

IN THE DISTRICT COURT OF KAY COUNTY  
STATE OF OKLAHOMA

DEC 07 2009

MARY RAMEY, Court Clerk

BY  (REPUTY)  
S/TAMMY SCROGUM

GREG BROWN; KATRINA BROWN; )  
BRENDA DOLLARHIDE; LINDA FERDA; )  
DERRICK FLEMING; KIM JERNIGAN; )  
MARY JOHNSON; RONDA LAFFERTY; )  
ANTHONY LOOPER; CHERYL PAIGE; )  
DEBRA PAYNE; APRIL PROCTOR; )  
KELLE SHULTZ; CYNTHIA SHEAR; )  
JENNIFER SWOPE; GLORIA WEBB; )  
KATHY WILLIAMSON; )  
and CAROLYN WILSON; )

PLAINTIFFS, )

v. )

Cause No. CJ-2009-213

- 1. FREEPORT-MCMORAN COPPER )  
& GOLD INC.; )
- 2. PHELPS DODGE CORPORATION; )
- 3. CYPRUS AMAX MINERALS )  
COMPANY; )
- 4. BLACKWELL ZINC COMPANY, INC.; )  
and )
- 5. BNSF RAILWAY COMPANY f/k/a )  
BURLINGTON NORTHERN INC. )  
f/k/a BURLINGTON NORTHERN )  
RAILROAD COMPANY f/k/a THE )  
BURLINGTON NORTHERN and )  
SANTA FE RAILWAY COMPANY; )

DEFENDANTS. )

PLAINTIFFS' ORIGINAL PETITION

COME NOW Plaintiffs, GREG BROWN, KATRINA BROWN, BRENDA  
DOLLARHIDE, LINDA FERDA, DERRICK FLEMING, KIM JERNIGAN, MARY  
JOHNSON, RONDA LAFFERTY, ANTHONY LOOPER, CHERYL PAIGE, DEBRA PAYNE,

APRIL PROCTOR, KELLE SHULTZ, CYNTHIA SHEAR, JENNIFER SWOPE, GLORIA WEBB, KATHY WILLIAMSON, and CAROLYN WILSON ("Plaintiffs"), complaining of Defendants Freeport-McMoRan Copper & Gold Inc., independently, as successor-in-interest to Phelps Dodge Corporation, and as alter ego of Blackwell Zinc Company, Inc. ("Freeport-McMoRan"); Phelps Dodge Corporation, independently, as successor-in-interest to Cyprus Amax Minerals Company and as alter ego of Blackwell Zinc Company, Inc. ("Phelps Dodge"); Cyprus Amax Minerals Company, independently, as successor-in-interest to Cyprus Minerals Company and AMAX, Inc. and as alter ego of Blackwell Zinc Company, Inc. ("Cyprus Amax"); Blackwell Zinc Company, Inc. ("Blackwell Zinc Company"); and BNSF Railway Company f/k/a Burlington Northern Inc. f/k/a Burlington Northern Railroad Company f/k/a The Burlington Northern and Santa Fe Railway Company ("BNSF Railway") (collectively, "Defendants"), and for causes of action state as follows:

### I. Introduction

1. Defendants created, sustained and covered-up massive contamination and toxic exposure in the City of Blackwell, Oklahoma that caused severe injury to Plaintiffs. Plaintiffs are past and present citizens of Blackwell who have been exposed to Defendants' heavy metals since childhood and, as a result of their exposure, have suffered permanent injuries including, but not limited to, cognitive dysfunction.

2. Plaintiffs have been exposed to countless pounds of toxic, damaging and hazardous waste material released as a result of Defendants' wrongful conduct at the former zinc production facility known as the Blackwell Zinc Smelter in Blackwell, Kay County, Oklahoma (the "Smelter"). These deadly, dangerous substances were generated from primary and secondary zinc production and related processes at the Smelter and were distributed throughout

the community by the Smelter stack and various fugitive sources.<sup>1</sup> Additionally, this toxic waste was used throughout the community for a multitude of different purposes including, but not limited to, use as landfill and for the construction of roads, driveways, parking lots, and the Blackwell High School track.

3. As a result of Defendants' creation, sustainment and cover-up of contamination, Plaintiffs have been and continue to be exposed to the deadly, dangerous substances contained within the dust, smoke and other releases from the Smelter. The creation of these dangerous toxins from the Smelter and their contamination of the City of Blackwell occurred on a continual basis for almost 60 years while the Smelter was in operation. This contamination has continued for the past 35 years since the Smelter's closure. The dangerous nature of Defendants' actions has been and continues to be covered-up through their deceit. Accordingly, Defendants are responsible for more than 90 years of contamination—contamination that continues to do harm with each passing day. Despite their knowledge of the dangers associated with their conduct, Defendants did nothing to provide Plaintiffs with notice or warning of the discharge of these deadly, dangerous substances.

