IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

BOB COFFEY, LORETTA CORN, AND LARRY AND MARY ELLEN JONES, INDIVIDUALLY AND ON BEHAL OF ALL OTHERS SIMILARLY SITUATED,	)	
PLAINTIFFS,	)	
v.	)	**CASE NO. CJ-2008-68**
1. FREEPORT-MCMORAN COPPER & GOLD INC.;	)	
2. PHELPS DODGE CORPORATION;	)	
3. CYPRUS AMAX MINERALS COMPANY;	)	
4. BLACKWELL ZINC COMPANY, INC.;	)	
5. BNSF RAILWAY COMPANY f/k/a BURLINGTON NORTHERN INC. f/k/a BURLINGTON NORTHERN RAILROAD COMPANY f/k/a THE BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY,	)	
DEFENDANTS.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs respectfully move the Court to enter an order certifying a class of individuals owning real property in Blackwell pursuant to Rule 2023 of the Oklahoma Rules of Civil Procedure. Plaintiffs' case is well suited for class treatment because it satisfies each of the requirements of Rule 2023. The proposed class consists of more than 2,000 property owners whose claims arise from the same source of conduct—Defendants' release of toxic waste—and are based on the same legal theories. The class representatives and the putative class have been harmed in the same way and their injuries can be adequately ascertained and addressed by class-wide relief. For these reasons, as explained in detail below, the Court should certify a class pursuant to Rules 2023(B)(2) and (B)(3).

I. INTRODUCTION

By the end of the 19th century, natural gas had become the primary fuel for smelting[1] operations. As the natural gas reserves in Kansas and Missouri diminished, zinc smelting migrated to Oklahoma, an area still rich in natural gas. The first facility in Oklahoma was opened near Bartlesville in 1907 and was quickly followed by many others, including the Blackwell Zinc Smelter (the "Smelter"). Blackwell Zinc Company ("BZC") began operating the Smelter in Blackwell, Oklahoma in 1922. The Smelter encompassed approximately 160 acres on the western edge of town located near the intersection of 13th Street and State Highway 11. *See* Ex. A at 4. As a result of the Smelter, the population of Blackwell grew to 12,000, almost 1,000 of whom were employed at the Smelter. *See* Ex. B at 2. During the Smelter's peak years of operation, it was the largest horizontal retort smelter in the world. *See* Ex. C at 8.

During its operational life, workers at the Smelter produced ten billion pounds of zinc alloy, *see* Ex. C at 5-14, for use in many galvanized iron and steel products, including water

[1] Smelting is a form of extractive metallurgy; its main use is to produce a metal from ore.

piping, windmills, water tanks, siding, roofing and lightning rods. *See* Ex. B at 2. Due to its size and its ability to produce high volumes of zinc, the Smelter played an important role during World War II, as zinc was needed for many wartime products. *See* Ex. D at ¶¶ 8-9, 19-20. The erection of a new sintering plant in 1951 further propelled growth and led to the 1955 opening of a cadmium plant that produced products used in paints, pigments, ceramics, television phosphors and chemical compounds. *See* Ex. A at 11; Ex. B at 2.

The ore used as raw material for these products, brought to the Smelter by railcar from Joplin, Missouri and later from Mexico, Canada, Australia and Africa, contained up to 20% lead and considerable cadmium. *See* Ex. E at 6. Defendants continuously piled both ore and solid waste/residue on and around the Smelter facility. *See* Ex. F at 2; Ex. G.

Although the citizens of Blackwell were unaware of the dangers that existed and those that loomed ahead, BZC knew the byproducts created at the Smelter contained dangerous compounds. At least as early as February 21, 1939, the Tri-State Zinc and Lead Ore Producers Association recognized that dust emissions were so bad that it called them a "nuisance" and a "constant source of agitation and discontent." *See* Ex. I. Later that same year, the Producers Association acknowledged that the dust was a "hazard" and that steps were needed to prevent the dust from being blown over and into surrounding communities. *See generally* Ex. J.

Faced with increasing governmental regulations regarding pollution control, BZC began the process of closing the Smelter in 1972, and completely dismantled the facility by 1974. *See* Ex. K at 38. After fifty-eight years of continuous operation, the Smelter was gone. And, unbeknownst to Plaintiffs, Defendants left behind an environmental nightmare. Since the closing of the Smelter, rural Blackwell has struggled to attract new residents and businesses and its population has steadily declined to around 7,150. *See* Ex. L.

In 1974, after closing and razing the Smelter, BZC deeded the Smelter site to the Blackwell Industrial Authority ("BIA"), a public trust of the State of Oklahoma. *See* Ex. A at 4. From 1974 to the present,[2] the BIA developed the Smelter site as an industrial park, which resulted in the selling and leasing of various portions of the property. *See* Ex. N at 4. As the property was sold and leased, commercial construction activities further spread Defendants' contaminants throughout Blackwell.

In 1992, the United States Environmental Protection Agency ("EPA") evaluated Blackwell to determine if it should be placed on the National Priorities List ("NPL") as a Superfund site. To prevent listing on the NPL, an investigation and remedial efforts ensued. *See* Ex. O at 2. Thereafter, BZC, the BIA and the City of Blackwell entered into a Consent Agreement and Final Order (the "1992 CAFO") with the Oklahoma Department of Health.[3] *See generally* Ex. F. The 1992 CAFO required BZC and the BIA to characterize and remediate the environmental contamination at the former Smelter site and on property owned by the City of Blackwell. *See* Ex. F at 3-4. Significantly, the 1992 CAFO's remediation plan did **not** include and was **not** applicable to private property owned by the residents of Blackwell. *See generally* Ex. F. In 1994, the ODEQ and the EPA entered into a Memorandum of Understanding (the "1994 MOU") that obligated the ODEQ to ensure that the environmental characterization and remediation work at the Smelter site was conducted in a manner consistent with the EPA's Superfund program. *See* Ex. O at 3.

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[2] In 2009, the BIA was paid $1.95 million by the Freeport Defendants and 73 acres of the land, originally part of the BIA trust, was deeded back to Cyprus Amax. *See* Ex. M. Cyprus Amax, a wholly owned subsidiary of Freeport-McMoRan, is a shell corporation that resulted from the 1993 merger of BZC's parent corporation, AMAX, Inc. and Cyprus Mineral Company.

[3] The Oklahoma Department of Health was the predecessor to the Oklahoma Department of Environmental Quality ("ODEQ").

Pursuant to the 1992 CAFO and the 1994 MOU, Cyprus Amax, on behalf of BZC, performed environmental investigations and purported "remedial" actions on and about the Smelter site under the ODEQ's supervision. *See* Ex. F at 3-4; Ex. O at 2. Among other things, lead, arsenic and cadmium were found in the soils at the Smelter site and cadmium was further found to be infiltrating area groundwater. *See* Ex. P at 7, 11-12. After a series of negotiations and attendant delays, several consent orders were entered and alleged "remedial" efforts were intiated to address the soil and water contamination, as well as certain ecological concerns. See Ex. F at 3-4; Ex. P at 20-22. These "remedial efforts" were not binding on private citizens; nor did they help private citizens. *See generally* Ex. F; Ex. P at 20-22. Indeed, none of Defendants' purported "remediation efforts" was effective or comprehensive. The testing protocols and threshold clean up levels employed by Defendants were designed to minimize findings of contamination, wholly fail to investigate contamination inside residents' homes, and turn a blind eye to well-established and widely accepted benchmarks, such as those adopted and endorsed by the EPA.[4] *See* Ex. P at 21; Ex. Q at 8 n.7.

In 1999, BZC's parent company, Cyprus Amax, was purchased by Phelps Dodge Corporation. *See* Ex. R at 654. In 2006, *after* Plaintiffs began testing properties in Blackwell, Defendants announced a "voluntary supplemental soil sampling program" ("SSP") in Blackwell. Only after Plaintiffs announced their test results showing widespread contamination did the SSP begin. Although the Freeport Defendants make every effort to portray the SSP as either a

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[4] The Defendants and the ODEQ agreed to a contamination threshold of 750 parts per million (ppm) for lead in soil. However, even under lax EPA standards, a concentration greater than 400 ppm is a soil-lead hazard in areas where children play. 40 C.F.R. § 745.65. Defendants' testing protocol did nothing to determine whether the areas sampled are play areas where children under the age of six are likely to frequent. This omission is particularly disturbing in light of the fact that blood lead level test results from the Oklahoma Department of Health show that 1 in 3 Blackwell children have blood lead levels greater than 5 µg/dL. Blood lead levels greater than 5 µg/dL are sufficient to cause brain damage. *See* Ex. MM.

government mandated cleanup or pure charity,[5] in reality it is nothing more than a vehicle for propaganda. In fact, the Freeport Defendants' response to contamination in Blackwell has been, and continues to be, a well-organized public relations campaign designed to "diffuse public attention away from potentially image-damaging information . . . ." *See* Ex. R at 657; *see generally* Exs. T, U. The Freeport Defendants have made considerable efforts to alter opinions in Blackwell by: (1) implementing a "Good Neighbor" campaign;[6] (2) denying responsibility and seeking legitimization;[7] and (3) baselessly blaming alternative sources for the contamination.[8] *See* Ex. R at 657.

In order to recover for the damage to publicly owned property in Blackwell, the City of Blackwell and the Blackwell Municipal Authority ("BMA") filed suit against the Freeport Defendants on October 15, 2009. *See generally* Ex. V. The City of Blackwell and the BMA sought damages for any contamination or pollution as a result of the operation of the Smelter and/or the Freeport Defendants' conduct, acts or omissions to remediate contamination or pollution from the Smelter. *Id.* at ¶¶ 44-50. The City claimed damages for unjust enrichment, stigma damages, lost tax revenue, lost profits, punitive damages, annoyance, inconvenience and discomfort. *Id.* at ¶¶ 46, 50, 76, 78. On February 4, 2010, the City and the BMA settled their

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[5] *See* Ex. R at 658, 660; Ex. S at 1-2; Ex. T at 280.

