Cause No. BDV-14-001, Montana Eighth Judicial District Court, Cascade County* (hereinafter the "Action"), and understand the terms and conditions of the Order and agree to be bound by the Order.

Dated:_____

_____
Print Name

Attachment C

Katherine M. Bidegaray
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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, NANCY AHERN, and JOHN DOES 1 THROUGH 10, Defendants.	Cause No. BDV-14-001 Honorable Katherine Bidegaray **CORRECTED ORDER ON SANCTIONS**

INTRODUCTION[1]

On January 18, 2018, Plaintiff Robert Dannels ("Dannels") filed a Motion to Compel, Motion for Sanctions, and Brief in Support. (Dkt. 184) In his Motion to Compel, Dannels requested the imposition of sanctions (*Id.*). On February 5, 2018, Defendants ("BNSF" and "Ahern") filed their answer brief. (Dkt. 200) On February 9, 2018, Dannels filed his reply brief (Dkt. 202) and a Notice of Supplemental Authority, providing the February 5, 2018, Order and Memorandum in the FELA case of *Scott Kowalewski v. BNSF,* Cause No. 27-CV-17-145, in the District Court of the Fourth Judicial District, State of Minnesota, County of Hennepin, granting sanctions against BNSF for discovery abuses. (Dkt. 203) The Court heard oral argument on the motion on February 12, 2018;

1 The original version of this Order inadvertently omitted page 14.

and ruled on the discovery issues implicated by Dannels' Motion to Compel on February 22, 2018. (Dkt. 216)[2]

On March 27, 2018, Dannels filed the Affidavit of Dennis Conner Detailing Deficiencies with Defendants' Compelled Discovery (Dkt. 245) and the Affidavit of James R. Conner with Attached Orders (Dkt. 246). On April 6, 2018, Defendants filed their Response to Plaintiff's Request for Sanctions (Dkt. 250), the Declaration of Robert J. Phillips (Dkt. 251), and Defendants' Proposed Order on Plaintiff's Motion for Sanctions (Dkt. 249 and 253). On April 9, 2018, Dannels filed Plaintiff's Reply Brief in Support of Request for Sanctions. (Dkt. 255)

On April 18, 2018, at Defendants' request, the Court held an evidentiary hearing on Dannels' Motion for Sanctions. Defendants called three witnesses, and the parties offered exhibits as reflected in the record. After the hearing, the Court ordered the parties to submit proposed orders regarding sanctions. The parties did so. On May 7, 2018, Defendants filed their proposed Findings of Fact, Conclusions of Law, and Order. (Dkt. 259) On June 28, 2018, Dannels filed Plaintiff's Notice of Supplemental Authority, providing the Court the Memorandum Decision and Order on a Motion to Compel in *Sherwood v. BNSF Railway Co.,* Case No. 1:16-cv-00008-EJL-REB, decided on May 18, 2018, U.S. District Court of Idaho. (Dkt. 260) The Court is now prepared to rule.

FACTUAL BACKGROUND

This case arises out of the handling of an FELA claim brought by Dannels against Defendant Burlington Northern Santa Fe Railway Company ("BNSF"). Dannels was employed by BNSF when he suffered an on-the-job disabling injury on March 17, 2010.

2 Though issued February 22, 2018, the order was filed February 23, 2018.

On December 6, 2010, Dannels sued BNSF under the FELA. Dannels' FELA case was tried before a jury and, on February 13, 2013, the jury returned a $1,700,000 verdict for Dannels. On June 26, 2013, Dannels settled his claim with BNSF for $1,700,000. Dannels filed the present bad faith case on January 2, 2014.

In this case, Dannels alleges Defendants' breached duties of good faith owed him under § 33-18-201, MCA, and Montana's common law to handle his claim fairly and in good faith. He alleges that, by intentional acts or omissions, Defendants caused him emotional distress. Dannels also claims BNSF acted with malice and fraud and that punitive damages should be assessed because of its systematic scheme to:

(a) Cause delays and make litigation expensive to emotionally and financially affect injured employees to a point where they settle for less than a fair amount;

(b) Avoid fair and equitable settlement of FELA claims;

(c) Drive out competent legal representation for injured employees by making claims too stressful and time-consuming for attorneys to represent injured railroad employees; and

(d) Maximize profits by investing FELA injury claim reserves and premiums as long as possible to achieve the greatest return on those investments.

Dannels seeks compensatory damages on his statutory and common law bad faith and intentional infliction of emotional distress claims, and punitive damages because of BNSF's alleged fraud and malice.

Under this Court's March 6, 2015, Scheduling Order pretrial deadlines were set with the trial to begin on June 20, 2016. Dannels served written discovery on the Defendants in August 2014. In part, Dannels sought training and educational information regarding BNSF's claims handling practices, information about the FELA claim

investigation and handling, the relationship between BNSF and its insurance companies, and the entire claim file from the underlying FELA claim. In Interrogatory No. 5, Dannels asked whether "BNSF generate[s] any types of reports containing information about claims made by injured BNSF workers and the outcome of their claims." Dannels asked BNSF to identify and produce each such report utilized over the past 15 years. See Interrogatory No. 5 and Request for Production No. 7. Defendants did not respond to Plaintiff's written August 2014 discovery until May 2015.

In response to Dannels' first set of written discovery requests, Defendant Ahern produced what purported to be the underlying claim file. However, BNSF objected to nearly every discovery request and failed to provide any meaningful information. BNSF did not identify or produce a single report in response to Interrogatory No. 5 and Request for Production No. 7. Instead, BNSF objected to the discovery requests under two prevailing theories—privilege and general boilerplate objections. Dannels filed a motion to compel discovery.

On November 12, 2015, Dannels moved to vacate the pretrial deadlines until after the Court had the opportunity to rule on outstanding discovery disputes. On November 30, 2015, pretrial deadlines were set with the trial scheduled for October 3, 2016. The parties were warned that they must effectively participate in and complete all specified pretrial activities in good faith under threat of sanctions. On April 18, 2016, via a joint motion, the Court vacated the scheduling deadlines to permit the Court an opportunity to rule on the outstanding motions. The trial date was delayed a third time and reset for October 16, 2017.

By an order, dated January 26, 2017, the Court ruled on Dannels' motion to compel, specifically examining a number of discovery requests and BNSF's responses to them. (Dkt. 64) The Court found most of BNSF's objections baseless. With respect to the privilege objections, the Court ordered BNSF to produce all its work product, including opinion work product by its personnel. The Court overruled the boilerplate objections and ordered that BNSF meaningfully respond to Dannels' discovery requests. The Court specifically ordered BNSF to answer Interrogatory No. 5. (Dkt. 64, p.p. 13-14)

The Court noted the delay this case experienced in discovery. The Court found "that a substantial factor for the delay has been the defendants' conduct." (Dkt. 64, p. 21) The Court held that many of the Defendants' objections were not justified and that "the defendants have not responded in good faith at least contributing to the long delay." *Id.* The Court warned that if "the defendants choose to disobey these discovery orders or evade further discovery, harsh sanctions authorized by Rule 37(b)(2) shall be imposed." (Dkt. 64, p. 22)

On February 8, 2017, Dannels moved the Court for another scheduling conference, representing:

> As the Court knows, this case has been delayed by discovery disputes from its inception in January 2014. On January 26, 2017, however, this Court issued an Order which, hopefully, will resolve the discovery disputes and allow the case to proceed. In the interim, however, some of the scheduling deadlines have passed and some will not be feasible until after BNSF responds to the initial discovery. For instance, February 22, 2017, two weeks from now, is the schedule for naming experts and lay witnesses, which will not be possible until further discovery is completed.

(Dkt. 65) On March 17, 2017, the Court reset the trial for March 5, 2018.

Defendants served supplemental discovery responses to Dannels' first written discovery on February 27, 2017. The discovery responses purported to produce

discoverable information in response to the Court's January 26, 2017, order. However, in response to Interrogatory No. 5, BNSF responded:

> BNSF Claims Department currently runs thousands of reports each year. While some of these reports are run on a set schedule and retained in a central location, with set distribution lists, numerous Claims Department employees are able to run reports on their own and thousands of potentially responsive ad hoc reports are run each year. Providing the information requested would require an inquiry to all Claims Department employees with the ability to run reports in order to gather the requested information and take hundreds of hours of additional time.
>
> BNSF is working to identify whether it routinely runs any reports containing information about claims made by injured employees and the outcome of these claims. Discovery will be supplemented in accordance with the Rules of Civil Procedure.

Consistent with its response to Interrogatory No. 5, BNSF did not produce a single document in response to Request for Production No. 7. Instead, BNSF responded:

> BNSF incorporates its response to Interrogatory No. 5 as though fully set forth herein. It is not possible to disclose any reports identified in Interrogatory No. 5 without extensive redactions because the reports contain confidential settlement information, personal or confidential information of individuals not a party to this suit and other confidential and proprietary information. *Id.* BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Since February 27, 2017, BNSF has never supplemented its responses to Interrogatory No. 5 or Request for Production No. 7.

On September 19, 2017, Dannels served BNSF with a Notice of Corporate Depositions, Request for Production, and Subpoena. (Dkt. 110) Dannels sought to depose a representative from BNSF on topics such as document retention/destruction, the organizational chart, claims handling, consultation with consulting firms, incentive plans, loss reserves, bad faith complaints against BNSF, claims settlement practices, and the handling of Dannels' underlying FELA claim. Dannels served a subpoena with the

Notice of Corporate Deposition requesting that BNSF produce documents on enumerated topics. Dannels sought all documents relating to his underlying claim, including electronic data; copies of file jackets, telephone slips, and hand-written notes; all claims files, committee notes, memos, or documents relating to Dannels' underlying FELA claims; all case write-ups or summaries; payment records; methods of reserving or accruing losses; and SOX audit records. Dannels stipulated that BNSF could have until November 18, 2017, to produce the documents requested and subpoenaed under the Notice of Corporate Deposition.

Defendants responded to Dannels' notice of corporate deposition and additional discovery requests on November 17, 2017. (Dkt. 125) Defendants objected to the discovery requests, claiming duplication, attorney client privilege, work-product privilege, and trade secret confidentiality. Notwithstanding its objections, Defendants referred Dannels to the documents previously produced and limited its production to three new documents—a record of authority, incident notes, and an audit checklist. Defendants produced no further documents from the claim file and failed to seek or obtain a protective order regarding the Rule 30(b)(6) topics or requests for production. BNSF objected to the discovery regarding loss reserves and failed to produce any responsive documents.

On November 29, 2017, BNSF moved to continue the trial date a fifth time. Dannels objected, arguing for his right to speedy trial and noting delays caused by BNSF's decisions which obstructed and delayed discovery for years.

Before going to Fort Worth, Texas, to take BNSF's Rule 30(b)(6) deposition, Dennis Conner wrote Jeff Hedger and Robert Phillips asking to meet and confer about discovery disputes, including production of the claims file and reporting of FELA results.

BNSF brought its paper claims file to the deposition with a privilege log and stood on its privilege objections. At the end of the Rule 30(b)(6) deposition, Conner placed on the record that no motion for protective order was made concerning the deposition or production noticed and subpoenaed, and that BNSF's designee, Eric Hegi, on advice of counsel, refused to answer questions on all matters objected to in Defendants' Responses to the notice.

During November and December 2017 trips to Fort Worth, Dannels' counsel deposed Charles Shewmake (BNSF's former general counsel and Vice President of Claims), Rick Lifto (BNSF's former Assistant Vice President of Claims), and Eric Hegi (BNSF's current Assistant Vice President of Claims and Rule 30(b)(6) designee). BNSF identified all three of these witnesses as expert witnesses in its Lay and Expert Witness Disclosure filed on November 20, 2017. (Dkt. 126) Defendants' expert witness disclosure advised that these witnesses will testify at trial that: Dannels' FELA claim was evaluated reasonably; BNSF made reasonable offers, given the facts of the claim; liability throughout the FELA claim was never reasonably clear; there was no malicious motive by the BNSF claims department; and the BNSF claims department used effective, good faith claims practices. To reach these conclusions, the witnesses relied on everything in the claims file, including information BNSF withheld from Dannels in discovery under the auspices of privilege.

In its January 26, 2017, Order, the Court reviewed Defendants' objections and held (1) the attorney-client privilege does not apply to information generated by an attorney acting as a claims adjuster, claims process supervisor, or claims investigation monitor; (2) ordinary and opinion work product protections are generally overcome in bad faith

cases because (a) the claims file reflects a unique record of the claim's handling which cannot be obtained elsewhere and (b) the strategy, mental impressions, and opinions of the insurer's agents are directly at issue; (3) a defendant's claims practices are discoverable in a bad faith lawsuit; and (4) the attorney-client and work product privileges do not apply to documents generated with regard to claims practices. The Court noted that only opinion work product of BNSF's attorneys remains protected, absent the recognized exceptions. The Court forecast that depositions of Defendants' personnel will be "ineffective without documents to cross-examine the witnesses and test both their innocent lack of recollection and natural biases." (Dkt. 64, p. 8) Despite the January 26, 2017, Order, Defendants refused to produce the ordinary work product of its outside counsel. However, Defendants' experts relied on this information in concluding Defendants acted in good faith. By most accounts, it appears BNSF withheld about 400 pages of the claims file from production.

Further, in support of his opinion that BNSF acted reasonably in the underlying FELA case, Hegi testified that BNSF wins 70% of cumulative trauma trials and only about 5% of FELA cases have reasonably clear liability sufficient to advance wage losses. When pressed about the figures, Hegi testified that BNSF tracks the results of FELA claims and reports the results monthly to superiors.

Shewmake likewise confirmed that he prepared monthly case summaries for his supervisors at BNSF. The summaries addressed issues and developments that Shewmake believed his supervisors needed to be aware of, including results obtained in FELA cases. BNSF never mentioned these reports in response to Interrogatory No. 5 or Request for Production No. 7. Despite the discovery requests seeking such reports,

Dannels learned of these monthly case summaries for the first time at the Fort Worth depositions in November 2017.