## II. Factual Statement

4. By the end of the 19<sup>th</sup> century, natural gas had become the primary fuel for smelting operations. As the natural gas reserves in Kansas and Missouri diminished, zinc smelting migrated to Oklahoma, an area still rich in natural gas. The first facility in Oklahoma was opened near Bartlesville in 1907 and was quickly followed by many others, including the Blackwell Zinc Smelter.

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<sup>1</sup> Fugitive sources are those air emissions that emanate from facilities into the atmosphere through mechanisms other than stacks, chimneys, ducts or similar equipment. For example, at the Smelter, fugitive emissions emanated from various sources throughout the plant including, but not limited to, vents in buildings, railcar unloading activities and wind-blown dust generated by slag piles.

5. The Smelter, a facility used to refine zinc and cadmium ore concentrates, was located in Blackwell, Oklahoma from its opening in 1916 until its closure in 1974. The Smelter was operated by Defendant Blackwell Zinc Company, a subsidiary of Amax, Inc. ("AMAX"). The arrival of the new industry transformed Blackwell, bringing great growth and prosperity to the once-sleepy community. By 1930, Blackwell was home to more than 9,500 Oklahomans, almost four times the population recorded in the 1900 census. By 1950, the Smelter had become the single largest horizontal retort smelter in the world, employing more than 950 workers. The Smelter itself encompassed 80 acres on the eastern edge of town and was surrounded by an additional 700 acres comprising the Smelter facility.

6. During its operational life, workers at the Smelter produced millions of tons of zinc alloy for use in many galvanized iron and steel products, including water piping, windmills, water tanks, siding, roofing and lightning rods. The Smelter, its employees and the City of Blackwell enjoyed economic success throughout the 1940s and 1950s. The erection of a new sintering plant in 1951 further propelled growth and led to the 1957 opening of a cadmium plant that produced products used in paints, pigments, ceramics, television phosphors and chemical compounds.

7. The ore used as raw material for these products, brought to the Smelter from Joplin, Missouri and later from Mexico, Canada and Australia, contained up to 20% lead and considerable cadmium. Defendants continuously piled these substances on and around the Smelter facility. This contamination would occur without the knowledge of the town's residents.

8. Although the citizens of Blackwell were unaware of the dangers that existed and those that loomed ahead, Blackwell Zinc Company and AMAX knew the byproducts created at the Smelter contained dangerous compounds unfit for human exposure or ingestion. In a

February 21, 1939 letter written to all smelter operators by the Tri-State Zinc and Lead Ore Producers Association, the industry recognized that dust emissions were so bad that it called them a "nuisance" and a "constant source of agitation and discontent." Later that same year, the Producers Association acknowledged that the dust was a "hazard" and that steps were needed to prevent the dust from being "blown over" communities.

9. In the late 1960s, effects later attributed to the Smelter began to appear. A group of farmers started noticing unhealthy, barely harvestable crops and workers began to complain of breathing abnormalities. The Defendants compensated the farmers for their damaged crops, but they failed to take any action to address the harm already inflicted upon the rest of Blackwell or to prevent the continued contamination of the community.

10. Unwilling to make the necessary expenditures for pollution control equipment, Blackwell Zinc Company focused on its bottom line, disregarded the citizens of Blackwell and made the decision to shut down the Smelter. Accordingly, instead of updating the plant and preserving the livelihood of Blackwell, Defendants began the process of closing the Smelter in 1972, and completely dismantled the facility by 1974. After fifty-eight years of continuous operation the Smelter was gone. Defendants left behind an environmental nightmare that still haunts Blackwell residents, both past and present. Defendants' facility, which once defined an entire community, generating both opportunity and pride, now serves only as a reminder of Defendants' corporate greed, abandonment and deception.

11. In 1992, the United States Environmental Protection Agency ("EPA") suggested Blackwell would be a Superfund site and be placed on the National Priorities List ("NPL") if investigation and remedial efforts did not ensue. Thereafter, the Blackwell Zinc Company, the Blackwell Industrial Authority ("BIA") and the City of Blackwell entered into a Consent

Agreement and Final Order (the "1992 CAFO") with the Oklahoma Department of Health.<sup>2</sup> The 1992 CAFO required Blackwell Zinc Company and the BIA to characterize and remediate the environmental contamination at the old Smelter site and on city property. Significantly, the 1992 CAFO's remediation plan did not address the public health of the citizens of Blackwell.