[6] The "Good Neighbor" campaign includes opening a local "outreach" office, joining the local chamber of commerce, enlisting a former state senator as its spokesperson and giving donations to the local hospital and area schools. *See* Ex. R at 657-60; Ex. T at 280, Ex. U at 175-76.

[7] Defendants Freeport-McMoRan and Phelps Dodge have consistently told residents of Blackwell that the contamination is BZC's responsibility as the previous owner of the Smelter, not theirs. *See* Ex. R at 660; Ex. T at 280. This is a lie. Freeport-McMoRan and Phelps Dodge are "legally responsible" for the contamination in Blackwell and blaming Blackwell Zinc Company is nothing more than a smoke screen and a corporate shell game. *See generally* Ex. W. Furthermore, the Freeport Defendants have sought legitimacy for their actions by hiding behind approval from state and federal regulatory agencies. *See* Ex. R at 660-62; Ex. T at 280-81.

[8] The Freeport Defendants have repeatedly suggested that the source of the contamination in Blackwell is unknown. *See* Ex. O at 662-63; Ex. P at 281-82. This is another lie.

claims with the Freeport Defendants for $54,000,000.00.[9] *See* Ex. W at ¶ 1.

Like the city-owned property in Blackwell, Plaintiffs' and the putative class members' properties have been contaminated by millions of pounds of toxic waste material released as a result of Defendants' wrongful conduct at and about the Smelter site. *See* Ex. X at 2-3, 7-8. The toxic substances generated through Defendants' negligent operations have been and continue to be a nuisance and an ongoing trespass to Plaintiffs' properties and Defendants have been unjustly enriched through their unlawful use of Plaintiffs' properties as repositories for their toxic waste. Defendants' contamination contains and has continuously released into the community a variety of toxic substances, including lead,[10] arsenic[11] and cadmium.[12] *See* Ex. Q at 7-10. These toxins have contaminated and continue to contaminate private property, thereby limiting its use, diminishing its value and unjustly providing Defendants with a substantial value for the decades of storage of toxic waste. *See* Ex. Q at 9-10; Ex. BB; Ex. CC; Ex. DD.

Importantly, the toxins emitted by the Smelter possess no inherent warning properties that would alert a reasonable person to their presence. Indeed, each such contaminant is invisible, odorless and tasteless. *See* Ex. Y at 12, 283; Ex. Z at 2, 297; Ex. AA at 252. The presence of these toxins could not and cannot be detected without highly technical and expensive

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[9] The City and the BMA reserved the right to refile claims for damages associated with the contaminated groundwater. *See* Ex. W at ¶4.

[10] Exposure to lead can result in damage to the brain and central nervous system, peripheral nervous system, kidneys and hematopoietic system. Anemia is an early manifestation of lead poisoning due to the inhibition of hemoglobin synthesis and a reduction in the life span of circulating red blood cells. Lead exposure can lead to kidney damage and possible kidney failure, fine motor nerve damage, bone damage, hypertension, lead encephalopathy, memory loss, and permanent brain damage. Lead exposure can also have neurological and psychological effects. *See* Ex. Y at 8-11, 35-156.

[11] Exposure to arsenic can result in severe gastrointestinal toxicity, peripheral nervous system neuropathy, anemia, hyper-pigmentation, skin lesions, vascular disease, headaches, lassitude, weakness, respiratory ailments, and vision impairment. Arsenic is also associated with liver and kidney injury, disturbances of the central nervous system, and an increased risk of cancer of the lungs, skin, kidney, liver, and bladder. *See* Ex. Z at 6-10, 41-198.

[12] Exposure to cadmium can result in an increased risk of lung disease, death due to heart-related problems and serious effects on the kidney, including but not limited to, kidney cancer. *See* Ex. AA at 5-7, 43-173.

scientific testing. *See* Ex. Q 3-4, 10-11; Ex. X at 3. As such, Plaintiffs were unaware that Defendants were blanketing Plaintiffs' properties with these toxic heavy metals. A reasonable person could not have known, despite all manner of diligence, of the presence of these contaminants.

The manner in which Defendants operated, transported ore and waste, closed, cleaned-up and purportedly "remediated" the Smelter site was woefully inadequate and only served to further contaminate Blackwell. Defendants have caused and continue to cause damage to the properties of Plaintiffs. And, Plaintiffs' damages are exponentially exacerbated by Defendants' ongoing refusal to properly remediate the contamination.

As a result of Defendants' unlawful conduct, lead, arsenic, cadmium and zinc have been[13] and continue to be dispersed throughout Blackwell. Indeed, there is widespread heavy metal contamination to the exterior and interior of homes throughout the community. *See* Ex. Q at 9. The contaminants released from the facility were and are transported by wind, water and other natural processes onto and into the properties and homes of Blackwell residents. *See* Ex. P at 4; Ex. Q at 10; Ex. X at 2-3, 8. Furthermore, soil, dirt, sand, slag, "connies" and other materials were sold or given to the City of Blackwell and area residents for use as landfill, the construction of roads, driveways, parking lots, the Blackwell High School running track, and a multitude of other applications. *See* Ex. A at 9, 11, 16; Ex. P at 4. Once in the soils of Blackwell, contamination is continuously brought into homes, schools and places of business. *See generally* Ex. Q.

As a proximate result of Defendants' conduct, Plaintiffs and others similarly situated have suffered and will continue to suffer significant decreases in their property values.

[13] During the Smelter's operation, heavy metals were released from the facility and in to the community via the Smelter stack, railcar transport and various fugitive sources, including retort and sinter residues, slag, crushed retorts and condensor sands. *See* Ex. P at 4; Ex. X at 8.

Blackwell residents selling their homes are required to disclose the existence of lead, arsenic, and/or cadmium contamination to any potential buyer in accordance with Okla. Stat. tit. 60 section 833(B)(1)(g). *See, e.g.*, Ex. DD at 2. Should a seller fail to disclose the existence of any of these dangerous substances, he or she would be liable for any actual damages, attorneys' fees and/or court costs incurred by the purchaser and the seller's agent would be subject to a fine of up to $2,000.00. Plaintiffs and others similarly situated have been further damaged as a result of Defendants' unlawful and negligent conduct because they have lost the full use and enjoyment of their properties.

Remedial measures are available to properly test and permanently clean up the properties of Blackwell residents. *See* Ex. Q at 10; Ex. EE at 1, 3-7. Although charged with the responsibility of taking such remedial action, Defendants have failed to employ the protocols necessary to ensure that the contamination located on the properties of Plaintiffs are properly and permanently abated. For example, with respect to testing of Blackwell properties, Defendants have engaged in homogenized soil sampling and taken soil samples from inappropriate depths. These methods are designed to manipulate results by diluting soil samples and thereby decreasing findings of contamination. Additionally, Defendants have wholly failed to test or remediate the interior of homes.

Lead, arsenic and cadmium from the Smelter have also contaminated the groundwater under a large section of Blackwell. *See* Ex. P at 12. These toxic materials have washed and continue to wash into the Chikaskia River and other bodies of water and low-lying areas, as well as into residents' homes and onto community trails, sidewalks, rights-of-way, parks and playgrounds. Acknowledging that their conduct has contaminated the groundwater in and around Blackwell, Defendants have proposed the construction of a water treatment facility to

extract harmful zinc and cadmium compounds from the groundwater. *See* Ex. FF. Unfortunately, in the interim, Plaintiffs are precluded from using and enjoying their groundwater—groundwater that is plentiful and easily accessible. *See id.* The groundwater is currently unusable and could remain so for over one hundred years. *See* Ex. GG.

Of paramount concern is the effect of lead exposure on children. Exposure to lead can have a wide range of effects on a child's development and behavior. *See* Ex. P at 12-13; Ex. HH at 2; *see generally* Ex. Y. Children are at an increased risk for greater lead exposure. *See* Ex. P at 12-13; Ex. II at 1016; *see generally* Ex. Y. Children under the age of six are especially vulnerable to lead's harmful health effects as their brains and central nervous system are still developing. *See* Ex. JJ; Ex. KK at 6. For young children, even very low levels of exposure can result in reduced IQ, learning disabilities, attention deficit disorders, behavioral problems, stunted growth, impaired hearing, and kidney damage. *See* Ex. P at 12-13; Ex. JJ; Ex. KK at 6; Ex. LL at 2; Ex. MM at 1518, 1521-23.

As a result of Defendants' unlawful and negligent conduct, including their harmful, careless and dangerous operation, transport of ore and waste, closure, "cleanup" and purported "remediation" of the Smelter, thousands of Blackwell properties, including Plaintiffs', have been severely damaged. Through their actions and inactions, Defendants have allowed toxic chemicals including lead, arsenic, and cadmium to be deposited into the soil and interior dust, and to leach into groundwater. Defendants' toxic chemicals have contaminated the soil, homes and groundwater throughout the proposed class area and are entering Plaintiffs' homes, interfering with Plaintiffs' use and enjoyment of their properties and damaging Plaintiffs' property values. Furthermore, Plaintiffs' properties have been used as *de facto* storage facilities for Defendants' contaminated waste for decades. Plaintiffs commenced this action in order to

obtain broad relief for themselves and similarly situated Class Members for damages suffered as a result of Defendants' conduct.

As demonstrated below, the most efficient and appropriate manner for addressing Plaintiffs' claims is through the certification of the proposed class pursuant to both 2023(B)(2) and 2023(B)(3).

II. ARGUMENT AND AUTHORITY

In adjudicating the instant class certification motion, the Court must accept Plaintiffs' allegations as true. *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1032 (Okla. 2006); *Beer v. XTO Energy, Inc.*, No. CIV-07-798-L, 2009 U.S. Dist. LEXIS 23096, *6 (W.D. Okla. Mar. 20, 2009). At this stage of the litigation, Plaintiffs are not required to prove they will succeed on the merits of their claims and the Court is not to resolve the merits of Plaintiffs' claims. *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 52 (Okla. 2008). Indeed, such inquiry is inappropriate when deciding whether a class should be certified. *Burgess v. Farmers Ins. Co.*, 151 P.3d 92, 94 (Okla. 2006) (disagreeing with Court of Civil Appeals' consideration of the merits and rejecting the appellate court's merit-based determinations); *see also Black Hawk Oil Co v. Exxon Corp.*, 969 P.2d 337, 343 (Okla. 1998). Rather, the Court may consider the merits only "insofar as it informs what individual issues might be a part of the adjudicatory process." *Weber v. Mobil Oil Corp.*, No. 106241, 2010 Okla. LEXIS 36, *14 (Okla. Apr. 13, 2010).

