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THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

VIRDIE ALLEN, *et al.*,

Plaintiffs,

v. Putnam County Civil Action No. 04-C-465

MONSANTO COMPANY, *et al.*,

Defendants

CLASS CERTIFICATION ORDER

Pending before the Court is Plaintiffs' *Amended Motion for Class Certification* filed on or about August 24, 2007. The Court is in receipt of Plaintiffs' *Memorandum of Law in Support of Plaintiffs' Motion for Class Certification* filed on or about October 1, 2007. The Court also is in receipt of Defendants' *Memorandum in Opposition to Plaintiffs' Motion for Class Certification* filed on or about October 15, 2007, and Defendants' *Supplemental Table of Authorities* related thereto, filed on or about October 16, 2007. Furthermore, the Court is in receipt of Plaintiffs' *Reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification*, filed on or about October 22, 2007.

On October 29-31, 2007, the Court held an evidentiary hearing on the issue of whether this matter should proceed as a class action. Prior to the hearing, the parties submitted briefs, as noted above, and evidence in support of their respective positions on class certification. At the hearing the parties presented testimony, additional evidence, and argument of the issues related to class certification. The parties submitted a Joint Exhibit List designating those materials the parties believed were pertinent to the Court's ruling on certification issues. Following the

hearing, the parties submitted separate proposed findings of fact and conclusions of law to the Court.

The Court has thoroughly considered the entire record in this matter, as well as the pertinent legal authority, and **GRANTS** Plaintiffs' *Amended Motion for Class Certification* for the reasons more fully set forth herein.

I. Overview of Certification Order

A class trial of the instant action will permit a number of issues to be addressed in one action. These issues include liability, medical monitoring, remediation and damages, including property and punitive damages. The Court recognizes that some issues may require individual resolution, which is not an uncommon feature of class actions. Those issues notwithstanding, the Court finds that class treatment, especially when considering the overwhelming predominance of common liability issues, will provide the most efficient and fair procedure to handle the Plaintiffs' claims.

A. Class Definition.

Pursuant to this finding, this Court adopts the class definition as proposed in Plaintiffs' *Amended Motion for Class Certification* as modified herein:

1. **Property Class.** Current owners of real property in whole or in part within the Class Affected Area shown in Exhibit 1.

2. **Medical Monitoring Class.** Those persons who have resided, worked full time, or attended school full time in the Class Affected Area during the period 1948 to the present.[1]

[1] As more fully set forth below, Plaintiffs' toxicologist, William Sawyer, Ph.D., has preliminarily identified the duration of time within the Class Affected Area that persons would need to reside, work, or attend school in order to expose them to significant risks of dioxin-related cancers. Dr. Sawyer has initially determined, based on inhalation exposure, that persons residing, working, or attending school

3. **General Provisions.** Excluded from the definition of the class are: (1) the Defendants and any entity in which any Defendant has a controlling interest, any current employees, officers, or directors of any Defendant; (2) all attorneys and their staffs that are of record in this litigation; and (3) the presiding judicial officer and his staff. To the extent Plaintiffs' allegations seek monetary damages, they only relate to property owners. To the extent Plaintiffs' allegations seek medical monitoring, they relate to all past and present residents, whether or not they are private real property owners. This action does not seek damages for personal injuries.

The Court notes that it retains authority under Rule 23(c)(1) to alter and/or amend this Order prior to any trial or any decision on the merits of the case.

B. Certification Categories.

Plaintiffs seek the following class-wide relief: (1) the establishment of a Court-supervised medical monitoring fund; (2) the establishment of a Court-supervised property remediation fund, as well as damages for diminution of property value; and (3) punitive damages. Like liability, these categories of relief will benefit from class treatment as both equitable and monetary classes. While the establishment of a Court-supervised medical monitoring fund is generally considered an equitable remedy, West Virginia courts have certified medical monitoring under Rules 23(b)(1)(A), 23(b)(2) and 23(b)(3). Plaintiffs' property claims

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within the Class Affected area for a minimum of 10 years during period 1948-1970 would be at significant risk (excepting young children, who would be at a significant risk after only 6 years of residency in the Class Affected Area during this period). Dr. Sawyer has indicated he can further refine the "residency requirements" for the class. The Court would expect that Plaintiffs will present to the Court more comprehensive "residency requirements" after the parties have had the opportunity to litigate the merits of Plaintiffs' medical monitoring claims.

likewise seek equitable and monetary relief and, like medical monitoring, are appropriate for class treatment under Rules 23(b)(1)(A), 23(b)(2), and 23(b)(3).

1. **Medical Monitoring.** The medical monitoring subclass is certified under Rule 23(b)(1)(A) because separate adjudications would impair the ability to pursue a single, uniform monitoring program. The medical monitoring subclass is also certified under Rule 23(b)(2) because of the equitable and/or injunctive nature of the relief. Because common issues predominate over any individual questions, medical monitoring is also certified under Rule 23(b)(3).

2. **Property Damage.** Plaintiffs' property claims are certified under Rule 23(b)(1)(A), 23(b)(2), and 23(b)(3). Plaintiffs' common claims for property remediation are equitable and/or injunctive in nature making certification appropriate under Rule 23(b)(1)(A) and under Rule 23(b)(2). Common administration of any remediation program would likely increase cost savings and efficiency in clean-up measures. Plaintiffs' common claims for property damage also involve issues that predominate over individual issues making certification appropriate under Rule 23(b)(3). Plaintiffs also seek monetary relief for damages to their properties and class pursuit of such relief is appropriate under Rule 23(b)(3).

3. **Punitive Damages.** Plaintiffs' claims for punitive damages are predicated on alleged acts or omissions that are common to all class members. With respect to punitive damages, common issues predominate over any individual issues and are therefore appropriately certified under Rule 23(b)(3).

II. Findings of Fact

The Court makes the following Findings of Fact for the purpose of resolving issues relating to Class Certification. It is not the intent of the Court to usurp the function of the jury in resolving the ultimate merits of Plaintiffs' underlying claims. Whether the plaintiffs can succeed on the merits of their claims is left to be answered on a later date. For the purpose of class certification, the court has assumed that the substantive allegations of Plaintiffs' Complaint are true.