12. In 1994, in an effort to keep Blackwell off of the NPL, the ODEQ and the EPA entered into a Memorandum of Understanding (the "1994 MOU") that obligated the ODEQ to ensure that the environmental characterization and remediation work conducted at the Smelter site was conducted in a manner consistent with the EPA's Superfund program. Again, neither the EPA nor the ODEQ made any effort to address the adverse health effects caused by the Smelter.

13. Pursuant to the 1992 CAFO and the 1994 MOU, Cyprus Amax,<sup>3</sup> on behalf of Blackwell Zinc Company, performed environmental investigations and purported "remedial" actions on and about the Smelter site under the ODEQ's supervision. Among other things, zinc and cadmium were found in the soils at the Smelter site and were further found to be infiltrating area groundwater. After a series of negotiations and attendant delays, several consent orders were entered and purported "remedial" efforts ensued to address the soil and water contamination, as well as certain ecological concerns. These "remedial efforts" were not binding on private citizens; nor did they help private citizens. Indeed, none of Defendants' purported "remediation efforts" were effective or comprehensive and none of their efforts were intended to evaluate the citizens of Blackwell for health problems. In fact, Defendants' investigation and attempted remediation has been and continues to be nothing more than a sham designed to deceive the citizens of Blackwell. The testing protocols and threshold clean up levels employed

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<sup>2</sup> The Oklahoma Department of Health was the predecessor to the Oklahoma Department of Environmental Quality ("ODEQ").

<sup>3</sup> In 1993, Blackwell Zinc Company's parent company, Amax, merged with Cyprus Minerals Company to create Defendant Cyprus Amax.

by Defendants are designed to minimize findings of contamination, wholly fail to investigate contamination inside residents' homes, and turn a blind eye to well-established and widely accepted benchmarks, such as those adopted and endorsed by the EPA.

14. The deadly, dangerous substances generated through Defendants' negligent operation of the Smelter have been and continue to be a source of harm to the individuals living in and around Blackwell, including Plaintiffs. This contamination contains and has continuously released into the community a variety of harmful and damaging substances, including zinc, arsenic, lead and cadmium. These dangerous substances have contaminated and continue to contaminate Blackwell, causing severe injuries to Plaintiffs.

15. The deadly, dangerous substances emitted by the Smelter—zinc, arsenic, lead and cadmium—possess no inherent warning properties that would alert a reasonable person to their presence. Each such contaminant is invisible, odorless and tasteless. The presence of these deadly toxins could not and cannot be detected without highly technical and expensive scientific testing. As such, Plaintiffs were unaware that Defendants were exposing Plaintiffs' persons and properties to these dangerous compounds. A reasonable person could not have known, despite all manner of diligence, of the presence of these poisons. Furthermore, Defendants have told and continue to this day to tell Blackwell residents that there is no potential adverse health effects from the contaminants.

16. The manner in which Defendants operated, closed, cleaned-up and purportedly "remediated" the Smelter site was woefully inadequate and further jeopardized the safety and welfare of all individuals residing in and around Blackwell, including Plaintiffs. Such senseless conduct on the part of Defendants has caused and continues to cause damage to the health of Plaintiffs. These damages are exponentially exacerbated by Defendants' ongoing refusal to

properly remediate the contamination caused through their operation of the Smelter and by their inadequate remediation and improper management of the Smelter site since its closing in 1974.

17. Making matters worse and Defendants' conduct even more egregious, Defendants have actively engaged in a campaign of deception and cover-up designed to mislead the residents of Blackwell into believing that these deadly, dangerous substances have presented and continue to present no threat to them.

18. There is widespread zinc, arsenic, lead and cadmium contamination to the exterior and interior of homes, including those of Plaintiffs, throughout Blackwell as a result of Defendants' wrongful acts.

19. As a result of Defendants' dangerous and unlawful conduct, wind erosion and other airborne and waterborne releases from the Smelter facility have spread Defendants' contaminants throughout the town. The deadly, dangerous substances released from the facility were and are transported by wind and other natural processes onto and into the homes, properties and persons of Blackwell, including Plaintiffs. Furthermore, soil, dirt, sand, slag, "conies" and other materials were sold or given to the City of Blackwell and area residents for use as landfill, the construction of roads, driveways, parking lots, the Blackwell High School running track, and a multitude of other applications. In addition, once in the soils of Blackwell, contamination is continuously brought into homes, schools and places of business.

20. As a result of Defendants' conduct, Plaintiffs have suffered severe cognitive dysfunction affecting their livelihood and quality of life and causing Plaintiffs significant economic and non-economic damages.

21. Exposure to arsenic can result in severe gastrointestinal toxicity, peripheral nervous system neuropathy, anemia, hyper-pigmentation, skin lesions, vascular disease,



headaches, lassitude, weakness, respiratory ailments, and vision impairment. Arsenic is also associated with liver and kidney injury, disturbances of the central nervous system, and an increased risk of cancer of the lungs, skin, kidney, liver, and bladder. The National Toxicology Program, the International Agency for Research on Cancer and the EPA's Integrated Risk Information System classify arsenic as a known human carcinogen.

