



**Bufkin vs. Bufkin**

**Case Details:**

**Experts Challenged:**

**Name:** Expert #1

**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.

**Area of Expertise:**

**Disposition:** Testimony inadmissible.

**Date of Decision:**07/01/2008

**Gatekeeping Authorities:** Federal;Daubert, TEXAS;Gammill, TEXAS;Havner, TEXAS;Robinson

**Jurisdiction:** State

**Court:** Texas, Court of Appeals

**Plaintiff(s):** Edward O. Bufkin, Jr.

**Defendant(s):** Elizabeth W. Bufkin

**Docket No(s):** No. 05-06-01719-CV

**Citations:** 2008 Tex. App.

**Area of Law:** Matrimonial Law

**Counsel:**

**Judges:** O'Neill, Richter and Lang.

**Opinion By:** Michael J. O'Neill



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## **Summary:**

In this case, Edward O. Bufkin Jr. challenged the trial court's exclusion of his expert witness, Expert #1. Expert #1, a real estate appraiser, testified regarding the value of the ranch and residence on the subject property. Expert #1's testimony was challenged on the grounds of methodology. The reviewing court found no error and affirmed the judgment.

**Opinion:**  
**OPINION**

## Opinion By Justice O'Neill

Edward O. Bufkin, Jr. ("Edward") sued his wife, Elizabeth W. Bufkin ("Elizabeth"), for divorce in 1996, after nine years of marriage. The ensuing, protracted divorce proceeding, including two trials and several mandamus proceedings, has been focused on what property is subject to division under the terms of a prenuptial agreement. A divorce decree ("First Decree") was signed after the first trial on September 14, 2001 ("Divorce Date"). On appeal, the property division in the First Decree was reversed and the case remanded. This second appeal is taken from the second trial court judgment ("Second Decree"), which awarded Elizabeth community property rights in certain stock dividends and the valuation increases in two pieces of real property, a residence and a ranch. Edward raises seven issues. By cross-appeal, Elizabeth raises two.

First, Edward contends that an agreement to limit issues raised in the first appeal dictates what property is subject to division on remand by the second trial court. In his second and third issues, he complains about the trial court's exclusion of expert witness testimony and rebuttal evidence on the value of his ranch and its refusal to admit evidence of fault. Fourth, Edward argues that the trial court was wrong to disregard the jury's finding that a loan obligation is a community debt to be borne by both Elizabeth and Edward. Issue five complains about the court's award of dividend income to Elizabeth. In issue seven, Edward then states that the trial court erred by refusing to make requested findings of fact and conclusions of law. Elizabeth's cross-appeal raises two issues relating to the trial court's refusal to disregard jury findings on two property valuations. We are not persuaded by either ex-spouse on any of these issues. We affirm the Second Decree on these points.

One of Edward's issues, however, has merit. Issue six contends that an award of prejudgment interest is improper because Elizabeth did not plead for prejudgment interest and there is no statutory basis to support her recovery. We agree. The trial court's award of prejudgment interest, therefore, is reversed and judgment rendered that Elizabeth recover no prejudgment interest.

**Background**

Edward and Elizabeth married on July 26, 1987. Six days before the wedding, Edward and Elizabeth signed the Antenuptial Contract ("Agreement") in which they set out their relative rights to property. In essence, all property owned before marriage or acquired during the first five years of marriage, or on or before July 26, 1992 ("Fifth Anniversary"), was the respective spouse's separate property. However, the Agreement provides that "a community property estate will accumulate from and after a date which is five years from the date of the marriage of the parties." Specifically, Section XVIII of the Agreement states: It is agreed by the parties that from and after the [Fifth Anniversary], all income from all sources, from personal services, separate property, or otherwise; all earnings from personal services of each party; all property or increases in kind or in value of property that is the product of either party shall become the community property of the parties provided that it is acquired or produced from and after such date." Edward and Elizabeth stipulated to the validity

and enforceability of the Agreement.

During the first trial court proceeding, the judge granted a series of partial summary judgments declaring, among other things, the following items to be Edward's separate property: A. a residence at 3724 Wooded Creek Drive in Dallas County;

B. a ranch in Oklahoma;

C. all outstanding shares of stock in Campeon Pipeline Corporation ("Campeon"); and

D. all shares of stock in Norgasco, Inc. ("Norgasco") held in Edward's name. The first trial judge also issued a pre-trial order stating the Agreement dictated that any increase in the value of Edward's separate property was not community property and found that there was "no community property other than personal property in the possession of the parties." The judge then incorporated his pre-trial ruling and the partial summary judgments classifying property into the First Decree.

Elizabeth appealed. Her appeal was heard by the Eighth District Court of Appeals in El Paso. While on appeal, the parties agreed that Elizabeth would "narrow the scope of her appeal to the following issues: (1) whether the trial court erred in granting summary judgment, and (2) whether it erred in dividing the community estate by not including the increase in value of the Norgasco stock." In exchange, Edward agreed to dismiss his cross-appeal.

In its memorandum opinion dated November 20, 2003, the El Paso Court reversed the First Decree and remanded the case for a division of the community estate. *Bufkin v. Bufkin*, No. 08-02-00025-CV, 2003 Tex. App. LEXIS 9904, 2003 WL 22725522 at \*5-\*6 (Tex.App.- El Paso November 20, 2003, pet. denied). Focusing principally on the Norgasco stock acquired by Edward during the first five years of the marriage, the Eighth Court of Appeals determined "increases in kind or value of the [Norgasco] stock were susceptible of being produced from the separate property both before and after the [Fifth Anniversary]. We agree the [Norgasco] stock was not acquired after the anniversary, but [Edward][sic] wholly fails to distinguish the plain language that any increase in kind or value produced after the anniversary is community, under the [A]greement." 2003 Tex. App. LEXIS 9904, [WL] at \*4. The El Paso Court then concluded there was some evidence in the record that the difference in the value of Edward's Norgasco stock on the Fifth Anniversary and the Divorce Date was not de minimus and could have affected the just and right division of the Bufkins' community estate. Citing to *Jacobs v. Jacobs*, 687 S.W.2d 731 (Tex. 1985), the panel "remand[ed] the entire community estate to the trial court for a just and right division." 2003 Tex. App. LEXIS 9904, [WL] at \*6.

On remand, Edward and Elizabeth each raised claims for breach of the Agreement and equitable claims for reimbursement and injunctive relief. Elizabeth did not ask for prejudgment interest. Instead, her live pleading asks for "such other and further relief, general or special, legal or equitable, to which she may show herself justly entitled to receive."

A jury trial was conducted and the jury issued findings on ten facts: 1. The value of Edward's stock in Norgasco on the Fifth Anniversary was \$ 2,351,250;

2. The value of Edward's stock in Norgasco on the Divorce Date was \$ 1,660,000;
3. The value of Edward's stock in Campeon on the Fifth Anniversary was zero;
4. The value of Edward's stock in Campeon on the Divorce Date was zero;
5. The value of the residence on the Fifth Anniversary was \$ 210,000;
6. The value of the residence on the Divorce Date was \$ 284,000;
7. The value of the ranch on the Fifth Anniversary was \$ 1,506,680;
8. The value of the ranch on the Divorce Date was \$ 2,038,400;
9. The debt owed to the Northrim Bank of Alaska ("Bank") as of the Divorce Date was \$ 835,983.07; and
10. The debt owed to the Bank should be assumed one-half by each party.

Edward filed a motion asking the second trial judge to disregard the jury's findings nine (the amount of the Bank debt as of the Divorce Date), and seven (the Fifth Anniversary value of his ranch). Elizabeth filed her own motion also challenging fact-finding seven and additionally asking the court to disregard the jury's fourth finding (the value of Edward's stock in Campeon on the Divorce Date) and fact-finding ten (characterizing the Bank debt as an obligation to be assumed one-half by each ex-spouse). The trial court disregarded fact-finding ten but adopted all other findings by the jury.

Judge Lewis signed the Second Decree on October 2, 2006 and awarded Elizabeth \$ 302,010.00, "said sum being equal to one-half of the increase in value in Edward O. Bufkin Jr.'s residence in Farmer's Branch, Texas, plus one-half of the increase in value of his ranch in Oklahoma" less a mediation fee of \$ 850.00. Elizabeth was also awarded \$ 124,659.12 in prejudgment interest, measured from the Divorce Date. The second trial court also held that "[p]rior sums awarded as interim attorney's fees to [Elizabeth] are found to have effected a just and equitable division of the community income out of which they were paid, and shall not be reimbursed." The judge then incorporated the jury's findings that Edward's shares in Norgasco and Campeon had not appreciated and that the ranch's value on the Fifth Anniversary was \$ 1,506,680. Disregarding the jury's finding that the debt owed to the Bank should be allocated one-half to each ex-spouse, the trial court concluded "the evidence conclusively established that such debt should be allocated solely to [Edward]." Both parties perfected appeals from the Second Decree.

## Discussion

### 1. The Rule 11 Agreement

Edward's first issue contends that the letter agreement made during the first appeal limited what

issues could be remanded to the second trial court to only a division of any increase in value of Edward's Norgasco stock. n1 The El Paso Court of Appeals, however, determined that once it found that there was some evidence that there was an increase in the value of Edward's Norgasco stock between the Fifth Anniversary and the Divorce Date, it had to remand the entire community estate for division - not just any increased value of the Norgasco stock. We agree.

Appellate courts cannot reverse only one piece of a property division. *Jacobs v. Jacobs*, 687 S.W.2d 731, 732 (Tex. 1985); *Schlafly v. Schlafly*, 33 S.W.3d 863, 872 (Tex. App.-Houston[14th Dist.] 2000, pet. denied) (appellate court does not have authority to render judgment dividing marital property). Instead, a court of appeals must remand the entire community estate for a new division. *Jacobs*, 687 S.W.2d at 732. We resolve Edward's first issue against him.

## 2. Excluding Expert Testimony and Rebuttal Evidence

Edward's second issue contends that the trial court committed reversible error when it excluded the testimony of Edward's real estate appraiser, Expert #1, and rebuttal evidence on the value of the ranch and residence.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). The trial court's evidentiary ruling will be upheld if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Under an abuse of discretion standard, we are not free to substitute our judgment for the trial court's judgment. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). Instead, a trial court abuses its discretion only if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

### A. The Expert

Rule 702 of the Texas Rules of Evidence governs the admissibility of expert testimony. TEX. R. CIV. EVID. 702; *E. I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995). Rule 702 provides: "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." TEX. R. CIV. EVID. 702. The testimony must be relevant and based on a reliable foundation. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727-28 (Tex. 1998); *Robinson*, 923 S.W.2d at 554. Once the opposing party objects to proffered expert testimony, the proponent of the witness' testimony bears the burden of demonstrating its admissibility. *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996); *Robinson*, 923 S.W.2d at 557.

If the foundational data underlying an expert's opinion testimony is unreliable, the expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997). A flaw in the expert's reasoning from the data may render reliance unreasonable and render his inferences drawn

from information dubious. *Id.* In that circumstance, the expert's testimony is unreliable and legally constitutes no evidence. *Id.*

The trial court held a full evidentiary hearing on the admissibility of opinion testimony by Edward's real estate appraisal expert, Expert #1. Expert #1 admitted that Edward asked him to appraise the ranch as raw land as of the Fifth Anniversary and the Divorce Date ignoring the value of the timber on the land. He was then instructed to include a third party's timber appraisal originally from June 1996 in his total values. Although he was a trained and certified forester, Expert #1 was not engaged to express an opinion on the timber value. The expert admitted that the method dictated by Edward's counsel did not conform with mandatory provisions of the Uniform Standards of Professional Appraisal Practice 3 and that he had never valued real estate "that way" before.

3 "USPAP". Section 858.726 of the Oklahoma Certified Real Estate Appraiser's Act specifically requires Oklahoma appraisers to comply with USPAP. Okla.Stat. Ann. Tit. 59 § 858-726 (West 2000).

During the Daubert-Robinson hearing, Edward offered no evidence regarding the reliability of the third party's timber appraisal or its methodology, and, thus, he failed to prove the underlying data for his expert's opinion was reliable. Accordingly, the trial court did not abuse its discretion in concluding that the expert's methodology was unreliable and excluding his testimony. We overrule Edward's third issue as to the exclusion of Expert #1's testimony.

## B. Rebuttal Testimony

Edward also argues that he was precluded from presenting "rebuttal testimony" concerning the value of his ranch and residence. The judge gave each party an equal amount of time. The record does not reflect any details of the time limitations except that the trial court apprised him of his remaining time when he rested. Edward does not complain about the trial court's time limitations. Texas Rule of Civil Evidence 611 accords the trial court the ability to exercise reasonable control over the interrogation of witnesses and presentment of evidence. TEX. R. CIV. EVID. 611(a).

After the trial, Edward tried to introduce evidence (1) to rebut Elizabeth's testimony that he told her the value of the ranch was at least \$ 425 an acre; or (2) to dispute the valuations for the residence by Elizabeth's expert. Edward argues because rebuttal testimony was not allowed by the trial court, his appraiser could not defend his appraisal or critique Elizabeth's expert's appraisal. The record reflects, however, Edward had ample opportunity to cross-examine Elizabeth's valuations and did not. We conclude that his concerns could have been addressed when he examined Elizabeth in his case-in-chief and cross-examined her residential real estate expert. Further, although given the opportunity, he did not examine her after the pertinent testimony.

A successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. *Brownsville v. Alvarado*, 897 S.W.2d 750, 753-54 (Tex. 1995). In determining if the excluded evidence probably resulted in the rendition of an improper judgment, a court must review the entire record. *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex.1989).

A court ordinarily will not reverse a judgment for erroneous rulings on admissibility of evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case. *Gee*, 765 S.W.2d at 396. To obtain a reversal of a judgment based on error in the exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error was calculated to cause and probably did cause the rendition of an improper judgment. TEX. R. APP. P. 44.1; *Alvarado*, 897 S.W.2d at 753; *McCraw*, 828 S.W.2d at 757.

Given his full presentation of his expert's testimony, his cross-examination of Elizabeth's expert and his waiver of his right to cross-examine Elizabeth, we are not persuaded that the exclusion of the evidence Edward included in his bill of exception resulted in an improper judgment. We resolve Edward's second issue as to rebuttal evidence against him.