1. From approximately 1948 through 1969, the former Monsanto Company (hereinafter "Old Monsanto") manufactured the agricultural herbicide 2,4,5-trichlorophenoxyacetic acid (hereinafter "2,,4,5-T") at its chemical plant located in Nitro, West Virginia. The 2,4,5-T manufactured by Old Monsanto at its Nitro plant became a principal component in the defoliant known as "Agent Orange" that was utilized by the military in the Viet Nam War.

3. The process used by Old Monsanto to manufacture the herbicide 2,4,5-T resulted in the formation of 2,3,7,8-tetrachlorodibenzoparadioxin (hereinafter "2,3,7,8-TCDD") a highly toxic chemical contaminant.

4. On or about December 17, 2004, the Plaintiffs filed this action in the Circuit Court of Putnam County.

5. In their Class Action Complaint, Plaintiffs allege that their homes, their property, and their persons have been contaminated with 2,3,7,8-TCDD and other related dioxins that ultimately have as their source Old Monsanto's 2,4,5-T manufacturing process. Plaintiffs allege that waste from the 2,4,5-T manufacturing contained toxic dioxin. Plaintiffs allege that the

practices used by Old Monsanto, and later by the Defendants, to dispose of or manage 2,4,5-T waste have resulted in widespread dioxin contamination of Nitro and the surrounding area.

6. In their Class Action Complaint, the Plaintiffs allege that the Defendants' conduct that caused the widespread dioxin contamination of Nitro and the surrounding area is actionable based on common law concepts of negligence, nuisance, and strict liability. The Plaintiffs seek relief for themselves and others in Nitro and the surrounding area from the Defendants in the form of funds for medical monitoring, property remediation, and further environmental testing, the recovery of damages for diminished property value, and punitive damages. Notably, the Plaintiffs do not assert individual claims for personal injuries in their Class Action Complaint.

7. Both parties have had the opportunity to engage in a significant amount of discovery to-date, including the depositions of the named Plaintiffs, other residents of the Nitro area, Defendants' corporate representatives, and expert witnesses retained by the Parties.

8. On or about August 24, 2007, Plaintiffs filed their *Amended Motion for Class Certification.* In their *Amended Motion*, Plaintiffs seek to represent those "persons who have had their person and/or real property contaminated with dioxins and/or dioxin-like compounds" within a specific geographic area surrounding Nitro ("the Class Affected Area"). The proposed Class Affected Area is shown on the map attached to this Order as Exhibit 1.

9. More specifically, in their ***Amended Motion***, Plaintiffs seek class certification under Rule 23 for two subclasses: a "Property Owners Class" and a "Medical Monitoring Class." Plaintiffs define the Property Owners Class as persons presently owning real property in the Class Affected Area shown in Exhibit 1. Plaintiffs define the Medical Monitoring Class as those who have either resided, have been employed full-time, or who have attended school full-time in the Class Affected Area shown in Exhibit 1, during the period 1949 to the present.

10. The Class Affected Area shown in Exhibit 1 encompasses a large geographic area in both Kanawha and Putnam counties. Within the Class Affected Area are towns such as Nitro, Rock Branch, Poca, and portions of St. Albans and Cross Lanes. Given the size of the Class Affected Area and the number of towns within it, Plaintiffs' counsel has estimated that the putative class would consist of thousands – or even tens of thousands – of persons. The Court believes this estimate is reasonable. Defendants do not dispute this estimate.

11. Plaintiffs have submitted substantial evidence, in the form of historical documents, testimony of former employees of Old Monsanto, and reports and testimony from expert witnesses, in support of their allegations that the Class Affected Area has been significantly contaminated with dioxins, and that such dioxins were originally created as a result of practices used to dispose of waste from Old Monsanto's 2,4,5-T manufacturing process.

12. Plaintiffs submitted the report and testimony of Robert Pape, P.E., an expert engineer. Mr. Pape reviewed Old Monsanto's manufacturing processes for its herbicide 2,4,5-T. (Hearing Exhibit 159, Pape Depo., at Depo. Exhibit 2.) Mr. Pape calculated that the waste generated by Old Monsanto's manufacture of 2,4,5-T at its Nitro Plant from 1948-1969 would have contained more than 6,000 pounds of the toxic contaminant 2,3,7,8-TCCD.[2] (*Id.* at Depo. Exhibit 3, Figure 1.)

13. Plaintiffs submitted the testimony of former workers at the Old Monsanto plant. These workers testified that it was Old Monsanto's regular practice to burn the waste generated by its 2,4,5-T manufacturing process in open pits at the Nitro plant and at other sites in and around Nitro. (See Hearing Exhibits 161, 162, 186-194, 206.)

[2] According to Mr. Pape, this amount *does not* include an additional amount 2,3,7,8-TCCD that left the Nitro Plant in finished bags of 2,4,5-T herbicide.

14. Plaintiffs submitted the report and testimony of William M. Auberle, P.E., another expert engineer. Mr. Auberle utilized air emissions modeling ("air modeling") to determine the airborne concentration of dioxins that were emitted into the air in the Nitro area when Old Monsanto burned the waste generated by its 2,4,5-T manufacturing process. (Hearing Exhibit 172: Auberle Depo., August 27, 2007, at p. 5.) Using air modeling, Mr. Auberle was also able to determine where these dioxin emissions travelled. (*Id.* at p.16.)

15. Mr. Auberle consulted with Plaintiffs' expert toxicologist, William Sawyer, Ph.D. At Dr. Sawyer's request, Mr. Auberle produced a map of the Nitro region that indicates what areas received dioxin emissions from the Old Monsanto plant at levels that Dr. Sawyer believes are significant. (*Id.*, at pp. 31-33 and Depo. Exhibit 1.) This map is the basis for the Class Affected Area set forth in Exhibit 1 to this Order.