22. Exposure to lead can result in damage to the brain and central nervous system, peripheral nervous system, kidneys and hematopoietic system. Anemia is an early manifestation of lead poisoning due to the inhibition of hemoglobin synthesis and a reduction in the life span of circulating red blood cells. Lead exposure can lead to kidney damage and possible kidney failure, fine motor nerve damage, bone damage, hypertension, lead encephalopathy, memory loss, and permanent brain damage. Lead exposure can also have neurological and psychological effects. Lead is classified as a probable human carcinogen by the International Agency for Research on Cancer and the EPA's Integrated Risk Information System, and as a reasonably anticipated human carcinogen by the National Toxicology Program.

23. Of paramount concern is the effect of lead exposure on children. Exposure to lead can have a wide range of effects on a child's development and behavior. Children are at an increased risk for greater lead exposure. Children under the age of six are especially vulnerable to lead's harmful health effects as their brains and central nervous system are still developing. For young children, even very low levels of exposure can result in reduced IQ, learning disabilities, attention deficit disorders, behavioral problems, stunted growth, impaired hearing, and kidney damage. At high levels of exposure, a child may become mentally retarded, suffer permanent brain damage, fall into a coma, and even die from lead poisoning.

24. Exposure to cadmium can result in an increased risk of lung disease, death due to

heart-related problems and serious effects on the kidney, including but not limited to kidney cancer. Cadmium has a long biological half-life in humans. Cadmium is classified as a known human carcinogen by the National Toxicology Program, a human carcinogen by the International Agency for Research on Cancer and a probable human carcinogen by the EPA's Integrated Risk Information System.

25. Exposure to zinc can lead to the development of metal fume fever and copper deficiency, as well as altered iron function, reduced immune function and reduced levels of high-density lipoproteins. The most prominent respiratory effects of zinc exposure are substernal chest pain, cough and dyspnea, while reduced lung volumes and a decreased diffusing capacity of carbon monoxide characterize the impairment of pulmonary function.

26. Plaintiffs assert their claims under state common law for relief related to and resulting from widespread contamination in and around Blackwell with deadly, dangerous substance—contamination which was caused by Defendants' negligent and grossly negligent creation, sustainment and cover-up of the pollution.

27. As a result of the Defendants' unlawful and negligent conduct, including their harmful, careless and dangerous operation, closure, "cleanup" and purported "remediation" of the Smelter, Plaintiffs' health, safety and welfare have been damaged. The Defendants have and continue to place money above any concern for the health of Plaintiffs.

### III. Jurisdiction

28. This Court has personal jurisdiction over Defendants by virtue of the extensive amount of business they conduct(ed) within this state and, further, because of the specific conduct at issue occurred in the State of Oklahoma. Specifically, each Defendant's conduct resulted in the release of deadly, dangerous substances from the Smelter and/or Smelter site.

Millions of pounds of waste materials generated from primary and secondary zinc production and related processes at the Smelter were distributed throughout the community by the Smelter stack and fugitive sources at the Smelter. Additionally, this toxic waste was used throughout the community for a multitude of different purposes, including, but not limited to, use as landfill and for the construction of roads, driveways, parking lots, and the Blackwell High School track.

29. The Defendants are amenable to service under the Oklahoma long-arm statute. The exercise of personal jurisdiction over Defendants does not offend traditional notions of fair play and substantial justice. Defendants have established minimum contacts with the State of Oklahoma. Defendants have purposefully availed themselves of the privilege of conducting activities within the State of Oklahoma, thereby invoking the benefits and protections of its laws.

30. Furthermore, neither federal question nor federal diversity jurisdiction exists over this case. *See Coffey v. Freeport-McMoRan Copper & Gold Inc.*, 623 F. Supp. 2d 1257 (W.D. Okla. 2009) (holding removal was improper and that federal question jurisdiction did not exist under the Comprehensive Environmental Response, Compensation, and Liability Act or under the federal officer doctrine) *aff'd*, 581 F.3d 1240 (10th Cir. 2009). Additionally, Blackwell Zinc Company's principal place of business is in Oklahoma. *Id.* at 1264. Because Plaintiffs are all Oklahoma citizens and Blackwell Zinc Company's principal place of business is in Oklahoma, there is not complete diversity among the parties and federal diversity jurisdiction is lacking.

31. Plaintiffs will oppose any improper attempt to remove this case to federal court and will seek costs, fees and sanctions for any such action.

