

EXHIBIT B

IN THE DISTRICT COURT OF KAY COUNTY
STATE OF OKLAHOMA

Filed in the DISTRICT COURT
Kay County, Oklahoma

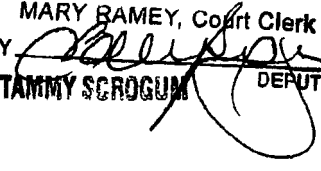
AUG 01 2011

BOB COFFEY, LORETTA CORN,
AND LARRY AND MARY ELLEN JONES,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

vs.

1. FREEPORT-MCMORAN COPPER
& GOLD INC.;
2. PHELPS DODGE CORPORATION;
3. CYPRUS AMAX MINERALS
COMPANY; and
4. BLACKWELL ZINC COMPANY, INC.,
DEFENDANTS.

MARY RAMEY, Court Clerk
BY 
S/TAMMY SCROGUM DEPUTY

CJ-2008-68

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Before the Court is a proposed class action initiated by Bob Coffey, Loretta Corn and Larry and Mary Ellen Jones ("Plaintiffs" or "Class Representatives") against Freeport-McMoRan Copper & Gold Inc., Phelps Dodge Corporation, Cyprus Amax Minerals Company and Blackwell Zinc Company, Inc. (collectively, "Defendants"). Plaintiffs seek certification of this case as a class action and appointment as Class Representatives on behalf of similarly situated persons.

I. FINDINGS OF FACT

1. Defendant Freeport-McMoRan Copper & Gold Inc. acquired Defendant Phelps Dodge Corporation in March 2007, at which time Defendant Phelps Dodge Corporation became a wholly-owned subsidiary of Defendant Freeport-McMoRan Copper & Gold Inc. See Plaintiffs' Original Petition at ¶ 47.

2. Defendant Phelps Dodge Corporation acquired Defendant Cyprus Amax Minerals Company in 1999, at which time Defendant Blackwell Zinc Company, Inc. ("BZC") became a wholly-owned subsidiary of Defendant Phelps Dodge Corporation. *See* Plaintiffs' Original Petition at ¶ 48.
3. Defendant Cyprus Amax Minerals Company was established through the merger of Cyprus Minerals Company and Amax. Defendant BZC was a wholly-owned subsidiary of Amax. *See* Plaintiffs' Original Petition at ¶ 49.
4. Defendant BZC is a wholly owned subsidiary of Phelps Dodge Corporation, which is a wholly-owned subsidiary of Defendant Freeport-McMoRan Copper & Gold Inc. *See* Plaintiffs' Original Petition at ¶ 51.
5. Defendant BZC operated the Smelter in Blackwell, Oklahoma at all relevant times. *See* Defendants' Answer at p. 5, ¶ 5.
6. Plaintiff Bob Coffey owns the following private real property located within the proposed class area: 605 North Sixth Street. *See* Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Defendants' Opposition") at Ex. C.
7. Plaintiff Loretta Corn owns the following private real property located within the proposed class area: 229 Vinnedge Avenue, 204 Enlow Avenue, 1004 South Main Street, 882 Saralyn Drive, and 911 North Seventh Street. *See* Defendants' Opposition at Ex. C.
8. Plaintiff Larry Jones owns the following private real property located within the proposed class area: 1922 South Third Street. *See* Defendants' Opposition at Ex. C.
9. Plaintiff Mary Ellen Jones owns the following private real property located within the proposed class area: 1922 South Third Street. *See* Defendants' Opposition at Ex. C.
10. As defined, the proposed class definition includes in excess of 4,000 individuals. *See* Plaintiffs' Motion for Class Certification ("Plaintiffs' Motion") at Ex. NN.
11. Plaintiffs' primary allegations in this case are centered on their contention that their properties in Blackwell have been damaged by the emission of lead, arsenic and cadmium from the historic operation of the Smelter. Plaintiffs also contend that the manner in which Defendants closed, cleaned-up, and remediated the Smelter site was inadequate and has caused and continues to cause damage to Plaintiffs' properties.
12. Plaintiffs claim that the operation and remediation of the Smelter have given rise to claims for public and private nuisance, trespass, strict liability based on ultra hazardous activity, and unjust enrichment. Plaintiffs seek damages and injunctive relief.

13. Defendants deny that they are the cause of injury to the property of any Plaintiff and contend that Plaintiffs cannot satisfy the elements of proof for their claims against Defendants.

14. Defendants assert multiple defenses, including but not limited to their contentions that Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations and by each Plaintiff's own comparative fault.

15. Defendants' operation of the Smelter contributed, to some degree, to the contamination of the proposed class area. This fact is based on statements made by Defendants whereby they admit that the Smelter contributed to heavy metal contamination in Blackwell. *See* Plaintiffs' Reply to Defendants' Opposition ("Plaintiffs' Reply") at Exs. U, V, W; *see also* Defendants' Opposition at Ex. H.

16. Lead, cadmium, and arsenic can be dangerous to humans. *See* Plaintiffs' Motion at Exs. Y, Z, AA.

17. The record demonstrates that lead, cadmium and arsenic are invisible, odorless and/or tasteless. *See* Plaintiff's Motion at Exs. Y, Z, AA.

18. Beginning in the early 1990s, the City of Blackwell, the State of Oklahoma, and the U.S. Environmental Protection Agency ("EPA") identified environmental concerns associated with the legacy operations of the Smelter. Ex. C. Defendants' Opposition.

19. In 1992, Defendant BZC, the Blackwell Industrial Authority, and the City of Blackwell entered into an enforcement order with the State of Oklahoma for the environmental investigation and cleanup of Blackwell associated with the legacy operations of the Smelter. *Id.*

20. In 2007, Defendants voluntarily implemented a Supplemental Soil Program ("SSP") wherein any property owner in Blackwell and the surrounding areas could have their soil tested for the presence of heavy metals and, if necessary, remediated. *See* Plaintiffs' Motion at Ex. E.

21. Among the named Plaintiffs, the results of the SSP soil sampling demonstrate varying heavy metal concentrations from property to property. Brunner Aff., Exs. 3-9. The results of SSP sampling at the proposed class representatives' properties varied both with respect to the extent of the contamination, if any, and with respect to which elements were present in amounts above the ODEQ-approved cleanup levels. *See generally id.*

22. The proposed class representatives had their properties sampled as part of the SSP, but have not participated in the state-supervised cleanup of their properties where sampling identified an exceedance of the lead, arsenic or cadmium cleanup standard. *Id.* at ¶ 9, 12.

23. Defendants' investigation and cleanup in Blackwell have been conducted under the supervision of the ODEQ and EPA. *Id.* at ¶ 4, 15. Both the ODEQ and EPA have stated that the

environmental investigations and cleanup are "protective of public health and the environment." *Id.* at ¶ 4. Defendants have presented additional evidence that the cleanup standards are protective of public health. Beck Aff. at 4-7. Plaintiffs dispute the protectiveness of the cleanup standards and recommend a 287 mg/kg cleanup standard for lead as compared to the ODEQ standard of 750 mg/kg. Affidavit of Jill Ryer-Powder, attached as Ex. O to Pls.' Reply ("Powder Aff.") at 7. The Court makes no finding on the merits at this stage with respect to the protectiveness of the cleanup standards.

24. Defendants have presented evidence that the remediation, when completed, will comprehensively address the environmental legacy of the historical Smelter operations. Beck Aff. at ¶ 9; Brunner Aff. at ¶¶ 4, 15. Plaintiffs dispute that Defendants' cleanup is sufficiently comprehensive. Affidavit of Rod O'Connor, attached as Ex. Q to Pls.' Mot.¹ ("O'Connor Aff.") at 10-11. The Court makes no finding on the merits at this stage with respect to the adequacy of Defendants' cleanup efforts.

25. With respect to lead, Defendants will not remediate a property owner's soil unless the lead level is 750 ppm or greater. *See* Plaintiffs' Motion at Ex. P. The Oklahoma Department of Environmental Quality ("ODEQ") has endorsed 750 ppm as an appropriate action level for lead in Blackwell soils. *See* Plaintiffs' Motion at Ex. P. The action level for lead in Blackwell soils, however, was calculated in 1995 by averaging the results of two different Integrated Exposure Uptake Biokinetic ("IEUBK") models, both of which are now, and were at the time of Defendants' implementation of the SSP, obsolete. *See* Plaintiffs' Reply at Ex. O. To that end, this Court limited the testimony of Defendants' expert, Barbara Beck, Ph.D. IEUBK models from prior to 1995 are unreliable for the calculation of appropriate action levels for lead in Blackwell soils. *See* May 24, 2011 Daubert Hearing Transcript at 2:4-13.

26. The presence of lead, cadmium or arsenic on or in real property can have an effect on the value of that property. *See* Plaintiffs' Motion at Ex. NN.

27. There are remediation techniques available to treat the interiors and exteriors of homes, soil and groundwater for contamination with lead, cadmium and arsenic. *See* Plaintiffs' Motion at Exs. Q, EE, FF.

28. There exist soil samples for a significant portion of the properties located within the geographic boundary of the class. *See* Defendants' Opposition at Ex. C.

29. The testing protocol and cleanup guidelines of the Defendants' SSP, offered to all members of the class, were identical. *See* Plaintiff's Reply at Ex. G.

30. Under Defendants' SSP, there was no requirement that a property owner establish that the heavy metal contamination on his or her property came from the Smelter. *See* Plaintiffs' Reply

¹Plaintiffs' Motion for Class Certification is referred to herein as "Plaintiffs' Motion" or "Pls.' Mot."

at Ex. G.

31. Defendants have presented evidence that sources other than the Smelter have impacted the concentrations of arsenic, cadmium and lead in Blackwell soils. Affidavit of William Hall, attached as Ex. E to Defs.' Opp. ("Hall Aff.") at Ex. 2, at 24-41; Affidavit of Dr. Mark Williamson, attached as Ex. H to Defs.' Opp. ("Williamson Aff.") at ¶¶ 5-6. Plaintiffs dispute this evidence and contend that the Smelter is the only "major" source of contamination in Blackwell. Dr. O'Connor Rebuttal to William L. Hall, attached as Ex. M to Pls.' Reply ("O'Connor Rebuttal to Hall") at 2; Dr. O'Connor Rebuttal to Dr. Mark A. Williamson, attached as Ex. N. to Pls.' Reply ("O'Connor Rebuttal to Williamson") at 2. This Court makes no factual or legal finding on the sources of contamination at this time.