In the face of a close question regarding whether certification is proper, the pragmatically correct action is to sustain certification. *Black Hawk Oil Co.*, 969 P.2d at 342; *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968) (holding that courts should err in favor of, and not against, allowing maintenance of the class action). A certification order is always, prior to judgment on the merits, subject to modification. *Black Hawk Oil Co.*, 969 P.2d at 342.

"The party who seeks certification has the burden of proving each of the requisite elements for class certification." *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 57 (Okla. 2008). There is little consensus among jurisdictions as to exactly what burden of proof a movant must satisfy in his motion for class certification. Several jurisdictions require the movant to simply make "some showing" that the prerequisites of class certification are satisfied, *Apolinar v. Prof'l Constr. Servs., Inc.*, 694 So. 2d 537, 542 (La. App. 4th Cir. 1997), while others require a more stringent standard, including requiring the movant to demonstrate the class certification requirements by a "preponderance of the evidence." *Jackson v. Unocal Corp.*, 231 P.3d 12, 16 (Colo. App. 2009). Oklahoma has yet to adopt a specific burden of proof for evidence the movant must satisfy to support a motion for class certification. However, even if the Court were to apply the "preponderance of the evidence" burden of proof, Plaintiffs' evidence in support of class certification meets, and in fact exceeds, this burden of proof.

Here, Plaintiffs seek to represent a class of Oklahoma citizens currently domiciled in the State of Oklahoma who currently own private real property in the City of Blackwell, Kay County, Oklahoma, or any other private real property located within a five-mile radius of the former Smelter.[14] *See* Plaintiffs' Original Petition at ¶103. Pursuant to Rule 2023, Plaintiffs must meet the following prerequisites for class certification:

1) The class is so numerous that joinder of all members is impracticable (OKLA. STAT. tit. 12, § 2023(A)(1) (2010));

[14] Courts routinely have certified classes defined by geographic boundaries. *See Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, No. CIV-05-445-C, 2007 U.S. Dist. LEXIS 577 (W.D. Okla. Jan. 3, 2007); *Madison v. Chalmette Ref., LLC*, No. 07-307, 2010 U.S. Dist. LEXIS 65708 (E.D. La. June 8, 2010); *Collins v. Olin Corp.*, 248 F.R.D. 95 (D. Conn. 2008); *Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. 2006); *Bentley v. Honeywell Int'l Inc.*, 223 F.R.D. 471 (S.D. Ohio 2004); *LaClercq v. The Lockformer Co.*, No. 00 C 7164, 2001 U.S. Dist. LEXIS 2115 (N.D. Ill. Feb. 23, 2001); *Josephat v. St. Croix Alumina, LLC*, No. 1999-0036, 2000 U.S. Dist. LEXIS 13102 (D. V.I. 2000); *Marr v. WMX Techs., Inc.*, 711 A.2d 700 (Conn. 1998); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378 (D. Colo. 1993); *Bates v. Tenco Servs., Inc.*, 132 F.R.D. 160 (D. S.C. 1990).

2) There are questions of law or fact common to the class (OKLA. STAT. tit. 12, § 2023(A)(2) (2010));

3) The claims or defenses of the representative parties are typical of the claims or defenses of the class (OKLA. STAT. tit. 12, § 2023(A)(3) (2010));

4) The representative parties will fairly and adequately protect the interests of the class (OKLA. STAT. tit. 12, § 2023(A)(4) (2010)); and

5) The party opposing the class has acted or refused to act on grounds generally applicable to the whole class thereby making appropriate final injunctive relief with respect to the class as a whole. (OKLA. STAT. tit. 12, § 2023(B)(2) (2010)); or

6) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (OKLA. STAT. tit. 12, § 2023(B)(3) (2010)).

Plaintiffs satisfy each of these requirements.

A. Plaintiffs' Case Meets the Requirements of Rule 2023(A)

1. Numerosity

The prerequisite of numerosity is discharged if the class is so numerous that joinder of all members is impracticable. OKLA. STAT. tit. 12, § 2023(A)(1) (2010). Joinder need not be impossible, only difficult and inconvenient. *Shores v. First City Bank Corp.*, 689 P.2d 299, 302 (Okla. 1984). Impracticability exists where the "plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required." *Barton v. Corrections Corp. of Am.*, No. 03-CV-428-JHP-SAJ, 2005 U.S. Dist. LEXIS 44895, *9-10 (N.D. Okla. Sept. 1, 2005). Although no "magic number" exists, the numerosity test is satisfied by numbers alone when the size of the class is in the hundreds.[15] *Black Hawk Oil Co.*, 969 P.2d at 343; 1 ALBA CONTE & HERBERT B. NEWBERG,

[15] Courts in Oklahoma have approved classes with far fewer than one hundred members. *See Barton*, 2005 U.S. Dist. LEXIS 44895, at *9-10 (certifying a class of 66 individuals); *Jones Oil Corp. v Claro*, 459 P.2d 858, 862 (Okla. 1969) (upholding certification of a class of 11 individuals).

NEWBERG ON CLASS ACTIONS § 3.5 (4th ed. 2002) (stating that a presumption should arise that joinder is impracticable with as few as 40 class members).

In this case, the impracticability of joinder is apparent from the sheer number of class members whose property has been contaminated by Defendants' conduct. Class members can be readily ascertained from the public property tax rolls in Kay County. *See* Ex. NN at 8. According to Plaintiffs' review of public records, of which the Court may take judicial notice,[16] the proposed class consists of over 4,300 individual properties with many properties having multiple fractional owners. *See* Ex. NN at 16. Thus, joinder is impracticable based on the number of property owners alone.

> Given the fractional ownership interests it is clear that the actual class members will far exceed the number of parcels. Further, given the limited fractional interests of some of the potential class members, it would be impracticable to join them as party plaintiffs. Finally, while it is true . . . that the issue deals with an area of limited geographic scope, that limit exists only as to the real property. The owners of that property and hence the actual class members may be widely dispersed. Consequently, the Court finds Plaintiffs have established the numerosity requirement.

Ponca Tribe of Indians, 2007 U.S. Dist. LEXIS 577 at *11-12 (certifying a property damage class based on Plaintiffs' representation that there were at least 201 parcels of real estate within the geographic boundaries of the proposed class).

Here, the numerosity requirement is clearly satisfied. *See* Ex. OO at 5-6.

2. Commonality

The next prerequisite to class certification is the existence of "questions of law or fact common to the class." OKLA. STAT. tit. 12, § 2023(A)(2) (2010). Importantly, commonality is not required for each issue that might arise in the case. *Realmonte v. Reeves*, 169 F.3d 1280, 1285 (10th Cir. 1999); *McNeely v. Nat'l Mobile Health Care, LLC*, No. CIV-07-933-M, 2008

[16] *See* OKLA. STAT. tit. 12, § 2202(B)(2) (2010).

U.S. Dist. LEXIS 86741, *16 (W.D. Okla. Oct. 27, 2008). In fact, "[t]here need only be one issue of law or fact common to all class members to satisfy the element of commonality." *Hill v. Marathon Oil Co.*, No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650, *8 (W.D. Okla. June 9, 2010). Because most cases seeking class certification will have at least one common issue, *Gipson v. Sprint Commc'ns Co.*, 81 P.3d 65, 70 (Okla. Civ. App. 2003), courts have described the commonality standard as one that is oftentimes easily satisfied. *Baby Neal v.* Casey, 43 F.3d 48, 56 (3d Cir. 1994); *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *7 (citing *Baby Neal*); *Hallaba v. WorldCom Network Servs. Inc.*,196 F.R.D. 630, 635 (N.D. Okla. 2000). The commonality requirement is "not high, and does not require that class members share every factual and legal predicate." *Naylor Farms v. Anadarko OGC Co.*, No. CIV-08-669-R, 2009 U.S. Dist. LEXIS 127516, *12 (W.D. Okla. Aug. 26, 2009).

Some of the common factual and legal questions in Plaintiffs' case include:

a. whether, and to what extent, Defendants emitted or allowed to be emitted, substances from the Smelter property and railcars transporting ore and/or waste to/from the Smelter;

b. whether the substances emitted or allowed to be emitted from the Smelter property were/are hazardous;

c. whether, and to what extent, Defendants are responsible for the hazardous substances on and around the properties of Plaintiffs and the Class;

d. whether, and to what extent, the actions and operations of Defendants have resulted in a continuing trespass on the properties of Plaintiffs and the Class;

e. whether, and to what extent, the actions and operations of Defendants have disturbed and are disturbing the free use, possession and enjoyment of the properties of Plaintiffs and the Class so as to constitute a continuing nuisance;

f. whether, and to what extent, Defendants possessed knowledge regarding the dangers surrounding their conduct at and about the Smelter;

g. whether, and to what extent, Defendants provided notice or warning to the Plaintiffs and the Class regarding the dangers associated with exposure to, and/or ingestion of, the dangerous substances emitted from the Smelter;

h. whether, and to what extent, the actions and operations of Defendants have resulted from negligent, intentional, malicious or reckless conduct;

i. whether, and to what extent, the actions and operations of Defendants are subject to strict liability; and

j. whether, and to what extent, Defendants have been unjustly enriched.

These questions, and their answers, apply to every class member. Thus, the common issues of fact and law greatly exceed, both in quality and quantity, the low threshold of commonality required by Rule 2023(A)(2). *See* Ex. OO at 6, 10-11.