#### IV. Venue

32. Venue is proper in Kay County, Oklahoma as to Defendant Blackwell Zinc Company under 12 Okla. Stat. § 134 because Defendant Blackwell Zinc Company resides in Kay

County, Oklahoma and because Defendant Blackwell Zinc Company resided in Kay County, Oklahoma at the time Plaintiffs' claims arose. *See Coffey*, 623 F. Supp. 2d at 1264.

33. Venue is proper in Kay County, Oklahoma as to Defendants Phelps Dodge, Freeport-McMoRan, Cyprus Amax and BNSF Railway under 12 Okla. Stat. § 137 because co-defendant Blackwell Zinc Company is a resident of Kay County, Oklahoma and may properly be sued in Kay County, Oklahoma.

#### V. Parties

34. Plaintiff GREG BROWN is a natural person who resides in Blackwell, Kay County, Oklahoma.

35. Plaintiff KATRINA BROWN is a natural person who resides in Blackwell, Kay County, Oklahoma.

36. Plaintiff BRENDA DOLLARHIDE is a natural person who resides in Blackwell, Kay County, Oklahoma.

37. Plaintiff LINDA FERDA is a natural person who resides in Blackwell, Kay County, Oklahoma.

38. Plaintiff DERRICK FLEMING is a natural person who resides in Blackwell, Kay County, Oklahoma.

39. Plaintiff KIM JERNIGAN is a natural person who resides in Blackwell, Kay County, Oklahoma.

40. Plaintiff MARY JOHNSON is a natural person who resides in Blackwell, Kay County, Oklahoma.

41. Plaintiff RONDA LAFFERTY is a natural person who resides in Blackwell, Kay County, Oklahoma.

42. Plaintiff ANTHONY LOOPER is a natural person who resides in Blackwell, Kay County, Oklahoma.

43. Plaintiff CHERYL PAIGE is a natural person who resides in Claremore, Rogers County, Oklahoma.

44. Plaintiff DEBRA PAYNE is a natural person who resides in Blackwell, Kay County, Oklahoma.

45. Plaintiff APRIL PROCTOR is a natural person who resides in Blackwell, Kay County, Oklahoma.

46. Plaintiff KELLE SHULTZ is a natural person who resides in Blackwell, Kay County, Oklahoma.

47. Plaintiff CYNTHIA SHEAR is a natural person who resides in Blackwell, Kay County, Oklahoma.

48. Plaintiff JENNIFER SWOPE is a natural person who resides in Blackwell, Kay County, Oklahoma.

49. Plaintiff GLORIA WEBB is a natural person who resides in Blackwell, Kay County, Oklahoma.

50. Plaintiff KATHY WILLIAMSON is a natural person who resides in Blackwell, Kay County, Oklahoma.

51. Plaintiff CAROLYN WILSON is a natural person who resides in Deer Creek, Grant County, Oklahoma.

52. Defendant FREEPORT-MCMORAN COPPER & GOLD INC., a foreign corporation organized and existing under the laws of the State of Delaware, whose principal office is located at One North Central Avenue, Phoenix, Arizona 85004, independently and as

alter ego of Defendant Blackwell Zinc Company; is authorized to do business in Oklahoma and may be served with process by serving its registered agent for service of process, the Oklahoma Secretary of State, at 2300 North Lincoln Boulevard, Room 101, Oklahoma City, Oklahoma 73105-4897. Defendant Freeport-McMoRan acquired Defendant Phelps Dodge in March 2007, at which time Defendant Phelps Dodge became a wholly-owned subsidiary of Defendant Freeport-McMoRan.

53. Defendant PHELPS DODGE CORPORATION, a foreign corporation organized and existing under the laws of the State of New York, whose principal office is located at One North Central Avenue, Phoenix, Arizona 85004-4416, independently and as alter ego of Defendant Blackwell Zinc Company, may be served with process by serving its registered agent for service of process, CT Corporation System, at 111 Eighth Avenue, New York, New York 10011. Defendant Phelps Dodge acquired Defendant Cyprus Amax in 1999, at which time Defendant Blackwell Zinc Company became a wholly-owned subsidiary of Phelps Dodge.

54. Defendant CYPRUS AMAX MINERALS COMPANY, a foreign corporation organized and existing under the laws of the State of Delaware, whose principal office is located at One North Central Avenue, Phoenix, Arizona 85004, independently and as alter ego of Defendant Blackwell Zinc Company, may be served with process by serving its registered agent for service of process, CT Corporation System, at 2394 East Camelback Road, Phoenix, Arizona 85016. Defendant Cyprus Amax was established through the merger of Cyprus Minerals Company and Amax. Defendant Blackwell Zinc Company was a wholly-owned subsidiary of Defendant Amax.