16. Plaintiffs submitted the reports and testimony of William Sawyer, Ph.D. Using the airborne emissions modeling performed by Mr. Auberle, Dr. Sawyer has performed initial calculations of the likely dose of dioxins from the Old Monsanto plant that have been inhaled by persons who have resided within the Class Affected Area. (Hearing Exhibit 164; Sawyer Report of August 2007.) For example, Dr. Sawyer has calculated that *all* persons who resided within the Class Affected Area for at least 10 total years prior to their 31st birthday during the period 1948 through 1970 (when Old Monsanto manufactured 2,4,5-T in Nitro) were significantly exposed to dioxins from the Old Monsanto plant and would have significantly elevated cancer risks as a result of such exposure and would likely be candidates for medical monitoring. (*Id.*) Dr. Sawyer reported that children who lived in the Class Affected Area during period 1948 through 1970 could be significantly exposed in less than 10 years time. (*Id.*)

17. Dr. Sawyer testified that he can perform more calculations to further define additional categories of persons in the Class Affected Area who have likewise been put at a significantly increased risk of dioxin-related cancers. (Hearing Exhibit 166: Sawyer Depo. of Oct. 2, 2007, at pp. 61-64.) However, Dr. Sawyer testified that he is satisfied, at this time, that the outer boundary of the Class Affected Area represented a reasonable cutoff for the boundary of the class area. (*Id.* at pp. 67-68.) He also testified that samples of attic dust taken from homes within the isopleth revealed levels of dioxins that confirmed a statistically significant health risk for residents. (*Id.*; Sawyer Depo., Oct. 17, 2007, at pp. 67-68.)

18. Dr. Sawyer further testified that the profile of the dioxins (their "fingerprint") found in soil and attic dust samples collected within the Class Affected Area revealed that the source of the dioxins was from Old Monsanto's manufacture of 2,4,5-T and the subsequent burning of waste from the 2,4,5-T manufacturing process. (*Id.*; Sawyer Depo., March 20, 2007, at pp. 117-121, 129-133.)

19. Plaintiffs submitted the expert report and testimony of John A. Kilpatrick, Ph.D., a licensed real estate appraiser in West Virginia. Dr. Kilpatrick testified that he can use a "mass appraisal" model to calculate – on a class-wide basis – the diminished value of real property in the Class Affected Area as a result of dioxin contamination. (Hearing Exhibit 204; Kilpatrick Depo. at Exhibit 5, Par. 3-9.) Dr. Kilpatrick testified that, from an appraiser's perspective, is preferable to use a mass-appraisal model where there has been a large number of properties subjected to environmental contamination rather than to appraise such properties on a case-by-case basis. (*Id.*) Dr. Kilpatrick testified that properties need not be identically contaminated to perform a mass appraisal. (*Id.* at Kilpatrick Depo., pp. 92-93.)

20. Based on the evidence submitted to the Court by the Plaintiffs, the Court finds that there is a reasonable basis in fact for the substantive allegations of Plaintiffs' Class Action Complaint.

21. Defendants have not offered the Court alternative definitions for the Class nor for the Class Affected Area. Although one of the experts retained by the Defendants, Walter J. Shields, Jr., has professed an expertise in air modeling, the Defendants have not submitted any air modeling of their own to the Court. Mr. Shields has admitted that the Nitro Community has been contaminated with dioxins from the Old Monsanto plant, at least to some extent. (Hearing Exhibit 168; Shields Depo. at pp. 60-62.)

III. Conclusions of Law

A. General Law of Class Certification.

Rule 23 of the West Virginia Rules of Civil Procedure ... was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims." *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). It is well-settled in West Virginia that, as long as the prerequisites to class-certification set forth in Rule 23 are met, a case should be allowed to proceed on behalf of the class proposed by a plaintiff. *See* W. Va. R. Civ. P. 23; *Mitchem v. Melton*, 167 W. Va. 21, 25, 277 S.E.2d 895, 899 (1981)("If the requirements of Rule 23 are met, then the Class should be allowed."); *Evans v. Huntington Pub. Co.*, 168 W. Va. 222, 223, 283 S.E.2d 854, 855 (1981). Under Rule 23, the only prerequisites to certifying a case to proceed on behalf of a class are that (1) the class is so numerous that joinder of all members is impractical (the "numerosity" requirement); (2) there are questions of law or fact common to the class (the

"commonality" requirement); (3) the claims or defenses of the represented parties are typical of those of the class (the "typicality" requirement); (4) the represented parties will fairly and adequately protect the interest of the class (the "adequacy" requirement); and, (5) that at least one of the three potential bases for seeking class relief set forth in Rule 23(b) exists. *See* W. Va. R. Civ. P. 23(a), (b). If appropriate, the Court may allow the action to be brought or maintained as a class action with respect to only particular issues or may allow the class to be divided into subclasses. *Id.* at R. 23(c)(4). In this regard, the Court has the discretion to enter an order it feels will best provide for the orderly conduct and management of issues to be handled in a class action proceeding under Rule 23, including entry of an order reserving any "unmanageable" issues for litigation at a later time. *See* W. Va. R. Civ. P. 16, 23(d); *Gasperoni v. Metabolife Int'l, Inc.*, 2000 WL 33365948, slip., op. at *4 (E.D. Mich. Sept. 27, 2000)(*citing In re Diet Drugs Prod. Liab. Litig.*, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000)).

The Court is required to perform a "thorough analysis" in determining whether the prerequisites to class certification exist under Rule 23 (a). *W.Va. ex. rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772, 782 (W.Va. 2004). In performing such an analysis, the Court's focus should not be on whether the Plaintiff will prevail on the actual merits of any substantive aspect of their claims:

> A circuit court's consideration of a motion for class certification should not become a mini-trial on the merits of the parties' contentions ... [N]othing in either the language or history of Rule 23 ... give a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

In Re Rezulin at 63. Rather, the Court is to simply decide whether the procedural requirements of Rule 23 are likely met. *Id.*, citing *Miller v. Mackey Intern., Inc.*, 452 F.2d 424, 427 (5th Cir.

1971). Moreover, "Any question as to whether a case should proceed as a class in a doubtful case should be resolved in favor of allowing class certification." *In re Rezulin* at 65, looking to *Esplin v. Hirschi,* 402 F. 2d 94, 101 (10th Cir. 1968), *cert denied*, 394 U.S. 928, 89 S.Ct. 1194, 22 L. Ed.2d 459 (1969).

B. Defendants' claims of property specific and individual medical issues do not preclude class certification.

Before turning to a discussion of how Plaintiffs' claims satisfy the elements of Rule 23, the Court first addresses Defendants' general attack on class certification. Defendants' primary argument is that property-specific contamination and individual medical issues preclude class certification. Relying on and applying the guidelines established in West Virginia's leading case on class certification, *In re Rezulin,* supra, this Court finds that Defendants' arguments do not defeat class certification.