After deposing Shewmake, Dannels served his Fifth Discovery Requests on Defendants on December 8, 2017. Dannels specifically asked Defendants to produce all FELA claims summaries produced by Shewmake to his superiors reporting the results obtained in FELA cases, as described in his deposition. BNSF refused to produce any documents responsive to this request. Instead, BNSF asserted a host of objections like those lodged in May 2015.

On January 18, 2018, Dannels filed another motion to compel. (Dkt 184) Dannels sought an order from the Court compelling BNSF to produce (a) the entire claim file and all documents directly related to the handling, evaluation, and settlement of Dannels' underlying claim; (b) the monthly summaries referenced in the Shewmake and Hegi depositions; (c) the non-disparagement clauses of all former employees listed as witnesses and the contractual consequences of making a disparaging statement; and (d) all documents setting forth the procedures and methodologies BNSF uses in setting loss reserves in FELA cases. Dannels also moved for sanctions for Defendants' discovery abuses, including a default judgment on liability. While the motion to compel was limited to four subject matters, the motion for sanctions was premised on the aggregate discovery abuses perpetrated by BNSF throughout this case.

After filing the second motion to compel, Dannels deposed Dione Williams (BNSF's Director of Claims Services) on January 25, 2018. Williams testified that he produces an executive slide presentation once a year for the BNSF leadership. The information is also shared with the claims department. All the data pertains to the claims department

and sets forth information on claim pay-outs, settled cases, and pending cases. The reports reflect data on FELA lawsuits, pay-out volume, average pay-outs, and cumulative trauma pay-out statistics. The reports trace where the FELA money goes. The deponents from Fort Worth—Shewmake, Lifto, and Hegi—attend the conference where the information is presented. Williams depo., pp. 17-20. Yet, BNSF did not identify this information in response to written discovery requests. Dannels learned about the annual presentation for the first time at the Williams deposition.

Williams also testified that BNSF runs monthly reports on pending claims and lawsuits on a system-wide basis, across the country. BNSF, through the claims services department, can run reports on: cases in which BNSF has set high loss reserves, high dollar pay-out claims, litigated cases, cases with trial dates, the number of FELA claims filed against BNSF at any given time, pay-outs in FELA claims, the number of litigated FELA claims, the number of FELA cases BNSF has settled, the number and substance of FELA verdicts in recent years, and BNSF's win/loss record on FELA cases in recent years. BNSF can narrow these searches by geographical zone, state, or city. It can also narrow the injury searches to particular body parts and employment positions. BNSF can generate a report showing pay-outs to unrepresented claimants versus pay-outs to represented claimants. Williams depo., pp. 61-78.

BNSF did not identify any of these reports in response to Dannels' written discovery. Rather, BNSF provided a vague response to Interrogatory No. 5, identifying no specific data or report, and insisted that it would take hundreds of hours of additional time to identify and produce the information. Williams testified that his department

regularly generates report information and could generate other specific detailed reports requested in about a week. Williams depo., pp. 69-70.

The Court heard oral argument on Dannels' second motion to compel on February 12, 2018, and entered an order on February 22, 2018. (Dkt. 216) The Court ordered BNSF to produce all claim file documents except those characterized as attorney-client communications and to submit to the Court for an *in-camera* inspection the purported attorney-client communications. As for the summaries referenced by Shewmake and Hegi, BNSF conceded it did not disclose the summaries even after the Court ordered them to meaningfully respond to Dannels' discovery. Dannels first learned of the summaries at Shewmake's deposition on November 30, 2017, and BNSF refused to produce them until after the Court granted Dannels' second motion to compel and directly ordered BNSF to do so. Regarding reserves, Dannels asked BNSF to identify someone to testify on its behalf. BNSF identified Hegi on the topic. Yet, Hegi had only limited information about loss reserves. Offering Hegi as its Rule 30(b)(6) designee on the topic of loss reserves did not meet BNSF's obligation. After again ordering BNSF to comply with its discovery obligations, the Court noted in the February 22, 2018, Order that, "[g]iven past difficulties with BNSF, this Court is seriously considering sanctions and the types of sanctions that may be appropriate in this case." (Dkt. 216 p. 27)

On March 15, 2018, BNSF filed and served its response in purported compliance with Paragraphs 5 and 6 of the Court's Order compelling discovery. Paragraph 5 required production of documents (subject to protective order) responsive to Dannels' requests for production regarding reserves and provided:

> This Order is not limited to documents already identified and claimed privileged. At a minimum, it includes documents disclosing how money set

> aside for the reserves is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF.

Id.

In response, BNSF produced Exhibit 698, part of its publicly available 2009 Form 10-K; Exhibit 699, the publicly available 2017 Form 10-K of the Travelers Company, Inc. (which is not involved with Berkshire Hathaway or any issue in this case); and Exhibit 700, the publicly available 2015 Form 10-K of the Allstate Corporation (which is not involved with Berkshire Hathaway or any issue in this case). The Defendants produced no documents disclosing how money set aside for the reserves is invested and earns investment income for BNSF from when an FELA claim has an expected loss that is both probable and reasonably estimable and a reserve is set until the claim is paid, who makes these investments, and the profits generated since Berkshire Hathaway purchased BNSF. BNSF individualizes what it does, but not what the Company or BNSF IC does in handling an earning profit from reserves on FELA claims. BNSF claims, for example, that it "does not maintain any reserve in an investment account, like an insurance company would." BNSF's individualized response fails to address its involvement in the handling and reserving of claims as documented in the Burlington Northern Santa Fe, LLC, Form-10 K for 2013 and the 2002 BNSF IC Business Plan. Paragraph 6 of the Order required the Defendants to work with Dannels to identify a date and time for the deposition of Kristi Radford. BNSF responded that Felicia Williams, General Director-Accounting, is the witness most knowledgeable at BNSF on these issues and that in lieu of Kristi Radford, Ms. Williams is the person that will testify at the hearing in Sidney,

Montana, on April 18, 2018. While identifying Ms. Williams, the Defendants did not identify or produce any documents as responsive to the Court-ordered discovery or which Ms. Williams may use at the hearing, except Exhibits 698-700.

On March 19, 2018, BNSF filed its Supplemental Responses to Plaintiff's Rule 30(b)(6) Notice of Corporate Depositions, Requests for Production and Subpoena Pursuant to Court Order. (Dkt. 241) In response to the Order requiring production of documents relating to its reserves, it produced Exhibit 698, its 2009 Form 10-K. In further response to Request for Production No. 16, BNSF states it "has retained no outside company or consultant to study or review BNSF FELA claims handling practices or procedures and /or amounts paid out on FELA claims" (which is directly contrary to the Burlington Northern Santa Fe, LLC, Form-10 K for 2013, and the 2002 BNSF IC Business Plan). In further response to Request for Production No. 17, BNSF states it "has retained no outside company or consultant to study or review BNSF FELA claims handling practices or procedures and/or amounts paid out on FELA claims" (which is directly contrary to the Burlington Northern Santa Fe, LLC, Form-10 K for 2013, and the 2002 BNSF IC Business Plan). In further response to the Court's Order, BNSF identified publicly available Financial Accounting Standard 5 (" FAS 5"). Dannels had marked this standard as Exhibit T to the Rule 30(b)(6) deposition of Hegi, who was completely unfamiliar with the standard.

Here, the Court has considered the interrelationship of Burlington Northern Santa Fe, LLC, and its subsidiaries, BNSF Railway Company (BNSF) and Burlington Northern Santa Fe Insurance Company, Ltd. (BNSF IC) as described in the Affidavit of Dennis Conner Detailing Deficiencies with Defendants' Compelled Discovery. (Dkt. 245) Given

their relationships, BNSF must have within its possession, custody or control the documents discussed and further ordered to be produced within this Order.

On February 12, 2010, Berkshire Hathaway Inc., a Delaware corporation (Berkshire), acquired 100% of the outstanding shares of Burlington Northern Santa Fe Corporation common stock that it did not already own. Burlington Northern Santa Fe, LLC, is a holding company that conducts no operating activities and owns no significant assets other than through its interests in its subsidiaries, including BNSF Railway Company (BNSF) and Burlington Northern Santa Fe Insurance Company, Ltd. (BNSF IC).

The financial statements of Burlington Northern Santa Fe, LLC, and its subsidiaries, including BNSF and BNSF IC, are consolidated. Burlington Northern Santa Fe Corporation's principal, wholly-owned subsidiary is BNSF, which operates one of the largest railroad networks in North America with approximately 32,500 route miles (excluding multiple main tracks, yard tracks and sidings) in 28 states and two Canadian provinces.

The Company has a consolidated wholly-owned subsidiary, BNSF IC, which provides insurance coverage for certain risks, including Federal Employers' Liability Act (FELA) claims.

The Company records an undiscounted liability for personal injury and FELA claims when the expected loss is both probable and reasonably estimable. The liability and ultimate expense projections are estimated using standard actuarial methodologies. Liabilities recorded for unasserted personal injury claims are based on information currently available. Expense accruals and any required adjustments are classified as

materials and other in the Consolidated Statements of Income. Liabilities for personal injury and FELA claims are initially recorded when the expected loss is both probable and reasonably estimable. Estimates of liabilities for these claims are undiscounted.

The Company estimates its liability claims and expenses quarterly based on the covered population, activity levels and trends in frequency and the costs of covered injuries. Estimates include unasserted claims except for certain repetitive stress and other occupational trauma claims that allegedly result from prolonged repeated events or exposure. Key elements of the actuarial assessment include:

- Size and demographics (employee age and craft) of the workforce.
- Activity levels (manhours by employee craft and carloadings).
- Expected claim frequency rates by type of claim (employee FELA or third-party liability) based on historical claim frequency trends.
- Expected dismissal rates by type of claim based on historical dismissal rates.
- Expected average paid amounts by type of claim for open and incurred but not reported claims that eventually close with payment.

From these assumptions, BNSF estimates the number of open claims by accident year that will likely require payment by the Company. The projected number of open claims by accident year that will require payment is multiplied by the expected average cost per claim by accident year and type to determine BNSF's estimated liability for all asserted claims. Additionally, the Company estimates the number of its incurred but not reported claims that will likely result in payment based upon historical emergence patterns by type of claim. The estimated number of projected claims by accident year requiring payment is multiplied by the expected average cost per claim by accident year and type to determine BNSF's estimated liability for incurred but not reported claims. BNSF

monitors quarterly actual experience against the number of forecasted claims to be received, the forecasted number of claims closing with payment and expected claim payments. Adjustments to the Company's estimates are recorded quarterly as necessary or more frequently as new events or revised estimates develop. At December 31, 2013, and 2012, $85 million and $105 million were included in current liabilities, respectively. In addition, defense and processing costs, which are recorded on an as-reported basis, were not included in the recorded liability. The Company is primarily self-insured for personal injury claims. Because of the uncertainty surrounding the ultimate outcome of personal injury claims, it is reasonably possible that future costs to settle personal injury claims may range from approximately $340 million to $455 million. However, the Company believed that the $387 million recorded at December 31, 2013, was the best estimate of its future obligation for the settlement of personal injury claims. The amounts recorded by BNSF for personal injury liabilities were based upon currently known facts. Future events, such as the number of new claims to be filed each year, the average cost of disposing of claims, as well as the numerous uncertainties surrounding personal injury litigation in the United States, could cause the actual costs to be higher or lower than projected.

BNSF IC provides insurance coverage for FELA and other claims which are subject to reinsurance. BNSF IC has entered into annual reinsurance treaty agreements with several other companies. The treaty agreements include insuring against general liability and FELA risks. In accordance with the agreements, BNSF IC cedes a portion of its FELA exposure through the treaty and assumes a proportionate share of the entire risk. At December 31, 2013, there was approximately $480 million related to these third-

party investments, which were classified as cash and cash equivalents on the Company's Consolidated Balance Sheet, as compared with approximately $485 million at December 31, 2012.

At BNSF's request, the Court held an evidentiary hearing on Dannels' Motion for Sanctions on April 18, 2018. BNSF solicited testimony from three witnesses in opposition to Dannels' motion. BNSF called Felicia Williams (BNSF General Director of Accounting), Christopher Decker (attorney with Boone Karlberg and former defense counsel in this case for BNSF), and James Roberts (BNSF Senior General Attorney).

BNSF called Williams to address the issue of loss reserves. Apparently, the point of Williams' testimony was to explain BNSF's treatment of reserves—purportedly to correct the Court's prior findings on the matter.

Lost on BNSF, however, is the critical notion it underscored in offering Williams' testimony. Williams essentially testified that she is the person best suited to testify about accounting principles, financial standards, and machinations associated with reserves on behalf of BNSF. She offered the kind of information which is calculated to lead to the discovery of admissible evidence. Dannels sought this kind of information in discovery and did not receive it. Rather than designating Williams as its corporate representative on the topic of reserves, BNSF designated Hegi to testify. Hegi admittedly had little information on the subject matter which thwarted the discovery Dannels sought.

At this juncture, the purpose of the hearing was not to confirm judicially whether BNSF complies with accounting standards or the like. The purpose of the hearing was to determine whether the Court should impose sanctions on BNSF for its discovery abuses. On this front, Williams' testimony was inapposite. In terms of production of

documents in discovery, Williams' only involvement was with BNSF's financial statement. As the Court noted at the hearing, Williams was not the right person to defend BNSF's discovery positions.

Williams is primarily a financial, and not a management, accountant. She had no idea about results obtained in FELA cases or what management does to monitor FELA results or profits earned on accounts where funds are held on set-aside reserves. She acknowledged BNSF is one of the largest railroad networks in North America and its Form 10-K reports work-related injuries are a significant expense for the railroad. She knew of no changes in the business model of the Burlington Northern companies over her career that extends before 2002.