55. Defendant BLACKWELL ZINC COMPANY, INC, a corporation organized and existing under the laws of the State of New York, whose principal place of business for the

purpose of determining diversity jurisdiction is Blackwell, Kay County, Oklahoma, as this is the place it last transacted business, is authorized to do business in Oklahoma, and may be served with process by serving its registered agent for service of process, The Corporation Company, at 735 First National Building, Oklahoma City, Oklahoma 73102. Defendant Blackwell Zinc Company is a wholly-owned subsidiary of Defendant Phelps Dodge Corporation, which is a wholly-owned subsidiary of Defendant Freeport-McMoRan Copper & Gold Inc.

56. Defendant BNSF RAILWAY COMPANY f/k/a Burlington Northern Inc. f/k/a Burlington Northern Railroad Company f/k/a The Burlington Northern and Santa Fe Railway Company, a foreign corporation organized and existing under the laws of the State of Delaware, whose principal office is located at 2650 Lou Menk Drive, Fort Worth, Texas 76131-2830, is authorized to do business in Oklahoma and may be served with process by serving its registered agent for service of process, The Corporation Company, at 735 First National Building, Oklahoma City, Oklahoma 73102.

57. Plaintiffs and Defendants are permissively joined in this case as permitted by 12 Okla. Stat. § 2020.

#### **VI. Plaintiffs' Causes of Action**

58. At all times relevant to the herein enumerated causes of action, Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge, Freeport-McMoRan and BNSF Railway concealed from Plaintiffs vital information concerning the harmful effects resulting from the operation of the Smelter. As a result, Plaintiffs did not know, nor should Plaintiffs have known, of their injuries. Plaintiffs, therefore, invoke the "discovery rule."

59. Specifically, Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge, Freeport-McMoRan and BNSF Railway had information and/or knowledge that would have

reasonably supported the conclusion that their operations in and around the Smelter posed a severe threat to individuals, including Plaintiffs, exposed to its harmful byproducts.

60. Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge, Freeport-McMoRan and BNSF Railway had knowledge that the byproducts generated through their operation of the Smelter contained deadly, dangerous compounds unfit for human exposure and/or ingestion. As mentioned *supra*, in 1939, the smelting industry recognized that dust emissions were a “nuisance,” a “constant source of agitation and discontent,” a “hazard” and that steps were needed to prevent the toxic dust from being “blown over” communities.

61. At the very latest, Defendants had knowledge that the byproducts generated through their operation of the Smelter contained dangerous compounds unfit for human exposure and/or ingestion in 1973 when a group of area farmers brought suit against them for property damage. That case, *Glenny v. American Metal Climax, Inc.*, included allegations that lead, arsenic and cadmium emitted from the Smelter had and were contaminating Plaintiffs’ property. Notably, after settling their dispute with the farmers for millions of dollars, Defendants waited 20 years to begin any remedial efforts. Even then, the remediation was conducted only because Defendants were forced to do so by state and federal environmental regulators. Making matters worse, the cleanup conducted to date has been shoddy at best. Defendants have negotiated elevated remedial threshold levels to limit the amount of remediation required and have consistently failed to employ recognized protocols with respect to the minimal remediation performed. Whether Defendants’ purported “cleanup” complies with standards imposed upon it by the EPA or the ODEQ is of no moment; Defendants’ actions have caused severe and permanent injury to Plaintiffs that is actionable under common law.



62. Defendants' conscious concealment of these known facts is misconduct that was and is a proximate and/or producing cause of the Plaintiffs' damages. Each of these acts and/or omissions, as well as other overt acts of commission, was done for the purpose of persuading Plaintiffs and the general public that operation of the Smelter was safe and/or for the purpose of hiding the dangerous and harmful effects resulting from its operation.

63. Because Defendants concealed the dangers associated with and attendant to their conduct, Plaintiffs did not know, nor should they have known, of their damages. In fact, Defendants' concealment of the dangers associated with their operation of the Smelter and resulting contamination of the community continues to this day. After opening an office in the City of Blackwell in 2006, Defendant Phelps Dodge has actively engaged in a campaign of misinformation and denial regarding the dangerousness and severity of the conditions existing in Blackwell. This propaganda campaign has been nothing more than a continued effort by Defendants to conceal the devastation caused by their conduct. As stated above, the deadly, dangerous substances emitted by the Smelter—zinc, arsenic, lead and cadmium—possess no inherent warning properties that would alert a reasonable person to their presence. Each such contaminant is invisible, odorless and tasteless. The presence of these deadly toxins could not and cannot be detected without highly technical and expensive scientific testing. As such, Plaintiffs were unaware that their persons were being exposed to and contaminated by these dangerous compounds. A reasonable person could not have known, despite all manner of diligence, of the presence of these poisons.