In re Rezulin explicitly cautions the trial court that where there is at least one predominating common issue, individual issues are expected and are not fatal to class certification. Discussing commonality under Rule 23(a)(2), the West Virginia Supreme Court adopted the position of the leading commentary on class actions regarding the effect of individual questions on commonality:

> The Rule 23(a)(2) prerequisite requires only a single issue common to the class. Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a

> class action precluded by the presence of individual defenses against class plaintiffs.

In re Rezulin, 214 W. Va. at 68, 585 S.E.2d at 68 (quoting A. Conte and H. Newberg, 1 *Newberg on Class Actions*, *4th Ed.*, § 3:12 at 314-315 (2002)).

Again, relying on Newberg's treatise, the Supreme Court cautioned trial courts that the predominance requirement does not mean the common issue must also be determinative or dispositive. Acknowledging the likely presence of individual questions, including individual questions of damages, *In re Rezulin* emphasized that where there is a single overriding common issue, numerous remaining individual questions should not defeat class certification:

> The predominance requirement does not demand that common issues be dispositive, or even determinative; it is not a comparison of the amount of court time needed to adjudicate common issues versus individual issues; nor is it a scale-balancing test of the number of issues suitable for either common or individual treatment. 2 *Newberg on Class Actions*, *4th Ed.*, § 4:25 at 169-173. Rather, "[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Id.* at 172. The presence of individual issues may pose management problems for the circuit court, but courts have a variety of procedural options under Rule 23(c) and (d) to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or matters, pilot or test cases with selected class members, or even class decertification after liability is determined. As the leading treatise in this area states, "[c]hallenges based on ...causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." 2 *Newberg on Class Actions*, *4th Ed.*, § 4:26 at 241, "That class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith v. Behr Process Corp.*, 113 Wash. App. 306, 323, 54 P.3d 665, 675 (2002)(citations omitted).

In re Rezulin, 214 W. Va. at 72, 585 S.E.2d at 72. In other words, where common issues permeate the litigation, as they do in the instant action, the need for individual inquiries does not preclude class certification.

For example, Defendants have raised the issue of possible alternative sources of dioxins within the proposed Class Affected Area.[3] However, the possible existence of alternate sources of such dioxins is not a reason for the Court to deny class certification. Even if the Court were to assume that such alternate sources did exist, Plaintiffs have demonstrated that the existence [illegible] of dioxins from the Old Monsanto facility will be the pivotal issue in this litigation. One of Defendants' own experts, Walter Shields, admitted – to some degree that he would not quantify – that dioxins from the Old Monsanto plant have contaminated property in the Nitro area. Thus, the primary issue of proof in this litigation will be to what extent the Class Affected Area has been contaminated with dioxins from the Old Monsanto plant.

Moreover, it appears to the Court that most of the Defendants' objections to class certification go to the ultimate merits of Plaintiffs' claims. Defendants' medical expert, Philip Guzelian, M.D., testified that he did not believe that medical monitoring would be warranted for the entire class; however, Dr. Guzelian admitted, on cross-examination, that other experts could disagree with his opinion. (Class Certification Hearing Trans., Oct. 31, 2007, at pp. 234-237.) Dr. Guzelian explained that he did not believe that Plaintiffs would ultimately succeed at trial in establishing that medical monitoring was necessary for all class members. (Id.) Similarly, Defendants' expert economist, Louis Wilde, Ph.D., testified that, although a "mass appraisal" can be an appropriate technique for ascertaining the diminution in value for a large number of properties, Dr. Wilde indicated that he did not believe that Plaintiffs' real estate appraiser, Dr.

[3] Defendants' arguments of multiple sources of contamination and different polluters are factual issues that go to the merits of Plaintiffs' claims and are not arguments that should be addressed by the Court at this time. *Bentley v. Honeywell*, 223 F.R.D. 471, 478 (S.D. Ohio 2004).

John Kilpatrick, could correctly apply a "mass appraisal" model in this case. (Id. at pp. 153-154). Defendants' chemical engineering expert, Ray K. Forrester, disagreed with Plaintiffs' expert's calculation of the total amount of dioxin waste generated by Old Monsanto's 2,4,5-T manufacturing process. According to Mr. Forrester, Old Monsanto's 2,4,5-T manufacturing process "only" generated 1,550 pounds of 2,3,7,8-TCDD waste.[4] (Hearing Exhibit 170; Forrester Depo. at p. 69.) As *In re Rezulin* makes clear, the Court cannot – at as part of its decision on class certification – rule on the substantive merits of Plaintiffs claims. Nor can the Court resolve a "battle of the experts" that goes to whether or not Plaintiffs can succeed in proving their case at trial. The Court is satisfied, based on the voluminous record in this case, that there is a reasonable basis in fact for Plaintiffs' substantive claims. This is the extent of the Court's inquiry into the merits of the case at this time.

C. Certification is appropriate under Rule 23(a).

(1) The proposed Class satisfies the "numerosity" requirement of Rule 23(a)(1).

Rule 23(a)(1) is satisified if the number of putative class members makes joinder "impracticable." Impracticable does not mean "impossible": "It is not necessary to establish that joinder is impossible; rather the test is impracticability." *In re Rezulin*, at 66. By "impracticable" in this context, the Supreme Court has referenced the difficulty of joining all of the members of the class as well as the inconvenience of doing so. *Id.* In addition, the Court held that there is "no magic number that breathes life into class ... and that lack of knowledge of the exact number of persons affected is not a bar to certification." (*Id.*, looking to and quoting *Clarkson v. Coughlin*, 783 F. Supp. 798 (S.D.N.Y. 1992).

[4] By way of comparison, it has been calculated that the total amount of dioxin present in sprays known to be dispersed in Viet Nam was 366 kg in total (or 732 pounds at approximately 2.2 pounds per kilogram). (Hearing Exhibit 90, at p. 684)

In this case, there can be no doubt that the sheer number of putative class members would make joinder impracticable. The proposed Class Affected Area encompasses a large geographic area in portions of both Putnam and Kanawha counties and includes the towns of Nitro, Rock Branch, Poca, and Bancroft, and portions of St. Albans and Cross Lanes. The Defendants do not dispute that there are potentially thousands of persons in the putative class and that the Class Affected Area contains thousands of parcels of property. Based upon the sheer number of class members and number of property parcels, this Court finds that joinder of individual claims would be impracticable and that the numerosity requirement has been satisfied.

(2) The proposed Class satisfies the "commonality" requirement of Rule 23(a)(2).