### 3. Exclusion of Evidence of Fault

Edward's third issue argues the trial court was wrong to exclude evidence of fault. Edward and Elizabeth both stipulated to the validity and enforceability of the Agreement. The El Paso court held that once Edward made this stipulation, he could not then argue it was invalid. *Bufkin*, 2003 Tex. App. LEXIS 9904, 2003 WL 22725522 at \*4. Section XI of the Agreement expressly provides for the division of property in the event of divorce. Specifically, "each party will take, in full settlement of his or her property and all other rights due upon divorce, only his or her separate property estate and his or her one-half (1/2) share of the community property estate of the parties." The Texas Family Code authorizes such written agreements. TEX. FAM. CODE ANN. §§ 4.001-4.009 (Vernon 2006).

Since Edward and Elizabeth have contracted how the community estate was to be divided in the event of divorce, provisions of the Texas Family Code allowing evidence of fault in divisions do not apply. The Agreement's terms dictated an even division of the community estate. Accordingly, evidence of fault is not relevant and the trial judge did not abuse her discretion when she excluded it. We resolve Edward's third issue against him.

### 4. Dueling Motions to Disregard Jury Findings

#### 1. Disregarding Jury Findings

Edward's fourth issue contends that the trial court committed reversible error when it granted Elizabeth's request to disregard the jury's answer Question No. 10, which allocated the Bank debt to both parties. The judge reasoned that "no evidence supported such answer, and the evidence conclusively established that such debt should be allocated solely to [Edward]."

A trial court may properly disregard a jury's finding of fact where the evidence supporting the finding is legally insufficient. *Toles v. Toles*, 45 S.W.3d 252, 259 (Tex.App.-Dallas 2001, pet. denied); *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990). Evidence is legally insufficient where (1) there is a complete lack of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively

establishes the opposite of a vital fact. *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 188 (Tex. App.-Dallas 1996, no writ).

The record reflects that the debt at issue was borrowed by Campeon to build a pipeline at Cedar Creek which was never completed. Edward signed guarantee for the debt but only used his separate property as collateral. Section XI of the Agreement specifically provides that "[a]ll liabilities benefitting separate property shall be assumed by the owner of the separate property" (emphasis added). There is no evidence in the record that the money borrowed by Campeon ever benefitted the community or that the loan proceeds received from the Bank were used to pay for the Bufkins' living expenses. Accordingly, the Agreement dictates that the debt must be assumed by the owner of the separate property. Since Edward owned the Campeon shares as his separate property, he alone assumes Campeon's liabilities, including the Bank debt. Edward's fourth issue is overruled.

The trial court did issue its own findings of fact on issues not included in the jury charge. Edward's seventh issue complains that it issued its findings, the trial court failed to include findings of fact he proposed. But, Edward fails to disclose what specific finding is the subject of his complaint. Bare assertions of error, without argument or authority, waive error. *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex.App.-Dallas 1995, writ denied). See also *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284 (Tex. 1994) (appellate court has discretion to waive point of error due to inadequate brief). When a party fails to adequately brief a complaint, he waives the issue on appeal. *Devine v. Dallas County*, 130 S.W.3d 512, 513-14 (Tex.App.-Dallas 2004, no pet.); *Howell v. T S Commc'ns, Inc.*, 130 S.W.3d 515, 518 (Tex.App.-Dallas 2004, no pet.). Since we cannot discern what finding is the subject of Edward's seventh issue, we hold that he has waived his complaint.

## B. Refusing to Disregard Jury Findings

Elizabeth also asked the trial court to disregard two other jury findings: (1) the jury's Divorce Date value of Edward's Campeon stock, and (2) the jury's Fifth Anniversary value of the ranch. The trial court's refusal to disregard these findings gives rise to her two issues.

The appeal of a trial court's refusal to disregard a jury finding is a challenge to the legal sufficiency of the evidence supporting the finding. *Hinkle v. Hinkle*, 223 S.W.3d 773, 777-78 (Tex.App.-Dallas 2007, no pet.). In contrast to reviewing a trial judge's decision to disregard a finding, when the trial court upholds a jury finding, we examine the entire record, considering the evidence both in favor of and contrary to the challenged finding. *Id.* (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986) (per curiam)). Anything more than a scintilla is legally sufficient to support the finding. *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003); *Pulley v. Milberger*, 198 S.W.3d 418, 426 (Tex.App.-Dallas 2006, pet. denied).

So, we must determine whether the record contains more than a scintilla of evidence that (1) Edward's Campeon stock on the Divorce Date was worthless, and (2) the ranch's value on the Fifth Anniversary was \$ 1,506,680. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 899 (Tex.App.-Dallas 2000, pet

denied). Evidence that is so weak that it only creates a mere surmise or suspicion of a fact is legally insufficient and constitutes no evidence. *Id.* at 898-99.

In her first issue, Elizabeth argues that the trial court erred by refusing to disregard the jury's answer on the Fifth Anniversary value of the ranch because the parties had stipulated to a different amount. The "stipulation" apparently arises from Edward's post-verdict motion in which he argues that undisputed evidence established the Fifth Anniversary value of the ranch to be \$ 1,101,794.37, and Elizabeth's response that she did not introduce any controverting evidence of the ranch's value. A stipulation, however, is "an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys respecting some matter incident thereto." *Travelers Indem. Co. of Rhode Island v. Starkey*, 157 S.W.3d 899, 904 (Tex.App.-Dallas 2005, pet.denied) (quoting *Shepherd v. Ledford*, 962 S.W.2d 28, 33 (Tex.1998)); *Ortega-Carter v. American Int'l Adjustment Co.*, 834 S.W.2d 439, 441-42 (Tex.App.-Dallas 1992, writ denied). To be enforceable, the stipulation must be in writing, signed, and filed as part of the record, or made in open court and entered of record. TEX. R. CIV. P. 11. Stipulations are binding upon the parties, the trial court, and the reviewing court. *Id.* (citing *Jim Sowell Const. Co., Inc. v. Dallas Cent. Appraisal Dist.*, 900 S.W.2d 82, 84 (Tex.App.-Dallas 1995, writ denied)); *M.J.R.'s Fare of Dallas, Inc. v. Permit & License Appeal Bd.*, 823 S.W.2d 327, 330-31 (Tex.App.-Dallas 1991, writ denied).

Elizabeth's argument fails for two reasons. First, a stipulation must be an express agreement and cannot arise by implication from a post-verdict statement in one party's motion to disregard a jury finding. TEX. R. CIV. P. 11("no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record"). Second, even if there was an agreement after trial on the ranch's value, that agreement would not be construed as an admission of a fact that was controverted at trial. *Austin v. Austin*, 603 S.W.2d 204, 207 (Tex. 1980) (stipulation will not be construed as an admission of a fact intended to be controverted); *Hansen v. Acad. Corp.*, 961 S.W.2d 329, 335 (Tex.App.-Houston[1st Dist.] 1997, pet. denied). The ranch's value on the Fifth Anniversary was controverted and the trial court submitted a question which the jury answered. At trial, Elizabeth's expert witness testified it was worth \$ 2,000,000. Edward testified that he thought the land "clear-cut" (or without timber) was worth \$ 1,000,000. His timber expert valued the timber alone on the Fifth Anniversary at \$ 387,194.37. The jury was entitled to derive a different value within the range established by the evidence. *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 321 (Tex.App.-San Antonio 2002, pet. denied) ("It is well-established that in resolving damages issue, a jury's finding will be upheld if it is within the range of testimony regarding the amount of damages incurred."). We overrule Elizabeth's first issue.

With respect to the Campeon stock, Edward testified that the value was zero and the corporation had no assets. He stated that Campeon's operations contract with a third party on the Divorce Date precluded the corporation from making any profits and it was merely an shell entity he used to bill actual expenses to the third party without any premium. As the owner of the stock, Edward was able to offer his opinion of its value. *Gulf States Util. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) ("It is well settled that a property owner may opine about the property's value.") (citing *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex.1984)). Elizabeth's stock expert derived a different value for the corporation and her testimony and appraisal were admitted. The jury, however, was not required to

adopt the expert's value. A jury is entitled to blend evidence admitted before it and may believe all, some or none of a witness' testimony. *State Farm Fire & Cas. Co.*, 88 S.W.3d at 321.

In conducting our review of both the legal sufficiency of the evidence, we are mindful that the jury, as fact-finder, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.*; *Burns v. Burns*, 116 S.W.3d 916, 920 (Tex.App.-Dallas 2003, no pet.). We may not substitute our judgment for the fact-finder's, even if we would reach a different answer on the evidence. *State Farm Fire & Cas. Co.*, 88 S.W.3d at 321 (citing *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex.1998)). The evidence before the jury was sufficient to support its finding. Accordingly, Elizabeth's second issue is overruled.

#### 5. Edward's Reimbursement Claim

The trial judge refused to reimburse "prior sums awarded as interim attorneys' fees to Elizabeth" because they "effected a just and equitable division of the community income out of which they were paid." Although labeled attorneys' fees, the record reflects that the money Edward wants reimbursed were proceeds from quarterly dividends of Nordasko stock issued to its shareholders between the Fifth Anniversary and the Divorce Date. Edward admitted that the \$ 64,000 at issue only reflected two of sixteen quarterly dividends he received between the Fifth Anniversary and the Divorce Date.

As dividends, these payments constituted income. *Fischer-Stoker v. Stoker*, 174 S.W.3d 272, 279 (Tex.App.-Houston[1st Dist.] 2005, pet.denied) ("[D]ividends paid on investments, whether the investments are separate property or not, are income under Texas law and generally community property"). Under Section XVIII of the Agreement, income "yielded by separate property" paid after the Fifth Anniversary and before the Divorce Date is community property. As such, the trial court has broad discretion to determine how to allocate the money. *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988); *Hailey v. Hailey*, 176 S.W.3d 374, 384 (Tex.App.-Houston[1st Dist] 2004, no pet.) (trial court has broad discretion both in evaluating a claim for reimbursement and making a just and proper division of the community). Further, as community property, Edward has no right of reimbursement of funds identified as dividends because they are already part of the community marital estate defined in Texas Family Code Section 3.401(4)(A). TEX. FAM. CODE ANN. § 3.401(4)(A) (*Vernon* 2006). We overrule Edward's fifth issue.

#### 6. Prejudgment Interest

The Second Decree awards Elizabeth "prejudgment interest, measured from [the Divorce Date] at the rate of 8.25% per annum simple interest, in the sum of One Hundred Twenty Four Thousand Five Hundred Seventy Nine and 12/100 Dollars (\$ 124,579.12)." We review the trial court's prejudgment interest award under an abuse of discretion standard. *Wilmer-Hutchins Indep. School Dist v. Smiley*, 97 S.W.3d 702, 706 (Tex.App.-Dallas 2003, pet. denied). To determine if there was an abuse of discretion, we must decide if the lower court acted without reference to any guiding rules or principles. *Downer*, 701 S.W.2d at 241-42.

In his sixth issue, Edward contends that the award of prejudgment interest is wrong because there

was no ascertainable sum of money due and payable prior to entry of the Second Decree. He characterizes Elizabeth's claim for prejudgment interest as one arising in equity and requiring a specific pleading request. Elizabeth's pleading merely contains a general prayer for relief. Elizabeth counters that the prejudgment interest results from her claim for a money judgment under the Agreement, which both parties stipulated was valid and enforceable. n7 It is undisputed that the Agreement does not provide for the recovery of prejudgment interest.

There are two separate bases for an award of prejudgment interest: an enabling statute, or general principles of equity. *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998); *Granite Const. Co. v. Mendoza*, 816 S.W.2d 756 (Tex.App.-Dallas 1991, writ denied). If Elizabeth's recovery is predicated on a statutory right, she is not required to plead a claim for prejudgment interest. *City of Houston v. Fletcher*, 166 S.W.3d 479, 493 (Tex.App.-Eastland 2005, pet.denied); *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 441 (Tex.App.-Houston[1 Dist.] 2000, no pet.)(citing *Benavides v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987)).

Until its repeal in 1997, Article 5069-1.06 of the Texas Revised Civil Statutes provided for prejudgment interest in contract cases. TEX. REV. CIV. STAT. ANN. Art. 5069-1.03 (Vernon 1987 & Supp. 2007). The statute now governing prejudgment interest is the Texas Finance Code. TEX. FIN. CODE ANN. §§ 301.001-304.302 (Vernon 2006); *de la Garza v. de la Garza*, 185 S.W.3d 924, 927-29 (Tex. App.-Dallas 2006, no pet.). The Finance Code provides for the recovery of prejudgment interest in cases involving extensions of credit, wrongful death, personal injury, property damage or condemnation. TEX. FIN. CODE ANN. §§ 302.002, 304.101, 304.201 (Vernon 2006). 8

Statutory construction is a legal question we review de novo. *City of Rockwall v. Hughes*, 246 S.W.3d 621 (Tex. 2008). In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *Id.* (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)). We use definitions prescribed by the Legislature. *Id.* (citing TEX. GOV'T CODE ANN. § 311.011(b)(Vernon 2005)). Otherwise, we construe the statute's words according to their plain and common meaning. *Id.* (citing *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)).

Unlike its predecessor, Finance Code § 302.002 is silent on contract cases not involving extensions of credit. Accordingly, we believe the provision does not apply to contracts where there is no extension of credit. *de la Garza*, 185 S.W.3d at 927-29. While the Agreement requires financial inventories and prescribes the characterization and division of property, its terms do not contemplate any extensions of credit. Therefore, we conclude Section 302.002 does not provide Elizabeth with the means to recover prejudgment interest. *Id.*; *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413 (Tex.App.-Amarillo 2003, pet. denied). Since this case does not involve claims for wrongful death, personal injury, property damage or condemnation, Elizabeth cannot seek support from either Section 304.101 (providing prejudgment interest in cases of wrongful death, personal injury or property damage) or Section 304.201 (providing prejudgment interest in condemnation proceedings).