She was asked about the Company's April 22, 2002, Business Plan, under which BNSF Insurance Company was to act as the consolidation point for collection of all relevant claims data with results, risk analysis, costs and reserve management to be handled by the actuary Tillinghast-Towers Perrin. She was unfamiliar with the management plan under which the company manages and handles its FELA claims. She acknowledged that according to Form 10-K reporting, the company now doing the actuarial work for the company is Willis Towers Watson. Tillinghast was the world's largest actuarial practice focused on insurance and a unit of Towers Perrin specializing in risk management and actuarial consulting. The Tillinghast business of Towers Perrin provided consulting and software solutions to insurance and financial services companies and advised other organizations on risk financing and self-insurance. In January 2010, Towers Perrin merged with Watson Wyatt Worldwide to form Towers Watson where Tillinghast became part of the risk management group. Williams knew nothing about the

claims handling except aggregate numbers she gets from the claims department. Williams did not even know whether BNSF earns any interest income on its large liquid assets or reserves. She did not know whether anyone consults with the company on amounts earned or paid out on FELA funds.

Next, BNSF called Decker. BNSF limited its questions of Decker to the work he did in discovery in the present matter. Decker was involved in the initial discovery on behalf of BNSF. Decker worked with BNSF on discovery from approximately April/May 2015 to August/September 2017. Decker described the effort he and his firm undertook to identify documents responsive to Dannels' discovery requests. Decker testified that he and his firm undertook a good-faith effort to obtain responsive documents and withhold privileged documents. The Court acknowledges this testimony and casts no dispersions on Decker or his law firm about BNSF's discovery abuses.

BNSF offered Decker's testimony to suggest its discovery positions were substantially justified throughout the discovery process. This notion may hold water at the action's inception. However, BNSF cannot reasonably argue substantial justification for spurning court orders. The Court will not permit BNSF to hide behind the cloak of its uninformed local Montana defense counsel. The discovery requests submitted to BNSF primarily involved information beyond Decker's personal knowledge:

> Q: Alright. Now, you don't know personally the answers to the questions that are being asked of you, do you? Not the questions being asked you, but the questions being asked the railroad as in discovery. As a general rule, that's information beyond your knowledge, right?
>
> A: That's often the case, yes.
>
> Q: Okay. And in this case, there was a lot of information that was being asked that you had no idea about, right?

A: There-yeah, when requests are asked, usually I don't have a good working knowledge of what's out there.

Decker testimony, p. 85. Because Decker did not know what information BNSF had, he worked with BNSF employees to identify information responsive to discovery requests and obtain BNSF's input.

On this front, it appears BNSF fell short in identifying responsive documents for Decker's consideration. For instance, BNSF did not advise Decker of the monthly summaries Dione Williams described. BNSF did not call Decker's attention to the monthly summaries Shewmake and Hegi described. BNSF did not produce any actuarial studies or reserve information unrelated to Dannels for Decker's consideration. BNSF did not produce any information on the outcome of FELA cases and any potential profits it may earn in holding money associated with claims. Rather, BNSF simply advised Decker that it had nothing specific in response to the request for reports and it would take hundreds and hundreds of hours to comply with the request.

Decker's contact at BNSF in putting together compelled discovery responses Dannels' discovery requests, which included Interrogatory No. 5, was primarily Jill Rugema, an in-house BNSF attorney. Also assisting Decker with BNSF's compelled discovery responses in-house BNSF attorney, Tom Jayne. The BNSF Law Department Guide requires case closing trial results be reported. Rugema and Jayne were recipients of the monthly summaries of results obtained in FELA cases Shewmake generated and reported to his superiors. They also would have authored or received monthly status reports of cases they were overseeing or involved in. Yet, they identified none of these reports. After his last motion for sanctions, Dannels learned through the deposition of Dione Williams that an executive slide presentation is made each year that presents

information to BNSF leadership about all the FELA claims that had been filed, whether they were settled, the amount paid and all of that. BNSF did not tell or inform Decker about this reporting of results and he was unaware of its existence. No one at BNSF told Decker or made him aware that claims representatives were required to update all information on their FELA claims and monthly reports are run showing the outcome of those cases. When Decker was involved in the case, he never produced any actuarial studies or reserve information. He did not produce any information on the outcome of FELA cases and profits that might be earned on reserves not paid out. He did not have that information. In assisting Decker in answering discovery, Rugema and Jayne did not disclosure relevant discoverable information and documents. Instead of having knowledgeable people within BNSF sign its answers to interrogatories, BNSF had Decker verify the answers under oath.

BNSF called Roberts as its final witness. BNSF questioned Roberts on the four subjects implicated by Dannels' second motion to compel. Roberts testified about whether BNSF was substantially justified in characterizing the monthly summaries Shewmake referenced as privileged. BNSF did not take a writ challenging the production and made no reasonable effort to comply with compelled discovery. Roberts attended Hegi's deposition and knew Hegi continued to make reports to his superiors of results obtained. These reports would include, for example, the results obtained in Iron Horse, which involved a FELA claim and trial almost contemporaneous with Dannels'. There was not even an inquiry made to obtain Hegi's reports despite the Court's order compelling their production. Roberts testified that setting reserves is a function of the claims department and more of an art than a science. Roberts testified that BNSF has

sparse documentation outlining how to set a reserve in an FELA case. He described his view on the distinction between loss reserves and the notion of reasonably clear liability. On the reserve front, Roberts' testimony was narrow—it primarily addressed the claims department's function of setting loss reserves in an adversarial claim. However, Dannels' discovery requests were not so limited, and Roberts did not address BNSF's discovery deficiencies on the expanded reserve information Dannels requested. Roberts had no information about tax implications or accounting principles associated with reserves. Once the claims department sets its loss reserve on a case, Roberts did not know what happens in the aggregate with BNSF reserves.

DISCUSSION

"The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation." *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 (citations omitted). The modern rules of discovery and pre-trial procedure "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Richardson*, ¶ 22 (citations omitted).

Richardson serves as the guidepost regarding discovery abuse and concomitant sanctions. In *Richardson*, Clarice Richardson fell on the smooth troweled concrete floor of the women's locker room at the Montana College of Technology. Richardson ultimately filed suit against the State of Montana regarding the dangerous condition in the locker room. Richardson served written discovery seeking information on other slip and

fall incidents at the facility, warnings about the conditions, protective measures undertaken by the State, and maintenance of the subject structures. The State refused to answer the discovery and asserted meritless objections—relevance, not reasonably calculated to lead to the discovery of admissible evidence, vague, ambiguous, etc. Thereafter, Richardson moved to compel meaningful responses. In the meantime, the State moved for summary judgment.

The trial court agreed with Richardson that she sought discoverable information. Accordingly, it granted the motion to compel and ordered the State to provide meaningful responses. The State subsequently responded to the discovery requests but failed to answer requests about other falls at the facility. In other words, the State provided incomplete responses to discovery in derogation of the trial court's discovery order. Richardson's counsel again contacted counsel for the State seeking answers. Then, over seven months after Richardson's initial discovery requests, over two months after discovery had closed, and a mere eleven days before trial, the State finally provided information about other falls. Richardson was put in the untenable position of going to trial with short notice and little discovery on the newly produced information or acquiescing to additional delay and expense. Richardson went to trial, obtained an adverse verdict, and subsequently moved to amend the judgment by entering default judgment on liability against the State as a sanction for the discovery abuses. The trial court denied Richardson's post-trial motion and Richardson appealed.

The Montana Supreme Court reiterated the foregoing maxims of discovery. It noted the State's discovery postures improperly concealed evidence and hid behind baseless objections. The actions directly contravened the express purpose of discovery

and severely undermined the integrity of the litigation. *Richardson*, ¶ 23. The Montana Supreme Court held:

> This Court strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently. As we have said, the trial courts, and this Court on review, must remain intent upon punishing transgressors rather than patiently encouraging their cooperation. Accordingly, the imposition of sanctions for failure to comply with discovery procedures is regarded with favor. "It is, after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires."
>
> We have adopted this policy of intolerance regarding discovery abuse pursuant to our "concern over crowded dockets and the need to maintain fair and efficient judicial administration of pending cases."

Richardson, ¶¶ 56-57 (citations omitted).

The Montana Supreme Court noted its prior admonitions that some discovery abuses warrant the imposition of default judgment on liability. *Richardson*, ¶ 58, citing *Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002, and *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc.*, 2005 MT 254, 329 Mont. 38, 122 P.3d 431. These discovery abuses, which justified the ultimate sanction of default, prohibited meaningful follow-up discovery, prevented the plaintiffs from assessing the merits of defenses and building cases-in-chief, and forcing the plaintiffs to incur mounting litigation costs while proceeding under a cloud of uncertainty. *Richardson*, ¶¶ 58-59. Because of the State's improper discovery positions, Richardson "was indeed faced with a no-win situation—i.e., either proceed to trial without fully investigating and developing the evidence of other falls or incur the needless expense and hassle of continuing the trial and conducting further preparation which could have been achieved earlier with timely disclosure from the State." *Richardson*, ¶ 61.

The Montana Supreme Court held that the State's discovery abuse directly undermined the objectives of Montana's Rules of Civil Procedure—to secure the just, speedy, and inexpensive determination of every action:

> Achieving a just determination is contingent upon full disclosure. As we have stated, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Achieving a speedy and inexpensive determination is contingent upon timely disclosure, which is thwarted by protracted legal wrangling over semantic nuances and technicalities.

Richardson, ¶ 63. Ultimately, the Montana Supreme Court held:

> Because the State's discovery abuse here was so blatant and systematic, and because it undermined the integrity of the entire proceeding, the only proper sanction is a default judgment on the issue of liability, just as we approved in *Schuff* and *Culbertson*. Any less severe sanction would be inconsistent with the rule that punishment for discovery abuses must be made unbearable in order to thwart the inevitable temptation which zealous advocacy inspires.

Richardson, ¶ 65. The Montana Supreme Court recently affirmed these same notions in *Cox v. Magers*, 2018 MT 21, 390 Mont. 224, 411 P.3d 1271.

As Rule 37, Mont. R. Civ. P., recognizes, trial courts are "in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court[ ] [and are] also in the best position to determine which sanction is the most appropriate." *Smith v. Butte-Silver Bow County*, 276 Mont. 329, 332, 916 P.2d 91, 93 (1996). As such, the Montana Supreme Court generally defers to the decision of the trial court regarding Rule 37, Mont. R. Civ. P., sanctions. *Smith*, 276 Mont. at 332, 916 P.2d at 93.

As confirmed by *Richardson*, litigants in Montana have long had notice of the judiciary's expectations of parties in discovery. Litigants have likewise long had notice of the consequences for discovery abuse. This is especially true of BNSF.

In *Spotted Horse v. BNSF R.R. Co.*, 2015 MT 148, 379 Mont. 314, 350 P.3d 52, the Montana Supreme Court recounted a disturbing history of discovery abuses perpetrated by BNSF. It referred to BNSF as a "seasoned and sophisticated corporate litigant." *Spotted Horse*, ¶ 27. Yet, despite its litigation recurrence, BNSF is not entitled to unilaterally control discovery and the exchange of evidence. *Spotted Horse*, ¶ 30. That is precisely what BNSF has attempted here. To that end, Justice Wheat specially concurred in *Spotted Horse*, concluding:

> It is the obligation of every Montana court to protect the integrity of the judicial system and to ensure proper administration of justice. See *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11. Usually this means that there is a presumption in favor of resolution of controversies on their merits. But, in cases where a party maliciously misuses our judicial system, this presumption is forfeited and the obligation to protect the judicial system instead requires courts to remedy the misuse, to punish the misuser, and to deter future misuse. See *Richardson v. State*, 2006 MT 43, ¶ 68, 331 Mont. 231, 130 P.3d 634; *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 81, 303 Mont. 274, 16 P.3d 1002; *Oliver*, ¶ 34.

Spotted Horse, ¶ 47.

The Montana Supreme Court has noted other inappropriate BNSF conduct perpetrated to undermine the truth-finding function. In *Anderson v. BNSF Ry.*, 2015 MT 240, ¶ 79, 380 Mont. 319, 354 P.3d 1248, the Court held that BNSF undermined the truth-finding function of the jury through repeated use of inflammatory and wholly inappropriate remarks. Justice Wheat again specially concurred, noting:

> We recently noted in *Spotted Horse v. BNSF* that the defendant here appears to have a pattern of practice that relies on misconduct to prevail in court. See *Spotted Horse v. BNSF*, 2015 MT 148, ¶¶ 22–27, 379 Mont. 314, 350 P.3d 52 (listing district court cases documenting discovery abuses and spoliation of evidence by BNSF). I note that Hedger Friend, PLLC, the law firm representing the BNSF here is the same firm (albeit a later iteration of the firm) that represented BNSF in the district court cases we cited to show a pattern and practice of misconduct. I also note that in one of those

cases, the district court commented that it "repeatedly warned BNSF, through its common counsel, about its common pattern and practice of discovery in other FELA cases currently or recently pending." Order Imposing Sanctions, Danielson v. BNSF, CDV–04–124(d) at 15 (Mont. Eighth Jud. Dist. Ct March 13, 2006). Despite those warnings, BNSF's counsel continued to engage in conduct the district court characterized as "part of a larger recurring pattern and practice of dilatory and obstructive discovery practices." *Danielson* at 25. The district court sanctioned BNSF for its misconduct by barring BNSF from presenting any evidence or argument contesting the plaintiff's proof of negligence in one case and granting default judgment as to liability in the other. *Danielson* at 25.

I also note that every time BNSF is called to account for its misconduct, it takes the same approach it took here, which is to treat each incidence of misconduct as though it occurred in isolation from all the others. A district court in Minnesota noted that tactic in an order granting over $4 million in sanctions against BNSF for multiple, flagrant instances of misconduct:

> This Court is satisfied that the record, which has developed over a period of six years, overwhelmingly supports a finding that BNSF did, in fact, engage in conduct and decision making that compromised critical evidence, interfered with witnesses, impeded the investigation by law enforcement, and misled and/or misrepresented a number of facts to Plaintiffs and this Court. BNSF has attempted to explain away this misconduct in piecemeal fashion by attributing much to inadvertence, coincidence, honest mistake, and/or legitimate business practices. This Court is simply not persuaded. Taken alone, some of BNSF's abuses might not be sanctionable, and indeed might have been understandable given the complexities of this case. But the breadth of BNSF's misconduct in this case is staggering.