Rule 23(a)(2) is satisfied if "there are questions of law *or* fact common to the class" (emphasis added). *In re Rezulin* sets out the requirements for "commonality" under 23(a)(2).

- The party seeking class certification must show that "there are questions of law or fact common to the class." "A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement." *In re Rezulin*, 214 W. Va. at 67, 585 S.E.2d at 67 (quoting *Rossario v. Livaditis*, 963 F.2d 1013, 1017-18 (7th Cir. 1992)).
- "The threshold of 'commonality' is not high," and "requires only that resolution of the common questions affect all or a substantial number of the class members." *Id.* (quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)).
- "Commonality simply requires that the class members share a single, significant common issue, which need be neither important nor controlling." *Id.*

In the present case, it is clear that there are common questions of both law *and* fact that are more than sufficient – in both quality and quantity -- to meet the "commonality" requirement of Rule 23(a)(2). Based on the allegations in the Complaint and the evidence submitted to the Court, these common issues include, but are not limited to:

- Whether Old Monsanto manufactured certain compounds at its Nitro plant that were contaminated with dioxins, and, if so, the amounts of such dioxins that were created.
- Whether Old Monsanto knew or should have known of the presence of these dioxins in its manufacturing process.
- Whether and to what degree dioxins are hazardous to human beings, and whether Old Monsanto knew or should have known these dioxins were hazardous to human beings.
- Whether, and to what extent, dioxins were emitted and released into the local environment from the Old Monsanto plant.
- Whether the Defendants are legally responsible to members of the class, in negligence, strict liability, or nuisance, for the release and emission of dioxins from the Old Monsanto plant.
- Whether the Defendants' acts and omissions with respect to the emission and release of dioxins warrants the creation of a Court-administered medical monitoring fund for the benefit of class members.
- Whether the Defendants' acts and omissions with respect to the emission and release of dioxins warrants the creation of a Court-administered remediation fund for the benefit of class members.
- Whether the Defendants' acts and omissions with respect to the emission and release of dioxins has devalued property in the Class Affected Area.
- Whether the Defendant's acts and omissions with respect to the emission and release of dioxins warrant the imposition of punitive damages.

The pivotal issues in this litigation relate to whether and to what extent dioxins that were originally created at the Old Monsanto plant were subsequently dispersed by the Defendants into the proposed Class Affected Area. Plaintiffs' air model indicates that the entire class area has been affected to varying degrees by dioxins from the Old Monsanto plant as a result of the burning of dioxin-contaminated waste. These pivotal factual issues are sufficient to satisfy the commonality requirement. Each member of the proposed class can be expected to rely on this same evidence to prove the liability of the defendants. It would be an enormous waste of resources to require the class members to repeatedly prove such evidence at countless individual trials on issues that ultimately bear on the Defendants' liability to everyone in the class. Adjudication of such common issues on a class-wide basis would be "appropriate to conserve judicial and private resources." *In re Rezulin* at 67, quoting Philip Stephen Fuoco and Robert F. Williams, *Class Action in New Jersey State Courts*, 24 Rutgers L.J. 737, 752 (1993).

Likewise, common issues of fact are raised by the remedies sought by the Plaintiffs, including their claims for Court-administered funds for medical monitoring and property damage. For example, Plaintiffs' claim for medical monitoring will require a showing that persons residing in the Class Affected Area during certain periods of time were significantly exposed to dioxins as a result of the Defendants' alleged tortious conduct, and that, as a result, such persons are at an increased risk of contracting serious latent diseases as compared to the general population. *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999) [Syll. Pt. 3]. The issues of whether dioxins are hazardous, whether persons in the Class Affected Are have been exposed, whether Defendants have behaved tortuously, whether such an exposure can result in increase risks of latent diseases, and whether monitoring procedures exist

by which latent diseases can be diagnosed are all questions that are common to each Plaintiff and can be answered on a class-wide basis.

When a multitude of persons are alleged to have been exposed, it is the most practical course of conduct to address these questions as to the group as a whole. For example, in *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994), *cert. denied sub. nom. General Elec. Co. v. Ingram*, 513 U.S. 1190, 115 S. Ct. 1253, 131 L. Ed. 2d 134 (1995), whose formulation of medical monitoring law was adopted by the West Virginia Supreme Court in *Bower*, 206 W. Va. at 141, 522 S.E.2d at 432, the court concluded that proving significantly increased risk should be done en masse:

> [W]here experts individualize their testimony to a group of individuals with a common characteristic (i.e., levels of exposure to chemical X above Y amount), we do not think there is a need for greater individualization so long as they testify that the risk to each member of the group is significant. We fail to see the purpose in requiring greater individualization.

Paoli, 35 F.3d at 788. It is for this reason that mass medical monitoring claims are so often certified as class actions. *See, e.g., State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 442, 607 S.E.2d 772 (2004); *In re Tobacco Litig.*, 215 W. Va. 476, 600 S.E.2d 188 (2004); *State ex rel E. I. Dupont De Nemours & Co. v. Hill*, 214 W. Va. 760, 591 S.E.2d 318 (2003); *Rezulin, supra*; *Leach v. E. I. Dupont De Nemours & Company*, 2002 WL 1270121 at *11 (W. Va. Cir. Ct. 2001) (not reported)("In cases like this involving claims from a chemical release, commonality is readily found, particularly where medical monitoring claims are involved.").

Plaintiffs' other requested remedy – i.e., damages for injury to their property – raises still more common factual issues, in particular with respect to property valuation methods. Plaintiffs' real estate appraisal expert, Dr. John Kilpatrick, testified that a common "mass-appraisal" model could be used to determine any diminution in property value caused by dioxin contamination in the Class Affected Area. Other courts have certified class actions involving wide-spread

environmental contamination, in part, based on the mass appraisal method articulated by Dr. Kilpatrick. See, e.g., *Turner v. MurphyOil USA, Inc.*, 234 F.R.D.597, fn.5 (E.D.La. 2006) (granting class certification); *Turner v. MurphyOil USA, Inc.*, 2006 WL 91364, *4-5 (E.D.La. 2006) (denying motion to exclude testimony of Dr. Kilpatrick); *Perrine v. E.I. DuPont De Nemours and Company*, Harrison County (W.Va.) Civil Action No. 04-C-296-2, "Order Granting Class Certification" entered September 14, 2006 (Bedell, Judge) (granting class certification). It would inefficient and impracticable, to say the least, to require an individual property appraisals for each putative class member.

