

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

SCOTT DAY and GLENDA V. WILSON,)
individually and on behalf of)
all others similarly situated,)
)
Plaintiffs,)
)
vs.) Case No. 2:13-CV-2164
)
WHIRLPOOL CORPORATION,) @ Fort Smith, Arkansas
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE P. K. HOLMES, III
UNITED STATES DISTRICT COURT JUDGE
OCTOBER 6, 2014

A P P E A R A N C E S

For the Plaintiffs: MR. KENNETH R. SHEMIN
Shemin Law Firm, PLLC
3333 Pinnacle Hills Pkwy, S603
Rogers, Arkansas 72758

For the Defendant: MR. ROBERT L. JONES, III
MS. VICKI BRUNSON
Conner & Winters
4375 North Vantage Drive, S405
Fayetteville, Arkansas 72703

MR. ROBERT H. BRUNSON
MR. WILLIAM H. LATHAM
Nelson Mullins Riley
& Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201

REPORTED BY:
RICK L. CONGDON, RMR, FCRR
Federal Official Court Reporter
P. O. Box 8493
Fort Smith, Arkansas 72902

PROCEEDINGS RECORDED STENOGRAPHICALLY; PRODUCED VIA C.A.T.

APPEARANCES (Continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

For the Objectors:

MR. SAM E. LEDBETTER
MR. ROSS NOLAND
McMath Woods, P.A
711 W. Third Street
Little Rock, Arkansas 72201

Others present:

MR. LESTER SOTSKY

1 ---o0o---

2 PROCEEDINGS OF OCTOBER 6, 2014

3 ---o0o---

4 THE COURT: Good morning.

5 AUDIENCE: Good morning, Your Honor.

6 THE COURT: We are here this morning in the matter of
7 Scott Day versus Glenda -- and Glenda Wilson versus Whirlpool
8 Corporation. The case number is 13-CV-2164. And we are here
9 this morning on a joint amended motion for preliminary approval
10 of class action settlement. And what I'd like to do, the way I
11 would like to proceed first is identify the parties who are
12 here. And counsel, Mr. Shemin, counsel for the Plaintiff, if
13 you'll introduce yourself and who's at your counsel table with
14 you.

15 MR. SHEMIN: Your Honor, I'm here at counsel table
16 alone, and I represent the putative class.

17 THE COURT: Okay. And for Whirlpool, Mr. Jones?

18 MR. JONES: Yeah, Bob Jones for Whirlpool. And Bill
19 Latham, Robert Brunson, Les, and Vicki Bronson.

20 THE COURT: Good. Thank you. And also, as you know,
21 there are some objectors who have, who have filed an objection
22 to the proposed settlement, and Whirlpool filed a motion to
23 strike which I denied, and I note that we also have present in
24 court Mr. Sam Ledbetter, who is the attorney for the objectors.

25 MR. LEDBETTER: Yes, Your Honor. Good morning. We

1 represent the objectors who are plaintiffs in the two separate
2 cases pending in your court, the Kralicek case and the
3 Wilkinson case, and I have with me this morning Ross Noland
4 also from our firm, McMath Woods.

5 THE COURT: Since the Court denied the motion to
6 strike and notes that the objectors are present, what I intend
7 to do is to let the -- to hear the statements of counsel and
8 the objectors, and I'm going to have the Plaintiff go first and
9 then have the Defendant Whirlpool follow after the Plaintiff,
10 and then I'm going to give the objectors an opportunity to
11 speak to the issues, too. I will note though, although I
12 didn't grant the motion to strike, you know, the Court does
13 have some question at this stage about the objectors not being
14 parties, having the right to object. However, after, after
15 looking at the procedural, the posture of this case and what
16 different courts do in regard to objectors, the Court felt that
17 it was best to hear out some of the objections of some of the
18 putative class members at this time so the Court can make an
19 informed decision on the classification -- of whether or not
20 the class ought to be certified and, secondly, as to the
21 fairness of the settlement. So let me, let me also state
22 how -- what I intend to do in regard to the motion. There
23 are -- the way the motion is drafted for the class settlement,
24 it gives -- it asks really the Court to take two steps, first,
25 to approve the fairness of the settlement, and then, number

1 two, notify the class. What I fully intend to do and there's
2 actually, you know, a provision, an opinion about how to
3 proceed. I fully intend to do a rigorous analysis of Rule
4 23(a) on classification at this stage and not at a later stage,
5 so today when you address the issues about the settlement, I
6 also want you to address the issues about certification as
7 well. Okay? Okay. Mr. Shemin?

8 MR. SHEMIN: Thank you, Your Honor. Judge, may it
9 please the Court. Thank you for the opportunity to be present
10 today and to explain our position. I want to start off by
11 giving you a score card as best I can. As I understand it from
12 Mr. Ledbetter, he, and I take him at his word, obviously, he
13 represents all but 19 of the proposed well ban class. And
14 then, Your Honor, by my count, there would be 42 putative class
15 members that he does not represent in the fringe -- the
16 proposed fringe class.

17 THE COURT: Is that inclusive of the 19 or is that --

18 MR. SHEMIN: These are property -- these are
19 properties, Your Honor, and not individuals.

20 THE COURT: Okay.

21 MR. SHEMIN: And coincidentally, just for the score
22 card, it turns out that there are 53 properties in the well ban
23 class and 53 properties in the fringe class. So that's, that's
24 the numbers as I understand it.

25 THE COURT: Okay. Now, we are going to be dealing

1 with individuals rather than properties, aren't we?

2 MR. SHEMIN: Right.

3 THE COURT: Yeah, I mean, the --

4 MR. SHEMIN: Yeah, I just wanted to make --

5 THE COURT: Yeah, yeah, I know. I've gone through the
6 exhibit that's attached to the -- actually did it to the first
7 settlement agreement and looked at all of the names in the well
8 ban class and fringe class because I knew I had those other two
9 pending suits, and so I somewhat made some calculations of my
10 own regarding the number of individuals who are in the well ban
11 class and also in the fringe class.

12 MR. SHEMIN: Right. Okay.

13 THE COURT: Thank you.

14 MR. SHEMIN: Judge, I think it's important. I just
15 want to take a moment because some issues have been raised
16 about how I got involved in this case to begin with. I was in
17 a business meeting. A gentleman by the name of Scott Day, who
18 I did not know, who lived in Fort Smith and had a house in the
19 impacted area, actually on the fringe, told me and a client
20 about his situation. As a result of that communication at that
21 point in time, I was asked and did conduct an interview with
22 Mr. Day with respect to his situation. I also did due
23 diligence with respect to the overall situation here in Fort
24 Smith with respect to Whirlpool. And at that point in time,
25 Your Honor, I thought it was in the best interests of Mr. Day

1 to file a class action complaint in this matter. And that's
2 based upon my years of experience handling class actions and
3 also individual cases. I thought that we could meet the Rule
4 23 requirements at that point in time, and I also knew from my
5 experience, Your Honor, that this was going to be a very
6 expensive piece of litigation and that if it was to proceed on
7 an individual basis, there might be a substantial number of
8 people that were left behind, and as evidenced by the numbers
9 today that I presented to the Court, and you have your own
10 numbers, there would be a number of people, a substantial
11 number of people that would be left behind if there's not a
12 class action settlement. Once I filed my complaint in state
13 court, and obviously it's been removed, once I filed my
14 complaint, I had a deluge of phone calls from -- because it
15 attracted some press. Obviously, Judge, what I did at that
16 point in time was to just inform people that called me about
17 the class action process, and I told those people that they
18 were free to call me and that I would be responsive throughout.
19 About a week later, Your Honor, I read the newspaper and I
20 learned that Mr. Ledbetter and Mr. Woods had filed some
21 individual actions. I called W. H. Taylor, who's a friend, a
22 colleague, and a partner of Rick Woods, and briefly discussed
23 it with him, got on the phone with Rick Woods, and then we got
24 on the phone with Mr. Ledbetter and we discussed the potential
25 of working together. I have the highest personal regard for

1 Mr. Ledbetter. I think he is an excellent attorney and I think
2 he does a great job in his areas of practice. And I feel the
3 same about Mr. Woods. There's no problem insofar as the fact
4 that Mr. Ledbetter and Mr. Woods chose to take a different
5 route and did not want to join in the class action process.
6 Obviously, Judge, the thing I didn't want to do, because it
7 would not be appropriate, was to sign up people that called me
8 when they called me for me to represent them on a personal
9 basis. I don't think that's appropriate under the
10 circumstances, and when I filed the class action complaint,
11 Your Honor, everybody in this courtroom knows on this side of
12 the rail that I have a responsibility to the class. And if I
13 want to be relieved of that responsibility of the class, I have
14 to come see you about that. So there's been a reference to the
15 fact, Your Honor, that I only represent two people. I've
16 always taken the position, Your Honor, that I represent the
17 putative class, depending upon what the Court does in class
18 certification. I also want to point out to the Court that
19 based upon my experience and my due diligence in connection
20 with this case, I was hopeful that at some point during the
21 litigation process that Whirlpool and the putative class could
22 work out a settlement rather than going through protracted
23 litigation. That was on my mind from the beginning because of
24 the way I viewed liability in this case. And I quickly gleaned
25 through, you know, numerosity, commonality, superiority, and

1 all the other aspects of what it takes to certify a class. And
2 I felt like in the end that a good settlement could be worked
3 out for everyone involved. Now, I completely understand that
4 Mr. Ledbetter and Mr. Woods want to go in a different
5 direction, and I totally understand their position, and they
6 are free, obviously, along with their clients, to go in a
7 different direction, but it's important to me and I'll go
8 through the process to explain, and I know you've read the
9 settlement, reviewed it, understand my state of mind as I
10 negotiated this settlement with Whirlpool. First of all, I
11 want you to know that we had protracted discussions throughout
12 the term of this lawsuit up to today's date. We worked
13 diligently. This class action settlement just didn't happen.
14 We've met. I've met with Mr. Jones. I've met with Mr.
15 Morrison who was the predecessor to Mr. Brunson. And we have
16 talked in detail about the possibilities of getting a
17 resolution of this case. Let me tell you what my understanding
18 of the law is, and I'm sure that Mr. Ledbetter and the Court
19 will correct me if I'm wrong. Here's the way I view this case.
20 The AMI instructions and the Felton case, which was where
21 Mr. Ledbetter was the late counsel in that case, and it's an
22 important opinion, differentiate between the permanent injury
23 of the land and a temporary injury to the land, to the
24 property. I view this case, based on the Felton decision and
25 based upon what I know about this case, to be a temporary

1 injury to land. And the reason for that is --

2 THE COURT: Do you even know that now if the, if the,
3 if the ADEQ is still in the middle of determining what the,
4 what the remediation is going to do?

5 MR. SHEMIN: Well, Your Honor, the reason that I feel
6 that way is because, obviously, it could be a jury decision.
7 It could be your decision. It will ultimately be your
8 decision. But the reason I feel that way is the reliance on
9 Felton developed by Mr. Ledbetter. What I understand the
10 holding in part in that case is that if ADEQ, if the state and
11 Whirlpool are going through this remediation process, then
12 there's the presumption that there has to be remediation, that
13 it's capable of being remediated, and if it's capable of being
14 remediated, then you go to the temporary injury to property as
15 opposed to the permanent injury to property.

16 THE COURT: Why then does Whirlpool need an access
17 easement for 20 years?

18 MR. SHEMIN: Well, because we don't know, Your Honor,
19 what problems are going to be occurring during the remediation
20 process. It has to be determined what the exact remediation
21 process will be, and things happen during the remediation
22 process that might require additional work.

23 THE COURT: Yeah. That's one of the big problems I
24 see with this, with this class action. By the way, I want to
25 say I want you to proceed. I've got a lot of questions that

1 I'm going to ask both parties, and I don't mean to interrupt
2 you, but --

3 MR. SHEMIN: Yeah, Judge --

4 THE COURT: -- and because I want to have a free flow
5 of exchange here and I want to hear what you want to tell the
6 Court, so --

7 MR. SHEMIN: No. And I appreciate the questions
8 because that's why I'm here, to answer your questions. That's
9 more important than anything for me to answer your questions.

10 THE COURT: But your thought process about how you
11 went about settling the case is important because I note a
12 couple of things; one, Miss Wilson did not become a plaintiff
13 in the case until the day before the settlement.

14 MR. SHEMIN: That's correct, Your Honor. And the
15 reason -- may I give you the reason for that?

16 THE COURT: Yes.

17 MR. SHEMIN: Yeah, the reason for that is when you're
18 looking at a motion for class certification and you're defining
19 classes and subclasses, you need to have, in my opinion, a
20 member of each class in order to properly present --

21 THE COURT: Yeah, but she's a member of the well ban
22 class. She is the most important plaintiff. I mean, at the
23 time you negotiated this settlement, and I don't know what
24 Miss Wilson's involvement is or her time involvement, the only
25 client you had was the fringe member of the class. Now, the

1 further thing, what I don't understand, reading your complaint,
2 what you -- you describe the class, and I'll not go back and
3 read the complaint, but all those property owners who have been
4 affected by the TCE contamination. Now, the class, though, now
5 is defined as well bore [sic] and fringe class members. How
6 did you come to your --

7 MR. SHEMIN: Your Honor, I didn't follow what you
8 said.

9 THE COURT: Okay. You've got, the class in the
10 settlement is divided into two subclasses.

11 MR. SHEMIN: Correct.

12 THE COURT: You've got the well ban class and you've
13 got the fringe class. How did you arrive at that class
14 definition that's different than the allegation that you have
15 in your complaint?