32. Defendants' SSP does not test, and has never tested, the interiors of homes for the presence of heavy metals. *See* Plaintiffs' Reply at Ex. G.

33. Individual class members who own property within the geographic boundaries of the class are ascertainable by reference to public documents and other readily available methods of identifying property owners. *See* Plaintiffs' Motion at Ex. NN.

34. Plaintiffs' experts Dr. Rod O'Connor and Jim Tarr have opined that any lead and arsenic contamination comes predominantly from the historical Smelter operations. Defendants' experts Dr. Mark Williamson, William Hall, and Stanley Hayes disagree, and opine that there are multiple significant sources for the lead and arsenic contamination including use of lead-based paint and other historical sources. The Court does not reach a conclusion on the merits regarding which party is correct with respect to the source of contamination.

35. This Court declines to make a merits based determination concerning the parties' dispute as to what qualifies as impairment to the value of real property arising from environmental contamination.

36. Plaintiffs' experts Dr. O'Connor and Dr. Ryer-Powder opine that the current lead and arsenic cleanup levels set by the ODEQ are not sufficiently protective of public health. O'Connor Aff. at 7; Ryer-Powder Aff. at 3, 7. Defendants' expert Dr. Beck responds that the current cleanup levels have been endorsed by the ODEQ and EPA as recently as 2007, and that these levels are sufficiently protective. Beck Aff. at ¶ 9(c); Ex. 3 at 27-42; Beck 3/16/11 Aff. at 1-4. This Court does not make a merits based determination regarding this dispute.

37. Each of the named Plaintiffs has asserted identical causes of action against Defendants. *See generally* Plaintiffs' Original Petition.

38. Each of the named Plaintiffs has given his or her deposition and has participated in this case. *See* Plaintiffs' Reply at Exs. A-D.

39. It is clear from their testimony that the named Plaintiffs have an adequate understanding of the case and are sufficiently involved to warrant appointment by the Court as Class Representatives. *See* Plaintiffs' Reply at Exs. A-D.

40. The claims in this case are not economically feasible to bring in individual cases. *See* Plaintiffs' Motion at Ex. OO.

41. The nature of the claims brought by Plaintiffs relating to the contamination of the class area, if brought in individual suits, would require repetitious presentations of evidence relating to contamination and alleged damages. The Court finds that such an approach would be highly inefficient. *See* Plaintiffs' Motion at Ex. OO.

42. Plaintiffs' chosen counsel has extensive experience in class action litigation and has demonstrated their competency to serve as representative counsel in this case. *See* Plaintiffs' Motion at Ex. QQ.

II. CONCLUSIONS OF LAW

In adjudicating the instant class certification motion, the Court must accept Plaintiffs' uncontroverted allegations as true. *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1032 (Okla. 2006). Although Plaintiffs bear the burden of establishing the statutory requisites for class certification, 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. Daimler-Chrysler Corp.*, 195 P.3d 48, 52 (Okla. 2008). Indeed, any 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 as a certification order is always, prior to judgement on the merits, subject to modification. *Black Hawk Oil Co.*, 969 P.2d at 342.

Here, Plaintiffs have moved for class certification under Oklahoma Statute title 12, sections 2023(B)(2) and 2023(B)(3). As such, Plaintiffs have the burden of establishing the following:

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

Before the six criteria for class certification are analyzed, however, the Court will address two arguments, not directly related to certification, but nonetheless raised by Defendants in their certification briefing - whether (1) the Class Representatives have standing; and (2) an ascertainable class has been proposed.

STANDING

When a plaintiff's standing is challenged, the plaintiff must show a (1) concrete, particularized, actual or imminent injury in fact; (2) causal connection between the injury and the alleged misconduct; and (3) protected interest within a statutorily or constitutionally protected zone. *Oklahoma Educ. Ass'n v. Oklahoma*, 158 P.3d 1058, 1063 (Okla. 2007). In the class action context, only one named plaintiff must meet the standing requirements for the claims asserted. *Stephenson Oil Co. v. Citgo Petroleum Corp.*, No. 08-CV-380-TCK-TLW, 2010 U.S. Dist. LEXIS 96051, *27 (N.D. Okla. Sept. 14, 2010).² Here, the Court finds that all Plaintiffs have standing to bring the claims asserted.

With respect to the first element of standing - a concrete, particularized, actual or imminent injury in fact - Plaintiffs allege that Defendants' operation, closure and purported cleanup of the former Smelter resulted in the discharge of lead, arsenic and cadmium onto and into Plaintiffs' properties. As a result, Plaintiffs further allege that the conduct of Defendants has interfered and continues to interfere with Plaintiffs' use and enjoyment of their properties and has diminished and continues to diminish the value of Plaintiffs' properties.

In support of their allegations of property contamination, Plaintiffs have offered evidence in

² Because "Oklahoma's class action scheme closely parallels that provided in the Federal Rules of Civil Procedure, [Oklahoma state courts] may look to federal authority for guidance regarding its rationale." *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 9 P.3d 683, 699 (Okla. 2000).

the form of soil sampling data demonstrating that each of the named Plaintiffs' properties has elevated levels of heavy metals. *See* Plaintiffs' Motion at Ex. Q. In addition, Plaintiffs offer correspondence from Defendants to Plaintiffs confirming the presence of heavy metals on Plaintiffs' properties. *See* Plaintiffs' Reply at Ex. TT; *see also* Defendants' Opposition at Ex. C. Plaintiffs' attendant injuries, in turn, are demonstrated through the deposition testimony of the Class Representatives and the affidavit testimony of Plaintiffs' property valuation expert, John Kilpatrick. For example, Plaintiff Loretta Corn testified that, as a result of her concerns regarding smelter contamination, she has ceased all gardening activity and is forced to dust and vacuum the interior of her home more frequently, and Dr. Kilpatrick's affidavit indicates that Plaintiffs' property values have diminished as a result of the presence of heavy metals. *See* Plaintiffs' Motion at Ex. NN; *see also* Plaintiffs' Reply at Ex. B. Dr. Kilpatrick's conclusion is supported by the deposition testimony of Plaintiffs Corn and Larry Jones. *See* Plaintiffs' Reply and Exs. B, C. These allegations and supporting evidence are more than sufficient to establish that each of the named Plaintiffs has suffered an actual, concrete injury in fact, and the first requirement of standing is satisfied. *Sher v. Raytheon Co.*, 261 F.R.D. 651, 663 (M.D. Fla. 2009) *rev'd on other grounds* at No. 09-15798, 2011 U.S. App. LEXIS 4902 (11th Cir. Mar. 9, 2011) ("Plaintiffs'allegations - specifically that chemicals leaked from the Facility have interfered with the use and enjoyment of their properties and caused them to suffer a diminution in the value of their homes - warrant the finding that Plaintiffs have standing.").

With respect to the second element of standing, Plaintiffs rely on the admissions and conduct of Defendants to establish a casual connection between their injuries and the Defendants' alleged misconduct. Plaintiffs note that Defendants' website, www.blackwellcommunityoutreach.com, acknowledges that the former Smelter is a source of contamination in Blackwell. For example, Defendants' website states "smelter-related materials contributed in part to elevated concentrations of metals found in soil and groundwater in certain areas of Blackwell." *See* Plaintiffs' Reply at Ex. U. The Defendants' website also indicates "Freeport-McMoRan Corporation is using its resources to address issues related to the old smelter." *See* Plaintiffs' Reply at Ex. V.

Plaintiffs point out that one way in which Defendants are attempting "to address issues related to the old smelter" is through their voluntary implementation and operation of the SSP. *See* Plaintiffs' Reply at Ex. G. Under the SSP, any property owner in and around Blackwell, regardless of geographic location, may request that their soils be tested, and if necessary, remediated. *See* Plaintiffs' Reply at Ex. G. In addition to the SSP, Defendants voluntarily constructed a groundwater treatment plant to address the dangerous levels of cadmium and zinc currently existing in Blackwell's water table - contamination Defendants admit was caused by the Smelter. *See* Plaintiffs' Reply at Ex. W.

Plaintiffs also rely on conclusions from the ODEQ and their own experts to further demonstrate their injuries were caused by Defendants' operation of the Smelter. Plaintiffs offered evidence demonstrating the ODEQ believes that the Smelter is a primary source of heavy metal deposition in Blackwell. The 1996 ODEQ Record of Decision states, "[T]he DEQ believes that a significant portion of the Site was contaminated through historical aerial deposition of metals from

the smelting operations and transport of solid materials from the Site.”) See Plaintiffs’ Motion at Ex. P.

Plaintiffs’ experts also testified that the primary source of the contamination in Blackwell is the former Smelter. For example, Dr. Rod O’Connor, Plaintiffs’ environmental chemist, testified “it is more likely than not that the widespread lead contamination in Blackwell is primarily residuals from the Blackwell Zinc Smelter operations, from operational emissions, blowing dusts and distributed waste solids. It is my opinion that the contaminants generated by the smelter operations have been invading the properties of the citizens of Blackwell for several decades. It is also my opinion that there are no significant alternative sources of lead and/or arsenic contamination in Blackwell.” See Plaintiffs’ Motion at Ex. Q. Dr. O’Connor’s testimony is corroborated by that of Jim Tarr, Plaintiffs’ air-modeling expert. In his report, Tarr remarks, “[F]or most of the properties in Blackwell, the smelter was more likely than not the most significant source for lead, arsenic, cadmium and zinc contamination.” See Plaintiffs’ Motion at Ex. X.

These allegations and supporting evidence are sufficient, solely for purposes of a standing analysis, to establish that Plaintiffs’ injuries are causally related to Defendants’ alleged misconduct. This determination is strictly limited to the standing analysis and is not a finding of fact or law for purposes of this Court’s consideration of class certification.

With respect to the final requirement of standing—whether Plaintiffs have a protected interest—the Oklahoma Constitution states “[n]o private property shall be taken or damaged for private use, with or without compensation ...” OKLA. CONST. ART. II, § 23. And, where private property has been “damaged,” the Oklahoma statutes entitle those affected to equitable or legal remedies to protect the fundamental interest to own and enjoy private property. See, e.g., OKLA. STAT. tit. 50, § 13 (The remedies against a private nuisance are (1) a civil action; or (2) abatement). *Bd. of County Commissioners v. Lowery*, 136 P.3d 639, 650-61 (Okla. 2006). Clearly, Plaintiffs have a statutorily protected right to own and enjoy private real property. Thus, the final element of standing is satisfied and the Court finds the named Plaintiffs have standing.