Order, Chase v. BNSF, No. C4–05–1607 (Minn. Tenth Jud. Dist. Ct, Oct. 15, 2009). The majority opinion here notes the same problem with BNSF's tactic of treating each incidence of improper argument in isolation. Opinion, ¶ 78. I submit that just as we refuse to view each improper comment in isolation from the others, so should we refuse to view this case in isolation from all the other documented cases in which this party has sought to prevail through misconduct. Although the misconduct documented in *Spotted Horse*, *Danielson*, and *Chase* primarily involved discovery abuses, misrepresentations, and evidence tampering, it is nonetheless relevant to the misconduct here because it shows a pattern of trying to win trials by misconduct, rather than merit.

> As I noted in *Spotted Horse*, it is the obligation of every Montana court to protect the integrity of the judicial system and to ensure proper administration of justice. *Spotted Horse*, ¶ 47 (Wheat, J., concurring) (citing *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 31, 297 Mont. 336, 993 P.2d 11). Where a party shows a repeated intent to flout the judicial system's strong preference that cases be decided on their merits—and instead tries to win the case on the basis of how much misconduct it can get away with—that party forfeits the right to have its case decided on the merits, and default judgment on liability becomes the appropriate remedy.

Anderson, ¶¶ 85-87.

In recent years, several trial courts in Montana have imposed sanctions on BNSF, including default judgment, for discovery abuses. See, e.g., *Sherrill v. BNSF Railway Co.*, Montana Eighth Judicial District Court, Cascade County, Cause No. BDV-13-834 (Judge Wheelis); *Trombley v. BNSF Railway Co.*, Montana Eighth Judicial District Court, Cascade County, Cause No. DDV-13-331 (Judge Sandefur); *Anderson v. BNSF Railway Co.*, Montana Eighth Judicial District Court, Cascade County, Cause No. CDV-08-1681 (Judge Kutzman); and *DeLeon v. BNSF Railway Co.*, Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV-13-0729 (Judge Fagg). BNSF's abusive litigation tactics apparently extend far beyond Montana's borders. Many courts have confronted similar discovery abuses perpetrated by BNSF over the years and sanctioned it accordingly. See the Affidavit of James R. Conner with Attached Orders (Dkt. 246).

The historical abuse chronicled above and in the corresponding sanctions orders from around the country is certainly troubling. Nevertheless, to be clear, BNSF's misconduct from other cases did not factor into the Court's determination of sanctions in the case at bar. The Court simply references the foregoing case law as a guidepost on sanctions considerations. BNSF's discovery abuses in this case stand on their own dubious merit and form the sole basis for the Court's sanctions determination.

The Court set forth the factual background in painstaking detail above. It will not reiterate all of that again. Suffice it to say that this case has vanquished in the discovery phase for years, in large part due to BNSF's recalcitrance.

Dannels filed this bad faith case in January 2014. He served his first set of discovery requests on Defendants in August 2014. Like many of the foregoing cases, the discovery sought information calculated to lead to the discovery of admissible evidence. When a discovery request (or order compelling discovery) can reasonably be interpreted, in the context of seeking discoverable information relating to claims and defenses at issue, the recipient must interpret it that way, rather than imputing some meaning to the request which would render it vague, ambiguous, or objectionable in some other respect. If litigants were allowed to do otherwise, the discovery process would not serve its purpose. Discovery rules are written in general terms, imposing a broad duty of disclosure. *Richardson*, ¶ 52. The Montana Rules of Civil Procedure require a good faith effort in serving discovery responses. See Rules 11 and 26(g), Mont. R. Civ. P.

As in *Richardson*, BNSF rejected the foregoing principles and essentially served non-responses. Defendants finally responded to the discovery requests in May 2015. They objected to nearly every discovery request and failed to provide meaningful information. Approximately two weeks later, on the heels of the improper discovery responses, Defendants moved for summary judgment on Dannels' claims. Given the positions Defendants advanced in response to the discovery requests, Dannels was forced to file a motion to compel.

This Court carefully reviewed the requests and responses and granted Dannels' motion to compel. The Court specifically instructed Defendants how to respond to the

discovery meaningfully. It further cautioned that it would enter sanctions for future discovery abuses. Nevertheless, BNSF continued to violate the spirit and intent of Montana's rules of discovery. BNSF has consistently attempted to conceal information and evade its discovery obligations. To be clear, this is not a reflection on Defendants' attorneys. The Court imagines, as Decker alluded to, that defense counsel's hands are somewhat tied regarding the existence and possession of internal BNSF documents. On that front, defense counsel necessarily relies on the representations of their corporate client. Yet, with BNSF, there seems to be a corporate pattern, practice, and mindset of superiority, invincibility, or both.

The pattern this case follows is similar to past BNSF cases and other cases in which courts have imposed default judgment as a sanction for discovery abuse. That is, the pattern which has emerged in this case is a legitimate discovery request, followed by evasive non-responses, a motion to compel, an order to compel, qualified and incomplete responses from BNSF following the order to compel, deposition testimony and/or evidence contradicting BNSF's written discovery responses, more discovery meetings, a second motion to compel, more incomplete responses from BNSF, and, ultimately, hollow explanations for the noncompliance which purport to cast blame in all directions but Fort Worth.

Now, almost five years after the case was filed, following repeated scheduling orders and extensions, following the fourth trial date being vacated, despite repeated admonitions, Dannels still does not have everything he requested from BNSF and was entitled to receive and was court-ordered to receive. Simply put, BNSF is not entitled to the self-serving, unilateral discovery positions it has taken throughout discovery.

Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents.

Defendants' discovery tactics have prevented Dannels from fully assessing the merits of the proffered defenses and building his case-in-chief, while simultaneously forcing him to incur mounting litigation costs. These discovery abuses put Dannels in the predicament of further continuances and delay or trying the case without evidence he is entitled to. Defendants' discovery abuses have consumed valuable hours and judicial resources. And, Dannels now faces a fifth trial setting, more than four years removed from when he filed this case

In a December 5, 2010, article in the Minneapolis Star Tribune, Shewmake analogized BNSF's litigation tactics to sports games. Shewmake said litigation is an adversarial process where both sides try hard to win. Occasionally, Shewmake said attorneys on both sides break the rules. He compared BNSF's litigation conduct to World Cup soccer and stated: "Some of the best athletes in world competing at a high level and sometimes they get yellow-carded 'cause they're competing so hard...Were they trying to be malicious? Were they trying to hurt somebody? I don't think so. When you get in this adversarial mode, I think both sides on occasion will get yellow-carded." The article goes on to report where BNSF has been frequently "yellow-carded" for litigation misconduct, including punishment for misconduct in seven Montana cases between 2003 and 2010, and a $4.2 million sanction in Minnesota.

Shewmake's analogy of litigation to a sports game is troubling because litigation is not a game. Litigation, unlike a sports game, involves serious issues that significantly affect the lives of real people. The view that litigation is a game in which a player may

be "yellow-carded" reveals an intention to break rules to win. Montana courts have an obligation to discourage the strategy of trying to win trials by misconduct, rather than merit. As a sophisticated litigant, BNSF is free to forge a path of its desire if left unchecked. This Court's previous orders were not enough of a yellow card to steer the Defendants toward following discovery rules or court orders. Hopefully, the resulting sanctions will have a greater deterrent effect and will discourage future abuse of the discovery process to conceal relevant evidence or impede the orderly adjudication of a case.

CONCLUSION

This Court warned BNSF about its discovery obligations and the potential for sanctions for noncompliance. Nevertheless, BNSF committed discovery abuses throughout the life of this case. Dannels suffered prejudice as a direct result of BNSF's pervasive discovery abuses.

Rule 37, Mont. R. Civ. P., vests this Court with wide discretion to impose sanctions for the discovery abuses. As chronicled above, BNSF has continuously provided evasive or incomplete responses to legitimate discovery requests and failed to comply with this Court's discovery orders. BNSF's conduct has not been substantially justified, particularly after this Court entered the initial discovery order on Dannels' motion to compel. Rule 37 contemplates a number of potential sanctions, including, but not limited to, default judgment or any other appropriate sanctions. Further, Rule 37 provides "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

BNSF's discovery tactics in this case are abhorrent. Notably, BNSF engaged in this discovery conduct on the heels of default judgments entered against it in *Sherrill* and *Trombley* (cases venued in the same judicial district) for discovery abuses. Clearly, the default judgments alone did not phase BNSF and its internal discovery team. Again, the Court notes BNSF's historical pattern for context, but the conduct at issue in this case is what forms the basis for the sanctions imposed.

Based on the foregoing, the arguments and submissions in this case, and everything of record in this matter:

1. Dannels' motion for sanctions against BNSF is **GRANTED**;
2. The Court hereby enters a default judgment on liability and causation against BNSF;
3. This case shall proceed to trial solely on the measure of damages Dannels is entitled to recover on his bad faith claims, and whether he should recover punitive damages against Defendants and, if so, the amount;
4. The Court hereby reserves entering a monetary sanction against BNSF for its discovery abuses until after the conclusion of the trial;
5. BNSF shall pay Dannels' reasonable expenses, including attorney fees, caused by BNSF's discovery abuses. Dannels' attorneys shall submit an itemization of such expenses, with supporting documentation if necessary, for the Court's consideration by December 17, 2018. BNSF may respond to the itemization of expenses by December 31, 2018. The Court may hold a reasonableness hearing on the expenses if necessary;

6. In addition to discovery otherwise compelled, as an additional sanction, it is

FURTHER ORDERED that by December 17, 2018, BNSF shall produce:

(A) All actuarial reports of Willis Towers Watson (including its predecessors and successors) from 2010 to date relating to FELA claims, including risk financing, results expected and obtained, and insurance;

(B) All annual executive slide presentations on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date; and

(C) All monthly status reports on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date.

Dated this 16th day of November, 2018.

Katherine M. Bidegaray
District Court Judge

Attachment D

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 18-0693

BNSF RAILWAY COMPANY, NANCY AHERN, JOHN DOES 1-10,

Petitioner,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY, HONORABLE KATHERINE M. BIDEGARAY, Presiding

Respondent.

ORDER

On December 11, 2018, Nancy Ahern and BNSF Railway Company (collectively "BNSF") petitioned this Court for a Writ of Supervisory Control and Stay of Proceedings in the Eighth Judicial District Court, Cause No. BDV-14-001. BNSF asks this Court to vacate the District Court's Sanctions Order, which entered a default against BNSF for discovery abuses and ordered BNSF to produce certain documents which BNSF describes as privileged. We ordered a response and Robert Dannels, Plaintiff in the underlying action, responded and opposed the Petition.

The cause underlying this Petition is a 2014 bad faith claim filed by Dannels against BNSF. Dannels is a former BNSF employee. After obtaining a judgment against BNSF in a Federal Employers' Liability Act (FELA) action, Dannels sued BNSF under common law and § 33-18-201, MCA, which prohibits certain claim settlement practices. The parties became embroiled in a number of discovery disputes. On January 26, 2017, the District Court ordered BNSF to provide Dannels with some of the discovery sought, determining that despite BNSF's assertions, much of the discovery was not protected attorney-client communications or protected opinion work product.

Pertinent to the present matter are BNSF's responses to two discovery requests. In Interrogatory No. 5, Dannels asked if BNSF generates reports containing information about claims made by injured BNSF workers and the outcome of their claims. In Request for Production No. 7, Dannels asked BNSF to identify and produce each such report utilized in the last fifteen years. After the District Court first attempted to compel BNSF to answer, BNSF offered supplemental responses as follows:

BNSF's Supplemental Answer to Interrogatory No. 5:

> BNSF Claims Department currently runs thousands of reports each year. While some of these reports are run on a set schedule and retained in a central location, with set distribution lists, numerous Claims Department employees are able to run reports on their own and thousands of potentially responsive ad hoc reports are run each year. Providing the information requested would require an inquiry to all Claims Department employees with the ability to run reports in order to gather the requested information and take hundreds of hours of additional time.
>
> BNSF is working to identify whether it routinely runs any reports containing information about claims made by injured employees and the outcome of these claims. Discovery will be supplemented in accordance with the Rules of Civil Procedure.

BNSF never supplemented this response further.

BNSF's Supplemental Response to Request for Production No. 7:

> BNSF incorporates its response to Interrogatory No. 5 as though fully set forth. It is not possible to disclose any reports identified in Interrogatory No. 5 without extensive redactions because the reports contain confidential settlement information, personal or confidential information of individuals not a party to this suit and other confidential and proprietary information. BNSF's review of this information is ongoing and it will supplement this response with a privilege log if any documents are identified.

Following receipt of these responses, Dannels scheduled depositions of three experts identified by BNSF: Charles Shewmake (BNSF's former general counsel and Vice President of Claims), Rick Lifto (former Assistant Vice President of Claims), and Eric Hegi (current Assistant Vice President of Claims). Hegi was also identified by BNSF as its Rule 30(b)(6)

designee.[1] During the depositions, Dannels learned that Shewmake had prepared monthly case summaries on closed FELA claim files and that Hegi prepared the monthly summaries after Shewmake retired. Dannels sought production of these summaries and BNSF refused to provide them. Because BNSF had disclosed that these three expert witnesses were expected to testify at trial that Dannels' FELA claim was evaluated reasonably, BNSF made reasonable offers, liability was never reasonably clear, and the claims department used good-faith practices, Dannels moved to compel BNSF to produce: (1) Dannels' entire claims file; (2) the monthly case summaries referenced in the witnesses' depositions; (3) non-disparagement clauses of all former employees listed as witnesses; and (4) documents setting forth the procedures and methodologies BNSF used in setting loss reserves for FELA cases.

Dannels then deposed Dione Williams, BNSF's Director of Claims Services. Contrary to BNSF's Supplemental Answer to Interrogatory No. 5, Williams testified that BNSF runs monthly reports on pending claims and lawsuits and that Williams prepares an annual executive presentation on FELA claims. Williams admitted that BNSF can run various reports about FELA litigation, such as the number of litigated claims, the verdicts, and BNSF's win/loss record. Williams admitted his department regularly runs such reports and could generate the reports in about a week.