**A. Count One – Fraud**

64. Plaintiffs incorporate herein the foregoing allegations of this Petition and further allege as follows:

65. As alleged in Section VI. A. above, Defendants knowingly concealed and made material, false representations to Plaintiffs regarding the presence of these deadly toxins and the dangers associated with them. Defendants knew of the dangers to Plaintiffs and launched this fraudulent campaign to induce Plaintiffs into a false sense of security and inaction regarding their health and the injuries caused by Defendants' actions. Furthermore, Defendants continue to make these fraudulent statements to this day.

66. In addition to other fraudulent misrepresentations, Defendants' fraudulently misrepresented to Plaintiffs that the toxin-laden chat material was safe for use as it was actively and permissively distributed throughout the city of Blackwell.

67. Defendants' fraudulent actions have induced Plaintiffs to remain as residents of Blackwell, thereby exacerbating their injuries and prolonging their exposure to these deadly and severely damaging toxins.

#### **B. Count Two – Assault and Battery**

68. Plaintiffs incorporate herein the foregoing allegations of this Petition and further allege as follows:

69. Defendants activities have resulted and continue to result in the release of deadly dangerous substances and have caused and will continue to cause an actual physical invasion of Plaintiffs' bodies. This assault is ongoing and continues to this day.

70. Deadly, dangerous substances presently being inhaled and ingested and that have been ingested and inhaled by Plaintiffs' came from the Smelter and/or the former Smelter site and were and continue to be owned by and/or the responsibility of Defendants.

71. Defendants have known that the toxic wastes have resulted in an assault on Plaintiffs, and have continued their intentional and/or negligent conduct.

72. This assault on Plaintiffs' has occurred and continues to occur without permission, authority or consent from Plaintiffs. Plaintiffs' ingestion and inhalation of these toxins is an assault under applicable state law. Defendants intentionally, knowingly and recklessly caused bodily injury to Plaintiffs by their conduct.

73. The conduct of Defendants has been and continues to be negligent. Additionally, the conduct of Defendants has been and continues to be willful, intentional, malicious, and/or with reckless disregard for the rights of others.

74. The above-stated acts and/or omissions of Defendants were and continue to be a proximate and/or producing cause of Plaintiffs' damages.

### **C. Count Three – Negligence**

75. Plaintiffs incorporate herein the foregoing allegations of this Petition and further allege as follows:

76. Defendants are, have been and/or continue to be successive owners of the property in question and each has neglected to abate the continuing contamination and resulting toxic exposure to Plaintiffs. This exposure has poisoned Plaintiffs with heavy metal toxins, including, but not limited to, lead, zinc, cadmium and arsenic.

77. The acts and/or omissions of Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge and Freeport-McMoRan were committed intentionally, negligently and/or grossly negligently, and include, but are not limited to, the following:

- a. failing to operate the Smelter in such a manner as to protect the safety, health, and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;
- b. failing to properly and safely handle, manage and/or store the harmful waste generated through operation of the Smelter in such a manner as to protect the safety, health and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;

- c. failing to properly remove and/or dispose of the harmful waste generated through operation of the Smelter in such a manner as to protect the safety, health and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;
- d. failing to close and cleanup the Smelter in such a manner as to protect the safety, health and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;
- e. failing to abate the harmful substances generated through operation of the Smelter, thereby jeopardizing the safety, health and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;
- f. failing to ensure proper containment of the harmful waste generated through operation of the Smelter, thereby jeopardizing the safety, health and welfare of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein;
- g. depositing and/or allowing to be deposited harmful contaminants in and on properties located in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein;
- h. distributing and/or making available to the public, including Plaintiffs herein, the harmful waste materials generated through operation of the Smelter;
- i. failing to warn of and/or make known to the public, including Plaintiffs herein, the dangers associated with operation of the Smelter;
- j. failing to warn of and/or make known to the public, including Plaintiffs herein, the dangers associated with exposure to and/or ingestion of the harmful waste materials generated through operation of the Smelter;
- k. failing to cooperate with City and State officials in the investigation and testing of soils located on properties in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein;
- l. failing to employ recognized and/or accepted protocols and/or procedures in the investigation and testing of soils located on properties in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein;

- m. failing to investigate, evaluate and/or test contamination levels inside the homes in and around Blackwell, Kay County, Oklahoma, including homes owned and/or occupied by Plaintiffs herein;
- n. failing to employ recognized and/or accepted protocols and/or procedures in the attempted remediation of contaminated properties located in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein; and
- o. failing to employ and/or provide appropriate and/or qualified personnel and/or management in the attempted remediation of contaminated properties located in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein.