3. Typicality

The purpose of the typicality prerequisite is to assure that the interests of the named class representatives align with the interests of the class. *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *17. Typicality refers to the nature of the claim of the class representative, not to the specific facts from which it arose or to the relief sought.[17] *McNeely*, 2008 U.S. Dist. LEXIS 86741, at *17-18. "It is not a high threshold." *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1055 (Okla. Civ. App. 1999). There is no requirement that the class representatives have circumstances identical to those of the potential class members. *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982). Indeed, "[f]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist." *Id.* (citations omitted). Typicality requires the class representatives only to have the same interests and seek a remedy for the same injuries as other class members. *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

[17] "Factual variations that affect the amount of damages do not negate the typicality requirement, as long as the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal theory." *Hess v. Volkswagen of Am., Inc.*, 221 P.3d 132, 136 (Okla. Civ. App. 2009).

Here, the interests of the named Plaintiffs are perfectly aligned with those of the proposed class. The class representatives' claims, like those of the putative class members, arise out of the same unlawful conduct—Defendants' operation of the Smelter, including the transport of ore to and waste away from the Smelter. *In Re Farmers Med-Pay Litig.*, 229 P.3d 551, 555 (Okla. Civ. App. 2009) ("Typicality is satisfied when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims." (internal quotations omitted)). And, the remedies sought by the class representatives are identical to and protective of the interests of the proposed class. As such, Defendants cannot genuinely dispute typicality in this case. The representative Plaintiffs and the putative class have experienced identical forms of harm arising out of the same course of conduct. *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524, 532 (M.D. Fla. 1996) ("[t]he test for typicality, like commonality, is not demanding"). Thus, Plaintiffs satisfy the typicality requirement of Rule 2023(A)(3). *See* Ex. OO at 6.

4. Adequacy of Representation

The final prerequisite to class certification under Rule 2023(A) is that the named Plaintiffs must establish they will fairly and adequately protect the interests of the class. OKLA. STAT. tit. 12, § 2023(A)(4) (2010). A class representative must have the same interest and suffer the same injury as the prospective class members. *Cactus Petroleum Corp. v. Chesapeake Operating, Inc.*, 222 P.3d 12, 18 (Okla. 2009). However, the fact that a class representative does not have certain claims, or that a defendant has a defense unique to a class representative's claim, does not, by itself, defeat the adequacy of representation element. *Id.* (citing *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998)). This requirement is met when the record

demonstrates that the class representatives (1) interests do not conflict with those of the class;[18] and (2) will fully and effectively represent the interests of the class. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 628 (Okla. 2003).

Here, Plaintiffs' interests do not conflict with those of the absent class members. Indeed, Plaintiffs are entitled to a presumption that no such conflict exists. *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 330 (W.D. Mich. 2000) ("In most instances, adequacy is presumed in the absence of contrary evidence by the party opposing class certification" and "[d]oubts about adequate representation should be resolved in favor of upholding the class." (citations omitted)). Even without the benefit of the presumption, however, it is obvious that the named Plaintiffs' interests do not conflict with those of the putative class as they both seek identical relief for identical harm arising from identical conduct by Defendants. *See supra* at II.3.

Plaintiffs can and will fully and effectively represent the interests of the class. Each of the named Plaintiffs sufficiently understands the factual and legal matters involved in this litigation and have agreed to consider the interests of the entire class as each would consider his or her own interests. *See* Ex. PP. And, as previously demonstrated, the class representatives' claims, interests, injuries and requested relief are both common to and typical of the class as a whole. *See supra* at II.2 and II.3.

The fact that Plaintiffs will vigorously prosecute and adequately protect the interests of the class is further ensured by the fact that Plaintiffs hired experienced, competent, qualified

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[18] "[A] potential conflict between the representatives and some class members does not preclude the use of a class action if the parties appear to be united in interest against the defendant." *In Re Farmers Med-Pay Litig.*, 229 P.3d 551, 556 (Okla. Civ. App. 2009); *see also* 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE CIVIL § 1768 (3d ed. 2009).

counsel. *See* Ex. OO at 7. Plaintiffs are represented by six law firms with extensive experience in complex litigation, class actions and environmental litigation generally. *See* Ex. QQ.

For example, in just the last five years, Plaintiffs' counsel, Nix, Patterson & Roach, L.L.P. ("NPR"), has served as lead and/or co-counsel in the following class action lawsuits:

> Overhead & Profit Litigation: In 2004, NPR and its co-counsel filed a series of nationwide class action lawsuits on behalf of millions of insureds, alleging that the defendant property insurers failed to properly pay "contractor overhead and profit" on property damage claims. As a result of the litigation, the seven families of property insurers agreed to settlements requiring them to make supplemental payments to qualifying class members and change certain practices with respect to adjustment of property damage claims. Collectively, the estimated class benefit provided by the settlements exceeds $1 billion. The settlements have received final approval.
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> Colossus Litigation: In 2005, NPR and its co-counsel filed a nationwide class action lawsuit against several automobile insurance companies and a software developer, alleging that the insurance companies used the "Colossus" software to systematically underpay uninsured and underinsured motorists' claims. After years of litigation, twenty-seven families of insurance companies and the computer software developer agreed to settlements requiring supplemental cash payments to qualifying class members and changes in how the Colossus software program is used in the adjustment of claims. The estimated collective class benefit of the settlements exceeds $1 billion. The settlements have received final approval.
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> *Warmack-Muskogee LP v. PricewaterhouseCoopers, et al.*: NPR resolved this putative nationwide class action on behalf of clients of the "Big Four" accounting firms in Arkansas state court. The class alleged the accounting firms overcharged their clients for costs and expenses paid to travel vendors by billing their clients the full face amount of these costs while, at the same time, receiving back-end rebates, incentives, commissions, and other compensation. NPR obtained settlements with the "Big Four" accounting firms in the total amount of $108 million. These settlements also included significant corporate governance change—the accounting firms are prohibited from engaging in the offensive conduct and from coordinating their travel program with that of any other accounting firm. Each of the settlements has received final approval.
>
> *Meredith, et al. v. Clayton Homes, Inc., et al.*: NPR resolved this class action on behalf of over 100,000 putative class members against two manufacturers of mobile homes. The nationwide class alleged the manufacturers charged customers for the wheels and axles used to transport purchased mobile homes and, after placing the homes, removed and retained the wheels and axles.

> The class alleged claims of fraud, unjust enrichment and conversion and sought monetary and injunctive relief. NPR obtained a 100% restitution recovery valued at $100 million, as well as injunctive relief in the form of a court order requiring the defendants to cease their offending conduct.

Additionally, NPR is well-versed in handling large, complex cases. NPR, along with four other law firms, was selected by the State of Texas to prosecute the State's claims against the tobacco industry, seeking to recoup State monies paid to treat smoking-related illnesses. *The American Tobacco Company et al.*, Civil Action No. 5:96-CV-0091 (E.D. Tex). A settlement of $17.6 billion—the largest single civil litigation settlement in history—was obtained on behalf of the State of Texas.

In this case, Plaintiffs and their counsel have already demonstrated both their willingness and ability to fully and effectively represent the interests of the proposed class members. Prior to filing suit, Plaintiffs' counsel conducted an extensive pre-filing investigation for approximately sixteen months, including environmental testing in Blackwell in December 2006 and July 2007. Based on the results of this testing, Plaintiffs filed suit in April 2008. Shortly thereafter, on June 23, 2008, Defendants removed Plaintiffs' case to the United States District Court for the Western District of Oklahoma. After ten months of extensive briefing, jurisdictional discovery, and ultimately oral argument, Judge Heaton remanded Plaintiffs' case to Kay County District Court—an Order the Defendants immediately appealed to the Tenth Circuit Court of Appeals. Three months later, after additional briefing and oral argument before the Tenth Circuit, Judge Heaton's remand Order was affirmed.

In addition to protecting Plaintiffs' chosen venue, Plaintiffs' counsel has likewise vigorously guarded Plaintiffs' legal interests. To date, Plaintiffs' counsel has filed no less than thirty substantive briefs, reviewed over 1.75 million pages of documents, and argued for or

against numerous motions. Clearly, Plaintiffs can, have and will continue to fairly and adequately protect the interests of the class. *See* Ex. OO at 7.

B. Plaintiffs' Case Meets the Requirements of Rule 2023(B)

In addition to satisfying each of the requirements of Rule 2023(A), Plaintiffs must satisfy one of the requirements of Rule 2023(B). Here, Plaintiffs satisfy the requirements of and seek class certification under Rule 2023(B)(2) and Rule 2023(B)(3). Specifically, Plaintiffs seek class certification under Rule 2023(B)(2) for equitable relief in the form of unjust enrichment and remediation of real property based on standards and using protocols determined by the Court, and class certification under Rule 2023(B)(3) for monetary damages, including punitive damages.

Plaintiffs have pled and seek two separate and distinct forms of relief. Equitable relief in the form of remediation will consist of systematic and uniform testing of the interior and exterior of real property in Blackwell. Additionally, Plaintiffs seek equitable relief for the unjust enrichment of Defendants for the reasonable storage value of Defendants' contaminants. *Harvell*, 164 P.3d at 1035 ("Unjust enrichment is a condition which results from the failure of a party to make restitution in circumstances where . . . in *equity* and good conscience it should not be allowed to retain." (emphasis added)). A right of recovery under the doctrine of "unjust enrichment arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss." *McBride v. Bridges*, 215 P.2d 830, 832 (Okla. 1950).

Monetary damages sought by the Plaintiffs on behalf of the class include loss in property value and/or "stigma" damages and punitive damages. Other jurisdictions have recognized bifurcated class certification using subsections analogous to (B)(2) and (B)(3) simultaneously.

As the Ninth Circuit recently explained, "a district court must squarely face and resolve the question of whether the monetary damages sought by the plaintiff class predominate over the injunctive and declaratory relief. If so, the court may either deny certification under Rule 23(b)(2) *or bifurcate the proceedings by certifying a Rule 23(b)(2) class for equitable relief and a separate Rule 23(b)(3) class for damages.*" *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 620 (9th Cir. 2010) (*citing Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003)) (emphasis added); *see* Ex. OO at 7-8.