CLASS DEFINITION

Oklahoma courts generally recognize that the class must be adequately defined and clearly ascertainable before a class action may proceed. *Sias v. Edge Comm., Inc.*, 8 P.3d 182, 187 (Okla. Civ. App. 2000). “An identifiable class exists if its members can be ascertained by reference to objective criteria ...” *Id.* Of course, the Court “is not bound by the definitions proposed by the [Plaintiffs],” *Bailey v. Kemper Cas. Ins. Co.*, 83 S.W.3d 840, 848 (Tex. App.—Texarkana 2002), and “[i]f the court finds that the proposed class definition is not sufficiently definite, it may modify the definition instead of dismissing the proposed action.” *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999). Indeed, if the Court does not agree with a plaintiff’s class definition, modification of the class definition, instead of denial of a certification motion, is the preferred course of conduct. *Brooks v. Norwest Corp.*, 103 P.3d 39, 48 (N.M. App. 2004). This discretion is consistent with the well-established Oklahoma rule that courts should err in favor of allowing maintenance of a class

action because a certification order is always, prior to judgement on the merits, subject to modification. *Black Hawk Oil Co.*, 969 P.2d at 342.

Initially, Plaintiffs sought to certify the following class:

Oklahoma citizens currently domiciled in the State of Oklahoma who own private real property in the City of Blackwell, Kay County, Oklahoma or within a five-mile radius of the former Smelter site[.]

See Plaintiffs' Original Petition at ¶ 54. Excluded from the proposed class were following individuals and entities.

Defendants and any entity in which any Defendant has a controlling interest, any current employees, officers, or directors of any Defendant, and the legal representatives, successors and assigns of any Defendant, as well as the State of Oklahoma and/or any political subdivisions thereof. Also excluded from the definition of the class are those individuals who participated as plaintiffs in Cause No. C-73-21; *Glenny, et al. v. Blackwell Zinc Company, Inc., et al.*; In the District Court of Kay County, Oklahoma and/or Cause No. CJ-95-482; *Miller v. Blackwell Zinc Company, Inc.*; In the District Court of Kay County, Oklahoma.

See Plaintiffs' Original Petition at ¶ 56.

In response to Plaintiffs' Motion for Class Certification, Defendants argued Plaintiffs' proposed class definition was arbitrary because it was "not sufficiently tied to the conduct of Defendants or the harm alleged by the putative class." Defendants, however, have failed to provide any legal support suggesting that Oklahoma has adopted or even endorsed such a standard for class definitions. As such, the Court will review Plaintiffs' proposed class definition under the "adequately defined" and "clearly ascertainable" standard set forth in *Sias*, 8 P.3d at 187.

In their reply, Plaintiffs offered the following amended class definition:

Oklahoma citizens currently domiciled in the State of Oklahoma who own private real property located within the geographical boundary defined by the following UTM coordinates expressed in meters and NAD27:³

Southwest corner:	14N	649500, 4071500
Northwest corner:	14N	649500, 4076500
Southeast corner:	14N	655000, 4071500

³ The universal Transverse Mercator (UTM) geographic coordinate system is a grid-based method of specifying locations on the surface of the Earth that is a practical application of a 2-dimensional Cartesian coordinate system. It is a horizontal position representation used to precisely identify unique locations on the Earth independent of vertical position.

Northeast Corner: 14N 655000, 4076500

Plaintiffs' amended class definition was accompanied by a map that geographically depicts the proposed class area.

Plaintiffs assert, and the Court agrees, that the amended class definition is grounded in and based on reliable scientific air-modeling performed by Plaintiffs' expert, Jim Tarr. Plaintiffs' proposed class area is further supported by the data of Dr. O'Connor taken from exterior soil samples and interior dust samples throughout the proposed class area. *See* Plaintiffs' Motion at Exs. Q, RR. Even Defendants' own data show high concentrations of heavy metals throughout the proposed class area. *See* Defendants' Opposition at Ex. E; *see also* Plaintiffs' Motion at Ex. RR.

The Court finds that Plaintiffs' amended class definition is adequately defined by the geographic boundaries described in the text of the definition and depicted on the accompanying map. The Court finds that the geographic boundaries themselves are objectively ascertainable and thus the parameters of the class area are well defined. The Court further finds that the members of the class are easily ascertainable as they are those individuals owning private real property located within the geographical boundaries. These class members can easily be identified through the Kay County tax records and other available methods for locating property owners. The Court, therefore, adopts Plaintiffs' amended class definition. The Court also adopts the exclusions proposed by Plaintiffs and adds the following exclusion: any currently-sitting Oklahoma State Court Judge or Justice; and the current spouse and all other persons within the third degree of consanguinity to such judge/justice.

Having determined that the Class Representatives have standing and that an objectively ascertainable class exists, the Court now turns to an analysis of the statutory requirements of Rule 2023.

RULE 2023(A)(1) - NUMEROSITY

In Oklahoma, the first requirement for class certification is that the class is so numerous that joinder of all members is impracticable. *OKLA. STAT. tit. 12, § 2023(A)(1)* (2011). Joinder need not be impossible, only difficult and inconvenient. *Shores v. First City Bank Corp.*, 689 P.2d 299, 302 (Okla. 1982). Although no "bright line" rule has been adopted by the Oklahoma Supreme Court to determine how many class members are required to satisfy the numerosity requirement, the Court has held that the numerosity requirement "is satisfied by numbers alone when the size of the class is in the hundreds." *Black Hawk Oil Co.*, 969 P.2d at 343.

The Court has before it evidence demonstrating that the number of class members reaches into the thousands. Specifically, Plaintiffs have presented evidence that the class includes in excess of 4,300 properties, many of which have multiple fractional owners. *See* Plaintiffs' Motion at Ex. NN. Thus, the class is so numerous that joinder would be impracticable. Moreover, while the class definition is limited to Oklahoma citizens, it is quite possible that not all owners of the properties located within the class boundary actually reside there. That is to say, there may be class members

who reside in all parts of Oklahoma, making joinder that much more difficult.

In light of this evidence, and the absence of opposition offered by Defendants to this element, the Court finds that Plaintiffs have satisfied the numerosity requirement.

RULE 2023(A)(2) - COMMONALITY

The second requirement of class certification is commonality. The commonality element requires a determination that there are "questions of law or fact common to the class." *OKLA. STAT. tit. 12, § 2023 (A)(2)* (2011). Commonality is not required for each issue that might arise in the case. *Realmonite v. Reeves*, 169 F.3d 1280, 1285 (10th Cir. 1999). 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 v. Nat'l Mobile Health Care*, No. CIV-07-933-M 2008 U.S. Dist. LEXIS 86741, *7 (W.D. Okla. Oct. 27, 2008).

The Court finds that there are numerous common questions that arise from the operative set of facts of this case that can be resolved on a class-wide basis to the benefit of Plaintiffs and Defendants. Specifically, Plaintiffs present the following as common issues of law and fact which the Court determines satisfy Rule 2023(A)(2):

1. 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;
2. whether the substances emitted or allowed to be emitted from the Smelter property were/are hazardous;
3. whether, and to what extent, Defendants are responsible for the hazardous substances on and around the properties of Plaintiffs and the Class;
4. 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;
5. 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;
6. whether, and to what extent, Defendants possessed knowledge regarding the dangers surrounding their conduct at and about the Smelter;

7. 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;
8. whether, and to what extent, the actions and operations of Defendants have resulted from negligent, intentional, malicious or reckless conduct;
9. whether, and to what extent, the actions and operations of Defendants are subject to strict liability; and
10. whether, and to what extent, Defendants have been unjustly enriched.

Any one of these common issues satisfies the requirements for commonality.

In determining that sufficient commonality exists, the Court is not unmindful of the recent decision handed down by the United States Supreme Court in *Dukes v. Wal-Mart* __ U.S. __, 2011 WL2437012 (June 20, 2011). In that case the court found commonality did not exist because the causes of action resulted from a series of decisions that were subject to "local managers' broad discretion" and [local managers'] own subjective criteria..." *Dukes*, 2011 WL2437012, *3. However, in the instant case neither party is alleging that discretion or subjective criteria were involved in the contamination of Blackwell. As neither factor exists, there are no variances between the class members.

The *Dukes* court also placed heavy reliance on the existence of many possible individual defendants making numerous decisions that did not affect or relate to those decisions made by other possible individual defendants. In this case the only alleged wrong doer is Blackwell Zinc Co. which is alleged to have caused community wide contamination (See Def. Opp. At Ex. H.). In analyzing the *Dukes* decision it is clear that the court determined that since it was a Title VII discrimination case the statute could be violated in numerous ways by numerous persons in very disparate ways. *Id.* at *7. The parties in this case appear to be in agreement that only one entity committed any possible wrong doing against the community. The Court finds that the Plaintiffs have satisfied Rule 2023 (A)(2)'s element of commonality.

RULE 2023(A)(3) - TYPICALITY

The third requirement for class certification, typicality, requires that "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)* (2011). The purpose of the typicality requirement 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. *Id.* at *17-18. 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). In fact, if the claims arise from a similar

course of conduct by the defendant and share the same legal theory, factual differences in the claims of the class members are immaterial. *Cactus Petroleum Corp. v. Chesapeake Operating Inc.*, 222 P.3d 12, 18 (Okla. 2009). 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). "It is not a high threshold." *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1055 (Okla. Civ. App. 1999).

Here, the interests of the named Plaintiffs are aligned with those of the proposed class. The Class Representatives' claims, like those of the class members, arise out of the same alleged unlawful conduct—Defendants' operation of the Smelter. See *In Re Farmers Med-Pay Litig.*, 229 P.3d 551, 555 (Okla. Civ. App. 2009). And, the remedies sought by the Class Representatives are identical to and protective of the interests of the class. Thus, Plaintiffs have satisfied the typicality requirement.

Defendants argue the named Plaintiffs are atypical because they are subject to certain unique affirmative defenses—namely, contributory negligence and failure to mitigate damages. Even assuming, however, the affirmative defenses have merit, they are irrelevant for purposes of class certification. "A class representative may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him that would not impact other class members." *In re: Farmers Ins. Co.*, No CIV-03-158-F, 2006 U.S. District LEXIS 27290, *24 (W.D. Okla. Apr. 13, 2006). The unique defense rule is intended to protect the absent class members, not to shield defendants from a potentially meritorious suit. *Id.* At *23-24. Thus, whether the named Plaintiffs may be subject to certain affirmative defenses that other members of the class are not, does nothing to defeat the Court's finding that the typicality element is satisfied.