Because we have determined that neither the Agreement nor any enabling statute provides for

Elizabeth to recover prejudgment interest, we now turn to common law to see if Elizabeth's general prayer for relief will support the trial court's award. Courts do have the equitable power to award prejudgment interest. *Perry Roofing Co. v. Olcott*, 744 S.W.2d 929 (Tex.1988); *Rio Grande Land & Title Co. v. Light*, 758 S.W.2d 747 (Tex. 1988) (per curiam). However, where prejudgment interest is sought at common law as an element of the damages, a plaintiff must plead for it. *Benavides*, 726 S.W.2d at 25 (citing *Republic Nat. Bank v. Northwest Nat. Bank*, 578 S.W.2d 109, 117 (Tex. 1978)). A prayer for general relief does not suffice. *Id.*; *Vidor Walgreen Pharm. v. Fisher*, 728 S.W.2d 353 (Tex. 1987)(per curiam).

We conclude the trial court erred in awarding prejudgment interest to Elizabeth. We sustain Edward's sixth issue.

### Conclusion

We reverse the trial court's judgment insofar as it awards Elizabeth W. Bufkin prejudgment interest, render judgment in favor of Edward O. Bufkin, Jr., and order that Elizabeth take nothing against Edward for prejudgment interest. We affirm the remainder of the trial court's judgment.

MICHAEL J. O'NEILL

### JUSTICE

1 Although not contained in Edward's first issue, his brief argues that, not only should the issues on remand be limited, the case should also have been remanded to a specific visiting judge who presided over the first trial. However, the case was properly remanded to the trial court where the sworn and elected judge, Marilea Lewis, had authority to preside over the second trial. *Davis v. Crist Indus., Inc.*, 98 S.W.3d 338 (Tex. App. - Fort Worth 2003, pet. denied)(assignment of case to visiting judge does not give visiting judge exclusive authority to try case); *Starnes v. Chapman*, 793 S.W.2d 104, 106-07 (Tex. App.- Dallas 1990, orig. proceeding) (assigned judge did not continue to have authority to proceed once case was reversed and remanded unless reassignment ordered). In addition, the record reflects that the visiting judge's assignment to the case was canceled in an order relieving judge entered on March 16, 2005 - over nine months before trial.

2 The June 1996 timber appraisal was later amended after a reduced appraisal process to include values for the timber as of the Fifth Anniversary and the Divorce Date.

4 TEX. FAM. CODE ANN. § 7.001 (Vernon 2006).

5 Motion for Decree on Jury Verdict and for Judgment N.O.V. Regarding the Amount of Northrim Bank Debt and Valuation of Mountain Top Ranch filed by Edward on February 15, 2006.

6 The record reflects that, during trial, the parties used the terms dividends and distributions interchangeably.

7 Elizabeth also contends that Edward waived his sixth issue by not objecting to the award of

prejudgment interest in the trial court. The record reflects that Edward did file a timely motion to modify the judgment in which he objected to the award. Elizabeth did not plead for it and there was no discussion of it in any hearing before entry of the Second Decree. Recovery of prejudgment interest is not even mentioned in Elizabeth's post-verdict motion to enter judgment. Accordingly, we construe Elizabeth's argument to be Edward was required to object before judgment was entered to a cause of action she did not raise. This contention incorrectly assumes that the trial court can award relief a party has not requested. *Bird v. Kornman*, 152 S.W.3d 154, 161 (Tex.App.-Dallas 2004, pet. denied) ("a trial court may not grant relief to a party in the absence of pleadings to support that relief")(citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex.1983)); *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex.1979); TEX. R. CIV. P. 301 (judgment must conform to pleadings).

8 The Finance Code does not apply to prejudgment interest recoverable for delinquent taxes or unpaid child support which are governed by Chapter 33 of the Texas Tax Code, and Texas Family Code Section 157.265, respectively. TEX. FIN. CODE ANN. §§ 304.301, 304.302 (Vernon 2006).

**United States of America v. 43.77 Acres of Land More Or Less in The County Of Fresno****Case Details:****Experts Challenged:****Name:** Expert #1**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.**Area of Expertise:** Land Economics, Housing Finance**Disposition:** Motion to exclude was filed; outcome unknown.**Date of Decision:****Gatekeeping Authorities:****Jurisdiction:** Federal**Court:** California, Eastern District**Plaintiff(s):** United States of America**Defendant(s):** 43.77 Acres of Land More Or Less in The County Of Fresno**Docket No(s):** 1:03cv06065**Citations:** THIS is an UNREPORTED DECISION-20141; 2006 WL 4069994, 2006 WL 4069999, 2006 WL 4069995, 2006 WL 4069987, 2006 WL 4070001, 2006 WL 4069844, 2006 WL 4069833, 2006 WL 4069991, 2006 WL 5462686, 2006 WL 4069993, 2006 WL 4743584**Area of Law:** Land Use Law**Counsel:** Retaining Attorney: McGregor W. Scott, United States Attorney, E. Robert Wright, Brian W. Enos, Assistant U.S. Attorneys, Federal Courthouse, 2500 Tulare Street, Suite 4401, Fresno, California 93721, Telephone: (559) 497-4000, Facsimile: (559) 497-4099 Opposing Attorney: Peggy M O'Laughlin**Judges:** Anthony W. Ishii, LAWRENCE J. O'NEILL**Opinion By:**



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## **Summary:**

Expert #1 was retained by the Plaintiff as a real estate appraiser expert. Defendant had filed a motion in limine to exclude Expert #1's testimony. The outcome is unknown.

**Simon v. Honeywell, Inc., Et Al****Case Details:****Experts Challenged:****Name:** Expert #1**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.**Area of Expertise:** Land Economics, Housing Finance**Disposition:** Motion to exclude denied without prejudice.**Name:** Expert #5**Discipline:** Accounting**Area of Expertise:** Financial Reporting, Accounting Controls, Management Reporting, Compensation Analysis, Buy/Sell Agreements, Mergers and Acquisitions, Business Concepts Long Range Planning, Tax Planning**Disposition:** Motion to exclude granted.**Date of Decision:**07/19/1999**Gatekeeping Authorities:****Jurisdiction:** Federal**Court:** Florida, Middle District**Plaintiff(s):** Simon**Defendant(s):** Honeywell, Inc., Et Al**Docket No(s):** 8:96-CV-01955**Citations:** THIS is an UNREPORTED DECISION-20142;**Area of Law:** Property Law**Counsel:** Retaining Attorney: Ellen S. Vars Opposing Attorney: Charles D. Bavol**Judges:** Henry Lee Adams, Jr.**Opinion By:** Henry Lee Adams, Jr.



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## **Summary:**

Expert #1 was retained by the Defendant in the instant case. Plaintiff filed a motion in limine to exclude Expert #1's testimony. The Court denied Plaintiff's motion in limine to exclude without prejudice.

**Opinion:**

ORDER It is ORDERED: 1. Defendant's Motion in Limine with Respect to Discovery Issues (Dkt. 261) is GRANTED. Plaintiffs are precluded from offering evidence or argument concerning Defendant's delays in producing documents or other matters that were the subject of discovery disputes, including Defendant's assertion of attorney-client privilege and/or work product privilege, see *Empire Gas Corp. v. American Bakeries Co.*, 646 F. Supp. 269 (N.D. 111. 1986), and are precluded from offering evidence of any alleged spoliation of documents, see Order of Magistrate Judge Pizzo (Dkt. 167) (denying Plaintiff's motion to reopen discovery because Plaintiff suspects Defendant may have destroyed documents in the early 1980's); see also *In Re Hopson Marine Transport, Inc.*, 168 F.R.D. 560 (E.D. La. 1996) (adverse inference rule applies when a party wrongfully denies another the evidence necessary to establish a fact in dispute, but is inapplicable where there was no wrongful discovery denial). 2. Defendant's Motion in Limine with Respect to Damages Testimony (Dkt. 262) is DENIED without prejudice. 3. Defendant's Motion in Limine with Respect to Evidence of Fraud or Mistake (Dkt. 263) is DENIED AS MOOT. This Court dismissed Plaintiffs Fraud and Mistake of Fact claims. See Order on Defendant's Mt. to Dismiss (Dkt. 377). 4. Plaintiffs Motion in Limine to Prevent Defendant from Objecting to Admissibility of Documents Produced after Discovery Cutoff (Dkt. 268) is DENIED. 5. Plaintiffs Motion in Limine to Preclude Honeywell from Presenting Evidence Regarding Settlement of Disputed Claim with Philips and Plaintiffs Termination of Option to Purchase Simon Property and Plaintiffs Wealth (Dkt. 269) is DENIED without prejudice. 6. Plaintiffs Motion in Limine to Preclude Expert #5, C.P.A. from Testifying (Dkt. 279) is GRANTED. 7. Plaintiffs Motion to File Amended Motion in Limine to Preclude Expert #5, C.P.A., from Testifying (Dkt. 320) is DENIED AS MOOT. 8. Plaintiffs Motion in Limine to Preclude Defendant from Offering Any Evidence or Argument at the Trial Concerning Certain Discovery Issues (Dkt. 280) is DENIED without prejudice. 9. Plaintiffs Motion in Limine to Exclude Expert Testimony by Expert #1 (Dkt. 321) is DENIED without prejudice. 10. Plaintiffs Motion for Discovery Sanctions (Dkt. 345) is DENIED insofar as it seeks discovery sanctions and insofar as it seeks to offer evidence or argument concerning discovery matters; it is DENIED without prejudice inasmuch as it is an untimely-filed motion in limine. DONE AND ORDERED at Tampa, Florida, this 15 day of July, 1999. Henry Lee Adams, Jr. United States District Judge



**Smith v. Riverwalk Entertainment, L.L.C.**

**Case Details:**

**Experts Challenged:**

**Name:** Expert #1

**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.

**Area of Expertise:** Land Economics, Housing Finance

**Disposition:** Motion to exclude denied.

**Date of Decision:**08/21/2008

**Gatekeeping Authorities:** Federal;Rule 702

**Jurisdiction:** Federal

**Court:** Louisiana, Western District

**Plaintiff(s):** Smith

**Defendant(s):** Riverwalk Entertainment, L.L.C.

**Docket No(s):** 5:05CV01416

**Citations:** THIS is an UNREPORTED DECISION-20139; 2008 WL 5375351, 2008 WL 5375350, 2007 WL 5806693

**Area of Law:** Civil Rights

**Counsel:** Retaining Attorney: Edwin H. Byrd III Opposing Attorney: Lemle & Kelleher, Dale G. Cox, Bar #4518, 401 Edwards St., Suite 1000, Shreveport, LA 71101, Telephone: (318) 227-1131, Telecopier: (318) 227-1141, E-mail: dcox@lemle.com

**Judges:** Stagg, Hayes

**Opinion By:** Tom Stagg



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## **Summary:**

Expert #1 was retained by the Defendant in the instant case as a valuation expert. Plaintiff argued that Expert #1's testimony consisted of legal conclusions and moved to exclude his testimony. The Court denied Plaintiff's motion to exclude without prejudice.

**Opinion:**

ORDER Before the court is a "Motion In Limine To Exclude Testimony Of Expert #1" filed by the plaintiffs, Charles Smith and Bossier Riverside, LLC. See Record Document 156. The plaintiffs argue that the conclusion of defendants' expert Expert #1 - that compensation for the property at issue in this case would result in an "unearned windfall" to the plaintiffs if valuated in light of the current development on the project-is an inadmissible legal conclusion. See Record Document 156-2 at 4. Defendants reply that Expert #1's statement "explains an economic and real estate concept" and, therefore, is not a prohibited legal conclusion. See Record Document 175 at 3-4. The court finds that there is not sufficient evidence in the record to make a ruling at this time. However, the court notes that should the plaintiffs argue at trial that the value of the property in question has been enhanced by the current project development, this testimony will be relevant and will be allowed to be presented to the jury. Accordingly; IT IS ORDERED that the motion in limine (Record Document 156) be and is hereby DENIED WITHOUT PREJUDICE. THUS DONE AND SIGNED at Shreveport, Louisiana this 21 day of August, 2008. Judge Tom Stagg

**Courtney v. Shell Oil Company****Case Details:****Experts Challenged:****Name:** Expert #1**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.**Area of Expertise:****Disposition:** Motion to exclude denied.**Date of Decision:** 10/15/2001**Gatekeeping Authorities:****Jurisdiction:** Federal**Court:** Florida, Middle District**Plaintiff(s):** COURTNEY, ET AL**Defendant(s):** SHELL OIL COMPANY**Docket No(s):** 2:00CV00178**Citations:** THIS is an UNREPORTED DECISION-20140; 2001 WL 34853103, 2001 WL 34853098**Area of Law:** Property Law**Counsel:** Retaining Attorney: Karl J. Brandes, Florida Bar No. 329797, Bradford D. Kimbro, Florida Bar No. 908002, James J. McGuire, Florida Bar No. 0187798, Holland & Knight LLP, P.O. Box 1288, Tampa, FL 33601-1288, (813) 227-850 Opposing Attorney: Patrick E. Geraghty**Judges:** JUDGE JOHN E. STEELE**Opinion By:** JOHN E. STEELE



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## **Summary:**

Expert #1 was retained by the Defendant in the instant case as a valuation expert. Plaintiff argued that Expert #1 proffered hearsay testimony. Plaintiff moved in limine to exclude his testimony. The Court denied Plaintiff's motion.