On February 22, 2018, the District Court issued an Order on Dannels' Motion to Compel. The District Court found BNSF had waived work-product privilege because its expert witnesses had unfettered access to the information, including information BNSF unjustifiably withheld from production, and that BNSF's actions precluded Dannels from meaningfully cross-examining these witnesses. The District Court ordered BNSF to produce: "all documents" directly related to the handling, evaluation, and settlement of Dannels' underlying claim, except those documents that "legitimately meet" the definition of attorney-client privilege; to specify documents or redactions on a privilege log; to highlight

[1] BNSF identified all three of these witnesses as "expert witnesses" in its Lay and Expert Witness Disclosure, filed on November 20, 2017.

portions of documents for which BNSF asserted attorney-client privilege; the monthly summary reports over the last twenty years; and documents showing methods and criteria used for reserving or accruing losses related to FELA claims since Berkshire Hathaway purchased BNSF.

The District Court noted it was "seriously considering" sanctions against BNSF, and it asked the parties to submit proposed orders regarding sanctions. On April 18, 2018, the District Court held a hearing on the sanctions motion. On November 16, 2018, it issued a Corrected Order on Sanctions. As part of the sanctions, the District Court entered a default judgment on liability and causation against BNSF. The District Court also ordered BNSF to produce the following:

> (A) All actuarial reports of Willis Towers Watson (including its predecessors and successors) from 2010 to date relating to FELA claims, including risk financing, results expected and obtained, and insurance;
>
> (B) All annual executive slide presentations on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date; and
>
> (C) All monthly status reports on FELA claims, as identified in the deposition of Dione Williams, from 2010 to date.

Supervisory control is an extraordinary remedy that is sometimes justified when (1) urgency or emergency factors make the normal appeal process inadequate; (2) the case involves purely legal questions; and (3) in a civil case, the district court is proceeding under a mistake of law causing a gross injustice or constitutional issues of state-wide importance are involved. M. R. App. P. 14(3).

Pretrial discovery disputes are typically not appropriate for an exercise of supervisory control. As we have previously noted, "[i]t is not our place to micromanage discovery . . . ." *Mont. State. Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 17 n. 12, 392 Mont. 458, 426 P.3d 541 (internal quotation omitted). Nonetheless, this Court will sparingly exercise supervisory control over interlocutory discovery matters under truly extraordinary circumstances where the lower court is proceeding under a demonstrable

mistake of law and failure to do so will place a party at a significant disadvantage in litigating the merits of the case. *Mont. State. Univ.-Bozeman*, ¶ 17 n. 12; *Hegwood v. Mont. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308.

In its Petition, BNSF first argues the Sanctions Order is void because FELA preempts Dannels' underlying bad faith claim. BNSF urges this Court to overrule *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 2002 MT 289, 312 Mont. 498, 60 P.3d 418, in which we rejected this very argument. This is BNSF's second attempt at raising FELA preemption as a basis for supervisory control in this case. As we concluded in our February 20, 2018 Order denying BNSF's previous Petition for Writ of Supervisory Control, applying existing precedent is not a "mistake of law," and we see no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit our holding in *Reidelbach*. *See* M. R. App. P. 14(3).

Second, BNSF argues the District Court erred in entering a default against it as a discovery sanction. A district court has broad discretion when ordering discovery sanctions. M. R. Civ. P. 37; *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶ 15, 379 Mont. 314, 350 P.3d 52. We have consistently recognized that district courts are in the best position to assess "which parties callously disregard the rights of their opponents and other litigants seeking their day in court and [are] also in the best position to determine which sanction is the most appropriate." *Smith v. Butte-Silver Bow Cty.*, 276 Mont. 329, 332, 916 P.2d 91, 93 (1996) (internal citations and alterations omitted). A district court may enter a default as a sanction for a failure to produce discoverable information. M. R. Civ. P. 37(c)(1)(C), (b)(2)(A)(vi). Entering a default is an appropriate sanction only when there is a blatant and systemic abuse of the discovery process or a pattern of willful and bad faith conduct. *Spotted Horse*, ¶ 20.

BNSF maintains the sanction of default is arbitrary because the documents compelled by the Sanction Order were not sought by Dannels in his motion to compel. A district court has broad discretion when assessing what is encompassed in a discovery request. *See Richardson v. State*, 2006 MT 43, ¶¶ 51-52, 331 Mont. 231, 130 P.3d 634. This issue

may properly be reviewed on direct appeal under an abuse of discretion standard. *See Smith*, 276 Mont. at 332-33, 916 P.2d at 92-93. BNSF fails to convince us that the District Court made a purely legal error, and we are satisfied an appeal would afford BNSF an adequate remedy. *See* M. R. App. P. 14(3); *see also Bullman v. Curtis*, 2011 Mont. LEXIS 449, at *4-5, 362 Mont. 543 (Aug. 9, 2011).

Third, BNSF argues that discovery sanctions against Ahern are inappropriate given that there is no mention of any alleged discovery abuse perpetrated by Ahern or any basis in the record for any sanction against her. In Dannels' response to this Petition, he asserts that his motion for sanctions was against BNSF and that he will move to dismiss with prejudice all claims against Ahern. Thus, this argument is moot. BNSF also argues the District Court cannot fault BNSF for failing to produce documents and information from non-party corporate entities. The District Court considered the interrelationship of the non-party corporate entities and determined that "[g]iven their relationships, BNSF must have within its possession, custody or control of the documents discussed . . . ." After examination of the record and BNSF's Petition, BNSF has not demonstrated that the District Court is proceeding under a demonstrable mistake of law or that a direct appeal is an inadequate remedy for determining potential District Court error in imposition of this sanction. *See Mont. State. Univ.-Bozeman*, ¶ 17 n. 12; *Hegwood*, ¶ 6; M. R. App. P. 14(3).

Finally, BNSF argues that a writ of supervisory control is warranted in the present case because BNSF will suffer irreparable harm if it is forced to disclose certain privileged documents as ordered by the District Court. BNSF alleges that the documents the District Court compelled it to produce contain privileged work-product information.

BNSF also alleges that the monthly reports contain privileged attorney-client information, including cases which are currently being litigated. Dannels responds that the monthly reports pertain only to closed cases and Dannels does not seek documents pertaining to active litigation. BNSF has not demonstrated that the District Court is proceeding under a demonstrable mistake of law and that failure to grant supervisory control will place BNSF at a significant disadvantage in litigating the merits of the case. *See Mont. State. Univ.-*

Bozeman, ¶ 17 n. 12. We reiterate that the District Court, that has been intimately involved in this matter, was in the best position to enforce discovery rights and limits and to assess and sanction discovery abuses. *See Ascencio v. Halligan*, 2019 Mont. LEXIS 77, at *2-3 (Feb. 19, 2019); *Richardson*, ¶ 21; *Smith*, 276 Mont. at 332, 916 P.2d at 93.

With respect to BNSF's preemption argument, as we noted in our previous order denying BNSF's petition for a writ of supervisory control, this is an issue for which the normal appeal process is adequate. Regarding the substance of the District Court's Sanction Order because of BNSF's alleged discovery abuses, BNSF has not demonstrated the truly extraordinary circumstances that warrant our sparing exercise of supervisory control over interlocutory discovery matters. *See Mont. State. Univ.-Bozeman*, ¶ 17 n. 12. Accordingly,

IT IS ORDERED that BNSF's Petition for a Writ of Supervisory control is DENIED and DISMISSED.

The Clerk is directed to provide copies of this Order to all counsel of record, including counsel for the *Amici Curiae*, and to the Honorable Katherine Bidegaray.

Dated this 12th day of March 2019.

Chief Justice

Justices

Justice Laurie McKinnon dissents from the Court's Order.

I did not sign the Court's previous order dated February 20, 2018, denying BNSF's Petition for Writ of Supervisory Control and concluding that *Reidelbach* was controlling on the question of FELA preemption. I will say no more than that.

First, the facts and circumstances of *Reidelbach* are distinguishable from those here. In *Reidelbach*, the parties had neither settled nor tried the FELA claims. Based on BNSF's negotiations and representations, Reidelbach believed BNSF would compensate him adequately without the need to pursue a FELA action. Later, when the expected damages did not materialize, Reidelbach brought his state law bad-faith claims in conjunction with his FELA claims. Here, in contrast, Dannels sued BNSF under FELA in 2013, and a jury awarded Dannels $1.7 million. BNSF fully satisfied that amount, and the FELA case concluded. A year later, Dannels filed this second lawsuit arising from the same injuries and now alleges BNSF violated the UTPA when it defended the FELA action. More particularly, Dannels alleges BNSF's misconduct caused him emotional distress and requests punitive damages—relief which FELA does not allow. In both petitions requesting this Court exercise supervisory control, BNSF urged the Court to overrule or reconsider *Reidelbach* and find preemption of Dannels' state-law claims under FELA.

Second, there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers; that Congress intended FELA to "occupy the field"; and that FELA preempts state-law claims based on injuries arising from a railroad's conduct. I would order further briefing to address the preemption issue and this Court's decision in *Reidelbach.*

This case has now grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption; the Court is affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*; and the documents ordered to be disclosed are potentially protected pursuant to the attorney work-product and attorney-client privileges. I would order further briefing and address the question of whether FELA preempts the Dannels' state-law claims.

Attachment E

Katherine M. Bidegaray
District Judge, Department 2
Seventh Judicial District
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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

ROBERT DANNELS, Plaintiff, vs. BNSF RAILWAY COMPANY, NANCY AHERN, and JOHN DOES 1 THROUGH 10, Defendants.	Cause No. BDV-14-001 Honorable Katherine Bidegaray **ORDER SETTING HEARING ON PLAINTIFF'S RULE 37(b) MOTION FOR SANCTIONS AND ORDER TO SHOW CAUSE WHY CONTEMPT SANCTIONS SHOULD NOT BE GRANTED**

IT IS HEREBY ORDERED that a hearing on Plaintiff's Rule 37(b) Motion for Sanctions is set to be held beginning at 1:30 pm o'clock on the 5th day of April, 2019, in the courtroom of the Cascade County Courthouse.

IT IS FURTHER ORDERED that the following must personally appear at said time and place to show cause why under § 3-1-501(1)(e) and (2), MCA, contempt sanctions should not be imposed against them and Defendant BNSF Railway Company for the disobedience of this Court's discovery orders:

Roger Nober (BNSF Executive Vice President, Law and Corporate Affairs);

Jeff Hedger and Michelle Friend (Hedger Friend, PLLC), counsel of record BNSF;

Robert Phillips and Kathleen DeSoto (Garlington, Lohn & Robinson, PLLP), counsel of record for BNSF.

IT IS HEREBY FURTHER ORDERED that BNSF shall have until April 3, 2019, to file its response to Plaintiff's motions, and Plaintiff shall have until April 4, 2019, file his reply.

The Honorable Katherine M. Bidegaray will appear in person. Requests for video or telephonic appearance will not be entertained.

DATED this 30th day of March, 2019.

Katherine M. Bidegaray
District Court Judge

cc: Jeff Hedger/Michelle Friend
Robert Phillips/Kathleen DeSoto
Dennis Conner/Keith Marr
Erik Thueson

Attachment F

No.

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY, NANCY AHERN, AND JOHN DOES 1–10,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY; THE HONORABLE KATHERINE BIDEGARAY, PRESIDING JUDGE; AND ROBERT DANNELS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioners

QUESTION PRESENTED

The Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, establishes a "comprehensive" and "exclusive" federal framework governing railroads' liability for their employees' on-the-job injuries. *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151 (1917). In Montana, however, a self-insured employer who is sued under FELA owes additional state-law duties to the plaintiff, beyond those established by FELA, that exist in no other jurisdiction. If the employer's FELA liability is reasonably clear, Montana law requires that it immediately advance the plaintiff's wages and medical expenses during the pendency of the suit, and that it enter into a "prompt, fair, and equitable settlement." If the employer fails to satisfy these state-law duties because, for example, it chooses to contest the merits of the plaintiff's FELA claim, the employer is subject to a follow-on bad-faith suit under Montana law that exposes the employer to additional liability not authorized by FELA.

The question presented is:

Whether FELA preempts bad-faith claims under Montana law that seek to impose state-law liability based on the litigation conduct of a self-insured employer sued under FELA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding below are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners BNSF Railway Company, Nancy Ahern, and John Does 1–10 respectfully petition for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court denying petitioners' second petition for a writ of supervisory control is unreported but available at 2019 WL 1125342. Pet. App. 1a–11a. The opinion of the district court granting Dannels's motion for sanctions is unreported. Pet. App. 12a–52a. The opinion of the Montana Supreme Court denying petitioners' first petition for a writ of supervisory control is unreported but available at 2018 WL 4094463. Pet. App. 53a–57a. The opinion of the district court denying petitioners' motion for summary judgment is unreported. Pet. App. 58a–72a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on March 12, 2019. Pet. App. 1a.

This Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioners sought a writ of supervisory control in the Montana Supreme Court on the ground that the district court exceeded its authority by imposing liability-determining sanctions in an action that is preempted by the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51. The Montana Supreme Court denied that petition on March 12, 2019. Because the petition for a writ of supervisory control is an independent suit, the Montana Supreme Court's judgment disposing of the suit is a final judgment for

purposes of this Court's jurisdiction. *See Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment . . . .").

Moreover, the Montana Supreme Court's "judgment is plainly final on the federal issue" of preemption. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975). Petitioners may prevail at trial on nonfederal grounds on the issue of damages—or on appeal on other nonfederal grounds—thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court's preemption ruling is erroneous, then "there should be no trial at all." *Ibid.*; *see also infra* Part III.B (discussing finality).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All pertinent constitutional and statutory provisions are reproduced in the Petition Appendix at 73a–77a.