1. Rule 2023(B)(2)

With respect to the requested equitable relief, Plaintiffs' case is well-suited for certification under Rule 2023(B)(2). Rule 2023(B)(2) provides that class certification is appropriate where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" OKLA. STAT. tit. 12, § 2023(B)(2) (2010).

The Tenth Circuit, examining the rule's federal counterpart, has held:

> By its terms, Rule 23(b)(2) imposes two independent but related requirements. In the first place, the defendants' actions or inactions must be based on grounds generally applicable to all class members. . . . The latter half of Rule 23(b)(2) requires that final injunctive relief be appropriate for *the class as a whole*. The rule therefore authorizes an inquiry into the relationship between the class, its injuries, and the relief sought, and we have interpreted the rule to require that a class must be "amenable to uniform group of remedies." Put differently, Rule 23(b)(2) demands a certain cohesiveness among class members with respect to their injuries, the absence of which can preclude certification.
>
> This cohesiveness has at least two aspects. First, the class must be sufficiently cohesive that any classwide injunctive relief can satisfy the limitations of Federal Rule of Civil Procedure 65(d) – namely the requirement that it "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required." Second, "[a] class action may not be certified under Rule 23(b)(2) if

> relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant.

Shook v. Bd. of County Comm'rs of the County of El Paso, 543 F.3d 597, 604 (10th Cir. 2008) (internal citations omitted) (emphasis in original) ("*Shook II*"). Stated another way, "cohesiveness also requires that class members' injuries are 'sufficiently similar' that they can be remedied in a single injunction without differentiating between class members." *DG v. Devaughn*, 594 F.3d 1188, 1200 (10th Cir. 2008) ("*Devaughn*").

While the Oklahoma Supreme Court has had few opportunities to review a decision to certify a class under 2023(B)(2),[19] the Court has stated that certification under Rule 2023(B)(2) "is generally reserved for cases in which broad, class-wide injunctive or declaratory relief is necessary to address a group wide injury . . . even though some damages may also be awarded." *Harvell*, 164 P.3d at 1038. Indeed, the award of monetary damages along with injunctive or declaratory relief does not preclude certification under Rule 2023(B)(2), "provided that monetary relief is secondary or incidental to the primary injunctive or declaratory relief sought." *Id.* Here, Plaintiffs seek certification of the class under Rule 2023(B)(2) solely with respect to their requested equitable relief—testing, remediation and unjust enrichment. Although Plaintiffs claim they are entitled to some monetary relief in the form of cash for unjust enrichment, that relief is (1) equitable in nature; and (2) incidental and secondary to Plaintiffs' requested injunctive relief.

Examining two recent Tenth Circuit opinions addressing certification under Rule 23(b)(2) demonstrates that Plaintiffs' case is appropriate for certification under 2023(B)(2).[20] First, in

[19] *Harvell*, decided in 2006, was the first time the Oklahoma Supreme Court reviewed a class certified under Rule 2023(B)(2). *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1038 (Okla. 2006).

[20] The Oklahoma Supreme Court has recognized that "Oklahoma's class action scheme closely parallels Rule 23 of the Federal Rules of Civil Procedure and [the Court] finds it illustrative." *Harvell*, 164 P.3d at 1037.

Shook II, a class of prisoners sought injunctive relief for numerous conditions regarding their confinement, including the lack of adequate staffing and safe and appropriate housing. *Shook II*, 543 F.3d at 602. The district court refused to certify the class because it found that the plaintiffs had not sufficiently demonstrated that the defendants had acted "on grounds generally applicable to the class" and that factual differences between the members of the class made class-wide relief inappropriate.[21] *Id.* at 602-03. The Tenth Circuit agreed with the district court's decision and noted that different injunctions would be required to address the different groups of class members and that individual inquiries would be necessary to determine what would constitute, for instance, adequate staffing and safe and appropriate housing for each class member. *Id.* at 606. Thus, the Tenth Circuit found that certification under Rule 23(b)(2) was not appropriate where the class members' injuries were not "sufficiently similar that they [could] be addressed" in a "single injunction that need not differentiate between class members." *Id.*

Earlier this year in *Devaughn*, the Tenth Circuit had another opportunity to address class certification under Rule 23(b)(2). *Devaughn* was filed on behalf of all children in the Oklahoma foster care system and sought injunctive relief. 594 F.3d 1188, 1192-93 (10th Cir. 2010). The *Devaughn* plaintiffs complained that the Oklahoma Department of Human Services' (OKDHS) mismanaged foster children in its care and exposed all class members to an impermissible risk of harm in violation of their Constitutional rights because of overloaded caseworkers and the lack

[21] "In particular, the district court noted the factual differences between the individual named plaintiffs' situations, suggesting that because some plaintiffs were asserting claims for denial of medication, some for lack of supervision, and others for use of excessive force, there was no single policy or procedure to which all were subject. Similarly, the [district] court held, this variation in fact patterns made injunctive relief on a class-wide basis inappropriate. The [district] court reasoned that many of the matters plaintiffs sought to have addressed, such as the use of tasers or restraints, could not be dealt with prospectively on a class-wide basis because the propriety of using such methods depended on the circumstances in which they were used, and those circumstances necessarily varied among class members. And while some of the standards plaintiffs sought to have put in place did not depend on individual circumstance, the court expressed concern that it was not equipped to determine what constitutes 'adequate' training or how many employees are 'sufficient' to deal with a shifting number of mentally ill prisoners, and thus that it would be extraordinarily difficult to craft an injunction satisfying the specificity requirements of Fed. R. Civ. P. 65(d)." *Shook II*, 543 F.3d at 602-03.

of caseworker visits. *Id.* at 1192-93. The district court certified the class under Rule 23(b)(2). *Id.* at 1193. On appeal, Defendants challenged whether, under Rule 23(b)(2), the injuries to the class members were sufficiently similar and argued that, like in *Shook II*, an individual determination would be required for each foster child and therefore the class did not meet the "cohesiveness" requirements outlined in *Shook II*. *Id.* at 1195.

More specifically, Defendants argued that their conduct was not generally applicable to the class because they demonstrated the existence of rural caseworkers who did not have excessive caseloads. *Id.* at 1201. The Tenth Circuit found that Defendants misunderstood the Rule's "generally applicable" requirement. *Id.* The Court explained:

> Rule 23(b)(2) does not require Named Plaintiffs to prove [Defendants'] controverted policies or practices actually harm or impose a risk of harm upon every class member at the class certification stage. . . . [C]ertification is appropriate even if the defendant's action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."

Id. (*citing* FED. R. CIV. P. 23(b)(2), 1996 Amendment advisory committee note).

After finding that the plaintiffs had satisfied the elements of Rule 23(a), the Tenth Circuit reiterated the Rule 23(b)(2) requirements from *Shook II* needed for class certification:

> As we explained in *Shook II*, Rule 23(b)(2) "imposes two independent, but related requirements" upon those seeking class certification [under Rule 23(b)(2)]. First, plaintiffs must demonstrate defendants' actions or inactions are "based on grounds generally applicable to all class members." Second, plaintiffs must also establish the injunctive relief they have requested is "appropriate for *the class as a whole*." Together these requirements demand "cohesiveness among class members with respect to their injuries. . . ."

Id. at 1199 (internal citations omitted). The court noted that Rule 23(b)(2)'s cohesiveness is a two-part test requiring (1) the requested injunctive relief to satisfy Rule 65(d)'s requirement of specificity and detail and (2) that the class members' injuries be sufficiently similar that they can be remedied with a single injunction. *Id.* at 1199-1200.

The district court determined that the *Devaughn* plaintiffs' proposed class alleged sufficiently similar injuries because the OKDHS policy or practice of failing to adequately monitor the safety of plaintiff children thereby causing significant harm and risk of harm to their safety, health and well-being was applicable to the entire class. *Id.* at 1196. Agreeing, the Tenth Circuit noted that "[a]ll class members, by virtue of being in the OKDHS's foster care, are subject to the purportedly faulty monitoring policies of OKDHS, regardless of their individual differences; therefore, all members of the class are allegedly exposed to the same unreasonable risk of harm as a result of Defendants' unlawful practices." *Id.* Therefore, the class members' injuries were sufficiently similar.

Sufficiently similar injuries alone are not enough to warrant class certification under Rule 23(b)(2). The class' injuries must also be capable of being remedied by a class-wide injunction that meets Rule 65(d)'s requirements. In *Devaughn*, the district court determined that a class-wide injunction could be applied to the OKDHS' actions and (1) limit caseworkers' caseloads and (2) mandate that caseworkers monitor the foster children's condition through visitation. *Id.* at 1200. Without these injunctions, the district court recognized that all foster children would remain at risk. *Id.* The Tenth Circuit agreed, holding that the "requested injunctions remedies OKDHS's conduct based on grounds generally applicable to the class." *Id.* at 1200-01. The court also agreed with the district court and found that changing the standard policies and practices of OKDHS would provide every class member with a remedy in the form of relief from "exposure to an impermissible risk of harm," and, therefore, certification under 23(b)(2) was appropriate. *Id.*

Using the analysis set forth by the Tenth Circuit in *Shook II* and *Devaughn*, Plaintiffs' case should be certified under Rule 2023(B)(2). As in *Devaughn*, the acts and omissions of

Defendants have affected the class as a whole and all class members suffer from a similar injury—contamination of real property. The entire class has been subjected to harm or the risk of harm from substances emitted into the atmosphere by Defendants—substances that Plaintiffs claim have invaded their land and homes. Also, like in *Devaughn*, Plaintiffs seek injunctive relief that would be applicable to the entire class. *See* Ex. Q 10; Ex. EE at 1, 7; Ex. OO at 8-9. Plaintiffs seek injunctive relief to have their homes rid of Defendants' contaminants. Plaintiffs seek an injunction to have specific protocols and procedures put in place for testing and remediation of their property. And, Plaintiffs seek to have imposed specific remediation levels for lead, arsenic and cadmium. Most importantly, a class-wide injunction, like the one Plaintiffs seek, can address the ongoing public health issue that exists in Blackwell—an issue that cannot be alleviated on a property-by-property basis. *See* Ex. Q at 10-11.