**Opinion:**

Electronic Case Filing | U.S. District Court - Middle District of Florida-Electronic Case Filing | U.S. District Court - Middle ORDER Before the Court are the following motions: (1) plaintiff's Motion in Limine, filed on September 19, 2001 (Doc. #116), and Shell's memorandum in opposition thereto (Doc. #137); (2) Shell's Motion in Limine (Doc. #120) and plaintiff's memorandum in opposition thereto (Doc. #126); (3) Shell's Motion in Limine (Doc. #121) and plaintiff's memorandum in opposition thereto (Doc. #128); (4) Shell's Motion in Limine (Doc. #122) and plaintiff's memorandum in opposition thereto (Doc. #131); and (5) plaintiff's Motion in Limine (Doc. #125) and Shell's memorandum in opposition thereto. Accordingly, it is now ORDERED: 1. Plaintiff's Motion in Limine (Doc. #116) is DENIED. The Court finds that the evidence may be relevant depending upon the trial testimony. For these reasons, this issue cannot be resolved on a motion in limine. Plaintiff may raise his objection to specific evidence at trial. 2. Shell's Motion in Limine (Doc. #120) is DENIED. 3. Shell's Motion in Limine (Doc. #121) is DENIED. 4. Shell's Motion in Limine (Doc. #122) is DENIED. 5. Plaintiff's Motion in Limine (Doc. #125) is DENIED. DONE AND ORDERED at Fort Myers, Florida, this 15th day of October, 2001. John E. Steele United States District Judge

**Sher vs. Raytheon Co.****Case Details:****Experts Challenged:****Name:** Expert #2**Discipline:** Engineering;Civil Engin.,Engineering;Environ. Engin.,Hydrology**Area of Expertise:** Groundwater contamination**Disposition:** Testimony sufficient to win class certification.**Name:** Expert #1**Discipline:** Economics;Economics (Unspec.),Finance;Finance (General),Political Science,Real Estate;Real Estate Appraisal,Real Estate;Real Estate Dev.**Area of Expertise:** Land Economics, Housing Finance**Disposition:** Testimony insufficient to avoid class certification.**Name:** Expert #3**Discipline:** Finance;Finance (General),Real Estate;Real Estate Appraisal**Area of Expertise:****Disposition:** Testimony sufficient to win class certification.**Name:** Expert #4**Discipline:** Geology;Hydrogeology**Area of Expertise:****Disposition:** Testimony insufficient to avoid class certification.**Date of Decision:**09/30/2009**Gatekeeping Authorities:** Federal;Daubert**Jurisdiction:** Federal**Court:** Florida, Middle District**Plaintiff(s):** NANCY SHER, et al., Plaintiffs**Defendant(s):** RAYTHEON COMPANY, Defendant**Docket No(s):** Case No.: 8:08-cv-889-T-33AEP**Citations:** 2009 U.S. Dist.**Area of Law:** Toxic Torts**Counsel:** For Nancy Sher, individually and on behalf of all others similarly situated, James R. Abel, individually and on behalf of all others similarly situated, Jennifer A. Baker, individually and on

individually and on behalf of all others similarly situated, Jennifer A. Baker, individually and on behalf of all others similarly situated, Carol A. Caleca, individually and on behalf of all others similarly situated, Joura Fink, individually and on behalf of all others similarly situated, Betty L. Key, individually and on behalf of all others similarly situated, Plaintiffs: Amanda R. Slevinski, Brian H. Barr, LEAD ATTORNEYS, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA\*, Pensacola, FL; Christopher Thomas Nidel, LEAD ATTORNEY, PRO HAC VICE, Nidel Law, PLLC, Washington, DC; Clay M. Townsend, LEAD ATTORNEY, Morgan & Morgan, PA, Orlando, FL; David G. Henry, Keith Maxie Carter, Michael Steven Goetz, LEAD ATTORNEYS, Armando T. Lauritano, Morgan & Morgan, PA, Tampa, FL; J. Michael Papantonio, Neil Edward McWilliams, LEAD ATTORNEYS, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, Pensacola, FL; Joel M. Rubenstein, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein LLP, New York, NY; Kevin J. Madonna, PRO HAC VICE, Robert F. Kennedy, Jr., PRO HAC VICE, LEAD ATTORNEYS, Kennedy & [\*2] Madonna, LLP, Hurley, NY; Steven J. German, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein, LLP, New York, NY. For Louis Giocondo, individually and on behalf of all others similarly situated, Plaintiff: Amanda R. Slevinski, Brian H. Barr, LEAD ATTORNEYS, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA\*, Pensacola, FL; Christopher Thomas Nidel, LEAD ATTORNEY, PRO HAC VICE, Nidel Law, PLLC, Washington, DC; Clay M. Townsend, LEAD ATTORNEY, Morgan & Morgan, PA, Orlando, FL; David G. Henry, Keith Maxie Carter, Michael Steven Goetz, LEAD ATTORNEYS, Armando T. Lauritano, Morgan & Morgan, PA, Tampa, FL; Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, LEAD ATTORNEY, Pensacola, FL; Joel M. Rubenstein, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein LLP, New York, NY; Kevin J. Madonna, PRO HAC VICE, Robert F. Kennedy, Jr., PRO HAC VICE, LEAD ATTORNEYS, Kennedy & Madonna, LLP, Hurley, NY; Neil Edward McWilliams, LEAD ATTORNEY, PRO HAC VICE, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, Pensacola, FL; Steven J. German, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein, LLP, New York, NY. For Virginia Lydon, Plaintiff: Amanda R. Slevinski, Brian H. Barr, LEAD ATTORNEYS, [\*3] Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA\*, Pensacola, FL; Christopher Thomas Nidel, LEAD ATTORNEY, PRO HAC VICE, Nidel Law, PLLC, Washington, DC; Clay M. Townsend, LEAD ATTORNEY, Morgan & Morgan, PA, Orlando, FL; J. Michael Papantonio, Neil Edward McWilliams, LEAD ATTORNEYS, Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, PA, Pensacola, FL; Joel M. Rubenstein, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein LLP, New York, NY; Joseph H. Saunders, LEAD ATTORNEY, Saunders & Walker, PA, Pinellas Park, FL; Keith Maxie Carter, LEAD ATTORNEY, Morgan & Morgan, PA, Tampa, FL; Kevin J. Madonna, PRO HAC VICE, Robert F. Kennedy, Jr., PRO HAC VICE, LEAD ATTORNEYS, Kennedy & Madonna, LLP, Hurley, NY; Steven J. German, LEAD ATTORNEY, PRO HAC VICE, German Rubenstein, LLP, New York, NY. For Linda Swartout, individually and on behalf of all others similarly situated, John C. Swartout, Consol Plaintiffs: Joseph H. Saunders, LEAD ATTORNEY, Saunders & Walker, PA, Pinellas Park, FL. For Raytheon Company, Defendant: Benjamin H. Hill, III, Dennis Parker Waggoner, LEAD ATTORNEYS, Landis Vernon Curry, III, Hill Ward Henderson, Tampa, FL; Brian T. Stansbury, PRO HAC VICE, Christopher Posteraro, PRO HAC VICE, LEAD ATTORNEYS, Andrew Clubok, Edwin John U, Eugene F. Assaf, Kirkland & Ellis, LLP, Washington, DC. For Craig Pethe, Defendant: Benjamin H. Hill, III, Dennis Parker Waggoner, LEAD ATTORNEYS, Hill Ward Henderson, Tampa, FL; Andrew Clubok, PRO HAC VICE, Edwin John U, Eugene F. Assaf, PRO HAC VICE, Kirkland & Ellis, LLP,



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Washington, DC; Landis Vernon Curry, III, Hill Ward Henderson, Tampa, FL.

**Judges:** VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE.

**Opinion By:** VIRGINIA M. HERNANDEZ COVINGTON

**Summary:**

The Court had before it a complex toxic tort case that Plaintiffs sought to pursue as a class action under Fed. R. Civ. P. 23. Defendant, Raytheon Company, owned a facility at which various industrial activities had been conducted over the years. Plaintiffs asked Expert #2 to evaluate and opine on the source of contamination and the extent of groundwater contamination associated with the Facility, whereas the defendant sought the groundwater opinion of their expert, Expert #4. The Plaintiff and the Defendant also presented the expert opinion of Property Valuation Experts Expert #3 and Expert #1 respectively. Plaintiffs asked Expert #3 to offer an opinion as to whether, from a real estate analysis and appraisal perspective, the alleged damages to properties in this case could be determined on a class-wide or mass appraisal basis. In Expert #3's expert opinion, which he claimed was based on a reasonable degree of scientific certainty, the answer was yes. In direct contrast to Expert #3, Expert #1 stated that there was no generally accepted method for analyzing property value diminution for these widely divergent property types with differing environmental impacts from the contaminated groundwater. The Court noted that the Defendant had spent a significant amount of time during the hearing attempting to prove that Plaintiffs' expert analyses and opinions were too factually and scientifically deficient to support class certification. As a threshold matter, the Court found that it was not necessary at this stage of the litigation to declare a proverbial winner in the parties' war of the battling experts or dueling statistics and chemical concentrations. The Court held that this type of determination would require the Court to weigh the evidence presented and engage in a Daubert style critique of the proffered experts qualifications, which would be inappropriate. Thus, the Court concluded that at this stage of the litigation, an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in Daubert would be inappropriate, because such an analysis would delve too far into the merits of Plaintiffs' case. Further, the Court ruled that it had considered the opinions of Plaintiffs' experts, Expert #2 and Expert #3 and was cognizant of Defendant's well-documented objections and Expert #3's scholarly credentials were impeccable. Thus, the Court found that after considering the evidence adduced to date, the unique facts of the mass tort case made certification appropriate at this juncture. Accordingly, the Class Certification Motion was granted.

**Opinion:****OPINION****ORDER**

This is a complex toxic tort case that Plaintiffs seek to pursue as a class action under Fed. R. Civ. P. 23. Before the Court are Plaintiffs' Class Certification Motion and Memorandum of Law in Support (Doc. 83), Defendant's Response and Memorandum of Law in Opposition (the "Response," Doc. 93), and Plaintiffs' Reply to the Response (Doc. 102).

The Court held an evidentiary hearing from September 21, 2009 to September 23, 2009 (the "Hearing") on the Class Certification Motion. In advance of the Hearing, the parties filed a Joint Pre-Evidentiary Statement (Doc. 120), which included submission of stipulated facts and separate Proposed Conclusions of Law (Docs. 121 and 123). Defendant also filed a Response to Plaintiffs' Proposed Conclusions of Law (Doc. 127). Following the Hearing, the parties filed Post-Hearing Motions and Memoranda (Docs. 137 (Defendant) and 138 (Plaintiffs)). For the reasons that follow, the Class Certification Motion (Doc. 83) is GRANTED. 1

**I. Factual and Procedural History**

2

Defendant, Raytheon Company, owns a facility located at 1501 72nd Street North, St. Petersburg, Florida (the "Facility") at which various industrial activities have been conducted over the years - including electronics assembly, electroplating and vapor degreasing. n3 It is undisputed that these industrial activities caused chemicals (hereinafter referred to interchangeably as Contaminants of Concern or "COCs," chemicals or contaminants) including TCE, vinyl chloride and 1, 4-dioxane, 4 to leak into the soil and groundwater 5 at the Facility. (Doc. 120, Stipulated). It is alleged that the leaked chemicals have migrated beyond the boundaries of the Facility and into the surrounding neighborhood, commonly known as Azalea (the "Azalea Neighborhood").

4 According to the Agency for Toxic Substances & Disease Registry ("ATSDR"), exposure to TCE can cause impaired heart function, impaired fetal development in pregnant women, nerve damage, kidney damage, liver damage, cancer and death; exposure to vinyl chloride can cause liver cancer, brain cancer, lung cancer, cancers of the blood, and damage to sperm and testes; and exposure to 1,4-dioxane can cause liver and kidney diseases and cancer. Further, the ATSDR noted that 1,4-dioxane does not degrade, does not stick to soil particles and moves easily from soil into groundwater. (Amend. Compl., pp. 1-2, n.1 and n.2 (internet links omitted)).

5 The environmental issues in this litigation pertain to the groundwater, not drinking water, which comes from a different source. (Doc. 120, Stipulated).

E-Systems, Inc. ("E-Systems") owned and operated the Facility from 1974 until Defendant acquired it as part of its 1996 purchase of E-Systems. E-Systems knew about the chemicals causing

groundwater contamination as early as 1991, when they were discovered during an environmental site assessment related to construction of the Pinellas Trail. (Amend. Compl. at p. 3, citing to FDEP02160, attached as Ex. B; Expert #4 Rep. 6). This site assessment was completed by the environmental engineering and consulting firm ARCADIS, formerly known as Mortensen Engineering. (Expert #2 Rep. 4). ARCADIS continues to investigate the groundwater contamination associated with the Facility. (Expert #2 Rep. 4; ARCADIS Description of Services Performed to Date, PX 47).

Prior to its acquisition, E-Systems signed a Consent Order with the Florida Department of Environmental Protection ("FDEP") to clean up the Facility's site. (Consent Order P 10, Ex. 1 to Decl. of Christopher Posteraro; RAYSTPETE-00377134, Ex. 2). Defendant was aware of the contamination when it purchased the Facility in 1996. As the Facility's new owner, Defendant was bound by the terms of the Consent Order. (Consent Order P 27, reading that provisions are binding upon E-Systems successors; see also Doc. 120-4, Ex. C (Defendant does not dispute this proposed finding and acknowledged its continuing duty under the Consent Order in the Response, pp. 1-2)).

On August 26, 2000, Defendant asked the Pinellas County Property Appraiser's Office to reduce the Facility's property taxes, citing the "inconvenience, liability and risk to a potential buyer" of the Facility's groundwater contamination. (RAYSTPETE-00405501). The Pinellas County Property Appraiser's Office granted Defendant's request and lowered the Facility's overall tax assessment. On February 24, 2005, Defendant submitted a Contaminated Property Information Form to the Pinellas County Property Appraiser that read, in pertinent part, "[c]ontamination affects offsite residential properties creating the opportunity for negative community relations and legal liability." (RAYSTPETE-00032360).

Since acquiring the Facility, Defendant has worked with the FDEP to address environmental issues relating to the site. (Response at p. 20). In addition, Defendant submitted a Site Assessment Report to the FDEP on January 28, 2009. (Doc. 120-5 at p. 20). Shortly thereafter, on April 28, 2009, Defendant submitted a proposed Remedial Action Plan ("RAP") to the FDEP. (Doc. 120, Stipulated).

On March 29, 2008, The Tampa Tribune published a story about contamination from the Facility migrating via groundwater beyond the Facility's property and into the surrounding neighborhoods. Plaintiffs are property owners from the Azalea Neighborhood, who owned property there on March 29, 2008, and whose properties have been allegedly contaminated by the release of chemicals from the Facility. Plaintiffs claim that until the March 29, 2008, story in The Tampa Tribune was published, as was discussed in a March 2008 "Mark Douglas" report on a local newscast, they were unaware of any chemical contamination from the Facility or its potential impact on them. See, e.g., Caleca Test., Sept. 21, 2009, Hr'g Tr. 276:23-277:8.