16 MR. SHEMIN: Your Honor, the way I arrived at that or
17 we arrived at it in the context of this negotiation is because
18 it encompasses a hundred percent of those impacted and that
19 could potentially be impacted.

20 THE COURT: Well, but in your fringe class, it
21 provides that if, you know, if they discover that there's
22 contamination on the fringe, then it becomes basically a well
23 ban member and it has those remedies the well ban members have
24 that the fringe classes members don't have.

25 MR. SHEMIN: That's correct.

1 THE COURT: Okay. What happens to the property owner
2 on the other side of the fringe class owner? Do they -- you
3 know, they are not in the case. Are they impacted? I'm just
4 trying to figure out who is impacted by this settlement.

5 MR. SHEMIN: Right. Well, Your Honor --

6 THE COURT: You've come up with this definition of
7 well ban and fringe.

8 MR. SHEMIN: Your Honor, there has to be some line of
9 demarcation.

10 THE COURT: Yeah.

11 MR. SHEMIN: You've got the well ban, you've got the
12 fringe, and how far you can extend it.

13 THE COURT: Why does the fringe even need to be in the
14 class if there's no trespass on their property?

15 MR. SHEMIN: Because, well, first of all, Scott Day is
16 a fringe class member and he feels like and I've always felt
17 like that those people on the fringe need to be protected
18 within reason.

19 THE COURT: I need to ask a question about Mr. Day.

20 MR. SHEMIN: Sure.

21 THE COURT: And I've read all of these pleadings and
22 I've got a lot of questions, and let me ask you about Mr. Day.
23 When I saw that he was the plaintiff and I looked at the
24 settlement agreement, I looked on the fringe class, I don't see
25 his name there. So I'm trying to figure out who he is. Well,

1 I find out that he is -- has an LLC called River Rock Holdings,
2 LLC. So what I did, I went to the -- it's real easy. You can
3 do this in about two minutes. You can go to the Sebastian
4 County website and can look and see. Does he own this property
5 or does River Rock Holdings own it?

6 MR. SHEMIN: He owns it through that entity.

7 THE COURT: How can he -- that is a separate legal
8 entity. How can Scott Day be a plaintiff?

9 MR. SHEMIN: Well, in his -- Your Honor, that can
10 easily be corrected. He's the real property party in interest.

11 THE COURT: Now, wait a minute, Mr. Shemin. You filed
12 this lawsuit. You alleged that Scott Day was the owner of this
13 property. He is not the owner of the property.

14 MR. SHEMIN: That's, that's correct, Your Honor.

15 THE COURT: It's River Rock Holdings, LLC. Now, I
16 don't even know if River Rocks Holding, LLC, can be a class
17 representative, an LLC. I mean, I'm not -- you-all are more
18 versed in class actions than I am. But, I mean, Scott Day is
19 not even the real party in interest.

20 MR. SHEMIN: Well, Your Honor --

21 THE COURT: He is by virtue, he is a member, but I
22 don't know if there are other members of this LLC.

23 MR. SHEMIN: Your Honor, the way I understand the
24 rules, if and when someone raises the issue of whether or not
25 someone is a real party in interest, then it can be corrected

1 with leave of Court, so I don't think anybody --

2 THE COURT: But the allegation in the complaint -- he
3 does not own the property.

4 MR. SHEMIN: Well, that's correct, Your Honor, but he
5 is the -- I believe he's the sole member of that LLC.

6 THE COURT: The other thing I looked at, I mean, you
7 are going to have to pardon me for my inquisitiveness here, but
8 I went and looked at the Secretary of State's record and it
9 shows his status as barred. The LLC is not even current, which
10 means he hasn't paid his franchise taxes.

11 MR. SHEMIN: Well, I would have to discuss that with
12 Mr. Day.

13 THE COURT: Okay. Well, I think that there's, I think
14 that there's a problem with him individually. If he were to
15 convey the property to himself individually and own it, but I
16 mean, you negotiated this settlement at a time when Scott Day,
17 he didn't even own the property, and he was your main client,
18 and I don't know when Miss Wilson became your client, but if
19 she only became a plaintiff in this litigation the day before
20 the settlement was made, the Court has some real questions
21 about who really negotiated this settlement.

22 MR. SHEMIN: Your Honor, I negotiated the settlement,
23 Your Honor, on behalf of the putative class.

24 THE COURT: I know, I know you did.

25 MR. SHEMIN: And, Your Honor, I think, very

1 respectfully, the inquiry from my perspective would be this.
2 My job would be to negotiate and at relevant times to sit down
3 with the class or the class representatives, the putative class
4 representatives, and discuss the proposed settlement and get
5 their input, and which I did with both Mr. Day and with
6 Miss Wilson to explain it to them in detail, and to have them
7 tell me if they have agreed or disagreed, and if they disagreed
8 in any way, in any material way whatsoever, then it would be my
9 job not to proceed, because I don't get to run this show. My
10 clients get to determine whether or not they believe it's
11 appropriate. And, Judge, I would just tell you this again
12 very, very respectfully. It's not in my experience atypical,
13 when you're trying to create classes and subclasses, to bring
14 in additional class representatives so that you make sure that
15 there's representations --

16 THE COURT: But Mrs. Wilson, though, is -- I mean, she
17 is in the well ban class. That is the -- that is the core of
18 the case. Those people whose -- that there's evidence now that
19 their property has been contaminated. I mean, you allege a
20 trespass and --

21 MR. SHEMIN: Well, I hope the Court wouldn't view
22 Miss Wilson as being disqualified --

23 THE COURT: No, I don't, but --

24 MR. SHEMIN: -- just because she came in late, later
25 in the game.

1 THE COURT: Well, no, I had these others -- I'm going
2 to tell you, Mr. Shemin, I have the highest regard for you as a
3 lawyer. We've handled cases together when I was in private
4 practice and you were an outstanding lawyer, and I don't for a
5 moment think that you did anything that was collusion or
6 anything in dealing with this. I know you were an advocate for
7 your clients' very best interests, so don't infer from my
8 questions that I think that you somehow short-changed your duty
9 as a lawyer to these Plaintiffs, because I know that you are
10 doing the best that you can for them.

11 MR. SHEMIN: Thank you, Your Honor. But I would
12 welcome you questioning me in this manner, because it gives me
13 the opportunity to let you know what my state of mind is and
14 was at the time. Can I proceed?

15 THE COURT: Yeah. Go ahead.

16 MR. SHEMIN: Judge, this is what I was driving at. If
17 you look at the temporary injury to the property, let's just
18 assume that's what we have at the end of the day. Under the
19 AMI instruction, under the guidance from the Felton case, the
20 damages would be the -- would be the cost of the repair, the
21 restoration, the remediation plus the loss of use and
22 enjoyment. It would not be the diminution of the fair market
23 value which would be the standard under the permanent injury.
24 Now, here's what my rationale is for the settlement. I
25 believe, I started off, Your Honor, with the thought that if

1 this is a temporary injury to property, we are going to get the
2 restoration, because I'm relying upon the State of Arkansas
3 through ADEQ to make sure that there is an appropriate
4 restoration of all the property as a result of those that are
5 impacted. But what I negotiated with Whirlpool in good faith
6 is that these putative class members -- let's talk about the
7 well ban class. They are going to get -- well ban class is
8 going to get the diminution in fair market value. Now, let
9 me -- so what we are doing, Your Honor, is I've got the
10 restoration covered, and then I'm going over and getting the
11 diminution in fair market value of the property. Now, here's
12 the point. It could be argued, and Mr. Ledbetter has done so
13 in his usual eloquence, that the tax assessor's diminution is
14 not appropriate. The way this settlement is crafted, Your
15 Honor, if the, if the independent appraiser does not think that
16 the tax assessor got it right, then the independent appraiser
17 for the well ban class, and later on for the fringe class, can
18 supplant the tax assessor's opinion. Now, the reason I felt
19 comfortable, Your Honor, in going with and putting in the tax
20 assessor's opinion, is because when I came to Sebastian County
21 and filed this complaint in state court, while I was in the
22 courthouse, I went to see the assessor. And I sat down with
23 her and we had a good conversation about it. Since that point
24 in time, Your Honor, I've talked to Page Kutait, who is an
25 appraiser, and I think that their methodology, their thinking

1 in terms of how they wanted to make the adjustment was
2 appropriate. But again, Your Honor, let me emphasize to you
3 that this is not a situation where anyone has to solely rely
4 upon the tax assessor.

5 THE COURT: Well, you know, you've done enough class
6 actions, you know where the experience is, is that most people
7 get these ten-page notices, and they -- in this case they may
8 look at them, but, you know, most people don't, just don't
9 respond, they don't do anything, so the default option here is
10 the appraisal by the assessor. Now, we know in Arkansas
11 that -- I mean, I looked at the tax assessment on my property.
12 Actually, the language in your settlement agreement talks about
13 assessment value. Assessed value is 20 percent of the
14 appraised value. And it's the appraised value that's in
15 question here, although the settlement agreement calls it the
16 assessed value.

17 MR. SHEMIN: That's correct.

18 THE COURT: So it's really the appraised value. But
19 appraisals are done just for the purposes of taxes, and when
20 people, and particularly I know historically around here, even
21 with my own residence, that the tax assessor's appraisal of
22 property, especially of older homes and not new construction,
23 is far below what the real market is because the whole purpose
24 of it is just to determine what the ad valorem taxes are,
25 because you take the assessed value, you take the tax

1 assessor's appraised value, take 20 percent of that and that
2 determines the value for calculating the ad valorem at that
3 tax, so to say that the tax assessor's appraisal is the
4 accurate fair market value is probably not the case. However,
5 it's -- they are relative numbers here, because if they are
6 reducing by 50 percent or whatever, it's 50 percent of a number
7 is what it is.

8 MR. SHEMIN: But, Judge, I -- may I interrupt you just
9 a second?

10 THE COURT: Sure.

11 MR. SHEMIN: Judge, if I implied or expressed in any
12 way whatsoever that I think that the tax assessor's value is
13 the fair market value, then I don't mean to communicate that to
14 the Court. What I tried to do here, Your Honor, was arrive at
15 a compromise. It was not a capitulation. It was a compromise.
16 And what I was trying to find was an objective benchmark for
17 the benefit of the class so that we would have something to
18 work with to move forward. But if class members do not like
19 the tax assessor's option, then they can default to the
20 independent appraisal and I think --

21 THE COURT: Who gets the independent appraiser for the
22 landowner?

23 MR. SHEMIN: Pardon me?

24 THE COURT: Who selects the independent appraiser for
25 the landowner?

1 MR. SHEMIN: The putative class members each have the
2 opportunity to select, subject to the qualifications.

3 Whirlpool --

4 THE COURT: I saw those qualifications. How in the
5 world are you going to find an appraiser around here that fits
6 those kind of qualifications?

7 MR. SHEMIN: Your Honor, can I go back to my history
8 with Whirlpool?

9 THE COURT: Yeah.

10 MR. SHEMIN: Okay. The reason I find it not difficult
11 to accomplish that is because I've known the people that
12 I've -- the person that I would recommend to the putative class
13 members would be Richard Stephens. He is an MAI appraiser in
14 Little Rock. I have known him for years and years and years and
15 I know he's eminently qualified and I know he's one of the top
16 MAI appraisers in the country. And so I have full confidence
17 that he and others like him would be able to find qualified
18 appraisers. That's the least thing, very respectfully, that
19 I'm worried about because I'm called upon in my practice to, to
20 use appraisers and be very familiar with the appraisal process,
21 and so that's been my experience that we can find top flight
22 appraisers. Now, this is important to me, Judge. The reason
23 that this mechanism was so important to me as the putative
24 class counsel is because Whirlpool pays for all of the
25 appraisals. They don't get to make the decision as to who's

1 going to get to be the independent appraiser or who's going to
2 be the appraiser selected by each putative class member, but
3 they have to pay for it. And if you'll allow me at this point
4 to follow through, but please interrupt me as I go through --

5 THE COURT: No. Go ahead.

6 MR. SHEMIN: Because my logic is on trial today and,
7 for better or worse, I want to explain what it is so that
8 you'll know my thought process. I told you about the
9 remediation. I don't think it's unreasonable for the putative
10 class members to rely upon ADEQ for restoration. But we are
11 gaining the opportunity to get the diminution in fair market
12 value, maybe not a hundred percent, but we have that
13 opportunity through the mechanism for the well ban class and
14 later on for the fringe class, as we will discuss. And then,
15 Your Honor, the question becomes what else? In addition to the
16 restoration, in addition to the fair market value analysis that
17 will hopefully be accomplished, in addition to that, Your
18 Honor, we've got a bump of one-third.