Defendants have acted and have refused to act on grounds generally applicable to the class. Defendants' actions—operating the Smelter and hauling ore and/or waste to and from the Smelter—are responsible for the contamination that testing reveals reaches every corner of Blackwell. *See* Ex. RR. It is clear from Plaintiffs' evidence that Defendants' emissions have contaminated and/or have had the potential to contaminate all real property within the geographic boundaries defined by the class definition. *See* Ex. Q at 7; Ex. X at 2-3, 7-9.

Also, in their "voluntary clean up," Defendants have failed to follow appropriate testing and remediation procedures. *See* Ex. Q at 9. First, Defendants' negotiated remediation levels exceed safe levels. *See* Ex. Q at 7 n.3. Second, soil testing on the exterior of residences is flawed and designed to limit positive results. *See* Ex. Q at 4, 9 n.7. And, importantly, Defendants' "voluntary clean up" wholly neglects the interior of class members' homes. *See* Ex. Q at 9 n.6. Plaintiffs' test results show that contamination exists inside many residences in

Blackwell. *See* Ex. Q at 7-8. By failing to test or creating artificial barriers with no scientific basis and by refusing to remediate the interiors of Blackwell homes, Defendants have refused to act in a manner that affects the entire class.

Injunctive relief is appropriate with respect to the class as a whole. In order to address the damage caused by Defendants, Plaintiffs seek "equitable relief in the form of proper and permanent abatement and/or remediation of all contaminated properties in Blackwell." Plaintiffs' Original Petition at ¶ 111. Plaintiffs seek the application of a single injunction with a defined testing standards to be applied to all Blackwell properties and a defined remediation standard to be applied to all contaminated properties in the City of Blackwell. *See* Ex. EE at 1, 7; Ex. OO at 9.

Because Plaintiffs' have all suffered, and continue to suffer, from a similar injury—property contamination from the same sources—and because a single injunction mandating proper testing, remediation levels and methods of remediation can be applied to the class as a whole, the class members exhibit the cohesiveness required for class certification pursuant to Rule 2023(B)(2). By utilizing defined standards, Plaintiffs avoid a situation, like the one in *Shook II*, where individual determinations and multiple injunctions would be required. Rather, the single injunction proposed by Plaintiffs here is more like the one approved by the Tenth Circuit in *Devaughn*.

Plaintiffs' injunctive relief can be stated specifically with regard to the class, and a single injunction can be issued by the Court without differentiating among the class members. Plaintiffs request a single injunction that will require Defendants to test and remediate the class members' properties in accordance with the recognized standards. Plaintiffs seek an injunction to have class members' properties tested according to a specific protocol. For exterior soil

samples, the protocol would prohibit homogenization of soils prior to testing and require samples to be digested according to NTIS method SW-846-3050B and analyzed by inductively coupled plasma ("ICP") spectrometry according to NTIS Method SW846 6010B. *See* Ex. Q at 7. Furthermore, Plaintiffs seek an injunction to have the interior of class members' property tested *without regard to the level of contamination found in the property's soil.* *See* Ex. Q at 9 n.6; Ex. EE at 1, 7. And, finally, Plaintiffs seek an injunction that mandates remediation of soils and the interior of structures to levels that are within acceptable risks for human health. These standards include remediation of dust and soil contaminated with lead to a level of 150 mg/kg and arsenic to a level of 3.9 mg/kg. *See* Ex. Q at 4. If such standards are applied across all residences and properties in Blackwell, all class members are guaranteed to have their properties properly remediated, regardless of their pre-remediation contamination level.

Class certification under Rule 2023(B)(2) is further justified because it affords economies to both the parties and the justice system. *See* Ex. OO at 4-5; *see also infra* at II.B.2.b. The need for such economies is particularly apparent in this case. Each member of the class has suffered harm or is threatened with harm resulting from the actions and inactions of Defendants, as discussed above. However, each class member faces prohibitive litigation costs and profound impediments to bringing suit. *See* Ex. Q at 3, Ex. X at 3; Ex. OO at 4-5, 11-12; *see also infra* at II.B.2.b.

Rule 2023(B)(2) can remedy this situation. Class actions make it possible for individuals with legitimate claims but small resources to access the courts. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits. . ., aggrieved persons may be without any effective redress unless they may employ the class-action device."); *see* Ex.

OO at 4-5. Of course, certification of this class would promote judicial economy. Thousands of individual lawsuits against Defendants to address these same issues would require the Court to expend considerable resources to hear substantially the same evidence in each case. *See* Ex. OO at 4-5, 11-12; *see also infra* at II.B.2.b. Therefore, granting class certification would conserve judicial resources by litigating the common questions of fact and law in a single proceeding and by affording a single, class-wide injunction that could provide relief to each resident of Blackwell.[22]

In sum, Defendants have acted and have refused to act on grounds generally applicable to the class and final injunctive relief is the only appropriate mechanism by which to remediate the damage caused by Defendants' actions and failures to act. Because Plaintiffs seek "hybrid certification" of the class under Rule 2023(B)(2) and (B)(3), *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 620-23 (9th Cir. 2010), there is no possibility that monetary relief predominates over the primary objective of injunctive relief and certification of the class under Rule 2023(B)(2) is not prohibited. *See* Ex. OO at 7-8, 10-11. Further, Plaintiffs and the unnamed class members suffer from a sufficiently similar injury and, therefore, a highly cohesive Rule 2023(B)(2) phase of the proceedings, including liability, can be adjudicated effectively. Finally, Plaintiffs seek "broad, class-wide injunctive or declaratory relief [that] is necessary to address a group wide injury." *Harvell*, 164 P.3d at 1038. Therefore, with respect to the requested equitable relief, a class of individuals owning real property in Blackwell should be certified under Rule 2023(B)(2). *See* Ex. OO at 7-9.

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[22] Rule 2023 also allows the Court sufficient flexibility to protect potential (B)(2) class members through notice and an opportunity to opt out of the 2023(B)(2) class. *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 620-21 (9th Cir. 2010) (stating that the "discretion to require notice and the opportunity to opt-out in a Rule 23(b)(2) class action is well established).

2. *Rule 2023(B)(3)*

Just as Plaintiffs' case is well-suited for certification under Rule 2023(B)(2) with respect to the equitable relief sought, so too is Plaintiffs' case well-suited for certification under Rule 2023(B)(3) with respect to the monetary relief sought. Rule 2023(B)(3) provides that class certification is appropriate where:

> [t]he prerequisites of [Rule 2023(A)] are satisfied and . . . [t]he court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of the controversy.

OKLA STAT. tit. 12, § 2023(B)(3) (2010).

As with the requirements of Rule 2023(A) and 2023(B)(2), Plaintiffs satisfy the predominance and superiority requirements of Rule 2023(B)(3).

a. Predominance

Under Rule 2023(B)(3), questions of law or fact common to the members of the class must predominate over any questions affecting only individual members. OKLA STAT. tit. 12, § 2023(B)(3) (2010). Predominance does not require, however, that there be *no* individual issues. *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 57 (Okla. 2008). Rather, it requires that the issues that can be answered as to all class members have more significance and weight than individual issues. *Id.* The determination of predominance is a "qualitative rather than quantitative" matter because the weight of resolving certain issues may outweigh their number. *Mattoon v. City of Norman*, 633 P.2d 735, 739 (Okla. 1981).

The predominance question requires the court to consider whether the group seeking class certification seeks to remedy a common legal grievance. *Lobo Exploration Co. v. Amoco Production Co.*, 991 P.2d 1048, 1052 (Okla. Ct. App. 1999). This must be done while keeping

in mind that "[t]he common questions need not be dispositive of the entire action. In other words, 'predominate' should not be automatically equated with 'determinative' or 'significant.' Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3)." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1778 (3d ed. 2005).

Generally, in determining whether Rule 2023(B)(3)'s predominance standard is met, courts focus on the issue of liability. *In Re Farmers Med-Pay Litig.*, 229 P.3d 551, 556 (Okla Civ. App. 2009). If the liability issue is common to the class, common questions are held to predominate over individual ones. *Id.* Thus, predominance is ordinarily satisfied where plaintiffs have alleged a common course of conduct by the defendants. *Hill v. Marathon Oil Co.*, No. CIV-08-37-R, 2010 U.S. Dist. LEXIS 56650, *23 (W.D. Okla. June 9, 2010); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997) (claims based on a "common cause or disaster" are likely subjects for class certification). In other words, the class members must share a "common nucleus of operative facts." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *Meyers v. Sw. Bell Tel. Co.*, 181 F.R.D. 499, 502 (W.D. Okla. 1997).