INTRODUCTION

In FELA, Congress established a "comprehensive" and "exclusive" liability framework for "the responsibility of interstate carriers by railroad to their employees injured in such commerce." *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151–52 (1917) (internal quotation marks omitted). In every State except one, a defendant in a lawsuit brought under FELA is entitled to contest liability and damages. That is not the case in Montana. Under Montana's "bad-faith" laws, a self-insured FELA defendant—*i.e.*, a defendant that relies on its own assets, rather than an insurer, to pay damages awards—has "an implied covenant of good faith and fair dealing" with a FELA plaintiff that requires

the defendant to "settle in an appropriate case" on "fair" and "equitable" terms. Mont. Code Ann. § 33-18-201(6); *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984); *see also* Mont. Code Ann. § 33-18-242(8). The consequence of this bad-faith regime is that in Montana—and only in Montana—a self-insured FELA defendant can be subject to a follow-on "bad-faith" suit merely for defending itself on the merits against the underlying FELA claim.

This is not the national, uniform legal framework that Congress envisioned when it enacted FELA. *See S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953). Yet the Montana Supreme Court has now twice refused in this case to hold that FELA preempts such bad-faith claims. That ruling is impossible to reconcile with this Court's precedent or with the FELA jurisprudence of other lower courts.

This Court has held that FELA's exclusive federal liability regime preempts state-law causes of action that impose on railroads additional liability beyond that provided by FELA itself. *See N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 361–62 (1917). In fact, FELA's preemptive force extends not only to state-law claims based on employment-related injuries covered by FELA but also to state rules that interfere with railroads' ability to defend themselves against FELA claims. As the Court has explained, "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under [FELA]." *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

None of this seems to matter to the Montana Supreme Court. By permitting this state-law suit to proceed based on BNSF's refusal to settle a FELA case, the Montana Supreme Court has broken from this Court's FELA precedent and from the decisions of other lower courts (including Montana's federal courts) faithfully applying that precedent. In so doing, it has upended the comprehensive federal framework that Congress established in FELA by expanding the potential liability of FELA defendants beyond the congressionally defined limits and restricting their ability to raise defenses to FELA claims.

This Court should grant review to restore the nationally uniform legal framework that Congress established in FELA and to ensure that FELA defendants sued in Montana have the same right to defend themselves as in every other State.

STATEMENT

A. FELA's Comprehensive Framework For Railroad Liability

FELA provides, in relevant, part, that "[e]very common carrier by railroad" engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51. A plaintiff bringing suit under FELA must prove that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957). The standard for liability under FELA is governed by federal law. *See Urie* v. *Thompson*, 337 U.S. 163, 174 (1949) (holding that negligence is defined "by the common law principles as established and applied in the federal courts" (internal quotation marks omitted)).

The linchpin of a FELA claim is negligence by the employer—"FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994) (internal quotation marks omitted). This framework of railroad liability is both "comprehensive" and "exclusive," displacing any state-law causes of action that impose additional liability on railroads. *Winfield*, 244 U.S. at 151–52.

As with liability, damages under FELA are governed by uniform federal law. *See Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("[Q]uestions concerning the measure of damages in an FELA action are federal in character."). An injured FELA employee or representative who proves negligence on the part of his employer is entitled to "such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power." *Mich. Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913). Injured employees are entitled to damages for emotional distress "caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Gottshall*, 512 U.S. at 556. Courts generally agree that punitive damages are not available under FELA. *See, e.g.*, *Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1394 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1241–42 (6th Cir. 1971).

B. Montana's Statutory And Common-Law Bad-Faith Claims Against Insurers

Under Montana common law, insurers owe a duty of good faith and fair dealing to their insureds. *See Stephens* v. *Safeco Ins. Co. of Am.*, 852 P.2d 565, 567 (Mont. 1993). Although all contracts in Montana

carry an implicit duty of good faith and fair dealing, where there is a "special relationship"—as between an insurer and an insured—an aggrieved plaintiff may bring a tort claim to recover damages against a defendant who has allegedly acted in bad faith, including damages beyond those caused by any alleged breach of the contract (such as damages for mental distress). *See Story* v. *City of Bozeman*, 791 P.2d 767, 776 (Mont. 1990), *overruled on other grounds by Arrowhead Sch. Dist. No. 75* v. *Klyap*, 79 P.3d 250 (Mont. 2003). A plaintiff may also obtain punitive damages if he can prove the insurer is guilty of actual malice or fraud. *See* Mont. Code Ann. §§ 27-1-220, 27-1-221. This common-law duty exists in parallel with the prohibition in Montana's Unfair Trade Practices Act ("UTPA") against unfair claim settlement practices by insurers. *See* Mont. Code Ann. §§ 33-18-201, 33-18-242(1).

Both precedent and statutes define the scope of an insurer's good-faith duty under Montana law. That duty includes an obligation to "settle in an appropriate case," *Gibson*, 682 P.2d at 730; to "attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear," Mont. Code Ann. § 33-18-201(6); to "conduct[ ] a reasonable investigation based upon all available information," *id.* § 33-18-201(4); and to pay the claimant's medical expenses and lost wages pending a settlement or judgment on the underlying claim when liability is "reasonably clear." *DuBray* v. *Farmers Ins. Exch.*, 36 P.3d 897, 900 (Mont. 2001); *see also Ridley* v. *Guar. Nat'l Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997). Accordingly, the alleged failure of an insurer to promptly settle a claim for a "fair" and "equitable" amount—and to pay the claimant's medical expenses and lost wages pending finalization of the

settlement—is grounds for a bad-faith suit against the insurer following the disposition of the underlying claim.

These duties are not limited to the ordinary insurer–insured relationship. An insurer's duty in Montana extends not only to directly insured entities, but also to third-party claimants—individuals or entities to whom an insured is liable, but whose damages will ultimately be paid by the insurer. *See* Mont. Code Ann. § 33-18-242(1); *Brewington* v. *Emp'rs Fire Ins. Co.*, 992 P.2d 237, 240–41 (Mont. 1999). Most strikingly, these duties also apply to self-insured entities—entities who, instead of purchasing insurance from a third party, pay out of their own assets to cover claims that ordinarily would be paid by a third-party insurer. Under Montana law, a self-insured entity, by way of its status as an insurer (of itself), owes a third-party claimant the same duties owed by an insurance company to its customers. *See* Mont. Code Ann. § 33-18-242(8). This means that a company not engaged in the business of insurance is nonetheless subject to a bad-faith suit for its treatment of claims filed against it simply because the company insures itself against such claims and because it chose to litigate a suit against it rather than settle for the demanded amount.

C. The Montana Supreme Court's Decision In *Reidelbach*

In *Reidelbach* v. *Burlington Northern & Santa Fe Railway Co.*, 60 P.3d 418 (Mont. 2002), the Montana Supreme Court held that FELA does not preempt the application of Montana's bad-faith laws to self-insured FELA employers. *Id.* at 430–31. There, the plaintiff allegedly suffered an injury while working for

BNSF. *See id.* at 421. The plaintiff sought compensation for his injuries, and BNSF indicated that a fair settlement for the injury would be approximately $280,000; BNSF paid the plaintiff advance wages and oversaw the plaintiff's medical care. *See ibid.* The plaintiff demanded $450,000, and when BNSF refused to settle at that amount, the plaintiff filed suit, bringing both a claim under FELA and under Montana's common-law bad-faith laws, alleging that BNSF and its claims representative had engaged in bad faith by refusing to pay the higher settlement amount. *See ibid.* BNSF successfully moved to dismiss the bad-faith claims in the district court, arguing that FELA preempted all such claims. *See id.* at 422.

The Montana Supreme Court reversed, holding that FELA did not preempt the plaintiff's bad-faith claims. The court first concluded, without citing any cases from this Court construing FELA's preemptive force, that the "plain language of the FELA" shows that the purpose of the statute "was to enact a compensatory scheme under which railway employees who were physically injured by the negligence of their employer while on-the-job and in pursuit of interstate commerce could obtain relief," not to regulate "the entire field of injuries and claims a railroad employee may have." *Reidelbach*, 60 P.3d at 425.

The Montana Supreme Court then went on to hold that there is no conflict between Montana's bad-faith laws and the purpose and objectives of FELA. *See Reidelbach*, 60 P.3d at 425. The court largely relied on cases in which other state courts have concluded that FELA does not preempt state-law claims for intentional torts—even though none of those other cases pertained to bad-faith claims premised on an employer's refusal to settle a FELA suit. *See id.* at 427

(citing *Monarch* v. *S. Pac. Transp. Co.*, 83 Cal. Rptr. 2d 247 (Cal. Ct. App. 1999); *Pikop* v. *Burlington N. R.R. Co.*, 390 N.W.2d 743 (Minn. 1986)). The court dismissed the significance of this Court's decision in *Dice*, 342 U.S. 359—which held that States are not permitted "to have the final say as to what defenses could and could not be properly interposed to suit under" FELA, *id.* at 361—on the ground that the plaintiff's claims in *Reidelbach* "[we]re distinct and separate from his physical injury FELA claim." *Reidelbach*, 60 P.3d at 428.

The court instead relied on this Court's holding in *Farmer* v. *United Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977), a non-FELA case that the Montana Supreme Court admitted had never been applied in the FELA context. *Reidelbach*, 60 P.3d at 429. In *Farmer*, this Court instructed courts determining whether a claim brought under state law is preempted by the National Labor Relations Act to consider (1) whether the underlying conduct is protected by the Act, (2) whether there is an overriding state interest in regulating the conduct, and (3) whether there is a risk of interfering with the effective administration of national labor policy. 430 U.S. at 298. Transplanting *Farmer*'s preemption test into the FELA context, the Montana Supreme Court concluded that FELA does not preempt the application of Montana's bad-faith laws to self-insured FELA defendants in light of the State's interest in protecting its citizens from unfair claim practices and "the humanitarian purpose of the FELA." *Reidelbach*, 60 P.3d at 429–30.

Reidelbach has remained the Montana Supreme Court's authoritative interpretation of the preemptive scope of FELA for seventeen years.

D. The Proceedings In This Case

This case arises out of a FELA suit that respondent Robert Dannels filed against BNSF in 2010 for injuries he allegedly suffered during an on-the-job activity. Pet. App. 14a. Dannels worked for BNSF for twenty years, during which, he alleged, BNSF negligently assigned him to physical work activities that carried a high risk of injuring his spine. Compl. ¶¶ 7–8. As a result, Dannels alleged, his lower back and spine slowly degenerated. *Id.* ¶ 9. Dannels alleged that he became disabled in an incident in 2010 in which the vehicle he was operating struck a steel wellhead buried under snow, and that he had not been able to return to productive employment since. *Id.* ¶ 10.

BNSF defended itself on the merits, denying liability. Following a jury verdict in Dannels's favor for $1.7 million, Dannels and BNSF settled for the full amount of the verdict in June 2013. Pet. App. 14a.

Six months later, Dannels filed this case in Montana state court alleging that BNSF had violated the UTPA, Mont. Code Ann. § 33-18-201, and Montana common law by failing to handle Dannels's claim in good faith. Pet. App. 14a–15a. In the complaint, Dannels named not only BNSF, but also Nancy Ahern, the individual claims investigator who handled Dannels's claim. Compl. ¶ 4.[1]

Dannels alleges that BNSF, as a self-insured entity, owed common-law and statutory duties to him to handle his FELA claim in good faith, and that BNSF

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[1] Dannels has represented that he will move to dismiss the claims against Nancy Ahern. Dannels also named as defendants John Does 1–10, alleged agents of BNSF who participated in decisions regarding his claims.

violated those duties. Specifically, Dannels alleges that it was reasonably clear that BNSF was liable for Dannels's injuries, and that BNSF breached its duties by failing to promptly respond to Dannels's communications with respect to his claim, failing to offer an adequate settlement amount or negotiate in good faith, and failing to advance Dannels his lost wages and retirement benefits during the pendency of his FELA suit. Compl. ¶¶ 17–26. For that conduct, Dannels seeks damages for his mental distress and expenses. *Id.* ¶ 27. He also seeks punitive damages for BNSF's "actual fraud and malice" in routinely using these "illegal and deceitful" settlement practices. *Id.* ¶ 29.

Petitioners moved for summary judgment on several grounds, including that Dannels's claims are preempted by FELA. Pet. App. 60a. Petitioners argued that a "railroad's substantive duties are defined by federal, not state law," and that "federal law preempts efforts to control the settlement of a FELA claim through state law." Defs.' Combined Br. in Supp. of Supplemental Mot. for Summ. J. 5. Petitioners further explained that permitting a plaintiff to bring bad-faith claims under Montana law "would have a chilling effect on BNSF's right to have liability, damages, and its defenses tried by a jury," and enable the plaintiff "to make an end-run around FELA's preclusion of various types of damages." *Id.* at 6, 8. The district court denied BNSF's motion, citing the Montana Supreme Court's controlling decision in *Reidelbach*, 60 P.3d 418. Pet. App. 61a–63a.

In response, petitioners filed a petition for a writ of supervisory control in the Montana Supreme Court, seeking, among other relief, dismissal of Dannels's claims as preempted by FELA. Petitioners argued that "FELA is comprehensive and exclusive regarding

a railroad's liability for injuries suffered by its employees while engaging in interstate commerce," and that Dannels sought to recover damages not provided for under FELA, "including emotional distress damages unaccompanied by risk of physical injury." Pet. for Writ of Supervisory Control 14–15.

The Montana Supreme Court denied that petition with only a citation to its prior decision in *Reidelbach*, explaining that if reevaluation of *Reidelbach* is warranted, "the normal appeal process is certainly adequate for that purpose." Pet. App. 56a.

As the case progressed, Dannels sought discovery from BNSF of large amounts of privileged, confidential, or otherwise protected documents, including privileged documents concerning Dannels's claim, "monthly summaries" of litigation prepared by in-house counsel, non-disparagement clauses in the separation agreements of several former BNSF claims personnel, and confidential materials concerning BNSF's procedures for setting reserves. Pet. App. 23a. BNSF objected to producing these materials, citing attorney-client privilege and work-product protections. The district court consistently overruled those objections. *Id.* at 25a.

Dannels subsequently moved for sanctions based on BNSF's alleged failure to produce these privileged materials. The district court granted that application—adopting Dannels's proposed order nearly verbatim—imposing a default judgment against petitioners on liability and causation, directing BNSF to pay Dannels's expenses and attorneys' fees, and ordering BNSF to produce additional documents that had never before been ordered produced by the court. Pet. App. 51a–52a. Among those documents are additional

privileged communications and attorney work product, including monthly status reports on *all* FELA claims, both in Montana and in other States, up to the present. *Id.* at 9a, 52a. The court directed that the case would proceed to trial on the issue of damages only.