Lastly, Plaintiffs' claim for punitive damages is clearly best-suited for resolution on a class-wide basis. The Defendants' alleged knowledge about the hazards posed by dioxins and their conduct in disposing of or managing dioxin-contaminated waste would be the same as to each class member.

(3) The proposed Class satisfies the "typicality" requirement of Rule 23(2)(3).

Rule 23(a)(3) is satisfied when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The "typicality" requirement requires that the representatives' claims be typical of, but not identical to, the claims of the class. A representative's claim is typical, "if it arises from the same event or course of conduct that gives rise to the claims of other class members, and his or her claims are based upon the same legal theory." *In re Rezulin* at 67, quoting *Newberg on Class Actions*, 4th Ed, section 3:13 at 328. In this regard it is important to note that, "When the claim arises out of the same legal theory or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Id.*, Syl, Pt. 12, see also Syl Pt. 7, *Ways v. Imation Enterprises Corporation*,

214 W.Va. 305, 589 S.E.2d 36 (2003); *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156 (S.D.W.Va. 1996). In short, typicality closely parallels commonality.

In the instant matter, there is no doubt that the claims of the representative Plaintiffs are typical of those of the other class members, in that the claims of the Plaintiffs are based on the same legal theories – strict liability, nuisance, negligence, and medical monitoring - all of which arise out of the same alleged course of conduct – the release of toxic dioxins by the Defendants into the Class Affected Area. Not only do representative parties claim to be aggrieved by the same conduct, but they also seek remedies available to each other and members of the class.

The Court notes that the test for "typicality" under Rule 23(a)(3) is whether the *claims* of the class members are typical – *not* whether they can be said to be a "typical" class representative or class member. This is more than just a semantic distinction. In *In re Rezulin*, the Supreme Court criticized the circuit court's finding that "there can be no 'typical' Rezulin user. *Id.* at 68. The Supreme Court held that the "typicality" requirement was met simply because all class members were, by the face of the complaint, seeking medical monitoring relief necessitated by their exposure to Rezulin. Like the defendants in *In re Rezulin*, the Defendants in the instant case also argue that there is not a "typical" class representative or class member. For example, the defendants assert that the representative plaintiffs and members of the class live different distances from the Old Monsanto plant, that there may be other sources of dioxins in the Class Affected Area, that the levels of dioxin contamination may vary on the properties of the representative plaintiffs and members of the class, and that the representative plaintiffs and members of the class have different medical histories. Such obvious differences, however, do not alter the fact that the legal claim of each representative Plaintiff is "typical" of the claims of the other representative Plaintiffs and class members – each claim is for dioxin contamination

from the same ultimate source. The Court finds the claims of the class representatives are typical of claims of class members, regardless of such individual variations among the individual representative plaintiffs and class members.

(4) The proposed Class satisfies the "adequacy of representation" requirement of Rule 23(a)(4).

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." In *In re Rezulin*, the Supreme Court held that:

> The adequacy of representation requirement of Rule 23(a)(4) requires that the party seeking class action status show that the representative parties will fairly and adequately protect the interests of the class. First, the adequacy of representation inquiry tests the qualifications of the counsel to represent the class. Second, it serves to uncover conflicts of interest between the named parties and the class they seek to represent. *In re Prudential Ins. Co. of America Sales Practices Litigation*, 148 F.3d 283, 312 (3d Cir. 1998) (internal quotations and citations omitted). In accord, *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 162 (S.D.W.V. 1996) ("When assessing the class representatives' ability to adequately represent the interests of the class, the Court must consider the abilities of the attorneys who represent the class representatives, and the class representatives themselves.") *Id. at* 68-69.

The U.S. District Court for the Southern District of West Virginia summed-up the application of the rule as follows (citing Newberg's treatise):

> Suffice it to say, "the two factors that are now predominately recognized as the basic guidelines for the Rule 23(a)(4) prerequisite [as to representative plaintiffs] are (1) absence of conflict and (2) assurance of vigorous prosecution." 1 Herbert B. Newberg, *supra*, section 3.22. In regard to the adequacy of class counsel, "courts consider the competence and experience of class counsel attributes which will most often be presumed in the absence of proof to the contrary." *Id.* Section 3.24." *Black v. Rhone-Poulenc*, 173 F.R.D. 156, 163 (S.D.W.Va. 1996).

The Court finds that Plaintiffs' counsel, W. Stuart Calwell, Jr., and The Calwell Practice PLLC, are qualified to continue to represent the class and are appointed Class Counsel. Class Counsel has demonstrated their ability to investigate the claims of the proposed class and fully prosecute this case. Moreover, this Court has already recognized the special competence of Class Counsel with respect to litigating a case involving dioxin contamination, based on Class Counsel's prior litigation experience on this subject. (*Memorandum Opinion and Order Granting Defendants' Motion for Designation of Plaintiffs' Lead Counsel,* entered July 23, 2007). Class Counsel shall prosecute this action on behalf of the representative Plaintiffs and the Class.

This court does not find any conflicts between the designated Representative Plaintiffs and the class they seek to represent. As set forth in Plaintiffs' *Memorandum of Law in Support of Plaintiffs' Motion for Class Certification,* Lead Counsel has requested, for strategic reasons, that the Court designate the following Plaintiffs as Class Representatives: Zina Bibb, Donald R. and Wanda Rhodes, Herbert W. and Norma J. Dixon, Charles S. and Betty Tyson, and Vicki Bailey. Mrs. Bibb grew up in Nitro during the period 1965-1985 and attended Nitro public schools. Although she is not a current resident of Nitro and does not own real property there, she still fits the criteria established by Dr. Sawyer for being subjected to an increased risk of cancers due to her exposure to Defendants' dioxin during the period she did live in Nitro. All of the other proposed class representatives currently reside within the Class Affected Area, are longtime residents of the Nitro area, and fit the preliminary criteria established by Plaintiffs' toxicologist for being subjected to an increased risk of cancers due to exposure to Defendants' dioxin. (Hearing Exhibits 195-202). These proposed class representatives have been involved in

this litigation for a significant period of time, have been deposed, and wish to continue to pursue this case. (*Id.*)

The Court finds that this class action can be prosecuted fairly and efficiently without the other named Plaintiffs, who are no longer represented by Class Counsel. The interests of these individuals, as class members, will continue to be fairly represented by Class Counsel. There is no "minimum number" of class representatives required at law. "Only one named class representative – who is a member of the proposed class – is required for filing a class action." *In re Rezulin* at 64. The fact that the proposed class representatives may have sustained different damages or damages to a different degree than each other or other class members is not an impediment to class certification. *Id.* at 69.