19 THE COURT: Why did you change -- the original
20 settlement agreement just left it open and it looked like it
21 had what I've learned recently is called a clear sailing
22 provision, what's called a clear sailing provision on the
23 attorneys' fees where the Defendant agrees not to object to, to
24 the fee award. And now you've changed it and just added 33
25 percent to the top of what you originally negotiated in the

1 settlement.

2 MR. SHEMIN: This is critically important and I'm glad
3 there are a number of people here because there's one promise
4 that I have made to everybody that I've talked to, and that is,
5 and I wish Mr. Ledbetter and I had had the opportunity to talk
6 about this issue. I have told everyone that the least
7 important thing in this class action is the attorney fees. And
8 let me explain. I'm not looking for a percentage. I've told
9 Whirlpool that I'm not looking for a percentage of recovery.
10 As a matter of fact, I am on record with you today that if I
11 receive anything, the only application that I would be making
12 for attorney fees is a reduced hourly rate with a cap of a
13 hundred thousand dollars if, if I reach that, if I reach it.

14 THE COURT: Well, there's criteria, and I've done this
15 before, to determine what fees are, and you don't need to be in
16 here limiting yourself to what your fee is going to be right
17 now, if this matter eventually gets approved. I was somewhat
18 intrigued in how that changed and --

19 MR. SHEMIN: I need to look you in the eye and tell
20 you, and I appreciate your comment, but that is where I began
21 this journey and that's where, respectfully, if we proceed, if
22 we proceed, we are going to wind up, because I've made a
23 commitment personally and professionally to try to help these
24 people out. And I have never done any class action with maybe
25 one exception where I've ever asked for anything, and I've done

1 numerous, other than my hourly rate. I've not -- I'm not
2 interested -- I'm interested, obviously, in the Lodestar, but
3 I'm not interested in any enhancement. That's not why I do
4 these class actions. I do these things because it is important
5 to me to give back and to help, and Mr. Ledbetter can go in his
6 direction and I know he's going to do a great job --

7 THE COURT: We are getting a little ahead of ourselves
8 here.

9 MR. SHEMIN: Well, let me explain. And then, Judge,
10 beyond -- because I had to consider when I got that one-third
11 bump negotiated, then the question becomes I know that in
12 addition to restoration, in addition to fair market value,
13 we've got a one-third bump, and there's going to be a small,
14 relatively small amount of attorney fees, if any, that would
15 come out, and the beneficiaries of that are going to be the
16 people in this courtroom. That's important to me. And then
17 there's two sides of the ledger, Your Honor, and this is also
18 extremely important for the Court to consider. It's not just
19 what you recover. It's what you save in making the recovery.
20 And I understand Mr. Ledbetter and I understand the due
21 diligence process in terms of fact that discovery hasn't been
22 completed and there may be a myriad of different issues --

23 THE COURT: Has discovery even commenced?

24 MR. SHEMIN: No, but I know --

25 THE COURT: You haven't done any discovery at all?

1 MR. SHEMIN: I haven't. I don't need, Judge --

2 THE COURT: One of the issues here is Rule 23(a),
3 whether it meets those requirements, and I don't think -- some
4 discovery might be required to determine that.

5 MR. SHEMIN: Well, Your Honor, and I'll explain. I'm
6 assuming from our perspective that, and this is just for
7 settlement purposes, not just a walk through, but I'm assuming
8 that there will be an admitted liability situation in my mind,
9 that liability would not be contested, and that's why my focus,
10 Your Honor, is on the damage component, and that's why I wanted
11 to explain to you the rationale as to how I analyze damages and
12 that's what I'm attempting to do now, because what I would like
13 to make clear to the Court that once we have liability
14 established, and we've talked about the damages, I'm not
15 interested in getting into a position where I'm hiring
16 appraisers, I'm hiring experts to duplicate work or maybe give
17 a different opinion on the environmental issues. What I'm
18 trying to do -- that are going to run up into the hundreds of
19 thousands of dollars. If the Court says -- believes that I
20 need to do that, then I'll do it, because I'm committed to the
21 class action, but I don't see the economic benefit to the
22 putative class for me to drain the resources for what they
23 might recover because those, those costs, Your Honor, are not
24 going to be paid directly by the Defendant in this lawsuit. I
25 cannot recover those costs, unless I negotiate for that. And

1 in addition, Your Honor, it's just clear to me that it's not --
2 I respect the way that Mr. Ledbetter and Mr. Woods are
3 proceeding, but in this case with the backing of the State of
4 Arkansas, I just do not think it's necessary, because what we
5 are going to do is rely upon ADEQ doing its job with respect to
6 the restoration and what's reasonably necessary under the
7 circumstances. And Whirlpool obviously does not get to dictate
8 what the final outcome of that is going to be, and nothing
9 precludes, as I understand it, Your Honor, the putative class
10 members from making -- from sharing their voice with the State
11 of Arkansas with respect to the remediation process as it goes
12 forward through ADEQ. And so I'm relying upon that. Now, I
13 will tell you what in my view we're giving up in terms of the
14 class action proposed settlement. As Mr. Ledbetter's pointed
15 out, we have, in my mind, I have analyzed, you know, the
16 punitive damage aspect of these cases and the class as a whole,
17 and I've looked at that and I factored that into my thinking
18 about the case.

19 THE COURT: Isn't one of your claims fraudulent
20 concealment?

21 MR. SHEMIN: Yes, Your Honor, but that, the issue
22 there would be the defense of statute of limitations which has
23 been raised and I anticipate would be an issue, although --

24 THE COURT: It will also be an issue regarding
25 punitive damages, too, if they concealed this contamination.

1 MR. SHEMIN: Yes; right.

2 THE COURT: Okay. Go ahead.

3 MR. SHEMIN: But in my way of thinking, Your Honor,
4 and this is just Ken Shemin, rarely do I fail to settle a case
5 if I get a good enough settlement for my clients based upon the
6 prospect of punitive damages. That's just my benchmark. I'm
7 not being critical of anybody else that uses different --

8 THE COURT: It's definitely a wild card.

9 MR. SHEMIN: Right, right. So I just wanted to let
10 the Court know what my thinking was in that regard. Your
11 Honor, I believe, obviously, that we would have numerosity,
12 commonality, typicality. I believe it's --

13 THE COURT: Let's dwell on this numerosity here. We
14 already know that -- let me look at my -- out of the -- and,
15 and I don't have any individuals I'm dealing with, but because,
16 excuse me, the exhibits deal in parcels, not individuals, but I
17 went through here and looked at these myself to try to figure
18 out who these individuals are and I know my numbers can't be
19 right, but, anyway, they are an approximation anyway.

20 MR. SHEMIN: Having worked with you, I trust your
21 judgment.

22 THE COURT: Well, we can look at it and figure it out.
23 But out of the 53 properties, Mr. Ledbetter represents
24 individuals who own 34 of those properties, 34 of the 53
25 properties, and based on my numbers here, that leaves 14

1 individuals in the well ban class that are, that are, that are
2 possibly -- that are currently unrepresented at this time
3 except as putative class members.

4 MR. SHEMIN: Would it be 14 or 19, Your Honor?

5 THE COURT: Well, I stand to be corrected, but I just
6 went through and 14 is the number that I came up with. Then,
7 of the 51 -- and by the way, you know, when you look at these
8 two classes, and I think there may be conflicts between these
9 subclasses here, but you've got -- the bulk of the recovery
10 goes to the well ban class. The fringe class represents only
11 like ten percent of the value of the well ban class as far as
12 the damages go. And there are 50 -- based on this exhibit to
13 the original, and the reason I'm using the one from the
14 original settlement, maybe the one from the amended settlement
15 changed, I don't know if it did or not, but I marked it up on
16 this --

17 MR. SHEMIN: I don't think so, Your Honor.

18 THE COURT: But, anyway, there are ten opt-outs that
19 leaves, what I've got, maybe 31 individuals in the fringe
20 class, so, anyway, the -- so we are dealing with a relatively
21 small class.

22 MR. SHEMIN: That's true, Your Honor.

23 THE COURT: And then there's the -- there's some case
24 law -- I don't think there's authority probably anymore --
25 there's a presumption if there are over 40 members, then, you

1 know, it's possibly a class, but I don't think that's probably
2 the law anymore. I know the Eighth Circuit has a view that
3 there's not a particular number that there has to be. You have
4 to look at the facts and circumstances of each case. But I do
5 know when you've got, you've got the bulk of the well ban
6 class, which are the people who we know have been injured based
7 on the information we have to date, that there's been a
8 trespass on their property through this TCE contamination, you
9 know, 34 of those properties are -- indicate -- and I'm going
10 ask Mr. Ledbetter this, you know, he says maybe. I want to
11 know if -- he doesn't even have to tell me they are going to
12 opt out, because not until I certify the case and they actually
13 opt out would that in fact occur, but it looks like the bulk of
14 the well ban class members are not even going to be a part of
15 the class.

16 MR. SHEMIN: But -- may I speak, Your Honor?

17 THE COURT: Yes.

18 MR. SHEMIN: Your Honor, and, again, this is -- I'm
19 not trying -- I'm not here to challenge Mr. Ledbetter, his
20 legal position, and/or his integrity about what might happen.
21 What I am here to do, Your Honor, is to tell you two things;
22 number one, I think it is critically important that nobody be
23 left behind, and my experience in doing these class actions,
24 Your Honor, is that there are a number, a significant number of
25 people that will do absolutely nothing and receive no benefit

1 whatsoever because they are concerned about signing a contract
2 with a private attorney that says that they are going to be
3 responsible for a third of any recovery and expenses, whether
4 those expenses are ever collected or not. The reality, and we
5 all know this in this courtroom here, Your Honor, that people
6 react to that. People don't want to be exposed to substantial
7 costs in connection with protracted litigation, and what I'm
8 trying to do, Your Honor, is to make sure that those people who
9 are reticent have a voice in trying to protect themselves and
10 their interests and their property. And that's an important
11 component.

12 THE COURT: That is an important component, but, you
13 know, but individuals have to assert their own legal rights,
14 you know, they would have to make their own choice about
15 whether they want to pursue that, but, you know, the purpose of
16 the class action is that you have, you have a potential class
17 with common issues of fact in law, and it's so numerous that it
18 is a superior method to adjudicate the claims, and that's one
19 of the questions here is whether or not this is a superior
20 method to adjudicate these claims and whether joinder is
21 impracticable, not impossible but impracticable.

22 MR. SHEMIN: Exactly, Your Honor, and I think in my
23 opinion, very respectfully, this case is well-suited because --
24 let me explain. On the issue of liability, I don't know how
25 there can be more common questions of law and fact with respect

1 to the class. I mean, to me that's a simple analysis, and
2 maybe I'm just missing it, Your Honor. From the liability
3 side, we know that Whirlpool has a major problem here in Fort
4 Smith. And we know that it has emanated -- where it's emanated
5 from and we know within reason the extent of the contamination,
6 and so to me those issues of, those common issues of law and
7 fact pertaining to the liability side are easy to get to. Now,
8 with respect to the damage side, Your Honor, what we've tried
9 to do in recognizing the class action requirements is to devise
10 methodology that's well suited and takes little or no
11 intervention on the Court's part to effectuate.

12 THE COURT: Let me ask you this about, you know, there
13 are four prerequisites for class certification; numerosity,
14 commonality, typicality, and the class representatives are
15 fairly and adequately protected, the interests of the class.
16 Okay. Those are the four considerations here. Now, one of
17 the -- the settlement agreement -- and we are going to go kind
18 of back and forth between the settlement agreement and this
19 issue about the prerequisites for certification -- is that one
20 of the considerations that the well ban parties are giving up
21 is a -- which is the covenants. They can't drill wells, but,
22 also, they are giving an access easement.

23 MR. SHEMIN: Right.

24 THE COURT: Now, I will tell you this. I read that
25 notice. I don't think that notice anywhere comes close to

1 informing a class member about what could possibly happen to
2 their property. That access easement is, you know, this, this
3 is not, this is basic property law, but that easement becomes
4 the dominant estate, and we've dealt with a lot of oil and gas
5 litigation around here and we know that whoever owns the rights
6 of ingress and egress has the right to go through there and do
7 what they want to with the property. Now, you know, I don't
8 know where these -- I looked at these maps and I can't tell
9 anything from the maps that are attached to the exhibits here
10 to the complaint. I don't know where ADEQ is saying that these
11 wells need to go. But then a landowner who has a monitoring
12 well in his backyard is going to be different from the neighbor
13 three doors down that and doesn't have anything at all and, and
14 his damage is going to be different, yet, he's being paid the
15 same thing as the neighbor three doors down.

16 MR. SHEMIN: Correct. Your Honor, to me it boils down
17 to -- if you see flaws, obviously, I commit --

18 THE COURT: I'm not looking for flaws.

19 MR. SHEMIN: But, Your Honor --

20 THE COURT: I'm looking at your settlement agreement
21 and I'm trying to figure out what it is, and I have tell you
22 what -- I have a lot of concern about what that notice says
23 because I do not see -- in this case remediation should be
24 about as broad as they can be, and we know, and you alluded to
25 this yourself, ADEQ is the one that controls what's going be

1 done. They are going to tell Whirlpool what they are going to
2 have to do.