Petitioners filed a second petition for a writ of supervisory control in the Montana Supreme Court, arguing that the district court abused its discretion in entering a default judgment on liability and ordering the production of additional privileged materials. Petitioners also reiterated their argument that Dannels's claims are preempted by FELA, explaining that "FELA is *comprehensive* as to railroad employers' liability to their employees for injuries incurred while engaged in interstate commerce" and that Montana's bad-faith laws impermissibly "restrict the defenses an employer may raise to a FELA lawsuit." Pet. for Writ of Supervisory Control and for an Order Staying Further Proceedings 15–16. Petitioners moved in the district court for a stay.

Petitioners asked the court to vacate the sanctions order and to stay the district court's order. Pet. for Writ of Supervisory Control and for an Order Staying Further Proceedings 17. The district court granted a stay on January 18, 2019, but the Montana Supreme Court denied the petition on March 12, 2019. Pet. App. 1a. With respect to preemption, the court held that the district court did not commit a "'mistake of law'" in "applying existing precedent," and that there was "no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit . . . *Reidelbach*." *Id.* at 7a. Justice McKinnon dissented, pointing out that "there is ample federal authority, not discussed in *Reidelbach*, which appears

to provide FELA is the exclusive remedy for injured railroad workers." *Id.* at 11a. Justice McKinnon added that the case had "grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption," and emphasized that the court was "affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*." *Ibid.* For those reasons, Justice McKinnon would have invited further briefing.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court's decisions in this case and in *Reidelbach* rejecting preemption defenses to bad-faith claims against self-insured FELA defendants conflict with this Court's FELA jurisprudence (as well as the decisions of other lower courts), undermine the comprehensive federal legal framework established by Congress in FELA, and deprive self-insured defendants in Montana of their fundamental right to defend themselves against FELA claims.

This Court has held that FELA occupies the entire field of railroad employer liability to employees and creates a nationally uniform liability framework governed by federal law. For that reason, the Court has repeatedly held that States may not impose liability or damages beyond that provided by FELA. *See N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 153 (1917) (holding that States do not "have a right to interfere," or, "by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose"); *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917) ("[FELA] liability can neither be extended nor abridged by common or statutory laws of

the state."). The Court has further held that the defenses available to a FELA defendant are governed by federal, not state, law, *see Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (holding that states are not permitted "the final say as to what defenses could and could not be properly interposed to suits under [FELA]"). Other state and federal courts—including the U.S. District Court for the District of Montana in a case addressing Montana's bad-faith laws—agree that FELA leaves no place for overlapping state liability or state-law restrictions on federal defenses.

The decision below defies this precedent, permitting employees to recover against self-insured FELA defendants *twice*—once for the underlying FELA claim, and again for the alleged emotional distress attributable to the FELA claim—even though FELA itself strictly limits employers' liability to damages incurred as a result of on-the-job injuries and does not authorize damages based on employers' litigation conduct. And although federal law governs the defenses a defendant may raise in a FELA suit, the Montana Supreme Court has permitted state law to supplant those federal defenses by imposing bad-faith liability on self-insured employers who elect to defend themselves against FELA claims rather than acceding to a plaintiff's settlement demands.

The Court should not permit Montana to continue its assault on the comprehensive federal liability regime that Congress established in FELA. As long as Montana's outlier, bad-faith regime remains on the books, FELA defendants in Montana will continue to face state-law liability that Congress never intended to countenance and will be compelled to settle nonmeritorious FELA suits that Congress never intended

to result in recovery. This Court should grant review to restore the supremacy of federal law in this field in which Congress has preserved no role for the States.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FELA PRECEDENT

The Montana Supreme Court's opinion in *Reidelbach*—and its decisions here adhering to that ruling—squarely conflict with this Court's FELA precedent. Montana's bad-faith scheme is fundamentally incompatible with FELA's structure and purpose, and the Montana Supreme Court's decisions upholding those state laws against preemption challenges are directly at odds with this Court's decisions regarding the preemptive force of FELA.

A. FELA was enacted as a comprehensive federal remedy for railroad employees injured in on-the-job accidents. Congress "was dissatisfied with the common-law duty of the master to his servant" and sought to reduce disputes between railroads and their employees to "the single question whether negligence of the employer played any part . . . in the injury or death which is the subject of the suit." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 507–08 (1957). It accomplished that objective by enacting FELA, which "withdraw[s] all injuries to railroad employees in interstate commerce from the operation of varying state laws, and . . . appl[ies] to them a national law having a uniform operation throughout all the states." *Winfield*, 244 U.S. at 150.

FELA seeks "uniform application throughout the country." *Dice*, 342 U.S. at 361; *see also Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) (emphasizing that FELA "requires uniform interpreta-

tion"). As this Court has explained, "[o]ne of the purposes of the [FELA] was to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (internal quotation marks omitted).

"That [FELA] is comprehensive and also exclusive is distinctly recognized in repeated decisions of this Court," *Winfield*, 244 U.S. at 151, which emphasize that Congress "undert[ook] to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce" and that the federal liability regime "is paramount and exclusive," *id.* at 151–52 (internal quotation marks omitted). FELA therefore "displaces any state law trenching on the province of the Act." *S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953).

The Court has affirmed the preemptive force of FELA in multiple opinions. In *Winfield*, for example, the Court held that FELA preempted a state-law claim for an on-the-job injury that did not result from negligence by the railroad employer. 244 U.S. at 153–54. The plaintiff sought recovery from his employer for an injury that "arose out of one of the ordinary risks of the work" in which he was engaged. *Id.* at 148. There was no allegation of fault or negligence, *ibid.*, and, in an effort to evade FELA preemption, the plaintiff argued that FELA did "not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws." *Id.* at 149.

This Court disagreed. It explained that FELA was intended to establish a nationally "uniform" law for injuries sustained by railroad employees in interstate commerce, and although FELA does not provide

for liability where the railroad "is not chargeable with negligence," FELA does not "leave the states free to require compensation where the act withholds it." *Winfield*, 244 U.S. at 149–50. "[N]o state," the Court emphasized, "is at liberty thus to interfere with the operation of a law of Congress." *Id.* at 153. Where Congress has regulated in an area within its constitutional powers, the Court continued, "it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations." *Ibid.*; *see also Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, 172 (1917) (same).

This Court has likewise held that "[q]uestions concerning the measure of damages in an FELA action are federal in character," *Liepelt*, 444 U.S. at 493, because "the proper measure of damages is inseparably connected with the right of action," *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916). Thus, in *Tonsellito*, this Court held that FELA preempted a state-law claim by the father of an injured railroad worker who sought to recover expenses incurred for medical attention to his son and for the loss of his son's services. 244 U.S. at 361. This Court explained that the claim was preempted because "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." *Id.* at 362; *see also Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 335–39 (1988) (holding that FELA preempted a state rule providing for prejudgment interest because such interest is not available under federal law and "constitute[d] a significant portion of an FELA plaintiff's total recovery").

The Court reached a similar conclusion in *Dice*, where it held that federal law controlled the validity of a release of liability that a defendant had raised in defense of a FELA claim. *See* 342 U.S. at 361. In holding that federal, not state law, controls, the Court emphasized the importance of a uniform standard governing FELA defenses: "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." *Ibid.* "[O]nly if federal law controls," the Court continued, "can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Ibid.*; *see also Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.").

B. The Montana Supreme Court's decisions in this case permitting Dannels's bad-faith claim to proceed under Montana law are impossible to reconcile with this Court's precedent. Dannels has already obtained damages under FELA for his on-the-job injury while working for BNSF. As *Winfield* and *Tonsellito* make clear, FELA bars Montana from imposing *additional* liability on BNSF arising out of that same injury: FELA "liability can neither be extended nor abridged by common or statutory laws of the state." *Tonsellito*, 244 U.S. at 362. This expansion of liability under Montana law affects not only the damages a plaintiff may obtain, but from whom the plaintiff may obtain them—it is only through Montana's bad-faith laws that Dannels has a cause of action against his coemployee, Nancy Ahern, the individual claims investigator. *See O'Fallon* v. *Farmers Ins. Exch.*, 859 P.2d

1008, 1015 (Mont. 1993) ("[I]ndividuals, as well as insurers, are prohibited from engaging in . . . unfair trade practices . . . .").

Montana's bad-faith laws also impermissibly limit the defenses an employer may raise in a FELA lawsuit—even though this Court has made clear that the defenses available to a FELA defendant are governed by federal law. *See Dice*, 342 U.S. at 361. In any other jurisdiction, a FELA defendant can assert any nonfrivolous defense to liability or damages, without any risk that it will expose itself to a larger damages award as a result of its litigation conduct. But in Montana, a self-insured FELA defendant faces the prospect of bad-faith liability under Montana law whenever a jury finds that its FELA liability was reasonably clear and it refused to promptly accept the plaintiff's settlement demand, because Montana's bad-faith laws require a self-insured FELA defendant to "settle in an appropriate case." *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984). Indeed, even a *defense* verdict on the underlying FELA claim will not preclude a plaintiff from recovering in a follow-on bad-faith suit. *See Graf* v. *Cont'l W. Ins. Co.*, 89 P.3d 22, 26 (Mont. 2004).

In addition, under Montana law, a self-insured entity whose FELA liability (in the judgment of a Montana judge or jury) was reasonably clear can be held liable for bad-faith damages if it failed to pay the full amount of the claimant's medical expenses and lost wages pending a settlement or judgment on the underlying FELA claim. *See DuBray* v. *Farmers Ins. Exch.*, 36 P.3d 897, 900 (Mont. 2001); *Ridley* v. *Guar. Nat'l Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997). This obligation runs headlong into a FELA defendant's right to raise the defense of comparative negligence,

which provides that an employee's recovery is diminished "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The obligation under Montana law that a self-insured FELA defendant pay the *full* amount claimed by the plaintiff, without regard to the employee's fault, is inconsistent with this statutorily conferred defense under FELA.

Each of these elements of Montana's bad-faith laws is unfair to self-insured FELA defendants. Taken together, they impose tremendous pressure on self-insured FELA defendants to promptly settle even non-meritorious FELA suits in the full amount demanded by the plaintiff. The imposition of this state-law liability above and beyond that authorized by FELA, as well as these state-law restrictions on FELA defendants' statutory defenses, is incompatible with the comprehensive federal remedial framework established in FELA. As this Court has emphasized, FELA "does not make the employer the insurer of the safety of his employees while they are on duty," *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994) (internal quotation marks omitted), but by stripping self-insured defendants of their right to contest FELA claims on the merits, that is precisely what Montana has done.

C. The Montana Supreme Court did not make any attempt in this case to reconcile its rejection of petitioners' preemption defense with this Court's FELA precedent. It instead mechanically adhered to *Reidelbach*, which rejected BNSF's preemption defense in a similar bad-faith suit under Montana law. The court's reasoning in *Reidelbach* underscores the conflict with this Court's FELA jurisprudence.

In *Reidelbach*, the Montana Supreme Court relied on two erroneous grounds for dismissing FELA's preemptive force. First, citing no FELA authority from this Court, the Montana Supreme Court asserted that FELA was intended only to "enact a compensatory scheme under which railway employees who were physically injured by the negligence of their employer while on-the-job and in pursuit of interstate commerce could obtain relief," and therefore did not preempt state-law bad-faith claims that compensate employees for mental and emotional injuries. *Reidelbach* v. *Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 425 (Mont. 2002). This contention is wrong as a factual matter: FELA permits plaintiffs to obtain damages for mental or emotional injuries in some circumstances. *See Gottshall*, 512 U.S. at 550. It is also wrong as an analytical matter: the fact that FELA does not provide a specific remedy does not mean that States are free to supplement FELA's comprehensive liability regime with state-law claims providing additional remedies. This Court has rejected that very reasoning, explaining that a State cannot "extend[ ]" or "abridge[ ]" FELA liability, even when FELA itself does not provide such a remedy. *See Tonsellito*, 244 U.S. at 361.

Second, the *Reidelbach* court held that because the plaintiff's "state claims [were] distinct and separate from his physical injury FELA claim," state law could provide an additional remedy. 60 P.3d at 428. But this Court rejected a nearly identical argument in *Winfield*, where the plaintiff contended that, in light of FELA's silence as to liability for injuries not attributable to a railroad's negligence, state law can fill this void with its own liability framework. 244 U.S. at 149–50. The Court categorically dismissed that contention. *See id.* at 153 ("[N]o state is at liberty thus

to interfere with the operation of a law of Congress."). In any event, a bad-faith claim based on a self-insured FELA defendant's litigation conduct is inextricably intertwined with the conduct addressed by FELA—the employer's alleged negligence in connection with the on-the-job injury—because the litigation conduct occurred in a case in which the plaintiff was seeking to recover for that alleged negligence. Bad-faith claims under Montana law are therefore no different from the claim this Court held preempted in *Tonsellito*, where the harm sought to be remedied was analytically distinct from the underlying on-the-job injury, but the claim was still preempted by FELA because the harm ultimately arose out of that underlying injury. *See* 244 U.S. at 361–62.

In addition, although the Montana Supreme Court in *Reidelbach* discussed *Dice* as it relates to a FELA employer's liability and damages (while citing neither *Winfield* nor *Tonsellito*), it failed completely to grapple with the fact that Montana's bad-faith laws limit the defenses a FELA defendant may raise and therefore are preempted under *Dice*. In fact, not only did the court fail to acknowledge that this Court has already spoken on the need to enforce a uniform regime for FELA claims and defenses, but it also disregarded much of this Court's FELA precedent by applying an inapposite preemption test used under the National Labor Relations Act. *See Reidelbach*, 60 P.3d at 429 (citing *Farmer* v. *United Bhd. of Carpenters & Joiners of Am.*, 430 U.S. 290 (1977)). That test relies on a three-factor framework that focuses on what conduct is *protected* by the National Labor Relations Act, and what interest the State has in regulating the conduct. *See Farmer*, 430 U.S. at 298. This Court has never held those considerations relevant in the FELA context.