RULE 2023(A)(4) - ADEQUACY OF REPRESENTATION

The final prerequisite to class certification under Rule 2023(A) is that the Class Representatives must establish they will fairly and adequately protect the interests of the class. *OKLA. STAT. tit. 12 § 2023(A)(4)*. This requirement is met when the record demonstrates that the class representatives (1) interests do not conflict with those of the class; and (2) will fully and effectively represent the interests of the class. *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618, 628 (Okla. 2003).

There is no evidence before the Court demonstrating the Class Representatives' interests conflict with the interests of the class. To the contrary, as pled, the Class Representatives and the class members assert identical causes of action arising out of alleged identical misconduct and seek identical relief for identical harm. Defendants argue Plaintiffs are unable to satisfy this requirement because, again, the proposed class representatives are subject to certain unique affirmative defenses—namely, the Class Representatives have not participated in the Defendants' SSP and Lorretta Corn's status as a landlord gives rise to the unique defense of contributory negligence. Defendants' argument—which the Court notes addresses the typicality requirement rather than the adequacy of representation requirement—has been expressly rejected by the Oklahoma Supreme

Court. *Cactus*, 222 P.3d at 18 (“[T]he fact that a class representative does not have certain claims, or that a defendant has a defense unique to the class representative’s claim, does not, by itself, defeat the adequacy of representation element.”)

The record is replete with evidence that the Class Representatives will fully and effectively represent the interests of the class. *See* Plaintiffs’ Motion at PP. The deposition testimony of the named Plaintiffs demonstrates that each named Plaintiff has embraced his or her role and has a sufficient understanding of his or her responsibilities as class representatives, as well as a sufficient understanding of the litigation. *See* Plaintiffs’ Reply at Exs. A-D. As class representatives, the named Plaintiffs are not required to have an attorney’s knowledge of the litigation. *Ysbrand*, 81 P.3d at 628 (Okla. 2003).

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 counsel. Plaintiffs are represented by six law firms with extensive experience in complex litigation, class actions and environmental litigation. *See* Plaintiffs’ Motion at Ex. QQ. In fact, members of Plaintiffs’ counsel team have tried a class action case to verdict in Oklahoma. *See* June 10, 2011 Motion for Class Certification Transcript. The Court finds that the quality of representation exhibited by counsel for both Plaintiffs and Defendants has been exemplary. The Court finds Plaintiffs and their counsel can, have and will continue to fairly and adequately protect the interests of the class and that the “adequacy” element has been satisfied.

Having found the named Plaintiffs satisfy the requirements of Rule 2023(A), the Court will now analyze whether Plaintiffs have satisfied the requirements of Rules 2023(B)(2) and 2023(B)(3).

RULE 2023(B)(2) - INJUNCTIVE RELIEF

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).

While the Oklahoma Supreme Court has had few opportunities to review a decision to certify a class under 2023(B)(2), 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—namely, an injunction requiring Defendants to properly test and remediate properties within the proposed class area. Although Plaintiffs also claim they are entitled to some monetary relief for the unjust enrichment

benefit that Defendants have received as the result of the storage of contaminated material on Plaintiffs' properties, that relief is (1) equitable in nature; and (2) incidental and secondary to Plaintiffs' requested injunctive relief.

Last year, the Tenth Circuit addressed certification under Rule 23(b)(2). *DG v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) ("*Devaughn*"). *Devaughn* was filed on behalf of all children in the Oklahoma foster care system and sought injunctive relief. *Id.* at 1192-93. 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 lack 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 an individual determination would be required for each foster child and therefore the class did not meet the "cohesiveness" requirements. *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 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, however, 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 *Devaughn*, and considering the specific elements for certification of such a class in Oklahoma, the Court finds Plaintiffs' case should be certified under Rule 2023(B)(2). As in *Devaughn*, the acts and omissions of Defendants related to the Smelter operation, closure and subsequent cleanup can be determined to have affected the class as a whole, and it is coherently alleged that all class members suffer from a similar injury—contamination of real property. It is alleged the entire class has been subjected to harm or the risk of harm from substances that were emitted into the atmosphere by Defendants—substances that Plaintiffs claim invaded their land and homes. Also, as in *Devaughn*, Plaintiffs seek injunctive relief that would be applicable to the entire class. Plaintiffs seek injunctive relief to have their homes and properties rid of Defendants' contaminants. Plaintiffs seek an injunction to have specific protocols and procedures put in place for testing and remediation of property within the class boundaries. And, Plaintiffs seek to have imposed specific and consistent remediation levels for lead, arsenic and cadmium throughout the class area. Most importantly, a class-wide injunction, like the one Plaintiffs seek, can address the ongoing threat of re-contamination and cross-contamination that exists in Blackwell—an issue that cannot be alleviated on a property-by-property basis.

Defendants have acted and refused to act on grounds generally applicable to the class. Defendants' conduct is, by its own admission, responsible for, at least in part, the contamination that testing reveals reaches every corner of Blackwell. See Defendants' Opposition at Ex. H; see also

Plaintiffs' Reply at Ex. RR. Further, Plaintiffs have submitted additional evidence that Defendants' emissions contaminated and/or had the potential to contaminate all real property within the geographic boundaries defined by the class definition. *See* Plaintiffs' Motion at Exs. Q, X; *see also* Plaintiffs' Reply at Ex. Q. This lends itself to the Court's finding that Defendants have acted in a manner generally applicable to the class.

Plaintiffs also have offered evidence that Defendants have failed to follow appropriate testing and remediation procedures in their SSP—thus, that Defendants have refused to act—and that such inaction affected all class members. *See* Plaintiffs' Motion at Ex. Q; *see also* Plaintiffs' Reply at Ex. O. First, according to Plaintiffs, the Defendants' remediation levels, which are used by Defendants throughout the Blackwell community and hence the class, are unsafe.⁴ Second, Plaintiffs have evidence that Defendants' soil testing on the exterior of residences is flawed and designed to limit positive results. *See* Plaintiffs' Motion at Ex. Q. Because this testing was performed in a uniform manner by Defendants, any shortcomings in such testing affects all class members. And, Plaintiffs have demonstrated and Defendants do not dispute that the SSP does not test the interior of class members' homes. *See* Plaintiffs' Reply at Ex. G. Plaintiffs' test results indicate that contamination exists inside many residences in Blackwell. *See* Plaintiffs' Motion at Ex. Q. Defendants' refusal to act, by failing to test the interior of homes without evidence of exterior contamination—a protocol which Plaintiffs claim has no scientific basis or support—and by refusing to remediate the interior of Blackwell homes, may have affected all class members and, if so, would have affected them all substantially in the same way. *See* Plaintiffs' Motion at Ex. Q.

Injunctive relief is appropriate with respect to the class as a whole. In order to address the damage allegedly 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 seek the application of a single injunction with defined testing standards to be applied to all Blackwell properties and a defined remediation standard to be applied to all contaminated properties in the class area. Such an injunction is precisely the type contemplated by Rule 2023(B)(2).

Because Plaintiffs have all allegedly suffered, and continue to suffer, from a similar injury—property contamination arising from the same source—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 for testing and remediation, Plaintiffs avoid a situation where individual determinations and multiple injunctions would be required. Rather, the single injunction proposed by Plaintiffs here is like the one approved by the Tenth Circuit in *Devaughn*.

⁴As indicated in the Court's findings of fact, the 750 ppm action level for lead in Blackwell soils was calculated in 1995 using now obsolete models. Plaintiffs have offered evidence demonstrating that, using current models, the action level for lead in Blackwell soils could be as low as 150 ppm. While the Court makes no determination regarding which, if either, action level is appropriate, the Court does conclude that Defendants' chosen action level of 750 ppm, although endorsed by the ODEQ, is not binding on the members of the class.

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 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 Plaintiffs' Motion at Ex. Q. 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 and require samples to be digested according to NTIS method SW-846-3050B and analyzed by ICP spectrometry according to NTIS Method SW846 6010B. And, finally, Plaintiffs seek an injunction that mandates remediation of soils and the interior of structures to levels that are allegedly within acceptable risk parameters 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. If such standards are applied across all residences and properties in Blackwell, all class members will have their properties properly remediated to a level that is believed to be protective of human health, regardless of their pre-remediation contamination level. The Court need not and does not adopt or even endorse Plaintiffs' injunctive plan, but does recognize that, as proposed, injunctive relief may be afforded to the class as a whole and that such an injunction would be appropriate under Rule 2023(B)(2).

Rule 2023(B)(2) certification can remedy this situation in a coherent and fair manner that would benefit all class members in the same way, should a fact-finder make a determination that Defendants are required to remediate the class area. 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.") Certification of this class would promote judicial economy. Thousands of individual lawsuits against Defendants to address the same issues would require the Court to expend considerable resources to hear substantially the same evidence in each case. 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 should a fact-finder so decide.⁵

In opposition to class certification under 2023(B)(2), Defendants argue that Plaintiffs' claims are primarily monetary in nature. In support, Defendants state "Plaintiffs' petition makes plain that the primary purpose of this case is to recover money damages. They seek money damages for each of their legal causes of action." This argument fails for several reasons.

⁵Rule 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) *rev'd on other grounds* at No. 10-277, 2011 U.S. LEXIS 4567 (June 20, 2011) (stating that the "discretion to require notice and the opportunity to opt-out in a Rule 23(b)(2) class action is well established")

First, it ignores the fact that Plaintiffs seek class certification under 2023(B)(2) only for their requested equitable relief—the cleanup of Blackwell. Thus, whether Plaintiffs seek to recover money damages for their legal causes of action is irrelevant to the Court’s analysis of whether (B)(2) certification is appropriate. *See Dukes*, 603 F.3d at 620.

Next, Defendants’ argument ignores the fact that the crux of Plaintiffs’ claims is for injunctive relief that is appropriate for the class as a whole. Plaintiffs allege that if Blackwell is not fully and completely remediated, Plaintiffs and the class will continue to suffer harm through existing contamination and re-contamination from other areas of Blackwell. Plaintiffs further allege that every member of the proposed class is threatened by existing contamination and cross-contamination, and every member of the proposed class requires interior testing. These allegations, taken as true, demonstrate that any monetary award arising from Plaintiffs’ unjust enrichment claim is incidental to Plaintiffs’ claim for injunctive relief because, as Plaintiffs allege, if there is not complete remediation, re-contamination and/or cross-contamination may continue within the class area.