3 MR. SHEMIN: Correct.

4 THE COURT: Once Whirlpool has access to those
5 properties.

6 MR. SHEMIN: Correct.

7 THE COURT: The problem is Whirlpool can't go out
8 there and put monitoring wells right now because they don't
9 have access to the property and, but once they do, and in the
10 last pleading I saw something about soil vapor tests. I don't
11 know even know what that is or what that involves, but it looks
12 like to me that you don't know -- it may be in the documents.
13 I looked at that, that agency decision, and I can't make heads
14 or tails out of it. Anyway, if I read it, I'm not sure I would
15 understand it, but there -- what the remedy that Whirlpool is
16 looking for and you're giving up is you're giving an access
17 easement in perpetuity. That means -- for 20 years. That
18 means that Whirlpool -- if ADEQ says, "go put a monitoring
19 well, dig out that backyard, remove the swimming pool because
20 we want the monitoring well to go right there." Do you think
21 that the landowner who gets that notice is adequately informed
22 that that's what might happen to his property?

23 MR. SHEMIN: Well, Your Honor, those are good points
24 that need to be addressed, and part of the process, as I
25 understand it, is that we are here today to discuss any of the

1 issues of concern of any of the potential objectors.

2 THE COURT: You know, this to me is a done deal, a
3 settlement, and that's the way these things are done. And, you
4 know, and I'm asked just to sign off on this and rubber stamp
5 it and send it on, which I'm not going to do, because I'm
6 looking at all of these different issues. There's a question
7 about, you know, I'm looking at the prerequisites for class
8 certification and I think that, you know, and actually it goes
9 to the Rule 23(e) (3). I can't remember if I've got -- it's
10 actually 23(b) (3) where the -- where it's required that the
11 questions of law and fact common to the class predominate over
12 questions to only individual members, and that's what I think
13 is possibly -- what this access easement does, hits that right
14 on the head because landowners are not going to be treated the
15 same way under this access agreement. And I don't know -- and
16 the other, the other thing, last night I was looking at that
17 agency decision and it looks like to me ADEQ is giving them two
18 years to figure out if this remedy they have is going to work.
19 If it doesn't work, they are going to try something else.

20 MR. SHEMIN: Right.

21 THE COURT: Now, that's in the future. We don't know
22 what that's going to be. Hopefully it's going to be nothing.
23 Hopefully the remedy they are doing right now is going to work.

24 MR. SHEMIN: Right.

25 THE COURT: But if it doesn't work, and they are

1 holding -- and what Whirlpool is getting out of this deal, they
2 are getting unfettered access to all of the property in the
3 well ban class and unfettered access to the fringe class. And
4 the fringe class members -- I looked, I looked at that, I
5 looked at that so-called mutual covenant -- or I can't remember
6 what it is. It's really -- what it is is unilateral. It may
7 be mutual. Either one of them can invoke it, but if there's
8 evidence of contamination on the property, that fringe member,
9 for \$5,000, is giving up complete access of his property to
10 Whirlpool to go out there and do whatever they need to
11 remediate the property.

12 MR. SHEMIN: May I speak, Your Honor?

13 THE COURT: Yes.

14 MR. SHEMIN: Your point --

15 THE COURT: I don't mean -- I want you to speak freely
16 anytime. You don't need to say anything about interrupting me.

17 MR. SHEMIN: Well, now, Judge, I appreciate your
18 comment, and I'm not trying to be argumentative with the Court.
19 Again, I just want to explain what we are attempting to do and,
20 obviously, Judge, you bring up excellent points, and these
21 things need to be addressed, but let me explain what the
22 rationale is because I can understand how you got to this issue
23 with mutuality. The consideration is obviously relatively
24 small because, for the fringe class, the \$5,000 plus the
25 one-third bump, because there is a plan, if they do get

1 impacted in the future, and that's the mutuality aspect of it.
2 So I just didn't want the Court to think that I didn't consider
3 that.

4 THE COURT: I know that they didn't get the diminution
5 in value just like the well ban class. Basically they become a
6 well ban class member, in essence, even though they are called
7 the fringe class.

8 MR. SHEMIN: That's correct, Your Honor, out into the
9 future --

10 THE COURT: It's obvious why Whirlpool wants that.

11 MR. SHEMIN: Pardon?

12 THE COURT: The reason Whirlpool wants that, they want
13 access to all of that property out there, because ADEQ is
14 telling them, you know, you need to negotiate with these people
15 and do something. Obviously, they must be telling them that
16 they are not -- I'm sure Mr. Ledbetter's clients probably are
17 telling them, no, you can't have access to my property.
18 Whirlpool's got a big problem here.

19 MR. SHEMIN: They have a problem.

20 THE COURT: They have got a big problem here, and the
21 parties need to get it resolved. I mean, they are making --
22 you know, when I first got this settlement agreement and looked
23 at it, it looked like a pretty good way to try to resolve this
24 problem. It really did. But the more I got into it, I saw the
25 problems with it. You know, I'm having some real questions

1 about it, but I want to hear out from all the parties. I
2 haven't had a chance to hear from Whirlpool yet. I'm sure they
3 have got some answers to some of these questions, but I have
4 some concern about whether the -- and I think this is --
5 although it says that the, that the claims and defenses of the
6 representative parties are typical of the claims and defenses
7 of the class, and they may not be typical if the parties -- if
8 the class members are impacted differently --

9 MR. SHEMIN: Judge, may I again --

10 THE COURT: Sure.

11 MR. SHEMIN: -- tell you my state of mind? What we
12 typically see in these class actions are a situation where
13 there may be common questions of law and fact with respect to
14 liability. And then where you get into issues in class
15 certification that we don't have in this case is reliance. We
16 don't have in it in this case, but then the damage component,
17 because people's damages would be different, and so what I
18 attempted to do, Your Honor, with Whirlpool's cooperation, is
19 to have a mechanism in place for the damages. That was
20 extremely important. I mean, I could ask you to certify
21 respectfully a class on the liability issue and not get the
22 damages issue. I could ask for a myriad of different things,
23 but what I wanted to do was present a package for the benefit
24 of the putative class as extensive as I could reasonably do so,
25 because that gets us to the fringe and how far you carry out

1 the fringe, so that everybody knew what they were entitled to.
2 And the other thing I will tell you, Your Honor, is that I do
3 not handle these class actions where I just send out a notice
4 and that's it. I mean, that's when my work begins. I mean, I
5 have, for lack of a better term, town hall meetings. I'm
6 available. My staff's available. We are very proactive. I
7 will not, absolutely will not contact putative class members
8 during -- before something is negotiated unless it's for a very
9 specific reason, but once, Your Honor, once there is a
10 settlement or a potential settlement in place that where there
11 is a notice that goes out, it's my job, it's absolutely
12 positively my job, not Whirlpool's job, my job, to be available
13 and my job to make sure that everybody who will communicate
14 with me --

15 THE COURT: Let me ask you this question in regard to
16 that, and I just thought about this since you talked about
17 communication with class members that you're not reaching out
18 and I understand that. Okay. Once this class gets certified
19 and that notice goes out, they get this ten-page notice that
20 is -- and I've seen a lot of these class actions, and I tell
21 you the claims rate is low, even though I have lawyers tell me
22 it's going be high. And it's low, and the reason I think it is
23 low is they get ten pages of something they can't understand,
24 and then -- but who are -- they have to decide whether to opt
25 out? Who are they going to call? Are they going to call you

1 and --

2 MR. SHEMIN: Absolutely.

3 THE COURT: -- ask you about the opt out and can you
4 objectively advise them whether it is in their best interests
5 to opt out or stay in the class?

6 MR. SHEMIN: That's exactly my job. I'm looking at
7 Judge Roy. You know, Judge, I've done far more defense class
8 actions than I have on the plaintiffs' side, but one of my
9 first plaintiffs' class actions was against Edward D. Jones,
10 and Judge Roy certified the class and we settled it immediately
11 before the trial, and I will tell you that was a nationwide
12 class action. And I think there were maybe 12 to 15,000
13 members of that class, and I did -- I devoted months of working
14 and calling and communicating with these class members.
15 That's, that's the way I handle them. That's what I do. And
16 whatever --

17 THE COURT: Well, what are you going to tell them when
18 they call you up and say, what's, what's investigation of
19 remediation mean in this access agreement? Am I going have a
20 well in my backyard?

21 MR. SHEMIN: I'm going to tell them the truth. I
22 don't know. Well, they are not, they are not going to have a
23 well in their backyard. In fact --

24 THE COURT: They might --

25 MR. SHEMIN: Let's talk about the common sense of it

1 though, Judge. How many of these people, and there are a great
2 deal -- I don't anticipate, Your Honor, that many people in
3 this area, in the impacted area, are going to want to dig when
4 they have city water --

5 THE COURT: No, I'm talking about, I'm talking about
6 monitoring wells.

7 MR. SHEMIN: Oh, yeah, the monitoring. I apologize.

8 THE COURT: Listen. There is no reason once
9 everybody -- I just know that it costs so much more to drill
10 your own water well than it does to get water from the city.
11 So, I know -- the thing about the well ban people can't drill
12 water wells out there doesn't bother me at all. But what I'm
13 thinking about is ADEQ says you are going to have -- you go put
14 a well in his backyard because we want to find out what the
15 contours for this contamination are. And then they move the
16 big drilling rig in the backyard and, you know, drill a well
17 and then if, if, you know, there's not enough water pressure
18 for the water coming up, then they put a pump out there. I
19 mean, somebody might have that in their backyard.

20 MR. SHEMIN: They very well might. And that's the
21 part of informed consent. I mean, that's what you have to do
22 in order to get resolutions on a class-wide basis. I mean,
23 Judge, the way I view the world, there's benefits and burdens.
24 We make our decisions. There's benefits and burdens.

25 THE COURT: Yeah, you're right.

1 MR. SHEMIN: And people are free to opt out, and we
2 can't respectfully just assume that people, if they are well
3 advised, can't make decisions and nobody compels --

4 THE COURT: Let me ask you another question and this
5 question is addressed more to Whirlpool than it is to you. You
6 know, you negotiated this agreement with them, but if more
7 than -- and this provision changed from the original to the
8 final. It says that if 25 percent or more of the class opt
9 out, then they can walk away from the deal. And we know -- I
10 haven't run my numbers, but if it's not over 25 percent, it's
11 going to be there real quickly. That if, if those people opt
12 out, then Whirlpool can just walk away anytime.

13 MR. SHEMIN: Your Honor, clearly if there's more than
14 25 percent, they can walk away. Absolutely. But it's also
15 been my experience that sometimes, not all the time, but
16 sometimes there's negotiations about that 25 percent, and this
17 is important to me, Judge, if a hundred percent of Sam and
18 Rick's clients opt out, I'm fighting -- I'm concerned for those
19 people that don't have counsel, and let me explain that to you.

20 THE COURT: That's your best argument, those left
21 behind.

22 MR. SHEMIN: Let me explain that to you, Judge,
23 because this is important. This is very important to me. I
24 mean, as I indicated to you, Judge, I have had numerous
25 discussions -- numerous discussions with putative class members

1 as a result of filing the lawsuit, and then I think there's
2 people that are in this courtroom that I've had discussions
3 with, and I want to make sure that those people who do not want
4 to hire an individual lawyer or law firm to represent them
5 have the opportunity, through some mechanism, to receive
6 redress and they just don't let it go and not get what I
7 believe that they are entitled to, and it's not going to be
8 perfect. It's going to be negotiated. And by virtue of the
9 fact that it's a compromise, we don't receive everything, but
10 there's a mechanism in place where there's consideration, a
11 price bargained for, and paid for a promise, and that's what
12 I'm trying to achieve on behalf of the class members. Okay.

13 THE COURT: Okay, good.

14 MR. SHEMIN: Thank you.

15 THE COURT: Thank you. I may have some more questions
16 for you because -- but not now. Let's go ahead and let's give
17 Whirlpool an opportunity to speak. Mr. Jones.

18 MR. JONES: Your Honor, if it's okay with the Court,
19 I'm going to talk about five or ten minutes just to do a little
20 initial introduction of Mr. Brunson.

21 THE COURT: Okay. That will be fine.

22 MR. JONES: Please the Court, counsel. As the Court
23 knows, this is a preliminary fairness review and the hearing is
24 to determine whether or not it's fairness. The question, as I
25 understand it from the cases, is this settlement within a range

1 that could be or zone that could be in a final approval? These
2 TCE -- this TCE was used all over the United States by many
3 manufacturing companies, so we have a history to look at. I've
4 heard that -- the fact that there may be 20,000 plumes in the
5 United States similar to this one. So we've got a history of
6 about what type of diminution in value that is done to the
7 property. And some of those studies I believe have been cited
8 in the briefs. The range of decreased value on these cases
9 across the country is somewhere between two and eight percent
10 with the highest being around 20 percent. And in this case,
11 Whirlpool has offered up to 75 percent plus a third --

12 THE COURT: Let me ask you about that 75 percent. Let
13 me ask you about that 75 percent, because it's not 75 percent.
14 Seventy-five percent of the value of the land and 50 percent
15 for the value of the improvements and if you look at the -- and
16 let me just take, for example, Mrs. Wilson's. The value of her
17 land was \$3,200 and the improvements are \$28,100 after the
18 appraisal. So the diminution, and I calculated it based on the
19 numbers you have. The diminution in value that you are
20 offering her is 55 percent; it's not 75 percent.