78. The acts and/or omissions of Defendant BNSF Railway were committed intentionally, negligently and/or grossly negligently, and include, but are not limited to, the following:

- a. failing to institute, implement and/or employ proper protocols and/or procedures to ensure containment of the hazardous materials it transported to and/or from the former Smelter property;
- b. depositing and/or allowing to be deposited harmful contaminants in and on properties located in and around Blackwell, Kay County, Oklahoma, including properties owned and/or occupied by Plaintiffs herein;
- c. failing to properly and adequately supervise and/or manage its operations occurring in and around the former Smelter property in such a manner as to prevent the release of toxic substances into the City of Blackwell and surrounding communities, thereby jeopardizing the safety, health, welfare and property of those living in and around Blackwell, Kay County, Oklahoma, including Plaintiffs herein; and
- d. failing to warn of and/or make known to the public, including Plaintiffs herein, the dangers associated with exposure to and/or ingestion of the hazardous materials it transported to and/or from the former Smelter property.

79. Additionally, the conduct of Defendants has been and continues to be willful, intentional, malicious, and/or with reckless disregard for the rights of others.

80. The above-stated acts and/or omissions of Defendants were, and continue to be, a proximate and/or producing cause of the Plaintiffs' damages.

**D. Count Four – Strict Liability for Ultra Hazardous Activity**

81. Plaintiffs incorporate herein the foregoing allegations of this Petition and further allege as follows:

82. Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge and Freeport-McMoRan are strictly liable for their operation of the Smelter as said operation, as conducted, constituted an ultra-hazardous activity. Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge and Freeport-McMoRan's activities were and are abnormally dangerous and Defendants are subject to liability for harm to Plaintiffs' persons resulting from their ultra-hazardous activity, even if Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge, and Freeport-McMoRan exercised the utmost care to prevent such harm.

83. Defendants Blackwell Zinc Company, Cyprus Amax, Phelps Dodge and Freeport-McMoRan's handling, storage, management and attempted disposal of the waste generated by their operation of the Smelter has caused and continues to cause damage to Plaintiffs.

84. Defendant BNSF Railway is strictly liable for its operations in and around the City of Blackwell as said operations, as conducted, constituted an ultra-hazardous activity. Defendant BNSF Railway activities were and are abnormally dangerous and Defendant BNSF Railway is subject to liability for harm to Plaintiffs' persons resulting from their ultra-hazardous activity, even if Defendant BNSF Railway exercised the utmost care to prevent such harm.

85. Defendant BNSF Railway's transportation and handling of dangerous and hazardous substances caused and continues to cause damage to Plaintiffs.

## VII. Plaintiffs' Damages

86. As a proximate result of the actions of Defendants, Plaintiffs have suffered severe and ongoing injuries. These injuries have affected Plaintiffs' qualities of life and have required and will continue to require medical treatment. Therefore, Plaintiffs would claim damages including, but not limited to:

- a. Reasonable and necessary medical expenses incurred in the past;
- b. Reasonable and necessary medical expenses reasonably likely to be incurred in the future;
- c. Physical pain and suffering in the past;
- d. Physical pain and suffering in the future;
- e. Physical and mental impairment in the past;
- f. Physical and mental impairment in the future;
- g. Mental anguish in the past;
- h. Mental anguish in the future;
- i. Loss of earnings and/or earning capacity in the past;
- j. Loss of earnings and/or earning capacity in the future;
- k. Punitive damages;
- l. Pre-judgment interest; and
- m. Post-judgment interest.

## VIII. Prayer

87. WHEREFORE, Plaintiffs respectfully request the Court award Plaintiffs relief as follows:

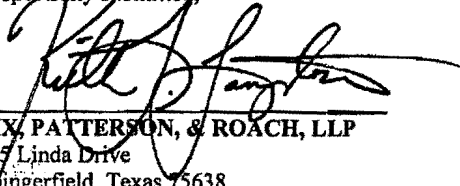
- a. Judgment against Defendants finding them liable to Plaintiffs;
- b. Compensatory damages in an amount to be determined at trial;

- c. Punitive damages in an amount to be determined at trial;
- d. Pre-judgment and post-judgment interest at the highest rate allowed by law;
- e. All other relief, whether compensatory, punitive or equitable in nature, to which Plaintiffs may be justly entitled as a result of their injuries sustained at the hands of the Defendants.

**IX. Jury Demand**

88. Plaintiffs demand a jury trial on all issues so triable.

Respectfully submitted,



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**ATTORNEYS FOR PLAINTIFFS**

State of Oklahoma, County of Kay, ss

I hereby certify that the within and foregoing is a true and correct copy of the original instrument as the same appears on file and of record in my office in the District Court of Kay County, Oklahoma.

Witness my hand and seal this 9<sup>th</sup> day of December 2009

MARY HANLEY Court Clerk  
Kim Carler Deputy