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FILED

FEB 14 2005

OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ALEXIS RAUSCH et. al.,

Petitioners,

vs.

MONTANA STATE FUND.

Respondent/Insurer,

and

JEREMY RUHD,

Petitioner,

vs.

**LIBERTY NORTHWEST INSURANCE
CORPORATION,**

Respondent/Insurer.

WCC NO. 9907-8274R1

**RESPONSE OF ASARCO, INC. TO
SUMMONS DATED JANUARY 10, 2005
INCLUDING OBJECTIONS TO
SUMMONS AND MOTION TO QUASH
SUMMONS**

COMES NOW ASARCO, Inc. ("ASARCO"), and in response to the Court's Summons dated January 10, 2005 in the above-entitled matter, responds as follows:

1. **OBJECTIONS:** ASARCO objects to the production of the information requested by the Summons, and moves to quash the summons pursuant to 24.5.316 ARM and 24.5.352 ARM, on the following grounds and for the following reasons:
 - A. ASARCO is not a party to this case and, consequently, this Court had no jurisdiction to issue a summons to ASARCO.
 - B. This Court does not currently have jurisdiction over ASARCO because no dispute exists between ASARCO and any claimants injured or suffering occupational diseases since June 30, 1991 or any attorneys and because no dispute has been presented pursuant to the Workers' Compensation and Occupational Disease Acts and this Court's rules.
 - C. This is not a class action, and class action claims have not been asserted in this action against any of the self-insureds which have not been made parties to this action.
 - D. ASARCO has no duty to solicit claims or to advise claimants of their legal rights in regard to said claims. See *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); see also *Dennehy v. Anaconda Mineral Company*, WCC No.: 8612-4030, 1989 WL 253344 (holding that self-insured had no trust relationship with claimants.)
 - E. While the Court's jurisdiction and authority appears to extend to "supervising enforcement of the common fund . . . from all insurers involved" in this action, it does not appear to extend to parties such as ASARCO which have not been properly made parties to this proceeding, which have not been properly joined by the assertion of class action claims, and which have no duty to solicit claims or advise claimants of their legal rights in regard to such claims. The Montana Supreme Court did not intend to do contravene such law by its statements in *Rausch et. al. v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25 and *Ruhd v. Liberty Northwest Ins. Corp.*, 2004 MT 236, 322 Mont. 478 (*Ruhd II*), decided August 31, 2004.

The above reasons are more particularly set forth in the accompanying brief which is incorporated by reference.

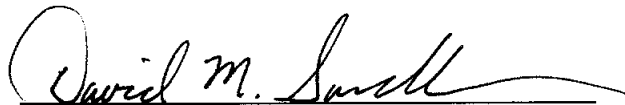
2. **RESPONSE:** Subject to the foregoing objections and ASARCO's Motion to Quash Summons, and without waiving its objections or Motion to Quash, ASARCO states that it is currently unable to produce the information requested by this Court for the reasons set forth in the Affidavit of Rick Davenport, which is attached as Exhibit A and by this reference incorporated herein.

WHEREFORE, ASARCO respectfully requests the following relief:

1. That the Court grant ASARCO's Motion to Quash Summons, and order that ASARCO is not required to answer or further respond to said Summons; or
2. Alternatively, if required to answer said summons, that ASARCO be granted until April 30, 2005 within which to provide the information requested.

DATED this ~~10th~~ day of February, 2005.

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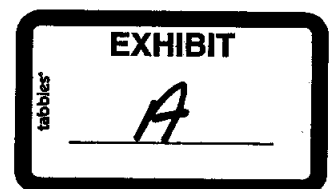
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WCC NO. 9907-8274R1

**AFFIDAVIT OF
RICK DAVENPORT**



STATE OF MONTANA)
 : ss
County of Flathead)

I, Rick Davenport, being first duly sworn upon oath, depose and say:

1. I work as a workers' compensation adjuster for Putman & Associates, Inc., a licensed third-party administrator of workers compensation claims in the State of Montana.

2. Putman & Associates has been a licensed third-party administrator since at least 1990. I have adjusting workers' compensation claims in Montana since June of 1995, but have been adjusting workers compensation claims in other states since 1977. I am making this affidavit on behalf of ASARCO, Inc. (hereinafter "ASARCO") and in response to the Summons issued by the Court on January 10, 2005.

3. Since 1991, we have adjusted claims for ASARCO, one of the Insurers or Self-Insureds to which the Summons dated January 10, 2005 was directed by this Court. As an adjuster for ASARCO, I have personal knowledge of the type of information maintained by ASARCO in regard to claims involving (a) claimants injured or suffering occupational diseases since June 20, 1991 to whom PTD benefits were paid, and (b) claimants injured or suffering occupational diseases since June 20, 1991 to whom TTD benefits were paid. I also have knowledge of the efforts which would be required to comply with or respond to the Summons, and I make this affidavit based upon my personal knowledge of such claims.

4. ASARCO is unable to provide the requested information to the Court by the deadline of February 14, 2005 because of the following reasons:
 - A. A computer inspection of the files and records will not provide the Court with the information that has been requested.

 - B. A physical inspection of the files and records is necessary to gather the information, particularly the information requested in subparagraphs 3, 4, 5, 6, 7 and 8 of paragraph 4 of the Court's Summons.

- C. With respect to the information sought in paragraph 4 of the Summons, ASARCO and I estimate that there are approximately 104 files that will need to be physically examined for claimants injured or suffering occupational disease since June 30, 1991 to whom PTD and/or TTD benefits may have been paid.
- D. A physical inspection or examination of these files cannot be accomplished by February 14, 2005, particularly since Putman & Associates also adjusts claims for several other of the insurers and self-insureds named in the Summons. In addition to our regular adjusting duties, I estimate that either myself or other adjusters at Putman & Associates will have to physically examine more than 1,000 files to comply with the Summons.
- E. ASARCO and I reasonably estimate that the physical inspection of the files necessary to comply with the Summons could not be completed until April 30, 2005.

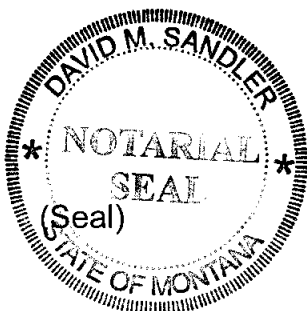
DATED this ___ day of February, 2005.

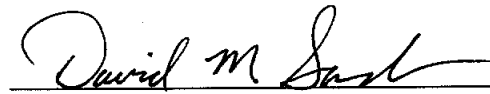


 RICK DAVENPORT

STATE OF MONTANA)
 : ss
 County of Flathead)

This instrument was acknowledged before me on this 10TH day of February, 2005, by Rick Davenport





 DAVID M. SANDLER
 [Type, Stamp or Print Name]
 Notary Public for the State of Montana
 Residing at KALISPELL, Montana
 My commission expires OCTOBER 10, 2006.

DATED this 10th day of February, 2005.

HAMMER, HEWITT, SANDLER & JACOBS, PLLC

A handwritten signature in cursive script, appearing to read "David M. Sandler", written over a horizontal line.

Todd A. Hammer

David M. Sandler

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Attorneys for Respondent