21 MR. JONES: Well, I said up to 75. Some of them are
22 less, I understand.

23 THE COURT: Well, no, I don't think any of them -- I
24 didn't see any of them up to 75 percent, but that's a little
25 bit misleading to say that it's 75, because it's not anywhere

1 close to that.

2 MR. JONES: Okay. I don't mean to mislead the
3 Court --

4 THE COURT: I know you don't.

5 MR. JONES: Well, let's say it's 75 percent or 50
6 percent or 45 percent. Why would Whirlpool pay that much money
7 when it's over twice as much as the juries award all across the
8 country? And, Judge, I've been -- you know, I'm from Fort
9 Smith. I went to Ballman. I went to Fort Smith Senior High.
10 That shows my age because it's now Northside. I went to
11 Ramsey. Both of my kids graduated from Southside. I've
12 represented Whirlpool for 43 years, since 1973, and they have
13 been a good client and I've asked -- I said -- I just don't see
14 any jury awarding the type of damages, you know, more than this
15 amount of money. And Jeff Noel I think has spoke before that
16 Whirlpool has made a promise to the citizens of Fort Smith that
17 we would do the right thing, and we are trying to do the right
18 thing. I mean, we did it. We want to fix it. It wasn't on
19 purpose. It was an accident. But there is a problem here and
20 we want to correct it. We've got a remediation plan going,
21 working with ADEQ. Those wells, I understand we've had 91
22 monitoring wells and it's my information that most of those
23 wells, Judge, are on either Whirlpool property or in
24 right-of-ways. I think there is less than ten of them that are
25 actually on individuals' properties, and they have tried to put

1 those in places that were not too intrusive. Also, there's
2 chemical treatment going on at the present time, as you
3 mentioned, that's the two-year thing they are looking at to see
4 if that is able to treat the source. I think you've got to
5 consider when you are looking at this settlement, the fact that
6 nobody's use of this property has been interfered with. I
7 mean, not any, their use of the property. They are all on city
8 water. There are no wells. Jenny Lind just recently got
9 widened or I shouldn't say that. They are going to start
10 widening Jenny Lind in January, I believe, the City is.
11 Whirlpool recently sold the warehouse, trying to sell the
12 manufacturing plant. But, you know, the studies show that
13 years down the road, these property values are going to be
14 higher or as equal to the pre-contamination level. Now,
15 Mr. Ledbetter --

16 THE COURT: Let me, let me understand that again. You
17 say that it's Whirlpool's opinion that the values of these
18 properties are going to be higher than --

19 MR. JONES: Equal to or higher years down the road
20 because of the improvements that are going on and natural
21 inflation.

22 THE COURT: Okay. Okay. Go ahead.

23 MR. JONES: The -- we feel like that the objections
24 that are being made are really not relevant and that they are
25 premature. We don't know for certain that all of these people

1 are going to opt out. I mean, I don't see the harm in the
2 Court going ahead and sending a notice to these people, and if
3 the notice needs to be redone a little bit to correct any
4 deficiencies, you know, we can do that. But what's, what's the
5 downside of sending out the notices to find out? And if all of
6 these people opt out, then that's -- you know, we will have to
7 take another look at it. That's for sure.

8 Judge, I would like to introduce Robert Brunson, my
9 co-counsel who I have been working with on this case. I've
10 worked with Nelson Mullins for years. They are a great firm
11 out of South Carolina. And he's going to do a Powerpoint
12 presentation and go into much more detail, and he's in a better
13 position to answer your questions.

14 THE COURT: Okay.

15 MR. JONES: Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Jones.

17 MR. BRUNSON: I'm waiting for the monitor.

18 THE COURT: We have them turned on, Jane Ann?

19 THE CLERK: Yes.

20 (Off the record briefly.)

21 MR. BRUNSON: Your Honor, I appreciate the Court's
22 indulgence and due diligence in your questioning and welcome
23 you to interrupt me at any point. I do have a Powerpoint here
24 that I would like to walk through --

25 THE COURT: Let's go with that, and I'll try not to

1 interrupt you if there are any questions and then we can get
2 back to -- because I do have a lot of questions. Okay. You
3 may proceed.

4 MR. BRUNSON: I understand, Your Honor. And if I
5 could start with a quick story, my late partner, Steve
6 Morrison, was lead trial counsel in this case previously and
7 unfortunately he passed away about a year ago. Mr. Morrison
8 had a story that he liked to tell when it fit, and if it's okay
9 with you --

10 THE COURT: Sure. Absolutely.

11 MR. BRUNSON: It's about a botany professor from
12 England who came over to Charleston, South Carolina, to be a
13 guest lecturer at the College of Charleston in the late 1700s.
14 He was met at the Port of Charleston, which, of course, was a
15 very small village at that time, by the President of the
16 College of Charleston and together they walked through the
17 market area, which was a cobblestone place where people came in
18 to sell their goods and trade from outside the city and from
19 inside the city, and as they walked together, there was a
20 cacophony of noises, as you can imagine, as people shouted bids
21 and asked for prices, and they had animals with them that they
22 were trying to sell and so forth, and the professor reached
23 into his pocket and pulled out a coin, and when he did, he
24 dropped coins onto the cobblestones, and as soon as those coins
25 hit the stones, everybody in the village stopped to see where

1 the coins were on the ground. And the professor turned to the
2 college president and said, "How in the world did those people
3 hear those stones -- those coins landing on the stones with all
4 of this noise?" And the professor said, "People hear what they
5 are listening for." And, Your Honor, I think it's important
6 for us to be focused today on what we are listening for in this
7 hearing. And if we could look at the first slide, this is a
8 preliminary approval hearing, and as the Court is very well
9 aware, preliminary approval simply means that the settlement is
10 within the range of possible final approval. What the Court is
11 looking at this with an eye of is that it's presumptively
12 valid, and, of course, public policy strongly favors agreements
13 and settlement agreements in class actions. And the Court is
14 to find that the class action is not the product of fraud or
15 collusion and that, taken as a whole, it is fair, adequate, and
16 reasonable to all concerned. And, Your Honor, Whirlpool, as
17 Mr. Jones indicated, has said all along it is very committed to
18 the Fort Smith community and is really trying to do right by
19 the residents of this area in making what we believe is a very
20 generous settlement proposal. This was an overview of the
21 manufacturing facility which Whirlpool operated in this
22 community for about 45 years. On the next slide, we can see a
23 close-up of the former degreaser building, and up above that to
24 the north side is the well ban area. You see Ingersoll is the
25 southernmost boundary. Jenny Lind over there on the right is

1 the easternmost. Brazil is the north, and then Ferguson comes
2 down on the left-hand side, and we believe that that former
3 degreaser building is the source of the TCE contamination.
4 Like Mr. Jones said, industry all over America used TCE as a
5 degreaser in the 1960s and '70s without knowing that it had
6 some negative issues when it was improperly disposed of, and
7 Whirlpool was one of those companies. And we don't know
8 exactly how the TCE got into the soil on that site, but it did.
9 And we have to deal with it now. But the soil -- eventually,
10 about 2001, Whirlpool realized that it had gotten into the
11 ground water. It had gotten off site into this neighborhood
12 right across Ingersoll Avenue from the Whirlpool facility.
13 Now, the water table there is eight to 25 feet. That's not
14 water, as the Court noted previously, that anyone would really
15 be using for drinking water anyway at that shallow of a depth.
16 And the plume is very well delineated with 90 plus water --
17 ground water monitoring wells in the region, mostly on
18 Whirlpool and public property, but some also on private
19 property owned by these residents. And Whirlpool is now --

20 THE COURT: How did Whirlpool negotiate easements with
21 some of those individuals who have private property north of
22 the plant?

23 MR. BRUNSON: Right. Some of the residents have been
24 willing to grant Whirlpool access to do ground water testing.
25 Some, very few, have been willing to allow for vapor monitoring

1 as well. And wherever Whirlpool has been able to negotiate an
2 agreement on a property that is located in an area where the
3 data would be meaningful to the remediation process, it has
4 followed through on that.

5 THE COURT: Okay. I note from some of the pleadings
6 that Whirlpool has reached settlement with some of the
7 landowners. Are those some landowners in the well -- who would
8 be in the well ban area?

9 MR. BRUNSON: One is in the well ban area. Yes, both
10 are actually in the well ban area, right.

11 THE COURT: Do they have monitoring, do they have
12 monitoring wells on their property now?

13 MR. BRUNSON: They -- let's see. Miss Scroggins I
14 don't believe has a ground water monitoring well, but I'm not
15 positive.

16 THE COURT: That's okay. That's okay.

17 MR. BRUNSON: Both of them, Your Honor, did enter into
18 access agreements which are similar, if not identical, to what
19 is attached to the settlement agreement with the class.

20 THE COURT: Were they paid for the diminution in value
21 of their property in that settlement?

22 MR. BRUNSON: They were.

23 THE COURT: Okay. Were they paid anything else? What
24 was the total consideration in that settlement?

25 MR. BRUNSON: I'm glad to tell you that, Your Honor.

1 I will tell you that both of the settlement agreements have
2 confidentiality provisions, but I --

3 THE COURT: Okay.

4 MR. BRUNSON: -- I want to answer your question --

5 THE COURT: Well, I think that the fact that you
6 settled with two people in the well ban class, and I think that
7 how you settled with them might have some relevance, would have
8 some relevance, but, again, I think that kind of, kind of
9 undercuts your argument about the commonality of the claims
10 here. I think clearly the claim of trespass is common to all
11 members. I think the theory of liability is common. It's,
12 it's the claims for damages that are different that we have
13 here.

14 MR. BRUNSON: Well, of course, the elements of the
15 claims are different, but factually there's absolute
16 commonality because it's the same TCE from the same source.
17 The amounts vary. The properties in different locations vary,
18 but that's not uncommon. In almost all environmental cases,
19 you are going to have some difference, and it's fortunate in
20 this settlement agreement, because we don't have the tax
21 assessor's data, we are able to have a common methodology to
22 resolve the claims of all the residents in the area as well.

23 THE COURT: Let me ask you, and, again, I'm sorry that
24 I ask these questions as they come to my mind.

25 MR. BRUNSON: Please do.

1 THE COURT: I just have to apologize for -- it's the
2 way I think. But the methodology came up using the tax
3 assessor's appraisal, and as I noted, the appraisals
4 historically are not fair market value of the property. But,
5 but if you are taking fifty percent of a number, while it may
6 affect what the bottom number is, if it's lower -- if your
7 appraised value is lower than what real fair market value is,
8 but, anyway, that, that mechanism that you, that you came up
9 with, did you have discussions with the tax assessor about how
10 they arrived at the diminution in the value? I mean, what --
11 we got, we've got -- you know, most of the appraisals around
12 here are done from a tax appraiser. Somebody drives by and
13 looks at the house and it's not an in-depth appraisal. And so
14 we got Becky Yandell, who is the tax assessor over there, who
15 went through some numbers. What was her rationale for coming
16 up with those numbers?

17 MR. BRUNSON: Well, I haven't personally interviewed
18 her or taken her deposition, so -- and, frankly, we think the
19 tax assessor's devaluations on the property are extremely high,
20 which would account for any degree to which their appraisal for
21 tax assessment purposes is low. It's impossible to go -- not
22 impossible but impractical to go to every single property to
23 look at the appraisal done by the tax assessor and evaluate is
24 this high, is this low for this particular property on this
25 particular day? What we do have, though, here is certainty.

1 We know what that number is and the tax assessor came up with
2 it prior to the contamination being more than publicly aware in
3 May of 2013, and so we have that number that residents can know
4 and rely on, and, importantly, if they don't like it, if they
5 think that that number understates the fair market value of
6 their property, they simply go the independent appraiser route,
7 Your Honor, and they have an independent appraiser come in and
8 calculate the damages based off of that number. And I think
9 another important point there is, in the amended settlement
10 agreement, we have added 33 percent on top of the diminution in
11 value that Whirlpool is paying to these residents, and
12 certainly that would more than account for it.

13 THE COURT: Now, that is -- now, let me understand
14 that. Is the 33 percent is just an increase in that and then
15 if the fees are less than 33 percent, the difference goes to
16 the landowner or does it go back to Whirlpool?