D. Certification is appropriate under Rule 23(b).

(1) Certification of the Class is appropriate under Rule 23(b)(1)(A) & (B).

When there is a probability of multiple lawsuits over the same matter, defendants run the risk of inconsistent outcomes that could create incompatible standards for them while plaintiffs run the risk that they may not be able to protect their interests. "The phrase 'incompatible standards of conduct' is thought to refer to the situation where different results in separate actions would impair the opposing party's ability to pursue a uniform course of conduct." Charles A. Wright, et al., 7A *Federal Practice & Procedure,* § 1773 at 431 (2d ed. 1986). Rule 23(b)(1) was designed to ameliorate the effects of inconsistent outcomes by providing a mechanism to deliver a uniform remedy. *Boggs, et al. v. Divested Atomic Corp.*, 141 F.R.D. 58 (S.D. Ohio 1991). (Rule 23(b)(1)(A) "... allows a single court to fashion an appropriate remedy, and to bring a controversy to a final and complete resolution.").

Cases involving remediation and medical monitoring are well-suited for class certification under Rule 23(b)(1)(A) and (B). For example, Plaintiffs' seek the establishment of a remediation fund to have the contaminants removed from homes and properties in the Class Affected Area. If each resident brought a separate suit, defendants could be subjected to various and inconsistent positions. For example, defendants could be required to fund or conduct potentially hundreds or thousands of cleanup plans differing in scope and degree. Under substantially similar circumstances within the same geographical area, defendants could be required to remove surface contamination in one case, while in another case be required to remove surface soil and contaminated indoor dust, and in another only be required to pay damages as a result of substantially the same contamination.

However, the existence of inconsistent outcomes would subject the Plaintiffs to a far worse injustice. For example, a successful plaintiff could be awarded relief in the form of cleanup of his home and property, while a neighbor may receive an award of only monetary damages. Therefore, separate suits could result in a remediated property lying adjacent to contaminated property. Under this scenario, plaintiffs, especially children, would still be subject to exposure, and remediated property could be re-contaminated.

(2) Certification of the Class is appropriate under Rule 23(b)(2).

Certification is warranted under Rule 23(b)(2) for two reasons: (1) the nature of Defendants' conduct, and (2) the nature of the relief sought. The Supreme Court has stated that "[t]he key [in applying Rule 23(b)(2)] is whether the actions of the party opposing the class would affect all persons similarly situated, so that the acts apply generally to the whole class." *In re Rezulin,* 214 W. Va. at 70, 585 S.E.2d at 70. For example, in *In re Rezulin,* where the

plaintiffs asserted the defendants had exposed the class members to the same risks, the allegations not only justified, but required, certification under Rule 23(b)(2):

> The plaintiffs assert that all members of the proposed class took the same drug, and were subject to the same risk of possible injuries. The drug was made by the same defendants, and the defendants' conduct was directed toward a discrete population: the plaintiffs, all West Virginia diabetics who needed medication for control of their condition. ... [W]e conclude that the plaintiffs have met the initial requirements of Rule 23(b)(2) and shown that the defendants acted, or refused to act, in a manner generally applicable to the entire proposed class. The circuit court therefore erred in holding otherwise.

214 W. Va. at 71, 585 S.E.2d at 71.

Plaintiffs' allegations in the case at bar are analogous to those in *In re Rezulin*: all members of the class were exposed to the same toxic substances and have at a minimum reached the same threshold risk of injury; all class members' properties have suffered the same harm (diminished value) for the same reason; the same wrongful practices were knowingly or negligently perpetrated by the same defendants; and Defendants' conduct affected a discrete populace, i.e., residents of certain communities around the Old Monsanto plant. Thus, this Court finds that Plaintiffs have alleged that Defendants have acted in a manner generally applicable to the class. Such a finding is unsurprising, for that is often the situation where a large group of persons is exposed to an environmental hazard. *See e.g. State ex rel. Chemtall, Inc. v. Madden,* 216 W. Va. at 450, 607 S.E.2d at 779.

The appropriateness for certification under Rule 23(b)(2) is further evidenced by the fact that Plaintiffs are seeking a common medical monitoring program under the oversight of the court. *See In re Rezulin* Syl. Pt. 14 ("[u]nder Rule 23(b)(2) ... a court may exercise its equitable powers to establish and administer a court-supervised medical monitoring program to oversee

and direct medical surveillance, and provide for medical examinations and testing of members of a class.").

(3) Certification of the Class is appropriate under Rule 23(b)(3).

Plaintiffs' claims are appropriately certified under Rule 23(b)(3). Under Rule 23(b)(3), a case may be certified as a class if:

> [t]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

W.Va.R.Civ.P. 23(b)(3). The two keystones of certification under Rule 23(b)(3) are "predominance" and "superiority."

In *In Re Rezulin,* the Supreme Court rejected a rigid formulation of the test for predominance and opted for a test that contemplates a review of many factors, including the central question of whether "adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *In re Rezulin,* 214 W. Va. at 72, 585 S.E.2d at 72 (quoting 2 *Newberg on Class Actions.* 4th Ed. § 4:25 at 174). In setting the guidelines to determine predominance, the court made the following points:

- The predominance test does not demand that common issues be dispositive.
- It is not the amount of time needed to adjudicate common issues versus individual issues.

- It is not a scale-balancing test of the number of issues suitable for either common or individual treatment.
- *A single common overriding issue will satisfy the predominance requirement even when the suit involves numerous individual questions.*

Id. at 72 (emphasis added).

The Supreme Court, elaborating on these points, has provided the following salient advice:

> [T]he bigger the class, the greater the likelihood that the defendant will argue that there is no common problem across the system. Defendants will argue ... that each plaintiff's case is different ....
>
> Defendants attempting to avoid class certification will, almost exclusively, overwhelm a circuit judge with the differences between each class member's case. It is akin to a judge being asked to look at a forest of oak trees and being told the difference between each tree: each tree has a different height, a different color, a different number of leaves, a unique number of branches, a wide variation in the number and size of tree rings, and so on.
>
> The test for the judge, though, is to step back and look at the similarities in class members. Step back and see the forest. No matter the number of branches or leaves, a collection of oak trees has enough similarities to be called a "class" of oak trees.