In sum, the Court finds Defendants have acted and have refused to act on grounds generally applicable to the class and that, should Defendants be found liable for the contamination, the injunctive relief would be an appropriate mechanism by which to remediate the contamination. Because Plaintiffs seek “hybrid certification” of the class under Rule 2023(B)(2) and (B)(3), *Dukes v. Wal-Mart Stores*, 603 F.3d at 620-23, (rev. on other grounds) 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 therefore appropriate. Further, Plaintiffs allege the 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 and efficiently. 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.

The court has further analyzed the pleadings, exhibits and supporting law supplied by the parties in conjunction with the U.S. Supreme Court ruling in *Dukes. Id.*, and determines that the injunctive relief sought by the Plaintiffs does not require different injunctions or declaratory judgments against the defendants. In contrast to the varying discriminatory behavior sought to be enjoined in *Dukes*, here the equitable relief sought by the Plaintiffs is the same class wide.

Having found that Plaintiffs satisfy each of the requirements of Rule 2023(A) as well as the requirements of 2023(B)(2), the Court will certify Plaintiffs’ requested Rule 2023(B)(2) class.

Rule 2023(B)(3) - MONETARY RELIEF

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).

In conjunction with the Rule 2023(B)(2) class, monetary relief may also be available under Rule 2023(B)(3). Although Rule 2023(B)(2) certification “is generally reserved for cases in which broad, class-wide injunctive or declaratory relief is necessary to address group wide injury..... some damages may also be awarded.” *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1038 (Okla. 2006).

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

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*, 195 P.3d at 57. 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*, 991 P.2d at 1052. 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 at 556. 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. *Marathon Oil*, 2010 U.S. Dist. LEXIS 56650, at *23.

Common Questions of Fact Regarding Defendants’ Liability Predominate

There are an overwhelming number of common questions of fact that predominate over individual issues. Above all others, however, is the common question of whether Defendants' operation of the Smelter caused the contamination of the class area. Resolution of this question requires fact findings common to each cause of action asserted by Plaintiffs, which will apply equally to all class members. Thus, all Plaintiffs and the class will rely on the same evidence to answer this question and attempt to establish Defendants' liability.

Whether or not Defendants are liable to Plaintiffs and the class, and the extent of any such liability, involves many underlying common questions of fact, including:

1. Whether Defendants' operation of the Smelter allowed lead, arsenic and/or cadmium to be emitted into the environment;
2. If so, whether the lead, arsenic and/or cadmium contaminated the proposed class area;
3. Whether Defendants had knowledge and, if so, when Defendants acquired knowledge, that lead, arsenic and cadmium are hazardous;
4. Whether it was reasonably foreseeable that lead, arsenic and cadmium could be released into the proposed class area as a result of Defendants' operation of the Smelter;
5. What actions, if any, Defendants took to prevent or reduce the amount of lead, arsenic and cadmium released from the Smelter;
6. Whether Defendants' remedial efforts are sufficient to protect human health and the environment;
7. Whether the presence of lead, arsenic and/or cadmium on and/or in Blackwell properties affects property values;
8. Whether lead, arsenic and/or cadmium contain intrinsic chemical characteristics that would alert a reasonable person to their presence; and
9. Whether re-contamination or cross-contamination has occurred in Blackwell and, if so, whether it is likely it will continue to occur.

These predominating questions, and their answers, are common to all members of the proposed class. Further, the issues raised by these common questions relate directly to the existence and extent of Defendants' liability to the class as a whole. There is simply no reason to resolve these questions thousands of times in separate, individual cases.

This shared question of fact - Defendants' liability-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 Defendants' conduct in this respect 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 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. Likewise, all Plaintiffs and the class will rely on the ODEQ's 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. And all Plaintiffs and the class will rely on Defendants' admission that the contamination of the groundwater in Blackwell is a result of the Smelter. In addition to this admission being applicable to the entire class, the manner in which the contamination affects the groundwater and the evidence of what is necessary to remediate the problem will likewise be offered on a class-wide basis. These fact issues, common to all class members, predominate over individual issues.

Just as Plaintiffs' experts will rely on class-wide proof, so too will Defendants' experts. William Hall is an engineer retained by Defendants to evaluate soil and house dust contamination in Blackwell. See Defendants' Opposition at Ex. E. Mr. Hall makes several statements in his report that demonstrate the presence and usefulness of, as well as the Defendants' reliance on, class-wide proof. For example, Mr. Hall states that Plaintiffs' single source explanation of the presence of metals throughout the community is not consistent with or supported by the available data. Setting aside the fact that this is a comment on the merits of Plaintiffs' case, Mr. Hall uses data from the entire community of Blackwell to conclude that sources other than the Smelter are responsible for the contamination. Thus, in the same way Plaintiffs' expert Dr. O'Connor used common evidence to offer his class-wide opinions, so too do Mr. Hall's opinions regarding the potential source(s) of contamination rely on this same class-wide data. Importantly, both Dr. O'Connor and Mr. Hall reached their conclusions without the necessity of conducting a property-by-property analysis.

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. Defendants' liability, if any, arises out of the same nucleus of operative facts for each Plaintiff and class member. Each Plaintiff and class member would rely upon the same evidence to show the negligent conduct of the Defendants. Each 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. Moreover, Plaintiffs contend they 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. This method of proof will involve answering questions that will not differ for Plaintiffs or the class members. See June 10, 2011 Motion for Class Certification Transcript.

The Court's conclusion that Defendants' liability is the predominant issue in this matter is consistent with recent Oklahoma class action case law. *Gentry v. Cotton Electric Cooperative, Inc.*, No. 107019, 2010 Okla. Civ. App. LEXIS 149 (Okla. Civ. App. Mar. 7, 2011), arose out of a fire in Stephens County that ultimately covered an area exceeding 13,000 acres. *Id.* at *2. The fire destroyed forty-eight residences, numerous structures and extensive personal property, including property owned by Plaintiff Gentry. Gentry sued Defendant Cotton Electric Cooperative, Inc. alleging the fire was caused by Defendant's defective electric transmission line. Gentry moved to certify a class of plaintiffs pursuant to Oklahoma Rule 2023(B)(3). The trial court denied class certification.

In reversing the trial court, The Court of Civil Appeals of Oklahoma held:

Determining whether there are issues 'of law or fact common to the class,' 12 O.S.2001 § 2023 (A)(2), and if so, whether those issues 'predominate over any questions affecting only individual members,' 12 O.S.2001 § 2023(B)(3), involves considerations that, although distinctive in their focus, often involve essentially the same or closely related analyses. Determining the existence of common issues of law and fact in this case are straightforward: did [Defendant's] transmission line cause the fire, and, if so, is [Defendant] liable for the damages caused. Whether that issue predominates is the crux of the matter.... In this case, the cause of the fire is the central issue. If [Defendant] was not responsible for the fire, that is the end of the matter. If [Defendant] did cause the fire, what remains to be determined is the amount of each class member's damages.

Id. at *12-13.

This case is not different. The central issue that predominates this matter is whether Defendants' operation of the Smelter caused the heavy metal contamination on and in Plaintiffs' properties.

Common Questions of Law Predominate

Common questions of law also predominate in this case. Here, the named Plaintiffs' claims are identical to the claims of the class members. Thus, there is no splintering of claims because *all* Plaintiffs assert *all* the same causes of action against *all* Defendants on behalf of *all* class members. Some of the predominate questions of law include:

1. Whether the substances emitted or allowed to be emitted from the Smelter property were/are hazardous to human health and/or the environment;

2. Whether, and to what extent, Defendants are responsible for the hazardous substances emitted from the Smelter;
3. Whether, and to what extent, Defendants are responsible for the hazardous substances on and around the properties of Plaintiffs and the class;
4. Whether, and to what extent, the actions and operations of Defendants have resulted in a contributing trespass on the properties of Plaintiffs and the class;
5. 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;
 - a. Would elevated levels of lead, cadmium or arsenic on an individual's property injure or endanger the use of the property by a reasonable property owner;
 - b. Would elevated levels of lead, cadmium or arsenic render a reasonable property owner insecure in the use of his or her property;
6. Whether, and to what extent, Defendants possessed knowledge regarding the dangers surrounding their operation of the Smelter;
 - a. What was the state of the art in the smelting industry for safe operation of the Smelter during the time of its operation;
 - b. At what point did Defendants learn, or should have reasonably learned, that the Smelter was emitting substances that were dangerous to human health and the environment;
7. 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;
8. Whether, and to what extent, the actions and operations of Defendants have resulted from negligent, intentional, malicious, or reckless conduct;
9. Whether, and to what extent, the actions and operations of Defendants are subject to strict liability;
10. Whether, and to what extent, Defendants have been unjustly enriched;
 - a. Did Defendants benefit from using Plaintiffs' and the class'

properties as depositories for the storage of millions of pounds of Smelter contaminants;

b. Does equity and good conscience require Defendants to compensate property owners for the storage of millions of pounds of Smelter contaminants;

11. Whether the operation of the Smelter was an ultra-hazardous activity;
12. Whether lead, cadmium and/or arsenic contamination beyond the Smelter site, but within the geographic boundaries of the class, was reasonably foreseeable;
13. Can Defendants present sufficient evidence to entitle them to present the issue of comparative fault to a jury;
14. Can Defendants present sufficient evidence relating to class members' knowledge of the potential contamination to entitle them to present the issue of comparative fault to a jury;
15. Can Defendants present sufficient evidence relating to class members' knowledge of the potential contamination to entitle them to present the issue of laches and/or equitable estoppel to a jury;
16. Can Defendants present sufficient evidence relating to class members' knowledge of the potential contamination to entitle them to present the issue of coming to a nuisance to a jury;
17. Can Defendants present sufficient evidence relating to class members' knowledge of the potential contamination to entitle them to present a statute of limitation defense to a jury;
18. Whether Defendants can establish that Plaintiffs' claims are barred by a statute of repose;
19. Whether Plaintiffs can present sufficient evidence to entitle them to be able to present the question of punitive damages to a jury; and
20. Whether Plaintiffs can present sufficient evidence that BZC, Cyprus Amax Minerals Company, Phelps Dodge Corporation and/or Freeport-McMoRan acted and/or operated as the alter egos of another.

These questions of law will apply to all Plaintiffs, class members and Defendants. Class action treatment is plainly the appropriate method to address these common questions of law.