17 MR. BRUNSON: No. It goes to the landowner. And, you
18 know, after we negotiated the original settlement agreement
19 with Mr. Shemin, and, by the way, we have had extensive
20 discussions with Mr. Ledbetter over a period of many months and
21 attempted to negotiate something that -- globally and we were
22 unsuccessful in doing that --

23 THE COURT: That's why I put this hearing off for two
24 months. I was hopeful that --

25 MR. BRUNSON: And, Your Honor, that's -- just to be

1 totally candid with you, that's where the additional 33 percent
2 came in because we really wanted to incentivize Mr. Ledbetter's
3 clients to participate in this agreement and not opt out, and
4 so we added more money to the deal. It's that simple. And
5 that would compensate them for the attorneys' fees, which, as
6 you point out, should be substantially less than 33 percent,
7 and their costs, which are minimal at this point, and give
8 them --

9 THE COURT: I'm not, I'm not saying it should be less
10 than 33 percent. I'm just saying that, you know, you've done a
11 lot of these class actions and know that when you have a common
12 fund -- actually the Eighth Circuit follows a rule that a
13 percentage of the common fund is really kind of the
14 determination for attorney fees, and the Eighth Circuit has
15 pretty much kind of authorized a third. That's what that
16 common fund is, but in some circumstances, it may be more
17 appropriate for the Court to do a Lodestar calculation, which
18 would, in a lot of respects, generates a lower fee, so we are
19 getting ahead of ourselves on fees here, but you did explain
20 something to me, and that is that if there was a Lodestar fee
21 here and it was somewhat less than a third, that that stays
22 with the landowner rather than going back to Whirlpool.

23 MR. BRUNSON: Right. And if you just take the number
24 that Mr. Shemin volunteered to the Court, a hundred thousand
25 dollars, that's less than three percent --

1 THE COURT: Well --

2 MR. BRUNSON: -- so it's a good deal for the property
3 owners.

4 THE COURT: I understand that, but I'm certainly not
5 going to hold him to that because if he vigorously represents
6 his clients, he ought to be compensated for the services he
7 renders and not some cut fee that he's willing to take, but,
8 anyway, let's get off of attorney fees. Move on to more
9 important things.

10 MR. BRUNSON: All right. So I think it's important to
11 note, Your Honor, in all of this that there is no health risk
12 here that's been identified. This is a quote from the ADEQ
13 Public Outreach and Assistant Division Chief, Katherine
14 Benotti, Beninotti, and she said, about a year ago actually,
15 the ground water is currently not being utilized for drinking
16 water purposes. Provided the contaminated ground water is not
17 used as a drinking water source, or the residents do not come
18 in contact with the contaminated ground water, parenthetically
19 don't touch it, don't drink it, there is no potential risk.
20 The current levels of TCE in the ground water have not shown an
21 unacceptable risk to vapor intrusion pathway. ADEQ has
22 required Whirlpool to take appropriate remedial actions to
23 mitigate the contamination of TCE in the ground water. There
24 are no health claims in the class action. There are no health
25 claims asserted by any of Mr. Ledbetter's individual clients.

1 This is purely a case about property damage and remediation
2 costs, and the other non-health claims of related damages. And
3 so when Your Honor refers to there being a trespass, there is
4 TCE in the ground water under the property, there is
5 technically a trespass, but exactly how does that interfere
6 with the use of anybody's property in this neighborhood? It
7 really doesn't unless you are going to use the ground water,
8 and nobody there is going to use the ground water, and so
9 Whirlpool is not taking a hard line here on what damages
10 Plaintiffs might actually be able to prove as a result of
11 having this TCE that's being remediated in their ground water.
12 What we are instead trying to do here is to resolve this
13 litigation without going through all of the uncertainty that is
14 associated with it, without incurring the tremendous expenses
15 of experts that both sides will have to invest in and without
16 digging into what the homeowners will net from any recovery
17 that they get by generating higher attorneys' fees, and I don't
18 want to go back there again, but it is an important aspect of
19 why this early settlement is so favorable, Your Honor.

20 Let's talk about the notice plan before I get into the
21 details of the settlement. This is at, you know, the
22 preliminary approval stage, and many courts are very focused on
23 the adequacy of the notice. We welcome Your Honor's input on
24 the notice, and we will be glad to work to modify it to make
25 sure it suits the Court's needs. As I think you have observed,

1 you have to balance the need to have enough detail in there so
2 that people do understand how their rights are affected with
3 not wanting to overwhelm the residents with so much information
4 that they throw the document into the trash can. What we are
5 happy about here is that the class is small enough and
6 manageable enough, we have everybody's name and address. We
7 can easily provide direct mail notice to every resident of the
8 class with certified mail. We also, as the Court is aware,
9 plan to publish the notice for four consecutive weeks in the
10 Southwest Times Record. We have an online copy of the amended
11 class settlement agreement that will be posted and we have a
12 claims administrator who will be available to respond to class
13 members' questions about the process, and as Mr. Shemin has
14 indicated, he would be willing to respond to questions in the
15 class about what -- how people's rights may be affected, and
16 obviously many of the residents also have Mr. Ledbetter who
17 they can communicate with. Now, we've -- the Court's been
18 through the classification definition, and I'm not going to
19 belabor that. I would rather just get to the two subclasses.
20 And I think we are getting a little ahead of ourselves here,
21 Bill. The subclasses. The well -- the next one. Forward.
22 Okay. The well ban subclass, I think the Court's very clear at
23 this point that those are the residents that are within the
24 confines of that rectangular area that I've pointed out to the
25 map in there previously. These are people who have also

1 experienced a reduction in the tax-assessed value of their
2 properties and located within that area. Then the next class,
3 of course, is the fringe subclass which those class members for
4 both are identified specifically in exhibits to the settlement
5 agreement, so there is no ambiguity or confusion about who is
6 actually in the class. And this map shows in red the well ban
7 subclass in case we need to refer to it, and in green the
8 fringe subclass. And Your Honor asked a question of Mr.
9 Shemin. How did you decide where to draw lines here, and, and
10 by the way, I want to be clear, this -- the plume depicted on
11 here is not exact. That's just a -- that's just a
12 demonstrative depiction that the plume is in that area. But we
13 consulted with Enviro, which is the environmental consulting
14 company that's carrying out the remediation in concert with
15 ADEQ and on behalf of Whirlpool, and we talked to them about,
16 you know, the reasonable possibility that the plume could move
17 outside its existing boundaries. What other properties do we
18 reasonably think could ever be affected? And that's how we,
19 Whirlpool, came up with these properties to include in the
20 fringe subclass. The plume is fairly stable. It's been there
21 for a long time. It's been delineated for a long time, but it
22 is ground water and ground water does move with seasonal
23 adjustments, differences in rainwater and so forth in the
24 season, so it does move, but we feel very comfortable based on
25 that input that we do have a very large margin for error or for

1 future movement of the plume in the future. Now, the
2 settlement terms, as the Court is aware, on the next slide, it
3 shows that Whirlpool would pay a hundred percent to the well
4 ban residents of their tax assessor devaluations or a hundred
5 percent of an independent appraiser's evaluation of the
6 property. We have in the amended proposal directly in response
7 to a concern that Mr. Ledbetter raised with us, we've had added
8 an appeal. If any of the property owners is dissatisfied with
9 the independent appraiser's determination of their devaluation,
10 they get to appeal. Whirlpool has no right of appeal itself.
11 Plus, we've added 33 percent on top just to alleviate any
12 concerns that the tax assessor's numbers might be a little
13 lower than actual fair market values, and also, as I said, to
14 incentivize the more reluctant members of the class to be more
15 enthusiastic. The property owners have simply had to agree to
16 release their claims, property only, not health claims, allow
17 reasonable access for testing --

18 THE COURT: Let me ask you about it. They are not
19 releasing personal injury claims obviously, and you've
20 indicated to me that there's, at least as the Arkansas
21 Department of Environmental Quality said, there's not a health
22 risk here. But if there were to become a health risk, what,
23 what about -- does this also release -- let's say, for
24 example -- I hope it doesn't happen, but let's say that there
25 were some possible health claims that might occur in the future

1 because -- would it be releasing indemnity claims if -- you
2 know, we've got a bunch of these properties that are apartments
3 and rental properties, and if, if a landowner rents his home to
4 someone and that person has a health claim that arises and then
5 that landowner gets sued, will that landowner have to pay an
6 indemnity claim against Whirlpool because I think, I think it
7 gets released.

8 MR. BRUNSON: I think an indemnity claim or a loss
9 based on health injury would be released under this.

10 THE COURT: It will. It was probably not intended,
11 but I think the release language probably does release it, but
12 that's just one claim I foresaw. Hopefully, there aren't going
13 to be any healthcare claims, but I notice that healthcare
14 claims are exempted with this, but I was wondering about an
15 indemnity claim if someone, some landowner -- there have been a
16 bunch of apartments out there, and I realize that's not likely
17 to occur, but they are getting apparently -- I recently saw
18 they are getting ready to do some soil vapor tests, and so
19 hopefully those are negative, but, you know, the healthcare or
20 health claims are -- while they are not likely, they are not
21 impossible, because we just simply don't know.

22 MR. BRUNSON: That's correct. It's not impossible.
23 And, you know, honestly I haven't looked at the lease with an
24 eye towards whether that exact scenario would be covered, but I
25 can tell you with certainty that the intention is that it would

1 be covered.

2 THE COURT: Okay.

3 MR. BRUNSON: So the next line, the fringe settlement
4 terms, Whirlpool pays -- initially it was \$5,000. We increased
5 that by 33 percent, so now Whirlpool is paying every resident
6 of the fringe class \$6,650. And the future option would
7 include, as you identified, that essentially if there is a
8 detection of TCE in the ground water above fresh hold limits,
9 then you basically get the same relief that the well ban class
10 does, and property owners, they are simply being paid this
11 money in order to agree to what that future option would be so
12 that the community has certainty, Whirlpool has certainty, the
13 residents have certainty as to what is going to happen in the
14 future if, if that eventuality takes place. That seems to be
15 in everybody's best interests so that we don't then have
16 another round of expensive and time-consuming litigation. Now,
17 going to the criteria which Your Honor has already reviewed
18 somewhat with Mr. Shemin, numerosity, typicality, commonality,
19 and adequacy. As to numerosity, I think it's pretty clear that
20 as defined, the -- let's go to the next slide. I think
21 that's --

22 THE COURT: Let me ask this question. You've got
23 subclasses. Does the Rule 23(a) analysis have to be applied
24 separately to each subclass?

25 MR. BRUNSON: It does.

1 THE COURT: That's what I thought.

2 MR. BRUNSON: But the subclasses together certainly or
3 separately -- there are 53 in the well ban and 53 in the
4 fringe. It wasn't planned that way, but it worked out, so you
5 have a total of 106, but in either class, you have above that
6 40 number, and the Eighth Circuit indeed has approved some
7 classes with as few as 20 members.

8 THE COURT: You know, I tell you, I know what case you
9 are relying on and I read that case. What that case stands for
10 is the proposition that particular circumstances can justify a
11 lower class. What happened in this case, that was the case
12 where some African-American school teachers has sued the State
13 of Arkansas regarding their -- they weren't getting paid. They
14 were discriminated in their pay. And that was a 1971 case, and
15 what the Eighth Circuit did is they said that 17 was
16 sufficient, and the reason they said it was is that the class
17 members were not likely to file individual actions because they
18 feared getting fired from their job. And then also that the
19 State of Arkansas changed the law. So I don't think that that
20 case stands for the proposition that 17 -- that as few as 17
21 class members is -- meets the numerosity standard.

22 MR. BRUNSON: But I do think it stands well for the
23 proposition that the Court has discretion to consider the facts
24 and circumstances of the class and that there is no bright line
25 and --

1 THE COURT: Yeah, I don't think there is.

2 MR. BRUNSON: Similarly, I'm sorry --

3 THE COURT: No, no. I'm -- there is no bright line.
4 You are absolutely right.

5 MR. BRUNSON: And I think the facts and circumstances
6 in this case weigh heavily in favor of exercising the Court's
7 discretion to approve this class with admittedly fairly small
8 numbers for the reason that Mr. Shemin pointed out, and that
9 the Court indicated was Mr. Shemin's best argument, and I
10 agree, that there are people who absent a class resolution are
11 going to get no resolution. They are not going to get any
12 money. They are not getting -- we are not going to get an
13 access agreement from them or a release. It's just nothing is
14 going to happen.

15 THE COURT: Yeah, that goes to the issue of whether or
16 not individual actions are better than a collective action,
17 and, and, you know, I can certainly see where there can be some
18 class members out there that are just -- one, they are
19 frightened of litigation, and, and, two, they wonder what it's
20 going to cost them. And, so, there's a lot of merit to that
21 argument.

22 MR. BRUNSON: I think so. I agree. And on the next
23 slide, if we could move to typicality, I think it's fairly
24 clear that we have Day and Wilson each typical of the subclass
25 that they --

1 THE COURT: Were you aware that Mr. Day did not own
2 the property?

3 MR. BRUNSON: I will be completely honest with you. I
4 knew that because I had looked him up before in the spreadsheet
5 and realized that I had to go to a different name.