If the Montana Supreme Court had not disregarded this Court's explicit guidance on the preemptive power of FELA, it would have concluded that FELA preempts the application of Montana's bad-faith laws to self-insured FELA defendants. Dannels's bad-faith claims exist only as a result of petitioners' handling of his FELA claim, which means that petitioners' potential liability under Montana law arises entirely out of BNSF's employment relationship with Dannels—a relationship governed comprehensively and exclusively by FELA. *See Chi., Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U.S. 472, 474 (1926). Whether Montana treats BNSF's conduct in FELA litigation as distinct from its conduct that allegedly contributed to the employers' underlying on-the-job-injury is irrelevant. *See Tonsellito*, 244 U.S. at 361–62. State law can neither restrict nor enlarge the scope of Dannels's claims. Nor can it impair petitioners' right to raise a full and vigorous defense to those claims. *See Dice*, 342 U.S. at 361.

The Court should grant review to ensure that FELA defendants in Montana are not subjected to state-law liability for conduct that, as this Court has recognized on multiple occasions, Congress intended to be governed exclusively by federal law.

II. THE DECISION BELOW CONFLICTS WITH THE FELA PRECEDENT OF OTHER LOWER COURTS

The Montana Supreme Court's holding that FELA does not preempt bad-faith claims against self-insured FELA defendants also conflicts with the FELA precedent of other lower courts, including federal courts in Montana and elsewhere.

A. Federal And State Courts In Montana Are Split On The Question Presented

Federal and state courts in Montana are divided on the preemption question presented in this case. When the Montana Supreme Court held in *Reidelbach* that Montana's bad-faith laws are not preempted as applied to self-insured FELA defendants, it expressly acknowledged that its decision was in tension with the decision of the United States District Court for the District of Montana in *Toscano* v. *Burlington Northern Railroad Co.*, 678 F. Supp. 1477 (D. Mont. 1987). *See Reidelbach*, 60 P.3d 418.

In *Toscano*, the district court held that bad-faith claims brought under Montana law against FELA defendants are preempted because "FELA presents the exclusive remedy in all actions falling within the ambit of the Act." 678 F. Supp. at 1479. FELA therefore precludes plaintiffs from using state law to "impos[e] liability upon the [defendant] for actions relating to an FELA claim, when"—as with Montana's bad-faith cause of action—"the liability is predicated upon a duty having its genesis in state law." *Ibid.*; *see also Giard* v. *Burlington N. Santa Fe Ry. Co.*, No. 12-CV-113, 2014 WL 37687, at *10 (D. Mont. Jan. 6, 2014) (holding a "mismanagement claim" under Montana law preempted because "[f]ederal law must control so that the FELA may be given the uniform application" (internal quotation marks omitted)).

Although the Ninth Circuit has not addressed whether FELA preempts the application of Montana's bad-faith laws to self-insured FELA defendants, several of its holdings are in direct tension with *Reidelbach* and leave little doubt that, if the court had the opportunity to address the issue, it would agree with the District of Montana that these state-law claims

are preempted. In *Counts* v. *Burlington Northern Railroad Co.*, 896 F.2d 424 (9th Cir. 1990), for example, the Ninth Circuit held that FELA preempted a railroad employee's state-law claim seeking to invalidate his release of his FELA claim on the basis of fraud. *Id.* at 425–26. The court held that "[t]o permit independent state-law actions for fraud in inducing FELA releases would lead to results that would vary from state to state. That we cannot allow." *Id.* at 425. The court therefore concluded that FELA preempted the plaintiff's state-law claim, "regardless of whether federal law provides the remedy he seeks." *Id.* at 426.

This division between state and federal authority means that the success or failure of a plaintiff's bad-faith claim against a self-insured FELA defendant depends entirely on whether the claim is brought in state or federal court. Indeed, if petitioners had been able to remove this case to federal court—which they were prevented from doing by Dannels's decision to sue the individual BNSF claims adjuster responsible for his claim—there is no doubt that it would have been dismissed on preemption grounds by both the District of Montana and the Ninth Circuit. A self-insured employer's right to defend itself against FELA liability should not depend on whether the plaintiff is able to identify a nondiverse defendant to foreclose removal to federal court.

B. The Montana Supreme Court's Decisions Conflict With The FELA Decisions Of Other Federal And State Courts

Montana is an outlier: It is the only State that currently permits "third-party claimant" actions against self-insured defendants under its unfair trade practices code. *See* Greg Munro, *Continuing*

Development of Insurance Bad Faith in Montana, Tr. Trends 25–26 (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/; *see also* Mont. Code Ann. § 33-18-242(8). The preemption question presented in this case is therefore unlikely to arise in the context of a circuit split—not because there is no difference of opinion, but because other States do not permit plaintiffs to use state law to exact damages from FELA defendants that FELA itself does not authorize.

Nevertheless, even in the absence of comparable bad-faith regimes, the Montana Supreme Court has managed to set itself apart. Unlike the Montana Supreme Court, numerous federal courts of appeals have recognized that FELA offers the *exclusive* remedy for railroad employees injured on the job. In *Janelle* v. *Seaboard Coast Line Railroad Co.*, 524 F.2d 1259 (5th Cir. 1975), for example, the Fifth Circuit dismissed a follow-on state-law action seeking to recover additional damages for the death of a railroad employee that could not have been recovered in the prior FELA lawsuit, pointing to "the exclusivity of the remedy under the FELA." *Id.* at 1261–62. Likewise, the Tenth Circuit has held that claims for loss of consortium are not cognizable under FELA, even if they are permitted under state law, because FELA's remedies are exclusive. *See Anderson* v. *Burlington N., Inc.*, 469 F.2d 288, 290 (10th Cir. 1972); *see also Jess* v. *Great N. Ry. Co.*, 401 F.2d 535, 536 (9th Cir. 1968) (per curiam) ("The [FELA] not only provides the exclusive remedy for the recovery by an employee of damages sustained by him as a result of an injury to him, but also governs the recovery by others for damages resulting from such injury.").

State courts outside of Montana have likewise followed this Court's precedent and foreclosed attempts by plaintiffs to recover damages beyond those authorized by FELA. For example, in *Boyd* v. *BNSF Railway Co.*, 874 N.W.2d 234 (Minn. 2016), the Supreme Court of Minnesota held that FELA preempted a state rule that provided for double costs after a rejected settlement offer. *Id.* at 242. And, like the federal courts of appeals, state courts have held that FELA preempts state-law claims for loss of consortium. *See, e.g.*, *In re Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998); *Kinney* v. *S. Pac. Co.*, 375 P.2d 418, 419–20 (Or. 1961) (citing *Tonsellito*, 244 U.S. 360; *Winfield*, 244 U.S. 147); *Louisville & Nashville R.R. Co.* v. *Lunsford*, 116 S.E.2d 232, 233 (Ga. 1960) (same).

Montana is thus an outlier not only because it imposes a unique and onerous regime of liability on FELA defendants (and, as here, their employees), but also because it is alone in its refusal to recognize that FELA's liability framework is comprehensive and exclusive. The Court should grant review to ensure that all FELA defendants are afforded the same right to defend themselves, and are subject to the same damages regime, no matter the jurisdiction in which suit is filed.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO FELA DEFENDANTS AND TO THE PRESERVATION OF FELA'S UNIFORM FEDERAL FRAMEWORK

The question presented directly implicates the right of defendants in Montana to defend themselves against FELA claims as well as the integrity of the nationally uniform legal framework that Congress established when it enacted FELA. This Court should grant review now—rather than permitting this

preempted claim to proceed further—because the Montana Supreme Court has twice made clear in this litigation that it is unwilling to apply this Court's FELA preemption jurisprudence. Requiring petitioners to litigate this case to resolution would waste judicial resources, imperil the confidentiality of BNSF's privileged communications, and undermine FELA's statutory objectives.

A. Montana's Bad-Faith Laws Deprive FELA Defendants Of Their Fundamental Right To Defend Themselves On The Merits

Montana's bad-faith laws effectively bar self-insured FELA employers in Montana from vigorously defending themselves against claims brought against them, lest they trigger a bad-faith suit seeking millions of dollars in additional damages for mental pain and suffering, or even punitive damages, not authorized under FELA. This risk is real and concrete. This case does not represent the first time that BNSF has been sued in a Montana bad-faith suit based on its decision to defend itself against a FELA claim. BNSF was also the defendant in the case that culminated in the Montana Supreme Court's controlling opinion in *Reidelbach*. *See* 60 P.3d 418. There are a number of more recent examples, as well. *See, e.g.*, *LeDoux* v. *BNSF Ry. Co.*, No. 17-CV-16, 2017 WL 3750203 (D. Mont. Aug. 15, 2017); *Lee* v. *BNSF Ry. Co.*, No. 17-CV-9, 2017 WL 3822019 (D. Mont. Aug. 14, 2017); *Toscano*, 678 F. Supp. 1477.

The unavoidable consequence (and apparent purpose) of Montana's bad-faith regime is that BNSF and other FELA defendants are deterred from defending themselves on the merits and instead settle even highly dubious claims in order to mitigate the risk of

potential bad-faith liability. This is anathema to the framework that Congress established in FELA—which does not provide for no-fault liability but instead requires employees to prove negligence to recover—as well as to this Court's longstanding recognition that a defendant has a due process right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Nor is there an opportunity for a self-insured FELA defendant to seek to settle the FELA claim and any follow-on bad-faith claim together, because even attempting to do so could itself be deemed an act of bad faith. *See Shilhanek* v. *D-2 Trucking, Inc.*, 70 P.3d 721, 726 (Mont. 2003); *Watters* v. *Guar. Nat'l Ins. Co.*, 3 P.3d 626, 638 (Mont. 2000). Thus, self-insured FELA defendants in Montana are under inexorable pressure to settle for the full amount demanded by the plaintiff promptly after suit is filed—no matter the merits of the claim—in order to minimize the risk of additional liability in a follow-on bad-faith suit.

Moreover, the prejudice from Montana's bad-faith regime extends beyond monetary liability. Petitioners face the possibility of a default judgment in this bad-faith litigation solely because they have declined to produce privileged or otherwise protected documents that would not be discoverable in ordinary litigation. *See* Mont. Code Ann. § 26-1-803 (privileging communications between attorneys and clients); Mont. R. Civ. P. 26(b)(3) (setting forth the protections for attorney work product). Justice McKinnon in dissent pointed out this disturbing anomaly, noting that the documents to be produced "are otherwise undiscoverable, *but for the case's status as a UTPA action*." Pet. App. 11a. A plaintiff bringing a bad-faith suit therefore is uniquely positioned under Montana law to use discovery to override the attorney-client privilege and

work-product doctrine. *See, e.g.*, *Barnard Pipeline, Inc.* v. *Travelers Prop. Cas. Co. of Am.*, No. 13-CV-7, 2014 WL 1576543, at *3–4 (D. Mont. Apr. 17, 2014).

On Dannels's motion to compel, the district court ordered BNSF to produce "all documents" relating to the handling, evaluation, and settlement of Dannels's underlying claim; "monthly summary" reports of FELA claims from the last twenty years; and "any study or review of BNSF's claims handling practices or procedures and/or amounts paid out on FELA claims." Order on Pl.'s Mot. to Compel 8, 27. In response to Dannels' motion for sanctions, the district court went even further by ordering BNSF to produce all monthly status reports on FELA claims from 2010 to present. Pet. App. 52a. BNSF's objections to the production of privileged or protected materials have largely been overruled by the district court, which ruled that the attorney-client privilege does not apply when an attorney provides advice related to claims adjustment and that work-product protections do not attach if the documents are necessary for the plaintiff's case. *See* Order Denying Pl.'s Mot. to Compel, Granting in Part Pl.'s Renewed Mot. to Compel, and Denying in Part Defs.' Mot. for Protective Order 4–6. The result is that Montana's bad-faith laws not only have exposed BNSF to the possibility of additional liability beyond that authorized by FELA, but also threaten BNSF's ability to protect privileged communications and work product essential to its ability to defend itself against FELA claims in Montana and elsewhere.

The stakes for self-insured employers facing the prospect of a FELA suit in Montana—and for the viability of the exclusive federal legal framework that Congress sought to establish in FELA—are therefore impossible to overstate.

B. Immediate Review Is Warranted

The question presented warrants immediate review. The Montana Supreme Court has denied petitioners' two petitions for writs of supervisory control regarding the preemption issue. No further record development is needed.

This Court has jurisdiction to decide the preemption issue now because the Montana Supreme Court's judgment denying the petition for a writ of supervisory control constitutes a final judgment. *See Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment . . . ."); *see also Costarelli* v. *Massachusetts*, 421 U.S. 193, 198 (1975) (same). The finality of the Montana Supreme Court's ruling on the preemption issue is not diminished by the ongoing state-court proceedings regarding the underlying merits of Dannels's bad-faith claim. This Court "has been inclined to follow a 'pragmatic approach' to the question of finality" and has held that a final decision "'does not necessarily mean the last order possible to be made in a case.'" *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 722 n.28 (1974). Review may therefore be appropriate where, for example,

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and

> character of . . . the state proceedings still to come.

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469, 482–83 (1975); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 163–69 (10th ed. 2013).

That is the precise situation here. The Montana Supreme Court definitively resolved the preemption question when it denied review of petitioners' two petitions for writs of supervisory control based on its controlling decision in *Reidelbach*, 60 P.3d 418. Petitioners intend to appeal the default judgment entered against them on state-law grounds and might well prevail on the merits on nonfederal grounds. Reversal of the Montana Supreme Court on the federal issue, however, "would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp.*, 420 U.S. at 482–83. This Court has granted certiorari in several state-court cases with a nearly identical procedural posture. *See, e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 289–90 (1980) (granting a writ of certiorari on a petition from a state supreme court's denial of a writ of prohibition); *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (treating as final a state supreme court's denial of a writ of prohibition). As in those cases, there is no reason to delay review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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