This case presents *far* more uniform questions of law than many other cases that have been certified by Oklahoma courts. Indeed, Oklahoma courts have not hesitated to certify class actions potentially involving laws from all fifty states. *Cuesta v. Ford Motor Co.*, 209 P.3d 278 (Okla. 2009) (contending with choice of law analysis in 50 state class actions and still finding common questions of law predominated); *Ysbrand*, 81 P.3d 618 (Okla. 2008) (same); *Masquat*, 195 P.3d 48 (Okla. 2008) (same); *Hess v. Volkswagen of Am., Inc.*, 221 P.3d 132 (Okla. Civ. App. 2009) (same). Here, the Court is not confronted with complex choice of law issues or the application of multiple states' laws. The Court must only apply Oklahoma law to Oklahoma claims and defenses asserted in this case.

Individual Issues do Not Predominate

Defendants argue this case involves numerous individual issues that predominate over any common issues. However, none of the "individual issues" identified by Defendants—proof of contamination, causation, statute of limitations or damages—predominates over the common issues in this case, and the Oklahoma Supreme Court has rejected many of these exact "individual issues" in other class cases as insufficient to defeat a finding of predominance.

Defendants argue that "proof of contamination" necessarily presents an individualized issue. Defendants' argument, however, is rebutted by both Plaintiffs' and Defendants' experts. Plaintiffs' proof of class-wide contamination can be readily viewed in the affidavit of Mr. Tarr. In his affidavit and the attached report, Mr. Tarr, through the use of the EPA's and ODEQ's approved air dispersion modeling program, AERMOD, testified:

that properties in Blackwell were subjected to large amounts of particulate matter originating from the smelter *in the same way*. Furthermore, other factors taken into consideration by the air modeling project *are applicable on a community-wide basis*—factors such as smelter emissions, wind speed, wind direction and frequency and the subsequent atmospheric dispersion of heavy metals and particulate matter are applicable to all properties in Blackwell.

See Plaintiffs' Motion at Ex. X.

Mr. Tarr is not the only expert that admits that the AERMOD modeling program can be used to correctly present evidence of ambient air concentrations in Blackwell on a community-wide basis. *See* Plaintiffs' Reply at Ex. J. Mr. Stanley R. Hayes, Defendants' expert, concurs. Although Mr. Hayes is critical of Mr. Tarr's emissions factors, emissions inventory and metal speciation, Mr. Hayes never states that the use of AERMOD for ambient air-modeling calculations across large number of properties is not scientifically appropriate. *See* Plaintiffs' Reply at Ex. J. In fact, Mr. Hayes stated exactly the opposite in his deposition. *See* Plaintiffs' Reply at Ex. J. Furthermore, Mr. Hayes testified in another Oklahoma case that the use of AERMOD to make these types of class-wide determinations is appropriate. *See* Plaintiffs' Reply at Ex. J.

Therefore, as is evident from Mr. Hayes' own testimony, the data—meteorological data, wind data, emission sources and emission rates for each of those sources—are the *same* for each property in Blackwell. And, all of this evidence, which is the *same* for every property in Blackwell, is then used as input for the AERMOD computer model that is specifically designed to calculate ambient air concentrations for a large geographic area *without* consideration of what type of property is being examined.

Defendants further argue that individual issues of causation defeat certification. Specifically, Defendants argue that individual issues of alternate causation and comparative fault defeat certification. It is well established in Oklahoma class action law, however, that individual issues relating to causation do not defeat a finding of predominance. See *Ysbrand*, 81 P.3d at 627; *Black Hawk Oil Co.*, 969 P.2d at 345 (Okla. 1998); *In re: Farmers Med-Pay*, 229 P.3d at 560; *Hess*, 221 P.3d at 138. The same is true under federal class certification standards. *Collins v. Olin Corp.*, 248 F.R.D. 95, 104 (D. Conn. 2008); *Bates v. Tenco Serv's Inc.*, 132 F.R.D. 160, 163 (D.S.C 1990).

Defendants argue that causation cannot be proven on a class-wide basis because Defendants have identified a number of potential sources for the metals present on residential properties located in Blackwell. Indeed, Defendants' experts have advanced alternative sources of contamination ranging from lead paint and foundries to sewer sludge and tobacco. Defendants also raise the issue of comparative fault, *i.e.*, Plaintiffs' use of or failure to maintain lead-based paint on their homes, as a basis for defeating class certification. See Defendants' Opposition at Ex. E. Other courts have rejected these same arguments, and this Court finds their reasoning persuasive.

For example, in *Price v. Martin*, No. 10-599, 2011 La. App. LEXIS 127 (La. App. Feb. 2, 2011), the trial court granted the plaintiffs' motion for class certification where the plaintiffs alleged property contamination from the defendants' operation of a creosote treatment plant for railroad ties. *Id.* at *2. The *Price* defendants, like Defendants here, argued the plaintiffs were unable to prove common causation. *Id.* at 17. In addition to making an "alternate source" argument regarding causation, the *Price* defendants argued the plaintiffs themselves contributed to the contamination through certain lifestyle choices, *i.e.* the use of burn barrels, smoking and the use of barbeque pits. *Id.* at 18. Rejecting the defendants' position, the court stated:

[i]f class certification required absolute conformity among the lifestyles of every potential class member (*i.e.* the use of burn barrels, smokers, and barbeque pits; the size of attic etc.) then no class would ever be certified. The common cause of off-site emissions of toxic substances (PAH's) from the plant still exist *regardless of whether there are alternate sources of PAH's existing in the environment*. The trial court found that alternate PAH sources and varying levels of PAH in different homes figure into an analysis of damage; not causation or liability. Based on the record before us, we cannot say that finding is manifestly wrong, and we decline to find it lies outside the trial court's considerable discretion.

Id. at 18-19 (emphasis added).

As the *Price* defendants did, Defendants here argue that decisions made by the named Plaintiffs with regard to home and/or paint maintenance, paint condition or the disposal of motor oil all require this Court to deny certification. However, none of these purported individual issues warrants such a conclusion. As stated by the *Price* court, no class action would ever be certified if the law required all class members to demonstrate complete uniformity. No Blackwell citizen will have exactly the same paint on his or her home in exactly the same condition and maintained with exactly the same frequency in exactly the same way as any other member of the community. Thus, Defendants' demand that class certification requires complete uniformity among the Plaintiffs and the putative class has no basis in the law.

This Court also agrees with the reasoning of the trial court in *Perrine v. E.I. DuPont de Nemours & Co.*:

While DuPont has raised numerous possible alternative sources, it has failed to show with any degree of certainty that these sources actually contaminated the class area. DuPont's failure of proof aside, its myopic presentation of alternative sources is akin to ignoring the elephant in the room. Even assuming the existence of alternative sources, Plaintiffs have demonstrated that the emissions from the Spelter smelter facility will be a common, pivotal issue in this litigation.... Arguing that the smelter's impact on the class area has been negligible does not lessen the overriding common issues of contamination and should be saved for the jury.

See Plaintiffs' Reply at Ex. Z.

Defendants' individual issues of causation, while potentially valid, do nothing to detract from the overwhelmingly predominating nature of the common questions of fact and law, not the least of which, again, is the overarching issue of Defendants' liability for the allegedly contaminated class area.

Defendants' next contend that individual issues arise from their affirmative defense of limitations and from Plaintiffs' assertion of the discovery rule in response to the limitations defense. Contrary to Defendants' position, the weight of Oklahoma and federal authority on these issues actually supports a finding of predominance and the certification of this case as a class action.

Defendants' legal expert, Professor Gensler, stated that "[i]ndeed, almost twenty years ago the Oklahoma Supreme Court appears to have done just that in concluding that the statute of limitations issue a defendant claimed precluded a finding of predominance was 'not a real issue.'" Gensler, 56 OKLA. L. REV. 289 at 317 (citing *Shores v. First City Bank Corp.*, 689 P.2d 299 (Okla. 1984) ("The claim that there exists sufficient individual statute of limitations defenses to prevent class action certification has not found much favor with the courts....")); see also 2 Conte & Newberg, *supra* n.3, § 4:26, at 243-44 (existence of "affirmative defenses against various class members" usually will not bar a finding of predominance); 5 *Moore's Federal Practice*, *supra* n.2, § 23.46[3] (stating that statute of limitations issues typically do not bar certification). The prospect

of rejecting certification on the basis of limitations arguments has not gained any traction since Professor Gensler wrote his article in 2003. *In re: Farmers Med-Pay*, 229 P.3d at 559 (“The Oklahoma Supreme Court has held that mere differences in limitations periods is usually not an impediment to class certification.”); *Melot v. Okla. Farm Bureau Mut. Ins. Co.*, 87 P.3d 644, 647 (Okla. Civ. App. 2003) (“the trial court can consider the matter as needed and limit the class in ways to conform to the statute of limitations, if it becomes necessary to do so. At this stage of the proceeding, the limitations issue is not a sufficient ground for denying certification.”); *Gentry*, 2010 Okla. Civ. App. LEXIS 149, at *13 ([A]ny defense to any individual claim does not diminish the commonality of the fundamental issue, which is [Defendant’s] liability in the first instance for the damages caused....”).

In fact, not only do limitations defenses not prevent a finding of predominance, Oklahoma courts have found, to the extent limitations defenses matter in a predominance analysis, such a defense can actually present overarching common questions which *support* a finding of predominance. The Oklahoma Supreme Court addressed this issue square on in *Masquat*:

In this matter, common questions arising from Plaintiffs’ assertion of fraudulent concealment are (1) whether defendants affirmatively concealed the alleged defect, and thus concealed a breach of warranty, and (2) whether the class members, by exercising due diligence, could have determined that a breach had occurred. Common to the class are both the evidence of the alleged acts of concealment and the evidence of whether knowledge of the alleged defect was readily available so as to put an ordinary prudent class member on inquiry.

Predominance does not require that there be no individual issues. It requires that the issues which can be answered as to all class members have more significance and weight than individual issues. Here any question of variation in individual reliance is eclipsed by the common questions surrounding the allegations of fraudulent concealment. The critical inquiry will be whether Defendants actively and successfully concealed the existence of the alleged defect from the class. The proof of the active concealment which Plaintiff alleges will be common to each class member.