Undoubtedly, the common question of whether Defendants contaminated the proposed class area is not only shared by all proposed class members, but predominates over any differences among the individual properties. *See* Ex. OO at 10-11. The Defendants' liability arises out of the same nucleus of operative facts for each Plaintiff and the putative class members. *See generally* Exs. Q, X, NN. Each Plaintiff and putative class member would rely upon the same evidence to show the negligent conduct of the Defendants. *See generally* Exs. Q, X, NN. Each proposed class member would rely on the same evidence to prove the Defendants'

knowledge of the dangers posed by the toxins generated, stored and disposed of at the Smelter and of the releases of the contaminants into the surrounding community. *See, e.g.*, Exs. I and J; *see also* Exs. Q, X, NN. Moreover, Plaintiffs will establish on a class-wide basis the manner in which Defendants contaminated the soil, home interiors and groundwater of Blackwell properties through expert testimony concerning the nature of Defendants' operational, transportation and disposal practices and the characteristics of the toxins that have contaminated the environment in Blackwell. *See* Ex. Q at 3-10; Ex. X at 9. This method of proof will involve answering questions that will not differ for Plaintiffs or the putative class members.

i. Common Questions of Law Predominate

The questions of law that establish Defendants' liability are inextricably tied to shared questions of fact and must be applied to Plaintiffs and all proposed class members in the same manner. The Plaintiffs, on behalf of themselves and the putative class members, assert causes of action for nuisance, trespass, ultra-hazardous activity and unjust enrichment against all Defendants. Therefore, shared questions of law include: (1) whether the actions and operations of Defendants have resulted in a continuing trespass on the properties of Plaintiffs and the class; (2) whether the actions and operations of Defendants have disturbed and are disturbing the free use, possession and enjoyment of the properties of Plaintiffs and the class so as to constitute a continuing nuisance; (3) whether Defendants' activities constitute an ultra-hazardous activity for which they are strictly liable; and (4) whether, and to what extent, the actions and operations of Defendants have resulted from negligent, intentional, malicious and/or reckless conduct. *See* Ex. OO at 10-11.

ii. Common Questions of Fact Regarding Defendants' Liability Predominate

Defendants' activities constitute a standardized course of conduct that affects all class members. This standardized course of conduct is responsible for contaminating all properties within the proposed class area. *See* Ex. Q at 9; Ex. X at 9. This shared question of fact, standing alone, satisfies the predominance requirement. Not only is it a significant question of fact, it is the controlling question of fact. The course of conduct that caused the contamination is identical for Plaintiffs and every proposed class member, and the Defendants' conduct is uniform with respect to each member of the class.

Plaintiffs' proof of the common facts—that contamination exists on their properties, as well as the properties of the other class members, and that the contamination came from the Smelter's operations—will be uniform across the class, including use of the same documents, testing, modeling and expert testimony. For example, all Plaintiffs and the class will rely on the same documents to demonstrate the amount of particulate matter historically discharged from the Smelter. *See* Ex. SS, *see also* Ex. X at 7-8. Likewise, all Plaintiffs and the class rely on the Oklahoma Department of Environmental Quality's ("ODEQ") independent conclusion that although heavy metals, particularly lead and arsenic, found in Blackwell may have originated from other sources, the Smelter contaminated Blackwell through its historical aerial deposition of metals and transport of solid materials to and from the Smelter. *See* Ex. P at 1, 2, 4, 7, 11.

Additionally, all Plaintiffs and the class will rely on the air dispersion modeling of Plaintiffs' expert, Mr. Jim Tarr. *See generally* Ex. X. Mr. Tarr calculated air emissions from the Blackwell Zinc Smelter facility for atmospheric particulate matter and the toxic heavy metals, lead, arsenic and cadmium. In order to make these calculations, Mr. Tarr created a basemap that included the Smelter and the nearby community. *See* Ex. X at 5-6. This basemap covers

approximately 10.5 square miles and encompasses the entirety of the City of Blackwell. *See* Ex. X at 5. Inventory emissions were determined for each major air emission source at the facility. *Id.* Next, emission source locations and dimensions were determined from historical aerial photographs and topographical maps. *Id.* A receptor grid was then used to designate points on the basemap at which ambient air concentrations were calculated. *Id.* These receptors were spaced over the entire community in Blackwell at 100-meter intervals with nine additional receptors located at local landmarks, for example, local schools. *Id.* All concentration calculations were made at the uniform height of five feet. *Id.* There were a total of 2,853 discrete receptor locations used to calculate the concentration of the toxic materials. *Id.* Meteorological data for the air dispersion modeling was based on observations collected 4.0 miles SSE of Blackwell by Mesonet. *Id.* at 5-6. The emissions data and meteorological data was then supplied to a computer modeling program developed by the USEPA, the American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD). *Id.* at 6. AERMOD is generally accepted and used in the evaluation of air emissions for industrial sources. *See Revision to the Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions*; Final Rule, Environmental Protection Agency, 40 CFR 51, November 9, 2004; *Air Dispersion Modeling Guidelines for Oklahoma Air Quality Permits*, Air Quality Division, Oklahoma Department of Environmental Quality, January 2008. AERMOD was specifically designed to calculate ambient air concentrations from multiple point area and volume sources over both rural and urban geographic areas in a uniform manner. *See* Ex. X at 5. Therefore, Plaintiffs' air emissions evidence will necessarily be done on a community-wide basis for the entire City of Blackwell.

Further, Dr. Rod O'Connor designed, implemented and evaluated test results regarding lead, arsenic and cadmium contamination in Blackwell. This study was designed to ensure that a scientifically significant geographic area of Blackwell was included in the sampling. *See* Ex. Q at 6. In order to obtain representative samples, the town was divided into sectors at varying distances and directions from the Smelter. *Id.*

Sampling trips were taken to Blackwell in 2006, 2007 and 2008 in order to estimate the geographic distribution and magnitude of lead, arsenic and cadmium. *Id.* A total of 74 homes were sampled. *Id.* Samples were taken from homes using standard EPA methods and analyzed using standard NTIS procedures. *Id.* Therefore, Plaintiffs' analytical and environmental chemistry evidence will necessarily be done on a community-wide basis for the entire City of Blackwell.

Finally, all Plaintiffs and the Class will rely on the Freeport Defendants' admission that the contamination of the groundwater in Blackwell is a result of the Smelter. These fact issues, common to all class members, predominate over individual issues.

iii. Common Remedies for Plaintiffs and the Class Predominate

The relief sought by Plaintiffs raises yet more common issues. Although the amount of each class member's loss may vary,[23] the mass appraisal used by Plaintiffs' appraiser is a method that combines simplicity and efficiency with commonality. Plaintiffs' expert, Dr. John Kilpatrick, has conducted an extensive examination of the proposed class area.[24] Based upon his

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[23] *Morris v. Transouth Fin. Corp.*, 175 F.R.D. 694, 697 (M.D. Ala. 1997) (stating that commonality may be satisfied despite individual differences in damages); *In re Workers' Comp.*, 130 F.R.D. 99 (D. Minn. 1990) (same).

[24] Dr. Kilpatrick holds a Ph.D. in Real Estate Finance and is a state-certified real estate appraiser in Oklahoma and many other states. For the last two decades, his firm has specialized in appraising properties that have been affected by contamination. The appraisal model that Dr. Kilpatrick proposes to use in this case has been peer reviewed by professionals in the field of real estate and has been widely accepted by Courts throughout the United States. *See e.g, Sher v. Raytheon Co.*, 261 F.R.D. 651, 663 (M.D. Fla. 2009); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D.597, 607 n.5 (E.D.La. 2006); Ex. NN at p. 10 ¶ 48.

investigation and expertise, Dr. Kilpatrick has concluded that the overwhelming weight of prevailing valuation methodology prefers a mass appraisal model to determine the impact of the contamination on property values over an individual appraisal approach. *See generally* Ex. NN.

Additionally, proper remediation of the interior of class members' homes will be done using a common methodology. Plaintiffs' expert John O'Rourke has evaluated properties in the Blackwell community. *See* Ex. EE at 3-4. Regardless of the differing levels of toxic contaminants contained inside these homes, the method used to eliminate the contaminants is the same. *See generally* Ex. EE. Every house must (1) be vacuumed with a HEPA vacuum cleaner; (2) be damp wiped; (3) have the HVAC system cleaned; and (4) undergo post-remediation verification to determine whether the cleaning process reduced the contamination to acceptable levels. *See* Ex. EE at 4-5.

And, as definitive proof that exterior decontamination of soil can be done on a community-wide basis, the Court need look no further than the Freeport Defendants' own supplemental soil sampling program. *See* Ex. H. This program, although improperly designed and ineffective, demonstrates that a uniform program for cleaning up the exterior of the homes in Blackwell is feasible and the Court can expect the vast majority of Blackwell residents to participate. *Id.*

Importantly, as with typicality, individual issues relating to damages will not defeat the predominance requirement. *Masquat*, 195 P.3d at 57 ("[T]here is a consensus . . . that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate.") (internal quotations omitted); *Burgess v. Farmers Ins. Co.*, 151 P.3d 92, 101 (Okla. 2006) ("Even though damages amounts may vary, common questions predominate where the acts or omissions are the same.").

"[T]he presence of individualized damages issues does not prevent a finding that the common issues in [a] case predominate." *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004); *see also* Ex. OO at 10. As explained by the Eleventh Circuit,

> [i]n mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (1988).

It is axiomatic that Rule 2023(B)(3) requires common questions predominate, not that all questions be unanimous. *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968). Based on this evidence, Plaintiffs have met their burden of demonstrating that common issues of law and fact predominate over individual issues. *See* Ex. OO at 10-11.

iv. Common Defenses Predominate

Additionally, common defenses predominate over unique defenses applicable to Plaintiffs or the putative class members. The Freeport Defendants and BNSF assert many identical defenses, including:

1. Plaintiffs' Petition fails to state a claim (*see* Freeport Defendants Answer at p. 23; Answers, Defenses and Jury Demand of Burlington Northern and Santa Fe Railway Company ("BNSF Answer") at ¶ 59);

2. Plaintiffs' claims are barred by the applicable statute of limitations (*see* Freeport Defendants Answer at p. 24; BNSF Answer at ¶ 60);

3. Plaintiffs' claims are barred by the doctrines of laches and estoppel (*see* Freeport Defendants Answer at p. 24; BNSF Answer at ¶¶ 64, 79);

4. Plaintiffs' claims are barred by the applicable statutes of repose (*see* Freeport Defendants Answer at p. 25; BNSF Answer at ¶ 61);

5. Plaintiffs' claims for punitive damages are barred (*see* Freeport Defendants Answer at 27-28, 99; BNSF Answer at ¶¶ 91-92, 94); and

6. Plaintiffs' claims are barred under the common law doctrine of coming to the nuisance (*see* Freeport Answer at 25; BNSF Answer at ¶ 86).