Gulas v. Infocision Mgmt. Corp., supra, 215 W. Va. 225, 230, 599 S.E.2d 648, 653 (Starcher, J., concurring).

In this case, the Court finds that there are common questions of law or fact that predominate over any individual issues that may arise among the class members. Liability is one such issue. The pivotal issue in this litigation is whether and to what extent dioxins that were originally created at the Old Monsanto plant were subsequently dispersed by the Defendants into the proposed Class Affected Area. See *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004)(Liability of plant owner for toxic emissions was a common issue that predominated over individual questions of damages.); *Bolanos v. Norwegian Cruise Lines, Ltd.*, 212 F.R.D. 144

(S.D.N.Y. 2002)("Courts should particularly focus on the liability issue ... and if the liability issue is common to the class, common questions are held to predominate over individual questions."). The Defendants' potential liability arises out of the same nucleus of operative facts for each plaintiff. For example, each Plaintiff would rely upon the same evidence to show the negligent conduct of each Defendant. Each putative class member would rely on the same evidence to prove the Defendants' knowledge of the dangers posed by dioxin-contaminated waste from the 2,4,5-T manufacturing process and of the releases of this waste into the surrounding communities.

Indeed, the only issue of any significance that is not identical to all class members is the amount of damages sustained by each claimant. But the need for an individual showing of damages does not preclude class certification under Rule 23(b)(3) where, as here, common issues predominate. *Rezulin,* 214 W. Va. at 72, 585 S.E.2d at 72. Moreover, the medical monitoring remedy is a class remedy that has as its purpose an ongoing determination of any individual injuries.

In *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), *cert denied*, ___ U.S. ___, 125 S. Ct. 2990, 162 L. Ed. 2d 910 (2005), for example, the court upheld the certification of a class of residents alleging personal injury and property damage caused by the emission of pollutants from a cement manufacturing plant. The court held that, despite variances in the amount of damages, common issues of liability predominated:

> [I]ndividual damage determinations might be necessary, but the plaintiffs have raised common allegations which would likely allow the court to determine liability (including causation) for the class as a whole. For instance, although some named plaintiffs admittedly describe a variety of minor personal medical issues ... which might require individualized damage determinations, the thrust of the plaintiffs' personal injury complaint appears to be related to the general increased risk of the class suffering medical problems in the future. ... Whether the defendant's negligence caused some increased health risk and even whether it

> tended to cause the class minor medical issues can likely be determined for the entire class. Similarly, although some named plaintiffs present a number of minor examples of specific property damage (roof damage, dead rose bushes, damaged window pane, peeling stain on deck, rusting of automobile), these examples seem to be no more than illustrative of the common argument that the class's properties are regularly covered in cement dust, causing minor property damage and a predictable reduction of property value and enjoyment of the property. Whether the defendant's negligence generally caused minor property damage and cement dust can likely be determined for the entire class as well.

383 F.3d at 508-09 (footnote omitted); *see also Clark v. Trus Joint MacMillian,* 836 So. 2d at 461 ("Trus Joist contends class certification must fail because plaintiffs have differing degrees of injury and assert disparate complaints and experiences. However, it is not necessary that all plaintiffs suffer identical damage and individual questions of quantum do not preclude a class action when predominate liability issues are common to the class.").

Class action is superior to other methods for adjudicating Plaintiffs' claims. Litigating common issues is far superior to thousands of individual claims. Applying the four factors set out in Rule 23(b)(3) underscores the superiority of class adjudication. While individual personal injury claims have been filed in Putnam County against some of the Defendants that ultimately relate to exposure to dioxins originating from the Old Monsanto plant, these lawsuits do not contain claims for property damage, property remediation, nor medical monitoring. The presence of these individual personal injury actions does not persuade the Court that putative class members have any interest members in individually controlling this litigation. The Court further finds the presence of individual personal injury class actions will not present any difficulty in allowing this case to proceed as a class.

Requiring individual lawsuits by putative class members would likely be prohibitively expensive. For example, class certification will permit Plaintiffs' expert to utilize a "mass appraisal" method to determine the effect, if any, that dioxin contamination has had on property values. Such a mass appraisal will allow spreading of the cost of the model over the entire class

of property owners, as opposed to each property owner being forced to develop expensive and time consuming appraisal models to quantify the effects, if any, that dioxin contamination has had on his or her property value.

As to the third factor, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, a class approach not only to liability but also to the establishment of uniform medical monitoring and property cleanup programs is highly desirable. As to the fourth factor, through proper case management, any difficulties likely to be encountered in the management of this class action will be minimized and will pale in comparison to the onerous, if not impossible task, of trying thousands, possibly tens of thousands, of similar claims separately. Indeed, because of the type of vigorous defense mounted by Defendants, and the expense of hiring experts and otherwise challenging such a defense, it is doubtful that many of these relatively small medical monitoring and property damage claims could be brought without a class approach.

The decision faced by this Court, in sum, is whether it is better to fragment the common issues into thousands of individual lawsuits, where each plaintiff would assert the same theories against the same defendants based on the same evidence, or to certify the class? In answer, this Court finds that a class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

Based on the foregoing, the Court, having found the requirements for class certification to be satisfied, hereby **ORDERS** that this matter proceed on behalf of a class as defined in Plaintiffs' *Amended Motion for Class Certification.*

Accordingly, it is **ORDERED** that:

(1) Plaintiffs' Amended Motion for Class Certification is **GRANTED.**

(2) Within 30 days of this Order, Plaintiffs shall submit: (a) a proposal for what steps must be undertaken to attempt to identify and notify class members; and (b) the proposed form of the notice to be given to class members. Defendants shall submit a response to such notice proposal within 21 days thereafter.

The objections of the Defendants are noted and preserved.

Finally, it is hereby **ORDERED** that the Clerk of this Court shall provide certified copies of this Order to all following counsel designated below.

Entered this 7th day of January, 2008.

O.C. Spaulding, Circuit Judge

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WEST VIRGINIA
...AM, SS:
...the Circuit Court of said
..., do hereby certify that the
...from the records of said Court.
...the seal of said Court
10 Jan 2008
Clerk
Circuit Court
...ham County, W.Va.