Masquat, 195 P.3d at 57. Plaintiffs herein have raised the issue of fraudulent concealment and have pointed out that the latent nature of heavy metal contamination may not produce any warning signs that would put a reasonable person on notice that the contaminants are present, much less harmful. Without determining the validity of either assertion by Plaintiffs, the Court finds that the analysis set forth above from *Masquat* certainly applies in this case to justify a finding that the limitation/discovery rule issue supports certification.

Finally, Defendants contend that inconvenience damages, annoyance damages and the issue of substantial interference require individual determinations sufficient to deny certification. However, in both Oklahoma and federal jurisdictions, individual issues of damage rarely defeat certification, particularly in a case like this with such a wealth of common proof and overarching common questions. *Gentry*, 2010 Okla. Civ. App. LEXIS 149, at *14 (“Even though damages may

vary, common questions predominate when the acts and omissions are the same.”); *Burgess*, 151 P.3d at 101(same); *Masquat*, 195 P.3d at 57 (“there is a consensus... that the need for individual damage calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate.”); *Collins*, 248 F.R.D. at 105 (“However, courts have repeatedly stated that differences in the amount and recoverability of damages do not defeat predominance.”) (citing *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)); see also *Bates*, 132 F.R.D. at 163-64. The reason for this rule is quite simple—there are a multitude of ways to deal fairly and efficiently with individual damage issues. For example, individual damage determinations can be managed through a trial bifurcated between liability damages, the appointment of a magistrate or other special master to oversee discreet damage proceedings, decertifying the class after liability is established and providing notice to class members with an established protocol to allow them to pursue damages, the creation of subclasses or amending the class definition to better accommodate damage issues, just to name a few. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 139-141 (2d Cir. 2001).

Individual issues relating to damages, as a matter of law, rarely result in the rejection of class treatment. In this case, given the extent of common proof, the actions that Defendants have taken in the past which are procedurally consistent with the injunctive relief requested by Plaintiffs, the overarching nature of the common questions posed by Plaintiffs, and the multitude of ways in which individual damage inquiries can be effectively handled, Defendants’ argument that individual issues act as a bar to certification is disregarded by the Court.

Superiority

The final requirement for class certification under Rule 2023(B)(3) is that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In Oklahoma, the elements to consider in a superiority analysis are:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
3. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
4. the difficulties likely to be encountered in the management of a class action.

OKLA. STAT. tit. 12, § 2023(B)(3)(a)-(d).

With respect to the first element, as previously discussed, Plaintiffs are typical of the proposed class. The claims and the relief sought are identical among all Plaintiffs and would likely

be the same as any that would be raised in an individual lawsuit, assuming such an individual case was economically feasible. The claims in this case, however, are not economically feasible to bring in an individual setting. Thus, there is no need for any class member to control the prosecution of a separate action. In fact, the class setting is likely the only way for class members' claims to be heard. The Defendants having offered no evidence to the contrary, this element weighs in favor of finding that a class action is a superior mechanism.

With respect to the second element, there is no other litigation concerning the claims asserted by Plaintiffs in this action.⁶ Defendants have offered no evidence that any such litigation is pending. Thus, this element weighs in favor of finding that a class action is a superior mechanism.

With respect to the third element, Defendants are critical of Plaintiffs' focus on the judicial efficiencies and economies to be gained through class action treatment and of having the claims of the many class members resolved in one forum at the same time. Plaintiffs' focus, however, is aligned with the Oklahoma Supreme Court. *Ysbrand*, 81 P.3d at 628 (acknowledging that class action treatment is appropriate where individual claims are not substantial enough to support individual actions and that the prosecution of separate individual actions will "inevitably result in inconsistent results."). As acknowledged by Defendants' legal expert, Professor Gensler:

[w]hile the section 2023(B)(3) class action emphasizes the cohesiveness and sameness of the class members, its primary goal is not consistency or uniformity, but rather judicial economy and efficiency. It uses representative adjudication to relieve courts and parties from having to litigate the same issues repeatedly and provides a cost-effective way of affording justice when defendants systematically cause a small amount of harm to a large number of people.

Gensler, 56 OKLA. L. REV. 289 at 289 (emphasis added).

As a practical matter, the evidence reveals that a class action is the only viable option for litigating this controversy for the 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. Consequently, it is unlikely that any individual class member could muster the resources to pursue the investigation and massive discovery required to prosecute a 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).

⁶Eighteen plaintiffs filed suit against the same Defendants for personal injuries arising out of their exposure to emissions from the Smelter. The case, *Brown et al. v. Freeport-McMoRan Copper & Gold Inc. et al.*, is pending in the United States District Court for the Western District of Oklahoma. Importantly, the Brown plaintiffs do not allege any form of property damage or seek any relief for property damage—it is strictly a personal injury case. Because Plaintiffs here expressly disavowed any claims for personal injury, it cannot be said that the controversies in the two cases are the same.

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. 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*, 81 P.3d at 628. 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).

Further, no party has raised any issue with respect to the procession of Plaintiffs' claims *in this court*. The Court has managed numerous aspects of this case and will be able to give this matter the attention it deserves. The Court is centrally located within the state and is not inconvenient for the parties or class members. Thus, the Court finds no reason why Plaintiffs' claims should not proceed in this Court.

Given the efficiencies to be gained by handling the matter as a class in the consolidated forum of this Court, the third element in the superiority analysis clearly weighs in favor of a positive finding.

With regard to the final element of the superiority analysis, Defendants argue that "[a] 'close look' at the claims and defenses in this case reveals that the significant and pervasive nature of the individual issues...makes a class trial on the claims not only unmanageable, but impossible." In support, Defendants contend the unmanageability of this case is evidenced by (1) Plaintiffs' failure to submit a workable trial plan; and (2) the individual issues that Defendants' contend cannot be presented to the fact finder on a class-wide basis. As an initial matter, the Court notes that a trial plan is not required. Speaking directly to this issue, Defendants' legal expert, Professor Gensler, stated:

Some jurisdictions require trial courts to offer concrete plans for resolving individual issues before certifying a (b)(3) class action.

The Oklahoma Supreme Court, however, has given no indication that it intends to adopt any such requirement. Indeed, rather than place a heavy burden on plaintiffs at certification, the court's longstanding practice has been to give plaintiffs the benefit of the doubt, believing

that the trial court can modify the certification order if it turns out to have been ill advised. In the same vein, the Oklahoma Supreme Court seems content to rely on the prospect that devices like subclasses and issue classes can resolve management problems as they arise, rather than requiring trial courts to actually sketch out in advance how they would be used and how doing so would impact predominance and trial management. As a result, it may appear to some that Oklahoma follows the “certify now and worry later” approach condemned by the Texas Supreme Court.

Gensler, 56 OKLA. L. REV. 289 at 318-19 (internal citations omitted).

In addition to its not being required, any trial plan offered at this point would be largely speculative and premature. The Court retains the discretion to certify (and subsequently decertify) any claim, or any combination of claims, or any issue or combination of issues. The Court retains the right to create subclasses or to modify the class definition. Some of Plaintiffs’ causes of action could be dismissed which could have a profound effect on how the matter is tried.⁷ The same is true of Defendants’ defenses. If any of those defenses are dismissed before trial or not submitted to the jury based on a lack of evidence, the landscape of any potential trial would be substantially altered.

Despite the fact that any trial plan would be premature at this point, Defendants’ contention that a trial plan is unworkable stretches the bounds of advocacy. There have been class actions tried to verdict and managed through completion all over the country in all types of different cases, including cases identical to this case. *See, e.g., Perrine v. E.I. DuPont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010). In fact, the *Burgess* case, which was certified by the Oklahoma Supreme Court, was successfully tried to verdict by members of Plaintiffs’ counsel team. There are reported cases from many jurisdictions detailing the manner in which class actions have been tried to verdict. *See e.g., Turner v. Murphy Oil USA, Inc.*, 582 F.Supp. 2d 797 (E.D. La. 2008) (trial court issuing detailed trial plan after considering the trial plans submitted by the parties). Moreover, there are abundant resources available to the parties and the Court—*e.g., Newberg on Class Actions*—on how to properly plan and execute a class action trial.

Defendants argue the same issues that defeat predominance—proof of contamination, causation, alternative causation, comparative fault, statute of limitations, and damages—likewise defeat superiority. To the contrary, Plaintiffs have established that this matter is uniquely suited to class treatment based on among others, the existence of substantial common proof. The common proof does not just show that common issues predominate in this case, but also that this case is manageable as a class action. Moreover, many of Defendants’ “individual issues” are subject to a coherent grouping that furthers Plaintiffs’ position that this case is manageable as a class action.

Defendants have not and cannot show this case is so complex that judicial administration of Plaintiffs’ claims simply cannot be accomplished. Indeed, the role of courts is to resolve disputes

⁷For example, Plaintiffs’ medical monitoring claims have been dismissed. If those claims were not dismissed, a proposed trial plan would look substantially different than one that did not contain medical monitoring claims.

among citizens, no matter how complex. The Court finds that Plaintiffs' claims can, and should, be tried as a class action with input from the parties, and guidance by the Court on how to harness the efficiencies available through class action device.

Having found that Plaintiffs satisfy each of the requirements of Rule 2023(A) as well as the predominance and superiority requirements of Rule 2023(B)(3), the Court will certify Plaintiffs' requested Rule 2023(B)(3) class.

DUE PROCESS

Defendants argue that class certification violates their due process rights by preventing them from presenting individualized evidence and individualized defenses. This argument was considered and rejected by the court in *Perrine*, 694 S.E.2d at 861:

DuPont argues that trying this case as a class action violated due process by preventing DuPont from introducing individualized evidence and individualized defenses. To support this claim, DuPont has listed a number of instances where individualized evidence or defenses were not permitted because the case was being tried as a class action. To the extent that this class action was properly certified by the trial court, all of DuPont's individualized evidence issues have no merit. Thus, to resolve this issue, we must determine whether the case was properly certified as a class action.

We find no error in the circuit court's conclusions with respect to the final four factors of analysis contained in Rule 23(b)(3). Having found no error in the circuit court's disposition of each of the elements to be considered in certifying a class under Rule 23(a) and (b), we find that certification was proper. Consequently, DuPont's claim that class certification violated its due process rights by preventing it from presenting individualized evidence and individualized defenses is without merit.