Each of these defenses, as well as many other factual issues relating to other defenses asserted by one or the other of the Defendants, is applicable to the class as a whole. Thus, Plaintiffs' response and proof in opposition to each of these defenses will be done on a class-wide basis. For example, both the Freeport Defendants and Defendant BNSF contend that Plaintiffs' claims are barred by the applicable statutes of repose. As the Court is aware, the viability of this factual defense will turn on the identification of one particular date. And, that date will be the same for each class member. In other words, the statute of repose defense will either succeed or fail with respect to every member of the class. By its very nature, this defense cannot bar certain Plaintiffs' claims and not others—it is an all or nothing defense.

Moreover, because Plaintiffs' claims are identical and rely on the same legal bases, purely legal defenses will likewise apply to the class as a whole. For example, all Defendants claim that Plaintiffs are barred from recovering punitive damages. If Defendants succeed on this defense, then no member of the class may recover punitive damages. If Defendants' fail, then all members of the class may, provided Plaintiffs carry their burden, recover punitive damages. Indeed, under no set of circumstances will certain Plaintiffs recover punitive damages while others will not.

Additionally, to the extent any defenses exist that may be unique to individual class members, any such defenses are subordinate to the larger common defenses. Thus, the fact that common defenses predominate over any unique defenses likewise supports class certification. *Perrine v. E.I. DuPont de Nemours & Co.*, 694 S.E.2d 819, 861 (W. Va. 2010); *Rimmer v.*

Citifinancial, Inc., 2008 Ohio App. LEXIS 1552, *12 (Ohio Civ. App. Apr. 17, 2008); *Johnson Sales Co., Inc. v. Harris*, 260 S.W.3d 273, 279 (Ark. 2007).

b. Superiority

In addition to finding that common questions of law or fact predominate over individual issues, the court must determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." OKLA. STAT. tit. 12, § 2023(B)(3) (2010). With respect to superiority, the Oklahoma Supreme Court explained in *Lobo Exploration*:

> In determining the superiority of a class action, the trial court is required to balance the benefits which the class action procedure has over other alternative methods of adjudicating the dispute . . . against the management problems which may arise from class treatment. Here the trial court reasoned that the claim of each working interest owner was small relative to the costs of litigating the claim. Therefore, individual litigation of their claims would be difficult or impossible for the members and would substantially increase the burden on the court system. It concluded the litigation was more manageable as a class action than if undertaken individually, even though management problems would arise.

991 P.2d at 1054. (internal quotations and citations omitted).

As a practical matter, a class action is the only viable option for litigating this controversy for the proposed class members because, in light of the complexity of the environmental issues and the significant costs associated with presenting them, the cost of bringing individual cases to trial would not be economically feasible. *See* Ex. Q at 3-4; Ex. X at 2-4; Ex. OO at 4-5. Consequently, it is unlikely that any individual class member could muster the resources to pursue the investigation and massive discovery required to prosecute a complex suit such as this. The U.S. Supreme Court has recognized that "[c]lass actions . . . permit the Plaintiffs to pool claims which would be uneconomical to litigate individually," and that, in cases such as this, "most of the Plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Amchem Prods., Inc.*, 521 U.S. at

616-17 (general test of whether prosecution of separate actions by class members would be desirable is whether the amount of potential monetary recovery suggests that class members have substantial incentive to pursue individual suits).

Even if the institution of many individual lawsuits against Defendants were not economically impracticable, a multiplicity of lawsuits by Blackwell property owners would unnecessarily waste judicial resources, and increase the risk of inconsistent judgments for both class members and Defendants. *See* Ex. OO at 4-5. Indeed, one of the central purposes of the class action device is to eliminate the unnecessary multiplicity of lawsuits arising from the same facts so that controversies can be efficiently adjudicated in a single action. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 628 (Okla. 2003). As the Fifth Circuit has stated:

> If these claims were tried separately, the amount of repetition would be manifestly unjustified. To the extent that each claim of each plaintiff depends upon proof concerning the history of the operations at the plant, the nature, timing, extent and cause of contamination, the kinds of remedies, if any, appropriate to address future potential [contamination] ... [and] the generalized impact on real property values, that proof would be virtually identical in each case. It would be neither efficient or fair to anyone, including the defendant, to force multiple trials to hear the same issues. Clearly, a Rule 23(b)(3) class could properly be certified under these circumstances.

Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472-73 (5th Cir. 1986) (citation omitted).

Due to considerable hardships that would be put upon the residents of Blackwell and the Oklahoma courts, class certification is plainly a superior method of resolving these matters. See Ex. Q at 3-4; Ex. X at 2-4; Ex. OO at 4-5, 10, 12.

C. This Matter Has Already Been Decided in Oklahoma

In 2007, Judge Cauthron, United States District Judge for the Western District of Oklahoma, certified a class nearly identical to the putative class now before the Court. *See Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, CIV-05-445-C, 2007 U.S. Dist. LEXIS 577 (W.D. Okla. Jan. 3, 2007). *Ponca Tribe* was an environmental contamination case filed by a group of property owners who, as a result of the operation of the Continental Carbon facility in Ponca City, alleged their properties were contaminated with carbon black. The *Ponca Tribe* plaintiffs alleged many of the same claims as Plaintiffs allege in this case and sought largely the same relief as Plaintiffs seek in this case. However, the *Ponca Tribe* plaintiffs sought certification under Rule 23(b)(1) or alternatively under Rules 23(b)(2) or 23(b)(3). Given that Plaintiffs in this case seek hybrid certification, the factual similarities between *Ponca Tribe* and Plaintiffs' case make Judge Cauthron's opinion particularly instructive to the Court in deciding Plaintiffs' motion.

In *Ponca Tribe*, four real property owners of the Ponca Tribe of Oklahoma brought suit for the recovery of, among others, property damage allegedly caused by Continental Carbon's operation of its carbon black plant outside of Ponca City, Oklahoma. *Id.* at *1-2. The *Ponca Tribe* plaintiffs asserted claims for nuisance, trespass and unjust enrichment, and demanded both injunctive and monetary relief, including punitive damages. *Id.* at *21, 25-26. Plaintiffs sought certification under Federal Rule 23(b)(1)(B), (b)(2) and/or (b)(3) of a class containing 201 parcels of real estate. *Id.* at *18. The *Ponca Tribe* plaintiffs did not seek hybrid certification of their proposed class with respect to the equitable and monetary relief sought. *See generally id.*

In her analysis of the requirements for Rule 23(b)(2) class certification, Judge Cauthron correctly noted that (b)(2) "certification is not appropriate where the relief sought is primarily

money damages." *Id.* at *21. The court determined that the "assertions in Plaintiffs' Amended Complaint . . . cast doubt on whether injunctive relief [was] truly the predominant relief sought." Judge Cauthron refused to certify the class under Rule 23(b)(2) because the plaintiffs did not satisfy their burden of demonstrating that injunctive relief was the primary relief sought by the class. *Id.* at *21-22.[25]

Plaintiffs here do not seek class certification of an issue that mixes both injunctive relief and money damages. Instead, Plaintiffs seek class certification under Rule 2023(B)(2) on the issues of an injunction for remediation and unjust enrichment, both remedies in equity, and class certification under Rule 2023(B)(3) with regard to their claims for money damages, including punitive damages. *See supra* at II.B.1; *see also* Ex. OO at 9.

While the court's analysis in *Ponca Tribe* is instructive for what it did not find, it also has application here with respect to Plaintiffs' motion for certification under Rule 2023(B)(3). The *Ponca* defendants contended that class certification was inappropriate under Federal Rule of Civil Procedure 23(b)(3) because individual issues predominated and the class was unmanageable. *Id.* at *2-23. Judge Cauthron found the defendants' arguments to be without merit. *Id.* at *23. With respect to the issue of predominance, she held:

> Here, questions regarding the production of carbon black, how it may be discharged into the environment, where it may go after such discharge, and what effect if has on property, among others, are clearly common to the claims of all Plaintiffs. Further, the legal theories on which the Plaintiffs rely are dependent on the same law. Thus, common questions of fact and law predominate.

Id. at *24. The same is true in this case regarding the contamination alleged by Plaintiffs, *e.g.* whether Defendants emitted lead, arsenic and cadmium from the smelter operations or railcars entering and exiting the smelter; whether these contaminants remain on Plaintiffs' properties, and what effect these contaminants have on Plaintiffs' properties are all common issues. *See*

[25] The court also decided that class certification was not appropriate under Rule 23(b)(1)(B). *Id.* at *20.

also supra at II.B.2.a. The facts and legal allegations of Plaintiffs that predominate over the individual issues are starkly similar to the claims certified for class action treatment in *Ponca Tribe*.

Judge Cauthron also rejected defendants' argument as to the unmanageability of the proposed class:

> Litigation of this matter as a class action is also superior to conducting individualized cases for each potential class member. Indeed, having hundreds of property owners file the same action against the same defendants for the same types of injury is a clear waste of judicial resources.

Id. at *25. For the very same reason—colossal waste of judicial resources—and even more so based on Plaintiffs' estimate of over ten times the number of parcels of real property at issue, certification of the class would be superior and significantly more manageable than thousands of individual cases.

Ponca Tribe is a correct application of the class action requirements. It provides a direct roadmap for the Court. Plaintiffs' case, a community-wide, environmental contamination case, is nearly factually identical. And, the legal theories asserted by Plaintiffs closely parallel those asserted by the plaintiffs in *Ponca Tribe*. For all of these reasons, the same result—certification of a class of property owners alleging contamination—is appropriate here. *See* Ex. OO at 4, 12-23.

III. CONCLUSION

For these reasons, Plaintiffs respectfully request the Court certify the class under Rule 2023(B)(2) with respect to their requested equitable relief and under 2023(B)(3) with respect to their requested monetary relief.

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CERTIFICATE OF SERVICE

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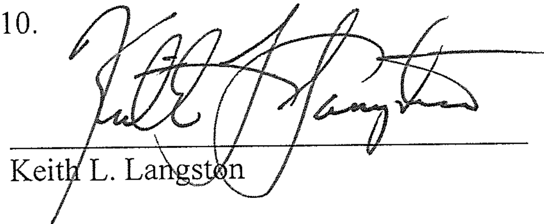
SIGNED this the 11th day of October, 2010.



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