As currently proposed by Plaintiffs, and delineated by their groundwater expert, Expert #2, the proposed class area is located over the contaminated groundwater plume that leaked from the Facility. Expert #2 estimates that the groundwater plume is approximately 1.0-mile-long and 1.5- to 1.7-mile-wide. (Amended Compl. at p. 4; Expert #2 Rep., Summary P 1). In its current form, the proposed class area consists of over 1,000 property owners and 1,300 parcels of property. (Doc. 120, Stipulated; Class Cert. Mot. at p. 9, referencing Property Map F (hereinafter, the

"Property Map" and the "proposed class area"). The proposed class area is composed often sub-areas or neighborhoods. (Expert #1 Rep. 7-8). There are seventeen different property types within the proposed class area, including various residential (single-family, apartments, condominiums); commercial (stores, shopping center); and institutional uses (schools, a church); as well as vacant land. (Expert #1 Rep. 6; see also Expert #1 Rep. Ex. 2-1).

## II. The Named Plaintiffs

As of the date of the Hearing, the Named Plaintiffs in this case are Ms. Nancy Sher, Mr. James R. Abel, Ms. Carol A. Caleca, Mr. Louis Giocondo, and Ms. Betty Key.

### A. Ms. Nancy Sher

Ms. Sher is the trustee of the trust which holds title to the property located at 1127 Russell Drive, St. Petersburg, Florida. (Doc. 120, Stipulated). Defendant deposed Ms. Sher on April 1, 2009. (Doc. 120, Stipulated).

### B. Mr. James R. Abel

Mr. Abel owns the property located at 7325 12th Avenue North, St. Petersburg, Florida. (Doc. 120, Stipulated). Mr. Abel had his deposition taken in this litigation on April 3, 2009. (Doc. 120, Stipulated).

### C. Ms. Carol A. Caleca

Ms. Caleca owns the property located at 7335 10th Avenue North, St. Petersburg, Florida. (Doc. 120, Stipulated). She gave her deposition on April 6, 2009. (Doc. 120, Stipulated).

### D. Mr. Louis Giocondo

Mr. Giocondo jointly owns, with his wife, a property located at 6945 11th Avenue North, St. Petersburg, Florida. (Doc. 120, Stipulated). Defendant deposed Mr. Giocondo on April 7, 2009. (Doc. 120, Stipulated).

### E. Ms. Betty Key

Ms. Key owns the property located at 1370 70th Street North, St. Petersburg, Florida. (Doc. 120, Stipulated). Ms. Key had her deposition taken in this litigation on March 24, 2009. (Doc. 120, Stipulated).

On August 5, 2008, Plaintiffs filed a Consolidated Amended Complaint (the "Amended Complaint," Doc. 61) asserting causes of action against Defendant for trespass, private nuisance, unjust enrichment, negligence, strict liability and liability under Fla. Stat. § 376.313. Plaintiffs also asked the Court to enter an Order certifying this case as a class action pursuant to Fed. R. Civ. P. 23 (the "Class Certification Motion," Doc. 83). 6

Plaintiffs define the proposed class as: Persons who on March 29, 2008, owned real property located over defendant Raytheon's groundwater plume as delineated by the map attached as Exhibit F.

Excluded from the class are (1) the defendant in this action (and its officers, directors and employees), and any entity in which the defendant has a controlling interest, and the legal representatives, heirs, successors, and assigns of defendant; and, (2) any governmental entity, subdivision, agency or department. (Class Cert. Mot. at p. 16).

At the Hearing, the parties submitted expert reports from their respective groundwater and property experts and called them to testify. (Expert #2 Rep., Amend. Compl., Ex. D; Expert #3 Rep., Amend. Compl. Ex. G; Expert #4 Rep., DX 255; and, Thomas Rep., DX 254) The expert reports, of course, differ markedly as to the size of the proposed class area; whether evidence of contamination exists within that area; and whether the alleged diminution in value to the properties in the proposed class area can be determined on a class-wide basis.

### III. Expert Opinions

#### A. The Groundwater Opinions

##### 1. Expert #2, Plaintiffs' Expert

Plaintiffs asked Expert #2 to evaluate and opine on the source of contamination and the extent of groundwater contamination associated with the Facility. (Expert #2 Rep. 1). In addition, Plaintiffs asked Expert #2 to evaluate the quality of the overall environmental investigation and remediation that has been performed at the Facility in response to the groundwater plume. (Expert #2 Rep. 2; Sept. 21, 2009, Hr'g Tr. 130:17-131:5). At the Hearing, Expert #2 opined about the size and location of the groundwater plume. When evaluating and charting the spread of the COCs, Expert #2 used a water quality standard that he defined as the presence or absence of COCs. (Sept. 21, 2009, Hr'g Tr. 131:6-25). He did not use a drinking water standard to define the size or magnitude of the plume because "in fact this is not a drinking water . . . aquifer that we're dealing with, but rather with respect to presence or absence of these chemicals." (Sept. 21, 2009, Hr'g Tr. 131:13-20).

Referencing the Property Map, Expert #2 discussed what he calls a zone of impact that identifies each and every property that has been affected, at any level, by the COCs migrating from the Facility. (Sept. 21, 2009, Hr'g Tr. 131:21-135:15). Expert #2 testified that all of the groundwater contamination that emanated from the Facility has had an impact on all of the properties within the proposed class area. (Sept. 21, 2009, Hr'g Tr. 131:21-135:15).

Part of Expert's task was to evaluate the work that ARCADIS performed for Defendant, which included evaluating the plume maps ARCADIS prepared (the "Plume Map"). The Plume Maps are based on drinking water quality standards as established by the State of Florida for the COCs. (Sept. 21, 2009, Hr'g Tr. 136:21-141:7). The Plume Maps were drawn to show all affected properties that would require cleanup. Expert #2 testified about the differences between the Property Map and the

Plume Map. (Sept. 21, 2009, Hr'g Tr. 138:19-143:13). Specifically, Expert #2 testified that the Property Map was not drawn to encompass only those properties requiring cleanup. The intent of the Property Map, which includes a "buffer zone," is to approximate with a reasonable degree of scientific certainty the last point of impact, or stated differently, the last point of contaminant impact. (Sept. 21, 2009, Hr'g Tr. 185:1-20).

## 2. Expert #4, Defendant's Expert 7

During the Hearing, Expert #4 testified about the three issues he addresses in his expert report. (Sept. 23, 2009, Hr'g Tr. 80:15-16). First, Expert #4 opined that each property within the proposed class area is "unique." (Sept. 23, 2009, Hr'g Tr. 80:23-25). He based this opinion on factors such as the site's complex and heterogeneous hydrology and the concepts of degradation, sorption, and plunging three-dimensional plumes. (Sept. 23, 2009, Hr'g Tr. 81:1-111:6).

Second, Expert #4 opined that the properties within the proposed class area must be individually tested because of the wide variability of contamination or non-contamination of properties within the proposed class area. (Sept. 23, 2009, Hr'g Tr. 111:8-123:11).

Third, and finally, Expert #4 opined that when identifying the proposed class area and writing his report for Plaintiffs, Expert #2 did not adhere to professional standards and his proposed class area reflects an oversimplified analysis of a complex site. (Sept. 23, 2009, Hr'g Tr. 123:14-19). Expert #4 bases the third part of his opinion on factors Expert #2 allegedly used to "expand" the proposed impact area. Expert #4 cites to the fact that Expert #2 allowed trace detections, an "arbitrary" "buffer zone," and "outliers" or alternate contamination sources to expand the proposed impact area. (Sept. 23, 2009, Hr'g Tr. 123:20-154:4).

## B. The Property Valuation Experts

### 1. Expert #3, Plaintiffs' Expert 8

Plaintiffs asked Expert #3 to offer an opinion as to whether, from a real estate analysis and appraisal perspective, the alleged damages to properties in this case can be determined on a class-wide or mass appraisal basis. (Expert #3 Rep., Amend. Compl. G, P 4). In Expert #3's expert opinion, which he claims is based on a reasonable degree of scientific certainty, the answer is yes. (Expert #3 Rep., Amend. Compl. G, P 64). Expert #3 opined that the use of a "hedonic regression model" would allow for the class-wide valuation needed to pursue this case as a class action. (Expert #3 Rep., Amend. Compl. G, PP 19-64).

In support of his opinion, Expert #3 noted that: . Mass appraisal is a methodology that allows multiple properties to be appraised at the same time using large, statistically valid data sets;

. Hedonic mass appraisal is a widely accepted and commonly used appraisal methodology with published standards and in peer review literature;

. A mass appraisal methodology is superior to an individual appraisal in that it provides a statistical

measure of reliability and a consistent application of qualitative judgments to determine the actual value of a property;

. A mass appraisal methodology is more efficient than individual appraisals in that it does not require an individualized appraisal of each and every property in the proposed class area to determine the actual impact of the environmental contamination from the Facility;

. The Pinellas County Property Appraiser maintains a database of property features for each and every property in the proposed class area that is sufficiently robust to allow for its use in a mass appraisal model;

. All of the properties, with the noted exception of five waterfront properties, are characterized by the Pinellas County Property Appraiser as Tax Assessment Area 2 (Appraisal Areas, Pinellas County, Florida, PX 133; Sept. 22, 2009, Hr'g Tr. 107:12-111:14);.

. The Pinellas County Property Appraiser uses a mass appraisal methodology to appraise properties in Pinellas County pursuant to that office's requirement to assess property taxes (Duties of Property Appraiser of Pinellas County, Pam Dubov, CFA, CAE, PX 115; The Florida Real Property Appraisal Guidelines (2002), PX 116);

. A mass appraisal can determine, on a property-by-property basis, the diminution in value, if any, attributable to the groundwater contamination emanating from the Facility; and,

. The majority of the properties within the proposed class area can be assessed using a mass appraisal methodology.

Expert #3 cautioned during the Hearing that the model he discussed is not a final formulated model. (Sept. 22, 2009, Hr'g Tr. 54:17-21). His final model would be presented prior to the merits portion of this case and for use during that phase. (Sept. 22, 2009, Hr'g Tr. 55:1-8). Expert #3 also called the Court's attention to the noteworthy fact that the Pinellas County Property Appraiser currently uses a mass-appraisal model. (Sept. 22, 2009, Hr'g Tr. 54:2-7).

## 2. Expert #1, Defendant's Expert 9

Expert #1 opined in his expert report and testified at the Hearing that the properties in the proposed class area cannot be evaluated together on a common, class-wide basis for purposes of determining the extent of any property value impacts. He testified that this is in part because the proposed class area consists of seventeen distinct property types and ten different neighborhoods.

Further, Expert #1 opined that the proposed class area contains within it divergent environmental issues, with some properties having no contamination and others having contamination from multiple sources, possibly including the Facility. Based on the divergent environmental issues, Expert #1 concluded that the proposed class area appears to be based on criteria that are inconsistent with the accepted definition of environmental contamination used by appraisers, specifically Advisory Opinion 9, which defines environmental contamination as: "Adverse environmental

conditions resulting from the release of hazardous substances into the air, surface water, groundwater or soil. Generally, the concentrations of these substances would exceed regulatory limits established by the appropriate federal, state and/or local agencies." (Uniform Standards of Professional Appraisal Practice, Advisory Opinion 9, DX 201(c)).

In direct contrast to Expert #3, Expert #1 stated that there is no generally accepted method for analyzing property value diminution for these widely divergent property types with differing environmental impacts from the contaminated groundwater. Expert #1 concluded that the properties located in the proposed class area were too diverse to be analyzed together on a class-wide basis. Instead, Expert #1 claimed that any analysis of property value diminution would have to consider the multiple combinations of individual property types and sub-areas, i.e., in order to be grouped together for class-action purposes, the properties would need to be of the same property type, approximately the same age, and have the same concentration of hazardous chemicals above regulatory levels, etc. At the Hearing, however, Plaintiffs' counsel provided Expert #1 with a letter dated July 24, 2009, from Pam Dubov, the Pinellas County Property Appraiser addressed to Mr. Joseph Saunders, a lawyer for the Plaintiffs. The Letter included an analysis of the property values in the "Azalea Area" that used the mass-appraisal method and a map prepared by ARCADIS. The model demonstrates that the Pinellas County Property Appraiser has determined that properties in and around the plume have experienced a diminution in value of either 5% or 10%. (Cert. Copy of Letter from Pinellas County Property Appraiser, Pam Dubov to Joseph Saunders regarding Azalea Area Analysis, PX 131; Sept. 23, 2009, Hr'g Tr. 280:13-288:3).

#### IV. The Parties' Claims

##### A. Plaintiffs' Claims

Plaintiffs claim that class certification is appropriate under Fed. R. Civ. P. 23 (the "Rule 23 Factors") because the proposed class has been harmed by the chemical release from the Facility and the compensatory and economic damages attendant to the contamination can be adequately ascertained and addressed by class-wide relief. The specific monetary damages Plaintiffs seek are compensation for the diminution in the value of their properties that the contamination caused and any restoration costs. (Class Cert. Mot. at p. 5). Plaintiffs also seek injunctive relief in order to prevent further harm to, and interference with, the enjoyment of their properties. (Class Cert. Mot. at p. 5).

##### B. Defendant's Claims

Defendant first argues that the Plaintiffs' proposed class definition is improper because it is over inclusive - that is, under Plaintiffs' definition, every property owner would be included even if chemicals from the Facility cannot be detected in their groundwater. Defendant also claims that the Named Plaintiffs cannot satisfy the typicality and adequacy requirements of Rule 23(a). Finally, Defendant contends that Plaintiffs' claims cannot stand under Rule 23(b)(2) because the principal relief Plaintiffs seek is monetary and not injunctive.

Defendant makes its primary argument against certification of the proposed class under Rule 23(b)(3). Specifically, Defendant claims that common issues cannot predominate when the Court

will have to make individualized inquiries as to causation and damages for each property owner. Defendant also argues, under Rule 23(b)(3), that a class action lawsuit is not a superior means of resolving Plaintiffs' claims.