The Court agrees that certification of the classes does not invade or in any way diminish Defendants' due process rights. Further, Defendants' due process arguments are premature. At this point in the litigation, Defendants have not been deprived of any procedural or substantive due process because the opportunity for them to present claims or defenses for final adjudication has not yet occurred. The United States Supreme Court has instructed that "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). "Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Id.*; see also *Urban Developers, L.L.C. v. City of Jackson*, 468 F.3d 281, 305 (5th Cir. 2006) (rejecting federal due process claim as unripe because of availability of further proceedings that would remedy any deprivation); *Diaz-Zaldierna v. Fasano*, 43 F. Supp. 2d 1114, 1121 (S.D. Cal. 1999) ("Only after finding the deprivation of a protected interest do we look to see if the state's procedures comport with due process. Since here, as in [*American Mfrs.*], there has been no deprivation of a constitutionally protected interest, we need go no further."). Defendants

acknowledge they have not been deprived on any actual liberty or property right, but merely anticipate such happening at the trial of this matter. Defendants argue that “[c]lass certification *would threaten Defendants’ ability* to have a jury consider individual proof to rebut claims of absent class members. As such there is very real *possibility* that certification threatens to violate Defendants’ due process rights under the United States and Oklahoma Constitutions.” As the Court has stated, careful thought will be given to the trial plan and the due process rights of both parties will be given due consideration by the Court. However, at this time, Defendants have not been deprived of any aspect of due process. The Defendants will be able to litigate their defenses effectively in the class setting due to the predominance of the issues. The Defendants’ reliance on the U.S. Supreme Court ruling in *Dukes* is misplaced in this case as a “novel project” or “trial by formula” has not been prepared or offered.

Further, Defendants’ argument ignores the Court’s ability to deal with individualized issues, as the need arises, through the creation of subclasses. *OKLA STAT, tit. 12, § 2023(C)(6)(b); Ysbrand*, 81 P.3d at 627 (“Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and give rise to the same legal or remedial theory....The trial court remains free to maintain the class with respect to particular issues or create subclasses should the need arise.”).

Finally, Defendants’ due process argument ignores important countervailing constitutional principles. In particular, Defendants fail to consider the important role of class actions in ensuring that Plaintiffs with relatively small claims (like those involved here) have access to a judicial remedy for their injuries. Plaintiffs here would not be able to prosecute their claims at all except through the vehicle of a class action. The current class action is precisely the kind of suit for which the class action procedure was designed—the aggregation of individual damages claims that will proceed either in class form or not at all. *Burgess*, 151 P.3d at 102 (“Class action lawsuits are designed to enable plaintiffs...to ‘vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.’”) (internal citation omitted). The right to petition is one of “the most precious of the liberties safeguarded by the Bill of Rights.” *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002).

III. CONCLUSION & ORDER

As a result of the Courts’ rigorous analysis in determining the foregoing findings of fact and conclusions of law, it is established that Bob Coffey, Loretta Corn and Larry and Mary Ellen Jones have satisfied all class certification elements in *OKLA. STAT. tit. 12 § 2023*, and the Court hereby **GRANTS** Plaintiffs’ Motion for Class Certification, except as specifically modified herein, and **ORDERS** that:

1. with respect to equitable relief sought, the Court certifies a Rule 2023(B)(2) class consisting of individuals defined as follows:

Oklahoma citizens currently domiciled in the State of Oklahoma who own private real

property located within the geographical boundary defined by the following UTM coordinates expressed in meters and NAD27:

Southwest corner:	14N	649500, 4071500
Northwest corner:	14 N	649500, 4076500
Southeast corner:	14N	655000, 4071500
Northeast corner:	14N	655000, 4076500

Excluded from the class are the following individuals and entities:

Defendants and any entity in which any Defendant has a controlling interest, any current employees, officers, or directors of any Defendant, and the legal representatives, successors and assigns of any Defendant, as well as the State of Oklahoma and/or any political subdivisions thereof. Also excluded from the definition of the class are those individuals who participated as plaintiffs in Cause No. C-73-21; *Glenny, et al v. Blackwell Zinc Company, Inc., et al.*; In the District Court of Kay County, Oklahoma and/or Cause No. CJ-95-482; *Miller v. Blackwell Zinc Company, Inc.*; In the District Court of Kay County, Oklahoma. Further excluded from the class definition are any currently-sitting Oklahoma state judges or justices and the current spouse and all other persons within the third degree of consanguinity to such judge or justice;

2. with respect to legal relief sought, the Court certifies a Rule 2023(B)(3) class consisting of individuals defined as follows:

Oklahoma citizens currently domiciled in the State of Oklahoma who own private real property located within the geographical boundary defined by the following UTM coordinates expressed in meters and NAD27:

Southwest corner:	14N	649500, 4071500
Northwest corner:	14 N	649500, 4076500
Southeast corner:	14N	655000, 4071500
Northeast corner:	14N	655000, 4076500

Excluded from the class are the following individuals and entities:

Defendants and any entity in which any Defendant has a controlling interest, any current employees, officers, or directors of any Defendant, and the legal representatives, successors and assigns of any Defendant, as well as the State of Oklahoma and/or any political subdivisions thereof. Also excluded from the definition of the class are those individuals who participated as plaintiffs in Cause No. C-73-21; *Glenny, et al v. Blackwell Zinc Company, Inc., et al.*; In the District Court of Kay County, Oklahoma and/or Cause No. CJ-95-482; *Miller v. Blackwell Zinc Company, Inc.*; In the District Court of Kay County,

Oklahoma. Further excluded from the class definition are any currently-sitting Oklahoma state judges or justices and the current spouse and all other persons within the third degree of consanguinity to such judge or justice.

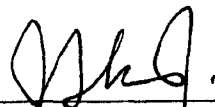
3. Bob Coffey, Loretta Corn and Larry and Mary Ellen Jones are adequate Class Representatives and are appointed as Class Representatives of the certified classes and shall adhere to all duties such an appointment entails;

4. The following attorneys and law firms are adequate class counsel and are appointed Representative Counsel to represent the certified classes:

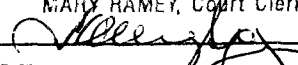
Nelson J. Roach, D. Neil Smith, Keith L. Langston, John C. Hull, and Amy Casbeer of the law firm of Nix, Patterson & Roach, L.L.P.; Michael A. Walsh of the law firm of Beeler, Walsh & Walsh, P.L.L.C.; Benjamin L. Barnes, Attorney and Counselor of Law; Andrew M. Ihrig of the law firm of Hert, Baker, Koemel and Ihrig, P.C.; Hal Ellis of the law firm of Hal Wm. Ellis, P.L.L.C.; Michael Burrage and Simon Gosnell Fulmer of the law firm of Whitten Burrage; and Terry W. West of the West Law Firm.

The Court, by separate order, will issue an order specifying the manner by which notice of class certification is to be given under *OKLA. STAT. tit. 12 § 2023(C)(3)* and/or (4).

IT IS SO ORDERED this 27 day of July, 2011.


JOHN G. CANAVAN, JR.
JUDGE OF THE DISTRICT COURT

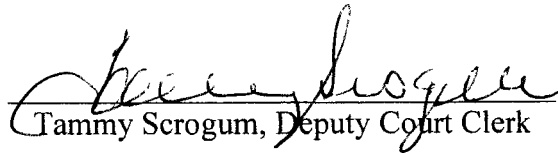
Oklahoma, County of Kay, ss
I, the undersigned, being a duly qualified and foregoing is a
true and correct copy of the original instrument as the
same appears and of record in my office in the
County of Kay County, Oklahoma
Witness my hand and seal this 27 day of

August 2011
MARY RAMEY, Court Clerk
 Deputy
STANLEY SCROGGIN

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of August, 2011, a true and correct copy of the Findings of Fact and Conclusions of Law and Order Granting Plaintiff's Motion for Class Certification was sent via First Class Mail, with proper postage thereon to the following:

Case	Person	Address	City	ST	Zip
CJ-08-00068	ARMSTRONG, BOROCHOFF ETC GIBBS	601 S BOULDER AVE STE 500,	TULSA	OK	74119
CJ-08-00068	CHARLES M LASTER	102 E HIGHLAND,	SHAWNEE	OK	74801
CJ-08-00068	DOUGLAS ROYCE DALGLEISH	2345 GRAND BLVD, SUITE 2200	KANSAS CITY	MO	64108
CJ-08-00068	JAMES L MENZER	211 WEST BLACKWELL AVE., P O. BOX 818	BLACKWELL	OK	74631
CJ-08-00068	LEWIS COOPER SUTHERLAND	VINSON & ELKINS LLP, 1001 FANNIN STREET SUITE 2500	HOUSTON	TX	77002
CJ-08-00068	MORGAN L COPELAND	VINSON & ELKINS LLP, 1001 FANNIN STREET SUITE 2500	HOUSTON	TX	77002
CJ-08-00068	REID E ROBISON	10TH FLOOR TWO LEADERSHIP SQUARE, 211 N ROBINSON	OKLAHOMA CITY	OK	73102
CJ-08-00068	SANDRA G RODRIGUEZ	VINSON & ELKINS LLP, 2801 VIA FORTUNA, SUITE 100	AUSTIN	TX	78746
CJ-08-00068	TIMOTHY J BOMHOFF	MCAFEE & TAFT, 211 NORTH ROBINSON 10TH FLOOR	OKLAHOMA CITY	OK	73102
CJ-08-00068	ANDREW IHRIG	JONATHAN C IHRIG & ASSOC, P O BOX 389	BLACKWELL	OK	74631
CJ-08-00068	BRADLEY E BECKWORTH	205 LINDA DRIVE,	DAINGERFIELD	TX	75638
CJ-08-00068	HAL WM ELLIS	711 S HUSBAND,	STILLWATER	OK	74074
CJ-08-00068	JOHN HULL	205 LINDA DRIVE,	DAINGERFIELD	TX	75638
CJ-08-00068	KEITH L LANGSTON	205 LINDA DRIVE,	DAINGERFIELD	TX	75638
CJ-08-00068	MICHAEL BURRAGE	ONE LEADERSHIP SQUARE, 211 N ROBINSON SUITE 1350	OKLAHOMA CITY	OK	73102
CJ-08-00068	MICHAEL WALSH	4508 N CLASSEN BLVD,	OKLAHOMA CITY	OK	73118
CJ-08-00068	SIMONE GOSNELL FULMER	ONE LEADERSHIP SQUARE, 211 N ROBINSON SUITE 1350	OKLAHOMA CITY	OK	73102
CJ-08-00068	TERRY W WEST	124 WEST HIGHLAND ST, P.O. BOX 698	SHAWNEE	OK	74801


Tammy Scrogum, Deputy Court Clerk