6 THE COURT: I mean, this can be fixed.

7 MR. BRUNSON: It can be. It just didn't occur to me
8 honestly to think that it was an LLC that owned property, and,
9 therefore -- I don't even know if the LLC owned the property
10 when the lawsuit was brought. That's something that we would
11 need to look into, but obviously we were working very well with
12 Mr. Shemin and that's an issue that could easily be resolved
13 with the Court's indulgence.

14 THE COURT: What about Mrs. Wilson? When did she come
15 into the picture?

16 MR. BRUNSON: Mrs. Wilson, as you know, was formally
17 added in July immediately before the settlement agreement. It
18 was a part of the extensive discussions that we had.

19 THE COURT: When did you become aware that Mrs. Wilson
20 was involved, because she entered -- I mean, the complaint was
21 amended the day before the settlement agreement. When did
22 you -- did you negotiate the well ban settlement with
23 Mr. Shemin before he had a client who was a well ban class
24 member?

25 MR. BRUNSON: Honestly, I don't know exactly when

1 Mr. Shemin signed up Mrs. Wilson. I do know that --

2 THE COURT: I think he would have told you whether or
3 not he had a client in the well ban class.

4 MR. BRUNSON: We had conversations about the fact that
5 he needed to have a representative of the well ban class, and
6 Mr. Shemin assured me that he had had conversations with a
7 number of people who were residents of the well ban class and
8 that would not pose any difficulties, and that he had met with
9 the residents and talked to them about their concerns. Now,
10 whether -- on what day he actually signed Mrs. Wilson up, I
11 don't know that.

12 THE COURT: I'm sure there are some that didn't want
13 to have their name on the complaint that he may have talked to,
14 but, nevertheless, she did, but it's just the fact that she --
15 I mean, the optics of it, of her becoming a class plaintiff
16 when he filed his lawsuit, I think in September of 2013, or
17 maybe July of 2013, I can't remember when it was filed, and so,
18 you know, the settlement agreement is reached and the day
19 before the settlement agreement is amended and the amended
20 complaint is exactly the same as the complaint except for, you
21 know, adding a party.

22 MR. BRUNSON: If I could, on that issue, Your Honor,
23 though, maybe I'm -- I want to hear what you're listening for
24 here, and it seems to me that --

25 THE COURT: It has to do with advocacy of the class

1 representative. I mean, that's the issue.

2 MR. BRUNSON: Okay. But let's say Mrs. Wilson was
3 brought in the day before it was amended and she lied. Just
4 make that assumption. Provided that Mr. Shemin fully explained
5 to Mrs. Wilson the circumstances of the lawsuit and the
6 settlement process, and she agreed to it, I'm not sure why that
7 would render her inadequate. I'm not sure there's a
8 requirement that she would need to have been involved for some
9 particular period of time.

10 THE COURT: I mean, it's the Plaintiff's claim. It's
11 not Mr. Shemin's claim.

12 MR. BRUNSON: Yes; correct.

13 THE COURT: And the -- you know, and the extent that,
14 you know, communications with her and how informed she was
15 about this, about this settlement, but, you know, the
16 appearance of it is that, you know, the settlement agreement
17 was negotiated and made before she was even a party. Maybe,
18 maybe she was a client back in December. He just didn't think
19 to amend the complaint then. I don't know what the
20 circumstances are, but when the complaint gets amended the day
21 before the settlement agreement, it calls into question who
22 negotiated the settlement agreement.

23 MR. BRUNSON: I understand that, and I think the real
24 question there is the adequacy of Mr. Shemin's communication
25 with Mrs. Wilson and the due diligence involved in her signing

1 off on the settlement, not necessarily the timing of it,
2 although I understand there is a relationship between the two.
3 But certainly we have not questioned her adequacy.

4 THE COURT: Yeah, but she's representing -- the well
5 ban class is the most -- is the class most affected here, and
6 she is the class representative for that well ban class, and so
7 her involvement and the time of her involvement is important.
8 She can, she can make a decision even if she did not know
9 anything or didn't know that she was going to be a litigant or
10 didn't talk to a lawyer until a week before. I mean, she can
11 become a class plaintiff even though she made that decision a
12 week before the settlement was made, but it calls into question
13 about the -- about the negotiations about the settlement and, I
14 mean, she is the one that had to make the decision, not
15 Mr. Shemin.

16 MR. BRUNSON: Correct. Well, Your Honor, I think when
17 you consider the adequacy of the class representatives, you
18 really have to look at the results of what they achieved.

19 THE COURT: Yeah.

20 MR. BRUNSON: And this is an extremely generous
21 settlement for these residents, so I think those results really
22 speak volumes as to the adequacy issue. Going to the next
23 slide, commonality, you know, I think it's pretty clear, as I
24 mentioned earlier, there's a common source of contamination and
25 common liability issues, although the causes of action are a

1 little different. We have the tax assessor's devaluations
2 which are common. Factual issues would be the same, if this
3 were pursued. Common questions of law. It seems pretty clear
4 to me that we have commonality. We've already talked about
5 adequacy. And, of course, you mentioned Rule 23(b) which is
6 the predominance of requiring of the class action. It seems
7 again pretty clear that while there are individuals, individual
8 issues in this class action as there are in virtually all class
9 actions, we do here have the common source of contamination.
10 Everybody lives in the same neighborhood. They all have the
11 same tax assessor who has issued these devaluation opinions.
12 They have common forms of injury and damages. Those
13 predominate over the --

14 THE COURT: Let me, let me ask that question about it
15 because I was going to ask Mr. Shemin this question, and that
16 is -- has to do with the landowner who signs that access
17 agreement and ends up with remediation taking place on their
18 property. Is that landowner not different than the landowner
19 down the street who has not been impacted by any type of
20 remediation? I can tell for you sure if, you know, if I had
21 water wells and vapor collection equipment in my backyard, I
22 would sure think differently that I had been -- I've been
23 damaged differently than my neighbor down the street who hasn't
24 had any impact at all.

25 MR. BRUNSON: I understand your concern, Your Honor,

1 and if I could, two things. First, the ground water monitoring
2 wells are -- it's not like an oil rig in somebody's backyard.
3 It's a very small thing. It's like if you take this water
4 pitcher, it's about the size of the top of the water pitcher,
5 and it's about that high up out of the ground on a very small
6 space. It's not something that you would have to dig up a
7 swimming pool to put in. And, secondly, the access agreement
8 that we have here provides a lot of rights to the homeowners.
9 It indicates that Whirlpool has to conduct all activities in a
10 safe, efficient, workmanlike, and non-negative manner, has to
11 comply with all the laws and regulations. Whirlpool agrees to
12 conduct its activities so as to minimize disruption of business
13 or landowner activities located at the property and, where
14 possible, to avoid disruption entirely. Those are -- those
15 give the landowners rights, and it seems to me that if you had
16 a landowner who felt like Whirlpool was asking too much, if
17 they wanted to put, put a well where a swimming pool was, which
18 I don't think they would, but if something like that happened,
19 certainly the landowner has rights that they could deny that
20 access and they could --

21 THE COURT: This, this doesn't give the landowner the
22 right to deny access to the property. I mean, when I read it,
23 it doesn't. Of course, you know, I've read it once or twice
24 and that's about it and I may be, I may be wrong, but this
25 access agreement gives -- of course, Whirlpool is going to do

1 what ADEQ tells them to do, isn't that right? Are they
2 going -- who's going to tell Whirlpool where to put these
3 monitoring wells?

4 MR. BRUNSON: Well, ADEQ doesn't, doesn't get down to
5 the level of granularity to say exactly where on this property
6 in general speaking the well needs to go, but ADEQ does have
7 requirements that Whirlpool has to have, you know, certain
8 numbers of wells in appropriate locations and so forth. And
9 Whirlpool is obligated, to the extent that it can, to comply
10 with ADEQ's directives, but, of course, we have the situation
11 now where Whirlpool and ADEQ are having discussions because
12 ADEQ wants a certain number of vapor monitoring points and
13 Whirlpool is not able to get access to the exact properties
14 that it needs in order to install those, and so there's an
15 ongoing conversation there about what do you do when Whirlpool
16 wants to comply, wants --

17 THE COURT: Listen. I firmly believe Whirlpool is
18 operating in good faith in trying to resolve this problem.
19 It's got some real impediments to try to do it and this is a
20 vehicle to try to maybe solve some of those, but they -- it's
21 tough on Whirlpool. I don't doubt. They have got ADEQ telling
22 them you need monitoring wells and you need other soil vapor
23 tests and you don't have the ability to do anything about it
24 and you want to do something about it.

25 MR. BRUNSON: Exactly right. That's exactly right.

1 And so the point I'm making there is your question was can ADEQ
2 make you do this, and the answer is, well, yeah, but not if we
3 don't have access, but if we do have access, which hopefully we
4 would, if the Court were to approve this agreement and people
5 were to not opt out --

6 THE COURT: Let me ask you one other thing. Again, I
7 again apologize in interrupting you, but what authority does
8 the Court have to impose a perpetual easement? I mean, an
9 easement is the dominant estate and the rest of the property is
10 the subservient estate, and the dominant estate can do what
11 they want to do with the property, and that's just basic
12 property law we learned in the first year of law school. And
13 the reason I have experience with it is representing oil and
14 gas companies and you know what they can do with the property,
15 and so my question is does Whirlpool know how many monitoring
16 wells need to be drilled out here on these well ban class that
17 ADEQ is requesting to be drilled?

18 MR. BRUNSON: I'm sorry. The last part of your
19 question --

20 THE COURT: I'm sorry. I don't think --

21 MR. BRUNSON: I was following you --

22 THE COURT: -- that was a poor question the way I
23 asked it. Does Whirlpool know today how many monitoring wells
24 that ADEQ wants drilled on the well ban class properties?

25 MR. BRUNSON: My understanding is that Whirlpool has

1 had access that it needs for the ground water monitoring wells
2 that ADEQ requires. That's not an immediate issue.

3 THE COURT: Okay.

4 MR. BRUNSON: The immediate issue is vapor monitoring.

5 THE COURT: Okay. And explain to me what's required
6 of that. What -- what -- what -- how many, where, and what's
7 the equipment or whatever is out on the property?

8 MR. BRUNSON: For vapor monitoring?

9 THE COURT: Yes.

10 MR. BRUNSON: So the vapor monitoring well is -- it's
11 not a well. It's called a vapor point. And it's soil gas
12 testing is what is envisioned in the current RADD, and in the
13 RADD, Whirlpool is required to have five of these established.
14 Whirlpool has put some into place, but unfortunately they
15 didn't work out well because there was ground water there and,
16 you know, you have to take into consideration whether there are
17 utilities in the ground and so forth. So there's a very
18 limited scope of properties that actually meet the
19 qualifications for installation of a vapor point. And so
20 Whirlpool has a need for two more properties that are located
21 basically on the plume, because the concept of vapor soil gas
22 testing as to take a sample, we drill down into the soil, you
23 take a sample of the gases that are above the ground water and
24 see to the extent to which there is your vapor escaping from
25 the ground water, if there is at all. Now, there's another

1 type of vapor testing that you actually do --

2 THE COURT: Okay. You've told me enough. I'm just --
3 what I'm trying to understand is that, you know, the notice
4 tells these class members that they are given access for
5 investigation for remediation. And one of my concerns is, I
6 mean, the notice is already ten pages long, but, I mean, if I
7 got that notice and I had somebody knock on my door and tell me
8 we are going to go put a vapor monitoring -- I don't know that
9 notice told me that that was likely to happen. And so I'm a
10 little concerned about -- you know, this access agreement is
11 that, you know, what type of notice would be adequate to inform
12 a landowner on that, that easement that they are going to be
13 giving Whirlpool for perpetuity, what's likely to happen? What
14 may happen to my property? Because that's going to affect
15 their decision whether, one, to opt out, and, you know, what
16 they want to do.

17 MR. BRUNSON: Well, I understand and appreciate your
18 concern, and to ameliorate it hopefully somewhat with respect
19 to vapor monitoring, we are only talking about two more
20 properties, and the soil gas testing vapor point is similar to
21 the ground water testing apparatus, it's unobtrusive, and can
22 be placed hopefully in an area of the property that won't
23 unduly inconvenience the homeowner. Now, frankly, my
24 discussions with Mr. Ledbetter and his clients about access for
25 vapor testing have actually gone the other way. His clients

1 want more, not less. Apparently they want Whirlpool to come
2 and drill a hole under the house and test indoor air quality in
3 some instances of the residents' homes to see if there is vapor
4 in that area, and that's really more in the context of the most
5 recent discussions that we have had in an effort to get access
6 to do the testing, and, unfortunately, we haven't been able to
7 reach those agreements.

8 THE COURT: Well, do, do -- I mean, a lot of these
9 people who are going to be named class members are not going to
10 respond, they are not going to file a claim, they are going to
11 do nothing, yet under this, under this settlement agreement,
12 you have a provision where the Court appoints an attorney-in-
13 fact to convey this easement to Whirlpool. And, again, let's
14 say, a landowner gets a knock on the door and they say we are
15 here, you know, to put in this vapor monitoring equipment or to
16 put a monitoring well on their property, have they gotten
17 adequate notice that that's likely to happen? Because to me,
18 and I know Mr. Ledbetter has spent a lot of time on this, but
19 if it's fair and it's reasonable, that's fine, but I think that
20 the landowner is going to have to have adequate notice that,
21 you know, what could possibly happen to their property with
22 that access agreement.