#### V. Evidence and Argument Presented at the Hearing

Plaintiffs called Mr. James R. Abel (Named Plaintiff); Ms. Carol Caleca (Named Plaintiff); Expert #2 (Groundwater Expert); and Expert #3 (Property Valuation Expert) as witnesses. Plaintiffs offered designated videotaped deposition testimony from Defendant's current Manager of Communications and Community Relations, Mr. Jack Radgowski, and Defendant's former Senior Manager for Public Relations, Mr. George Rhyndance. A written copy of designated deposition testimony from Mr. Louis Giocondo (Named Plaintiff) was also submitted by Plaintiffs. Defendant called its expert witnesses, Expert #4 (Groundwater Expert) and Expert #1 (Property Valuation Expert) to testify.

In their filings and during the Hearing, the parties advanced arguments for and against class certification under all of the Rule 23(a) factors and two of the Rule 23(b) factors, specifically Rule 23(b)(2) and (b)(3). The Court will conduct a rigorous analysis of the applicable Rule 23 Factors as required by the Eleventh Circuit. See *Vega v. T-Mobile, USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009) (stating, "A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class." (citations omitted)).

#### VI. Standard of Review

"For a district court to certify a class action, the Named Plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1250 (11th Cir. 2004); see also *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000). "Failure to establish any one of [the Rule 23(a)] factors and at least one of the alternative requirements of Rule 23(b) precludes class certification." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003). "The burden of proof to establish the propriety of class certification rests with the advocate of the class." *Id.* at 1187; see also *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000).

#### VII. Analysis

Rule 23 reads, in pertinent part, as follows: (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

#### A. Class Definition

Class definition is an overriding concern in environmental or mass toxic tort cases, and although not specifically mentioned in Rule 23(a) or (b), many courts treat "class definition" as a threshold issue. "It is elementary that . . . to maintain a class action, the class sought to be represented must be adequately defined." *De Bremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970); see *Colomar v. Mercy Hosp., Inc.*, 242 F.R.D. 671, 675 (S.D. Fla. 2007). To meet this threshold standard, plaintiffs must "distinguish [] members of the proposed class from the general public based upon" the defendant's alleged actions against them. *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 293 (W.D. Ky. 2008); see also *Clausnitzer v. Fed. Express Corp.*, 248 F.R.D. 647, 655, n.8 (S.D. Fla. 2008).

As a preliminary matter, a class must meet a minimum standard of definiteness that will allow the trial court to determine membership in the proposed class. *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1473 (N.D. Ala. 1996). A class definition must specify a "particular group at a particular time frame and location who were harmed in a particular way" and define the class "such that a court can ascertain its membership in some objective manner." *Edwards v. McCormick*, 196 F.R.D. 487, 491 (S.D. Ohio 2000).

Plaintiffs claim that the proposed definition, as set forth above, is appropriate and meets the minimum standard because it includes a particular group (real property owners), that were harmed during a particular time frame (beginning on March 29, 2008), in a particular location (over Defendant's groundwater plume) and in a particular way (groundwater contamination). Plaintiffs claim that tax records will help determine class membership and that this definition is similar to ones used in other contamination cases.

Defendant contends that the proposed class definition is improper because the geographic boundaries delineated on the Property Map arbitrarily identify a subset of the general public rather than a distinct class of persons affected by Defendant's alleged activities. Specifically, Defendant argues that the putative class would encompass every property owner in the proposed class area - including countless persons whose properties show no detection of chemicals from the Facility.

Defendant submits that other courts have routinely declined to certify classes using geographic definitions plagued by such deficiencies. By way of example, Defendant cites to *Duffin v. Exelon Corp.*, 2007 U.S. Dist. LEXIS 19683, 2007 WL 845336 (N.D. Ill. Mar. 19, 2007). Defendant further claims that certification is improper if many of the proposed class members have suffered no damages. During the Hearing, Defendant particularly questioned the soundness and preciseness of the methodology Plaintiffs' expert, Expert #2 used to determine the proposed class area as depicted on the Property Map.

The Court finds Defendant's reliance on *Duffin* unavailing. According to Defendant, the *Duffin* court denied class certification in a groundwater contamination case because the proposed class, defined by "arbitrarily drawn lines on a map," was "plainly overbroad" and not sufficiently limited to those properties for which plaintiffs presented evidence of contamination. *Duffin*, 2007 U.S. Dist. LEXIS 19683, 2007 WL 845336, at \*3 and \*4.

What the Defendant failed to note when citing to *Duffin* is that the proposed class was to encompass over 2,500 properties and 6,500 residents. In addition, the proposed class area in *Duffin* encompassed a 25 mile range. Here, the proposed class area is much smaller, approximately 1.0 mile long by 1.5 to 1.7 miles wide, and the number of potential plaintiffs is also smaller, 1,000. (Amended Compl. at p. 4; Expert #2 Rep., Summary P 1).

In *Duffin*, the court found that the proposed class area was defined in geographic terms "unrelated" to evidence of actual contamination because (1) the contamination and groundwater plume were miles from the outer boundaries of the defined class properties; (2) the groundwater plume constituted a fraction of the class area; and (3) the plaintiffs' expert report did not identify elevated

chemical levels in locations other than near the plume.

The facts developed to date allow the Court to distinguish Duffin and its progeny. Here, the proposed class area is relatively compact and well-defined; that is, according to Plaintiffs' groundwater expert, Expert #2, the proposed class area is located directly over the contaminated groundwater plume. In addition, Expert #2's described zone of impact is defined and delineated as it is because of the presence or absence of COCs.

The Court finds that the majority of the arguments Defendant advanced against Plaintiffs' proposed class definition are better addressed under each of the separate Rule 23 Factors than against the "minimum standard" of definiteness required for a proposed class definition to pass muster.

In summary then, the Court finds that the proposed class is sufficiently definite. That is, the proposed class definition makes it possible to identify who is and who is not a class member based on objective criteria. If the evidence above were not enough, Defendant's own efforts to provide contamination notification to selected property owners in the 1990s help prove that the proposed class is sufficiently definite.

In the 1990s, Defendant notified various groups of property owners, such as those from the Stone's Throw Condominium, that migrating contaminated groundwater from the Facility might have an impact on their properties. (Sept. 21, 2009, Hr'g Tr. 84:15-86:18; Min. from Stone's Throw Condominium Assoc. Board of Dir. Mtg., DX 271). The property owners Defendant notified mirror Plaintiffs' proposed class definition. That is, Defendant notified certain groups of real property owners, that were harmed during a particular time frame (the 1990s), in a particular location (over Defendant's groundwater plume) and in a particular way (groundwater contamination).

## B. Merits of Class Certification

### 1. Standing

"[A]ny analysis of class certification must begin with the issue of standing." Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987). For Article III standing, Plaintiffs must allege that they sustained "personal injury -[in-fact] fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Duffin, 2007 U.S. Dist. LEXIS 19683, 2007 WL 845336, at \*2 (quoting Johnson v. Allsteel, Inc., 259 F.3d 885, 887 (7th Cir. 2001) (other citations omitted)).

Plaintiffs have standing because they have "presented sufficient evidence for purposes of standing to show that they may have been injured-not as a theoretical matter, but rather as a question that is appropriate for judicial resolution." In re: MTBE Prods. Liab. Litig., 458 F. Supp. 2d 149, 158 (S.D.N.Y. 2006).

Review of the Duffin case, discussed above, is also particularly informative about standing. In Duffin, the plaintiffs complained that their properties were contaminated by defendant, Excelon Corporation, when it spilled millions of gallons of water containing potentially harmful radioactive chemicals. The Duffin plaintiffs alleged that this contamination interfered with the use and

enjoyment of their properties and diminished their properties' values. The Duffin court found that plaintiffs' allegations were "adequate to confer Article III standing." In reaching its decision, the Duffin court cited to *Family & Children's Ctr., Inc. v. Sch. City of Mishawaka*, 13 F.3d 1052, 1058, n.3 (7th Cir. 1994), for the proposition that the "standing inquiry exclusively addresses whether plaintiffs alleged facts satisfying constitutional and prudential limitations; the complaint's merits are not relevant." Duffin, 2007 U.S. Dist. LEXIS 19683, 2007 WL 845336, at \*2.

Here, Plaintiffs' starkly similar 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. Thus, the Court determines that Plaintiffs have standing under Article III of the United States Constitution. The Court will now examine the Rule 23(a) factors of numerosity, commonality, typicality and adequacy of representation.

## 2. Rule 23(a)

Rule 23(a) demands that, to sue as "representative parties on behalf of all," the Named Plaintiffs and their attorneys satisfy the closely related requirements of numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1278 (11th Cir. 2000) (describing the Rule 23(a) criteria).

### a. Numerosity

First, a class may be certified only if "the class is so numerous that joinder of all members is impracticable." Rule 23(a)(1), Fed. R. Civ. P. "In order to establish numerosity, the plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Kuehn v. Cadle Co.*, 245 F.R.D. 545, 548 (M.D. Fla. 2007) (citation and internal quotations omitted). "[W]hile there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (citation and internal quotations omitted). Class members in excess of forty can satisfy the numerosity requirement. *Colomar*, 242 F.R.D. at 675. To satisfy numerosity, the size of the class cannot be speculative. See *Id.* at 676; *Turnage v. Norfolk S. Corp.*, 307 Fed. Appx. 918, 2009 WL 140479, at \*4 (6th Cir. 2009).

Defendants do not mount a serious challenge to Plaintiffs' claim that they have met the numerosity requirement. However, Defendant does claim that Plaintiffs' failure to define a putative class of persons who can actually allege harm means that Plaintiffs' assertions about numerosity are fatally speculative. See *Turnage*, 307 Fed. Appx. 918, 2009 WL 140479, at \*4.

The Court disagrees with Defendant. "At this stage of the proceedings in which class certification is being considered, it is not necessary for the Court to know the precise number of class members. Instead the Court may rely upon reasonable inferences drawn from the known facts." *Snow v. Atofina Chems., Inc.*, 2003 U.S. Dist. LEXIS 27295, 2006 WL 1008002, at \*4 (E.D. Mich. Mar. 31, 2006) (citing to *In re Am. Med. Sys., Inc.* 75 F.3d 1069, 1079 (6th Cir. 1996)); see also *In re Carbon Dioxide Antitrust Litig.*, 149 F.R.D. 229, 232 (M.D. Fla. 1993) ("To meet this requirement, plaintiffs

need not prove the exact size of the proposed class, but rather need demonstrate only that the number is exceedingly large, and joinder impracticable.") Plaintiffs have identified 1,300 parcels with over 1,000 potential Plaintiffs. Plaintiffs claim that, given the obvious impracticality of joining potentially hundreds of plaintiffs in this action, they have satisfied the numerosity requirement. Upon due consideration, the Court finds that Plaintiffs have met the numerosity requirement.

#### b. Commonality

Second, a class may be certified only if "there are questions of law or fact common to the class." Rule 23(a)(2), Fed. R. Civ. P. "Commonality may be established where there are allegations of common conduct or standardized conduct by the defendant directed toward members of the proposed class." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 695 (M.D. Fla. 2005) (citation and internal quotations omitted). Commonality is satisfied when there "is a common issue the resolution of which will advance the litigation." *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

Commonality "does not require that all of the questions of law or fact raised by the case be common to all the plaintiffs." *Walco Invs., Inc. v. Thenen*, 168 F.R.D. 315, 325 (S.D. Fla. 1996). The fact that individual issues remain "after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

Recognizing the implicit commonality of fact and law in a mass toxic tort case, courts in groundwater contamination cases have characterized the commonality analysis as "straightforward." *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (affirming certification of class of property owners in TCE groundwater contamination case). The presence of individualized damages issues does not prevent a finding of commonality. *Allapattah Svcs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003). The Eleventh Circuit has recently advised district courts that they cannot conflate an analysis of commonality under Rule 23(a)(2) with a predominance analysis under Rule 23(b)(3). See *Vega*, 564 F.3d at 1268. In *Vega*, the Eleventh Circuit also reminded the district courts that Plaintiffs' burden under this Rule 23 Factor is "relatively light." *Id.*

Plaintiffs claim that Defendant's course of conduct that caused the contamination is identical for every potential member of the proposed class. Plaintiffs further claim that each potential class member would rely on the same set of operative facts to prove Defendant's liability because there is no dispute that groundwater contamination exists and Defendant is responsible for it. Plaintiffs set forth five shared questions of law and fact in their closing during the Hearing that mirror those set forth in the Amended Complaint (Amend. Compl. at p. 15). It is not necessary to repeat each here; however, by way of example and paraphrased, Plaintiffs asked whether Defendant's release of the contaminants into the soil and groundwater at the Facility was negligent, reckless and/or intentional? (Amend. Compl. at p. 15).

Defendant expends little effort arguing against Plaintiffs' satisfaction of this Rule 23 Factor. Instead, Defendant properly saves the bulk of its arguments against certification for the Rule 23(b)(3) factor, predominance, where they are better addressed. Based on Plaintiffs' ability to demonstrate that some

common issues of fact and law exist, the Court finds that the existence "here of some common factual questions the class-wide adjudication of which would advance the litigation . . . will suffice to satisfy the commonality requirement of Rule 23(a)." *Cochran v. OXY Vinyls, LP*, 2008 U.S. Dist. LEXIS 67389, 2008 WL 4146383, at \*8 (W.D. Ky. Sept. 2, 2008). Thus, the Court finds that Plaintiffs have satisfied the commonality requirement.

### c. Typicality

Third, a class may be certified only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3), Fed. R. Civ. P. "[T]ypicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large." *Prado-Steiman*, 221 F.3d at 1279. "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001). Typicality is satisfied when a plaintiff's claim "arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Sala v. Nat'l R.R. Passenger Corp.*, 120 F.R.D. 494, 497(E.D.Pa. 1988).

Typicality may be presumed when the plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members." *Snow*, 2003 U.S. Dist. LEXIS 27295, 2006 WL 1008002, at \*5 (citing to *In re American Medical Systems*, 75 F.3d 1069, 1082 (6th Cir. 1996) (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.13, at 3-76 (3d ed. 1992)).

Defendant first claims that Plaintiffs cannot satisfy this Rule 23 Factor because the Named Plaintiffs lack standing. Defendant also claims that the Named Plaintiffs differ from the putative class in a myriad of ways. Some examples cited are the fact that all but one of the Named Plaintiffs have no plans to sell their properties; none own commercial property; and only one uses groundwater. Finally, Defendant claims that the Named Plaintiffs are also subject to unique defenses.

The Court has already found that Plaintiffs have standing to pursue this litigation. The Court has also determined previously that Plaintiffs' claims arise from the same course of conduct, Defendant's contamination of groundwater, and are based on the same legal theories. Thus, it is appropriate under these circumstances to conclude that Plaintiffs' claims are typical because their claims arise from the same event and course of conduct.

Even if the Court determined that this conclusion was not warranted, the evidence adduced to date makes it very clear that all proposed class members, including the Named Plaintiffs, will be relying on the same underlying legal theories - nuisance, negligence and strict liability to address the same harm - contamination from the Facility. Although the relief requested may ultimately differ due to different property types and differing rates of diminution in value, the nature of the relief sought is the same for the Named Plaintiffs.

In addition to the evidence cited above, the Court finds the case of *Brockman v. Barton Brands, Ltd.*, 2007 U.S. Dist. LEXIS 86732, 2007 WL 4162920 (W.D. Ky. Nov. 21, 2007) instructive on this

point, although more for what it did not find than for what it held. In Brockman, the Court was unable to find that the Named Plaintiffs were "typical" of the class they purported to represent because the "factual and legal issues of Defendant's liability as to each proposed class member likely could 'differ dramatically from one plaintiff to the next.'" Brockman, 2007 U.S. Dist. LEXIS 86732, 2007 WL 4162920, at \*6 (citing to Daigle v. Shell Oil Corp., 133 F.R.D. 600, 600 (D. Colo. 1990)). The Brockman court contrasted its determination with that of the court in Boggs v. Divested Atomic Corp., 141 F.R.D. 58 (S.D. Ohio 1991). In Boggs the court noted that "[t]he harm suffered by the Named Plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type." Brockman, 2007 U.S. Dist. LEXIS 86732, 2007 WL 4162920, at \* 6, n.5 (citing to Boggs, 141 F.R.D. at 65). The situation here is more akin to Boggs than to that of Brockman.

Defendant's activities at the Facility, which resulted in a contamination leak, have caused harm to the proposed class of property owners, whose various types of property sit above a contamination plume. The Court finds that "typicality concerns are understandably reduced where a court can be assured that whatever trespass or nuisance has occurred, if any, was the result of the defendant's activities." Brockman, 2007 U.S. Dist. LEXIS 86732, 2007 WL 4162920, at \*6, n.5 (citing to Olden v. LaFarge Corp., 383 F.3d 495, 508-509, n.5 (6th Cir. 2004)). After due consideration, the Court finds that Plaintiffs have met the typicality requirement.

#### d. Adequacy

Fourth, a class may be certified only if "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(3), Fed. R. Civ. P. "The adequacy-of-representation requirement encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1323 (11th Cir. 2008) (citation and internal quotations omitted).

To satisfy Rule 23(a)'s adequacy requirement, the Named Plaintiffs must be sufficiently familiar with their case to exercise control over class counsel and protect the interests of absent class members. See, e.g., Scott v. NY City Dist. Council of Carpenters Pension Plan, 224 F.R.D. 353, 356 (S.D.N.Y. 2004); Levine v. Berg, 79 F.R.D. 95, 98 (S.D.N.Y. 1978).

Defendant argues that the Named Plaintiffs are not adequate because they are facially unfamiliar with even rudimentary aspects of this case. Defendant cited to cases supporting its contention, such as Spinelli v. Capital One Bank, No. 8:08-cv-132-T-33EAJ, 2009 U.S. Dist. LEXIS 20214, 2009 WL 700705, at \*8 (M.D. Fla. March 14, 2009) (Covington, J.); Scott, 224 F.R.D. at 356; and, Levine, 79 F.R.D. at 98. At the Hearing and in the Response, Defendant provided the Court a veritable laundry list of the Named Plaintiffs' supposed shortcomings. 12

Some examples are: . Mr. Abel admitted that he is "out of [his] league" in seeking to be appointed as a class representative (Abel Dep. Tr. 276-77) and that he only "breezed through the complaint." (Abel Dep. Tr. 192-93);

. Ms. Sher did not remember whether she had reviewed the Complaint before it was filed. (Sher Dep. Tr. 232);

. Ms. Key testified that she was unaware that the proposed class definition includes commercial property owners (Key Dep. Tr. 212) or whether the proposed class area includes churches. (Key Dep. Tr. 217);

. Mr. Giocondo mistakenly believed that Admiral Farragut Academy was too far away to be within the proposed class area in this case, although it is in the area (Giocondo Dep. Tr. 353) and he further testified that he was "really not sure" he could represent commercial property owners. (Giocondo Dep. Tr. 359); and,

. Ms. Caleca mistakenly testified that she seeks to represent those who bought their property after the case was filed (Caleca Dep. Tr. 435-36) and that she would still claim to be harmed if chemical exceedences were 20 miles away. (Caleca Dep. Tr. 421).

The Court finds that the Named Plaintiffs will adequately prosecute this action because they are sufficiently familiar with their case to exercise control over class counsel and protect the interests of absent class members. The Court bases its finding on the live testimony presented at the Hearing by the two Named Plaintiffs, Mr. Abel and Ms. Caleca. The Court had the opportunity to observe these two witnesses and examine their demeanor during their testimony. At the Hearing, Mr. Abel and Ms. Caleca demonstrated through their testimony that they each understand the complexities of this case (within reason), have no conflicts with the proposed class at large, and are willing and able to take an active role in the litigation. Mr. Giocondo did the same through his deposition testimony.

Mr. Abel and Ms. Caleca's live testimony and Mr. Giocondo's written deposition designations are sufficient to persuade the Court that they are adequate class representatives. The deficiency examples Defendant provided above have been remedied or were facts that were not significant to the Court's consideration of the Class Certification Motion.

### 3. Rule 23(b)

In addition to satisfying the requirements in Rule 23(a), plaintiffs seeking to certify a class must satisfy the requirements of at least one subsection of Rule 23(b). Vega, 564 F.3d at 1265. Plaintiffs seek certification under Rule 23(b)(2) and 23(b)(3).

#### a. 23(b)(2)

A class action can only be maintained under Rule 23(b)(2) if the relief sought is primarily injunctive or declaratory and the demand for monetary relief does not predominate. Murray, 244 F.3d at 812. Here, Plaintiffs seek both injunctive and monetary relief.

Defendant argues that Plaintiffs cannot satisfy this Rule 23 Factor because this case is predominantly one for money damages. (Pls. Mem. In Opp'n to Def.'s Mot. to Stay, Doc. 42; Order Denying Defs.' Mot. to Stay, Doc. 47; see also Compl. PP 62, 68, 79, 84, 90 and 105). Defendant further claims that

injunctive relief would be inappropriate because the Facility is no longer in active use and Defendant is working with the FDEP and in conjunction with ARCADIS to remediate historical contamination. See, e.g., *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1403-04 (W.D. Mo. 1994) (denying certification of Rule 23(b)(2) injunctive class because defendant had previously discontinued use of contaminant and the injunction sought was "clearly incidental to the monetary relief requested.").

Plaintiffs claim that given the broad remedial scope and thrust of the relief sought, their requests for compensatory and punitive damages do not preclude certification. In addition, Plaintiffs ask the Court to disregard as premature Defendant's argument that injunctive relief is inappropriate because of Defendant's current remediation efforts. Plaintiffs claim that this argument is merit based. See *Bentley v. Honeywell*, 223 F.R.D. 471, 486 (S.D. Ohio 2004).

The Court acknowledges the power injunctive relief can provide in contamination cases. However, even acknowledging the power of and, perhaps, necessity for, injunctive relief for the proposed class in such a case does not mean that injunctive relief is Plaintiffs' primary concern. This Court has determined previously, albeit in a different context, that this is primarily a damages case. Plaintiffs have not provided the Court with persuasive argument or evidence to the contrary.

In his capacity as the District Judge originally assigned to this case, Richard J. Lazzara entered an Order that denied Defendant's Motion to Stay (the "Stay Order," Doc. 47). In the Stay Order, Judge Lazzara wrote, "the instant case seeks damages for loss of use and decrease in property value caused by the contaminants, not the general enforcement of the state's pollution laws in the form of an adjudication of a public nuisance." (Doc. 47 at p. 8 (emphasis added)). The fact remains that since this case was filed, it has been predominantly about money damages and injunctive relief has always been incidental to that. Thus, the Court will deny Plaintiffs' request for certification under this Rule 23 Factor. 13

#### b. 23(b)(3)

Fed R. Civ. P. 23(b)(3) requires plaintiffs to prove both that common issues predominate over individualized issues and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. See *Vega*, 564 F.3d at 1265 (citations omitted).

#### i. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). "Common issues of fact and law predominate if they ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay*, 382 F.3d at 1255 (alteration in original) (citation and internal quotation marks omitted). "[I]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions." *Busby*, 513 F.3d at 1324 (citation and internal quotation marks omitted); see also *In re Theragenics Corp. Securities Litig.*, 205 F.R.D. 687, 697 (N.D. Ga. 2002) (same).

"The predominance inquiry focuses on the legal or factual questions that qualify each class member's case as a genuine controversy, and is far more demanding than Rule 23(a)'s commonality requirement. *Rutstein*, 211 F.3d at 1233 (citation and internal quotation marks omitted); *Vega*, 564 F.3d at 1270 (same); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006, n.12 (11th Cir. 1997).

Courts have found that claims based on a "common cause or disaster" are likely subjects for class certification. *Amchem*, 521 U.S. at 594. However, the Advisory Committee's note on this factor cautions that "[a] mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." See also *Henry v. St. Croix Alumina, LLC*, 2008 U.S. Dist. LEXIS 43755, 2008 WL 2329223 at \*3 (D.V.I. June 3, 2008) ("[C]lass certification is ordinarily 'inappropriate in mass tort claims . . . which present questions of individualized issues of liability' because such cases are unlikely to satisfy the requirements of Rule 23(b)(3).") (quoting *In re LifeUSA Holding Inc.*, 242 F.3d 136, 145 (3d Cir. 2001)).

Plaintiffs acknowledge that individualized proof will be necessary for certain aspects of their claims. However, Plaintiffs argue that common issues regarding Defendant's course of conduct and its legal effect on Plaintiffs predominate over individual issues.

Here Plaintiffs ask the Court to identify the common liability issues that can be resolved on a class wide basis. In other words, Plaintiffs would like the Court's predominant analysis to focus on the common nucleus of operative facts applicable to all proposed class members. The common issues cited include those pertaining to the elements of three of the claims set forth in the Amended Complaint (Doc. 61). (Doc. 138, pp. 3-11, setting forth the types of evidence and proof common to the proposed class as a whole that will be used to show trespass, negligence, and strict liability).

Plaintiffs submit that the overriding question of whether Defendant contaminated the proposed class area is central to the Court's inquiry. Plaintiffs believe that this central and uniform question is predominate to any perceived differences in the proposed class relating to damages. Finally, Plaintiffs claim that causation will not necessitate an individualized inquiry for each and every potential plaintiff.

In support of this proposition, Plaintiffs rely on cases such as *Bates v. Tenco Svcs., Inc.*, 132 F.R.D. 160 (D.S.C. 1990), finding that Rule 23(b)(3)'s predominance requirement is easily met in groundwater contamination cases, particularly where there is one source of contamination. Plaintiffs also submit that numerous courts have held that variation in contaminant levels and water distribution patterns do not defeat certification. See e.g., *Yslava v. Hughes Aircraft Co.*, 845 F.Supp., 705, 713 (D. Ariz. 1993); *Bentley*, 223 F.R.D. at 487 (individual questions did not defeat class certification in TCE groundwater case and stating "[t]he Court concurs in the sound reasoning of those other courts, which had cases before them very similar to this one."). Plaintiffs remind the Court however, that "the presence of individualized damages issues does not prevent a finding that the common issues in [a] case predominate." *Allapattah*, 333 F.3d at 1261.

By way of providing the following examples, Plaintiffs recall for the Court some of the common operative facts relevant to this case: . The Named Plaintiffs have alleged identical legal theories against the Defendant in this action;

- . The Named Plaintiffs' claims do not differ from the claims of the proposed class;
- . The legal theories upon which the Named Plaintiffs' claims are based do not differ from those upon which the claims of other members will be based;
- . The Named Plaintiffs seek the same forms of relief on behalf of themselves and the proposed class;
- . The Named Plaintiffs' claims arise from the same course of conduct and set of circumstances, the release of contamination from the Facility;
- . The common question of whether Defendant contaminated the proposed class area is shared by all proposed class members;
- . Each proposed class member will rely on the same evidence to prove Defendant's knowledge of the dangers posed by the chemicals generated, stored and disposed of at the Facility;
- . Each proposed class member will rely upon the same evidence to show the negligent conduct of Defendant;
- . Each and every Named Plaintiff owns property within the impacted zone as defined by Expert #2;
- . All property owners who own property within the proposed class area are identifiable through publicly available computerized property records;
- . Each and every property in the proposed class area has been damaged by the environmental contamination emanating from the Facility; and
- . The amount of damages can be determined on a class-wide basis with a mass appraisal methodology as discussed by Expert #3. (Doc. 120, Ex. 120-4).

As set forth above, these factual and legal issues are common to the potential class members. Furthermore, those factual and legal issues that focus on the activities of the Defendant rather than the activities of the plaintiffs are common to all class members.

In stark contrast to Plaintiffs' contentions, Defendant argues that significant individual inquiries are necessary to resolve each potential plaintiff's claims and there is neither a barrier to individual actions nor a credible threat to judicial resources at issue here. Defendant submits that showing contamination, demonstrating injury to property values or the use and enjoyment of property, and the causation for any injury, as well as the defenses it raised, all require individual proof. In support of this generalization, Defendant sets forth certain facts it believes demonstrate that class certification is not warranted under Rule 23(b)(3). 14

In support of its position, Defendant cites to cases such as *Martin v. Shell Oil Co.*, 198 F.R.D. 580 (D. Conn. 2000) (denying class certification in groundwater contamination case because varying contamination test results at individual properties indicated that individual issues predominated); *Thomas*, 846 F. Supp. at 1401-06 (denying class certification in groundwater contamination case because not all properties were equally affected); *Henry*, 2008 U.S. Dist. LEXIS 43755, 2008 WL 2329223 at \*6 (denying class certification because "highly individualized" issues, including the degree of damage suffered by each plaintiff's property, if any, and the contaminant present on each plaintiff's property, if any, presented "highly individualized" issues which predominated over common issues); *Fisher v. CIBA Specialty Chems. Corp.*, 238 F.R.D. 273, 304-05 (S.D. Ala. 2006) (emphasizing that common issues must not only exist but also predominate, and concluding that proof of background facts, such as the defendant's alleged history of producing and disposing of the contaminant, as well as the chemical properties, hazards and toxicity of the contaminants, are insufficient to establish commonality); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 677 (S.D. Ala. 2005) (same); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 598 (M.D. Pa. 1997) (same).

Finally, Defendant also baldly informs the Court that it "would become the first federal court in the country to certify an environmental case predicated on such deficient expert testimony. In sum, [P]laintiffs have not begun to satisfy their burden of proof under Rule 23, and certification on this record would be unprecedented." (Doc. 137 at p. 7).

Defendant's expostulation aside, the Court finds that class certification under Rule 23(b)(3) (and thus, under the Rule 23 Factors) is warranted. While honing its arguments against Plaintiffs' experts and focusing on proving that individualized damages would predominate, Defendant has lost sight of the class wide commonalities and unique circumstances present in this litigation that allow Plaintiffs to demonstrate compliance with Rule 23(b)(3)'s predominance requirement.

Defendant spent a significant amount of time during the Hearing attempting to prove that Plaintiffs' experts analyses and opinions are too factually and scientifically deficient to support class certification. As a threshold matter, the Court finds that it is not necessary at this stage of the litigation to declare a proverbial winner in the parties' war of the battling experts or dueling statistics and chemical concentrations. See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir.1999) (holding that "statistical dueling" between parties' experts on fact issues was "not relevant to the certification determination"). This type of determination would require the Court to weigh the evidence presented and engage in a Daubert style critique of the proffered experts qualifications, which would be inappropriate.

At this stage of the litigation, therefore, an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in *Daubert* would be inappropriate, because such an analysis delves too far into the merits of Plaintiffs' case. See, e.g., *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 25-26 (N.D. Ga.1997) (agreeing that expert's analysis was subject to *Daubert* test to determine admissibility in court proceedings, but finding *Daubert* inquiry unnecessary at class certification stage).

The Court has considered the opinions of Plaintiffs' experts, Expert #2 and Expert #3. The

Court is cognizant of Defendant's well-documented objections to these opinions. However, Expert #2's scholarly credentials are impeccable. Through the Property Map, Expert #2 established the geographic contours of the groundwater plume and using peer-reviewed science and relevant data he defined a zone of impact and identified the scope of the class. Expert #3's scholarly credentials are also sound. Expert #3 provided Plaintiffs with a viable model for calculating property damages on a class-wide basis. The Court finds therefore, that individual issues do not predominate. And, even if the Court found Defendant's arguments about the necessity for significant individualized inquiry regarding the proposed plaintiffs' damages, the rule of law in the Eleventh Circuit is that "the presence of individualized damages issues does not prevent a finding that the common issues in [a] case predominate." *Allapattah*, 333 F.3d at 1261.

Some of the unique facts the Court referenced above contributed to the Court's conclusion about Plaintiffs' experts' opinions. First, there is only one defendant in this case, and it has acknowledged that 1) the COCs migrated from its Facility and 2) that the presence of the COCs at the Facility caused it to suffer a diminution in its property value. In addition, Defendant has already acknowledged that it is responsible for the cleanup of the Facility and some properties surrounding it. This fact alone mitigates many of the causation concerns other courts used to deny class certification under Rule 23(b)(3).

Second, the COCs are identified and known to cause harm. Third, both parties' groundwater experts, as well as the FDEP and Defendant's environmental consultant, ARCADIS have acknowledged that there is a groundwater plume filled with COCs lurking under the Azalea Neighborhood. There is, and should be, a spirited debate about the contours and characteristics of the groundwater plume and the geographic size of the proposed class. It is elementary that Plaintiffs would prefer a larger geographic footprint for the proposed class, while Defendant would prefer a smaller one.

Finally, and of particular note when considering Expert#3's opinion, the Pinellas County Property Appraiser already uses a mass-appraisal analysis to determine property values in St. Petersburg, Florida - where the Facility and the Azalea Neighborhood are located. In addition, and as discussed above, the Pinellas County Appraiser has already performed an analysis of the "Azalea Area" which determined that the properties have suffered a diminution in value based on the presence of the contaminated plume.

## ii. Superiority

The superiority prong of Rule 23(b)(3) focuses on "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Klay*, 382 F.3d at 1269 (citations omitted). "In many respects, the predominance analysis . . . has a tremendous impact on the superiority analysis for the simple reason that, the more common issues predominate over individualized issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." *Id.* (citations omitted). The superiority inquiry includes attention to the "likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) classes are well suited for certification because if each "plaintiffs' claims were tried separately, the amount of repetition would be manifestly unjustified." *Boggs v. Divested Atomic Corp.*, 141 F.R.D. at 67.

"Rule 23(b)(3) provides what the Advisory Committee Notes describe as a non-exhaustive list of four factors that are pertinent to the finding of superiority." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009). These factors include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Here, based on testimony from three of the Named Plaintiffs "[t]here is no reason to believe that the putative class members in this case have any particular interest in controlling their own litigation, so the first factor does not counsel against class certification." *Klay*, 382 F.3d at 1269.

On December 1, 2008, one property owner and potential class member filed a separate lawsuit in the Middle District of Florida. See *Galligan v. Raytheon Co.*, No. 8:08-cv-2427-T-33TGW (M.D. Fla. 2008). There are 1000 potential plaintiffs in this class action. One lawsuit does not mean that this second superiority factor now weighs in favor of Defendant.

The third factor, desirability of concentrating the litigation in a particular forum, involves three considerations: (1) economies of time, effort, and expense; (2) aggregation of a large number of claims make it economical to bring suit; and (3) preliminary matters already handled in this forum. *Klay*, 382 F.3d at 1270-71. This factor weighs in favor of Plaintiffs because the preliminary matters in this suit such as a Motion to Dismiss (Doc. 22) and the Motion to Stay (Doc. 20) have already been addressed in this forum. In addition, through their Post-Hearing Memorandum, Plaintiffs effectively demonstrate the high costs facing any individual plaintiff who wishes to pursue this litigation. Such exorbitant costs would preclude or effectively bar most individual plaintiffs from coming to court. (Doc. 138, pp. 20-26).

Fourth, and given the previous finding that common issues predominate over any individualized issues, the Court "would be hard pressed to conclude that a class action is less manageable than individual actions." *Klay*, at 1273. Indeed, any management problems stemming from class certification would certainly pale in comparison to the problems the Court would face if it had to manage hundreds of separate lawsuits. The Court is convinced that altogether, Plaintiffs have shown that "it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly." *Id.*

Finally, Defendant claims that Plaintiffs lack of a trial plan for this case is clear evidence the Court will have difficulty managing this class action, and by implication, that a class action suit is not the superior means of proceeding here. (Sept. 23, 2009, Hr'g Tr. 324:21-326:22). Essentially, Defendant argues that Plaintiffs did not present a trial plan because they have no idea how they can or will be able to present at trial the substantial amount of factual and expert evidence necessary to prove their

case. (Sept. 23, 2009, Hr'g Tr. 325:8-13). At the Hearing, Defendant's counsel argued that the Eleventh Circuit's recent opinion in Vega supports its claim. (Sept. 23, 2009, Hr'g Tr. 325:14-327:6).

In Vega, the Eleventh Circuit vacated an Order in which the district judge granted Plaintiffs' motion for class certification and remanded it with the instruction that the plaintiff's claims proceed individually. Vega, 564 F.3d at 1256. Here, unlike Vega, trial is not imminent. Plaintiffs' failure to appear at the Hearing with a detailed trial plan, under the timing and circumstances of this case, is not fatal. The Court appreciates and understands Defendant's argument on this point. However, the argument is not strong enough for Defendant to prevail under this Rule 23 Factor.

### VIII. Conclusion

The Court finds that after considering the evidence adduced to date, the unique facts of this mass tort case makes certification appropriate at this juncture. However, the Court notes that Class certification is not an immutable decision. If at any time it appears that a plaintiff fails to meet the requirements of Rule 23, the certification may be withdrawn. AMJUR. FEDCOURTS § 1585; In re Carbon Dioxide Antitrust Litig., 149 F.R.D. 229, 232 (M.D. Fla. 1993).

Accordingly, and upon consideration of the evidentiary record developed to date, it is ORDERED, ADJUDGED and DECREED that:

The Class Certification Motion (Doc. 83) is GRANTED.

DONE and ORDERED in Chambers in Tampa, Florida on this 30th day of September 2009.

/s/ Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON

UNITED STATES DISTRICT JUDGE

1 For a district court to certify a class action, the plaintiffs must have standing, and the putative class must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004). Plaintiffs sought certification under the requirements of Rule 23(a) and under Rule 23(b)(2) and 23(b)(3). The Court grants the Class Certification Motion pursuant to Rule 23(a) and 23(b)(3).

2 The Court references stipulated facts with the designation, "Doc. 120, Stipulated;" Plaintiffs' Exhibits shall be designated as "Exhibit Name, PX, #" and Defendant's Exhibits shall be designated as "Exhibit Name, DX, #."

3 In addition to the industrial activities referenced above, past industrial activities undertaken at the Facility have included hand and mass soldering, coating, painting, chrome conversion, electroplating, metal finishing, photo-imaging, environmental product testing, photographic,

machining, electronics engineering, and laboratory functions. (Amend. Compl. at p. 2; Doc. 120, Stipulated).

6 The Amended Complaint contained a medical monitoring claim, which Plaintiffs voluntarily dismissed (Doc. 77). Prior to the Hearing, the parties filed a Joint Stipulation Entry of Proposed Order Concerning Evidence of Potential Existence of a Vapor Intrusion Pathway (the "Joint Stipulation," Doc. 126). In the Joint Stipulation, Plaintiffs agreed that the existence of a vapor intrusion pathway would not be pursued on a class-wide basis and that Plaintiffs would not introduce evidence of the alleged existence of a vapor intrusion to prove claims of trespass, private nuisance, unjust enrichment or strict liability. (Doc. 126-2). The Court orally approved the Joint Stipulation at the Hearing.

7 This synopsis of Expert #4's testimony is derived from his expert report, Expert #4 Rep., DX 255; a Slide Synopsis of his opinions, DX 299; and, his testimony at the Hearing.

8 This synopsis of Expert#3's opinions is derived from his written expert report, Expert #3 Rep., Amend. Compl. Ex. G and testimony provided at the Hearing.

9 This synopsis of Expert #1's opinions is derived from the summary section of his expert report, Expert #1 Rep., DX 254, and the Presentation Slides, DX 298 and testimony he provided at the Hearing.

10 Defendant filed a Motion in Limine (Doc. 128) seeking to preclude Plaintiffs from referencing the deposition testimony of Mr. Jack Radgowski and Mr. George Rhynedance at the Hearing. The Court issued an oral Order denying the Motion in Limine.

11 Differing test results on properties within the proposed class area, including "non-detects," does not defeat typicality because this type of argument/evidence is better addressed under Rule 23(b)(3)'s predominance inquiry.

12 Defendant did not argue that Plaintiffs' counsel was deficient or unable to adequately prosecute this action.

13 Based on the Court's determination above, it is not necessary (or wise) for the Court to entertain Defendant's argument that injunctive relief is improper because Defendant is already working with FDEP to remediate the toxic groundwater contamination plume efficacy.

14 Defendant has raised many of these facts before under the relevant Rule 23 Factor. These facts are that: The proposed class area contains large numbers of properties with wells that have no contamination. (Expert #2 Dep. Tr. 302 reading, "[T]here are at least dozens if not hundreds of wells that have no contamination at all within the" proposed class area.). The proposed class area includes properties where testing has shown that no relevant chemicals were present in the groundwater. (Expert #4 Rep. 23). The methodology used to draw the Plaintiffs' proposed class area is inconsistent with applicable professional standards. (Expert #4 Rep. 31; see also Expert #4 Rep. 22-23). The Property Map proposed by Expert #2, includes properties where the concentrations were too low to be

accurately measured or quantified, as well as properties where concentration levels were below the levels required for remediation. (Expert #4 Rep. 21-22, 31). Expert #2 added a "buffer zone" that extends roughly 200 to 500 feet beyond the farthest point at which any test has ever indicated the slightest bit of any chemical in drawing Plaintiffs' proposed class area. (Expert #2 Dep. Tr. 252-57, 545, 552-54, 578-80; Expert #4 Rep. 4). Expert #2's buffer zone includes valuable waterfront properties (and other properties) that have been proven entirely free from contamination. (See Ex. D to Class Cert. Mot., Fig. 7). Expert #2's use of a buffer zone is not a methodology recommended in peer-reviewed scientific literature. (Expert #2 Dep. Tr. 252-57, 545, 552-54, 578-80; Expert #4 Rep. 4). Expert #2 approximated the proposed class area without using a defined, consistent methodology. (Expert #2 Dep. Tr. 544-46, 563). Expert #2 did not do a consistent, thorough evaluation of whether sources other than Defendant contributed to groundwater contamination at the site. (Expert #4 Rep. 25-28). A portion of Plaintiffs' proposed class area is based on a single test result generated by lab error. (Expert #4 Rep. 27-28). Plaintiffs' proposed class area cannot be independently replicated. (Expert #2 Dep. Tr. 544-46, 563). Plaintiffs have not shown that exceedances of any chemicals from the Facility are present on the property of any named Plaintiff. (Sher Dep. Tr. 133-34; Abel Dep. Tr. 21, 23-24, 26-27; Caleca Dep. Tr. 252-56; Giocondo Dep. Tr. 190-92; Key Dep. Ex. 11; Expert #2 Dep. Tr. 486-92; MacIntosh Dep. Tr. 570-75; Compl. PP 14-21).