23 MR. BRUNSON: I totally agree. And, you know, we feel
24 like that the draft class notice is adequate, but we don't have
25 any concerns about having further discussions with the Court.

1 If you have a particular concern about that aspect of it, we
2 can certainly make that more clear. I did review it with an
3 eye toward that. It seemed, you know, given the obvious, which
4 you have noted, and that is that a lot of people will get this
5 in the mail that they are just not going to read it. There's
6 not much you can do about that, but to the extent that somebody
7 does read this notice, our sense is that it does, it does
8 adequately apprise them of their rights, and, Your Honor, it's
9 not --

10 THE COURT: Landowners do have a duty to -- I mean,
11 they do have a duty. I mean, they can't -- to read something,
12 and, you know, they just can't sit back. And I've got that in
13 another class action case where, you know, the class members,
14 you know, didn't do anything, but, you know, they have -- they
15 do have some duty, particularly if they have a claim, they have
16 a duty to read it and maybe consult with a lawyer about it, so
17 they are not totally -- a landowner is not totally blameless
18 here. But they need to be given some type of notice because
19 the wording "investigation remediation" is so wide open, I
20 mean, I don't know that they have been told what could likely
21 happen to their property.

22 MR. BRUNSON: Well, again, it's not like they are not
23 being told about some big fact they need to know, like we are
24 going drill an oil well in their backyard. These are, as I
25 said, unobtrusive and an agreement that is very resident

1 oriented I think. You are protective of their rights. But an
2 important point, Your Honor, is we are primarily talking about
3 the well ban class at this point. And those people are getting
4 tens of thousands of dollars, huge percentages, whether it's 50
5 or 75 percent of their property values. They are probably more
6 likely than most recipients of the class action notice to
7 become aware of what their rights are. There's going to be
8 chatter in the neighborhood. I would be surprised if very
9 many, if any, of the residents of the well ban did not act
10 either by opting out or by accepting their payment. And, of
11 course, that's part of the reason why we are paying as much
12 money as we are to resolve this case. Next slide. I'd like to
13 walk through three different scenarios because Mr. Ledbetter is
14 going to speak after me and he has concerns that he expressed
15 and the Court's allowed him to about the settlement
16 negotiation, but I think a fundamental question here is what is
17 in the best interests of the people who live in this
18 neighborhood? Under what scenario do they stand to come out
19 farthest ahead in this situation, and so I've taken one sample
20 property. I picked it at random. It's in the Westphal
21 property, 1400 Brazil Avenue. It's a well ban property at the
22 corner of Brazil and Ferguson, and the old tax assessment value
23 as you see on this lot was \$51,100, and that means -- when I
24 say, "old value," I mean the tax assessor appraised that
25 property for purposes of assessing taxes at \$51,100. The new

1 value, taking contamination into consideration, is \$22,050.
2 The devaluation, therefore, subtracting, gets you \$29,050.
3 When you add 33 percent to that, that's \$9,587, meaning the
4 total compensation for this property owner, if he chooses to
5 accept the tax assessor's number, is \$38,637. The percentage
6 of the original value of that settlement is 75.7 percent of
7 that property. Now, the guy gets to keep his property. All
8 he's giving up is access for monitoring wells, deed restriction
9 that doesn't allow him to drill a well, which nobody is going
10 to drill a well anyway, and a release of his property value
11 claims. Now, let's look at a second scenario of this same
12 property owner. I call this the litigation damages scenario,
13 and it assumes that the class is not certified, that
14 Mr. Ledbetter proceeds with this individual's claim against
15 Whirlpool and that he adds -- he says, okay, the tax assessor
16 number is too low. I want to add 13-and-a-half percent to that
17 number and that gets you to \$58,000. And let's assume that
18 Mr. Ledbetter at trial is able to convince a jury that it
19 should pay 20 percent of that property value, because that's
20 what the data really shows. The EPA study is under ten
21 percent. Some of the other studies by Mr. Simons, using
22 different methodologies, pushed the number up to 20 percent and
23 higher, but 20 percent is the number sort of in the middle
24 range of what a plaintiff in a case like this is likely to
25 recover. And so let's give them that 20 percent. That's

1 \$11,600 after trial. And if you take out fees of about 33
2 percent, that's \$3,028, and at that point you will have also
3 incurred a lot of costs, probably \$10,000 per property owner,
4 because that would get you in the range of three to \$400,000 in
5 costs, and it's clearly going to cost that much to bring in the
6 various experts who will be needed to try this case. So what
7 is the net to that owner of the payment [sic]? The owner there
8 is going to get less than zero. In other words, after he pays
9 his fees and costs, there is zero recovery for that property
10 owner, if he goes forward and tries his case against Whirlpool
11 and wins. Now, let's look at a third scenario. I call it the
12 home run damages scenario. This is Mr. Ledbetter's best day in
13 court where, with respect to the same property, he has the
14 \$58,000 and instead of getting 20 percent, he gets 100 percent.
15 The jury says it's so bad that you have TCE in the ground water
16 under your house, even though you don't ever use the ground
17 water, even though there's no way for it to get to your air
18 that you breathe, still, you deserve to be paid a hundred
19 percent of the value of your home. That's \$58,000, when you
20 add the additional 13-and-a-half percent that Mr. Ledbetter
21 wants added to the tax assessor's numbers. Well, take out his
22 fee. That's 33 percent. That's \$19,000. Let's take out
23 \$10,000 for costs. The net to that owner is \$28,800 of the
24 home run jury verdict. The difference between what we are
25 offering today, that person gets \$10,000 less than what we are

1 offering. And how far down the road are we, a year, two years,
2 with an appeal, maybe more. Time value of money is important
3 to consider. What I'm suggesting, Your Honor, is this is a
4 generous settlement, but not only is it generous in isolation.
5 When you think of it in the context of what is the best
6 alternative to what we are proposing to the Court, it seems
7 inescapable that this is a great deal for the residents of this
8 area. And Whirlpool is not oblivious to that. It realizes
9 that it is overpaying this case. Why? Because it wants to
10 avoid the cost of litigation. It wants to avoid uncertainty.
11 It wants to move forward with this remediation in the best
12 interests of the property owners. And Whirlpool feels a
13 responsibility. It was a neighbor of these people for 45
14 years. And it feels a responsibility to see this thing
15 through. And that's why we are here pursuing this. And, Your
16 Honor, I appreciate your questions. You know, the relief that
17 we are asking is preliminary approval of a class settlement.
18 That isn't the final word, as Your Honor knows. There would
19 still be a full fairness hearing in a few months after there is
20 notice, which we would be happy to negotiate further with the
21 Court, if you have any concerns that need to be addressed about
22 it, but the key point is let's give these residents a chance to
23 sit down at their kitchen table with the notice in front of
24 them, talking to their family members, talking to their lawyers
25 if they want to, talk to the class administrator if they want

1 to, fully understanding what their rights are, what they are
2 giving up, what they are going to be paid for that, and let
3 them make that informed decision in hopes that we can avoid a
4 longer battle that will in the end net less for the people who
5 live in that neighborhood.

6 THE COURT: Can I ask a few questions?

7 MR. BRUNSON: Absolutely.

8 THE COURT: The provision about Whirlpool being able
9 to draw from the settlement. Originally, I will tell you when
10 I looked at the first settlement agreement, I didn't like it.
11 That just essentially told me, you know, Whirlpool could walk
12 away from this at any time they want to if they don't like it.
13 That's what it said, you know, even up to the time it was at
14 the United States Court of Appeals, the Eighth Circuit, the day
15 before formal oral argument in the case, Whirlpool could say,
16 I'm walking away from this deal. I mean, and now you've
17 changed that and I don't see, you know, if more than
18 25 percent, you have the right to opt out, but that continues
19 up until, you know, some point in time to the -- I guess maybe
20 a final hearing. If, if Whirlpool thinks it is a fair and
21 adequate settlement, you know, why is it reserving a right to
22 walk away from the deal?

23 MR. BRUNSON: Well, if, if all of Mr. Ledbetter's
24 clients, after full consideration, opt out and they don't want
25 to proceed, I think we've got to take a look at where we are at

1 that point.

2 THE COURT: I mean, I thought the purpose of this was
3 to get the people who might be left behind. The people left
4 behind will be left behind if Wal-mart, I mean, if Whirlpool
5 just walks way.

6 MR. BRUNSON: Well, I'm certainly not saying that
7 Whirlpool would, would terminate that --

8 THE COURT: But you are reserving the right to do
9 that.

10 MR. BRUNSON: We do reserve that right. I don't think
11 that's unreasonable, the 25 percent. I think -- the Court may
12 have reservations at that point about whether to approve it. I
13 think everybody's going to have to take look at where we are.

14 THE COURT: I tell you one of the -- and talk to me
15 about this, because I want to hear what you have to say. I'm
16 real concerned about the predominance of the individual claims
17 as opposed to the claims of the class, and, again, I'm
18 referring to the people who are going be impacted differently
19 because of access agreement. Tell -- do you know -- help me
20 understand how the common claims predominated over those.

21 MR. BRUNSON: Well, the common issues for -- if you
22 could go back to the 26(b)(3) slide on 23. Sorry. Wrong
23 number. But you still have the same common issues; that
24 Whirlpool is the source; that there is TCE in the ground water;
25 that they live in this neighborhood that is under remediation;

1 that they all have the same tax assessor's devaluations that
2 have affected their property. Those are all common issues that
3 we believe predominate over the individual issue of maybe you
4 have one property owner who Whirlpool will never want to test
5 anything on their property. They don't want a monitoring well.
6 They don't want access. You know what? That resident is
7 getting a windfall because Whirlpool is paying as if -- it's
8 paying everybody the same amount, but it is paying the higher
9 number in order to incentivize people to willingly allow that
10 access to their property. So to the extent that there is a
11 disparity in rights, it is accounted for by paying more to the
12 people who are being imposed upon most and paying others the
13 same amount, even if, as it turns out in the end, they are not
14 imposed upon, and at this point, it's premature to say which
15 residents may or may not, at this point which residents may or
16 may not need to allow some testing on their property because,
17 as I indicated, the plume, though stable, does fluctuate some
18 with the seasons, and it's not possible for us to say right now
19 that there's no property in the well ban you would never need
20 access to. So everybody has, in a common sense, every owner in
21 the well ban area is giving up an uncertain right that may
22 happen in the future. And for some it will turn out to be a
23 right that Whirlpool exercises and go on and put a little vapor
24 point in the corner of their backyard, but for others nothing
25 happens, but while certainly, while those are differences that

1 may ultimately play out, they don't predominate. What
2 predominates are those common issues that I pointed out to you
3 earlier.

4 THE COURT: That's helpful.

5 MR. BRUNSON: Any other questions?

6 THE COURT: Again, I know in your proposed order you
7 write -- you cite to Rule 70 of the Federal Rules of Civil
8 Procedure about the Court's authority to transfer property, but
9 is there, is there some other authority for the Court to do
10 that? I mean, I don't --

11 MR. BRUNSON: There is, Your Honor. There are a
12 number of cases that we cite to the Court, primarily in the
13 context of cell phone tower property easements where the courts
14 have encumbered properties, and I think the most on point for
15 this is another case from the Eastern District of Arkansas, the
16 McDaniel vs Sprint case, which this agreement was actually
17 modeled upon. Where the Court approved that settlement
18 agreement and where it similarly allowed -- it allowed an
19 intermediary like we are having in terms of the claims
20 administrator serve as the attorney-in-fact, same situation in
21 that case, and it was upheld and approved. You know, in any
22 class action settlement, you will have a bar order. Of course,
23 that's one of the great advantages for a settling Defendant
24 that will bar any claims that anybody has, and that bar order
25 is going to bar everybody's claim whether they participate or

1 not. This is a little different because it's a real property
2 issue, but a chosen action is a chosen action, and I'm not sure
3 I see any difference. The last point I think is important and
4 that is the due process issue. I think we need to make sure
5 that, as Your Honor has indicated, that the notice is complete
6 enough that people do understand what their rights are and
7 because, you know, they need to have notice. They need to have
8 an opportunity to opt out. They need to have an opportunity to
9 be heard in order to make sure due process is honored.

10 THE COURT: Okay. Good. Thank you.

11 MR. BRUNSON: Thank you.

12 THE COURT: I tell you what I would like to do. I
13 want to take about -- we've been at this for a couple of hours.
14 Let's take about a ten-minute recess, and when we come back,
15 I'll give Mr. Ledbetter an opportunity to speak.

16 (Off the record at this time.)

17 THE COURT: Please be seated. Mr. Ledbetter, before I
18 go to you, I'd like to ask Mr. Brunson a couple of questions,
19 if you'll step back up to the podium. I tell you what. You
20 can do it from there. You've got your stuff. No, no, you stay
21 right there, Mr. Brunson. I have a question about the claim
22 form and the claim procedure. Does a class member have to file
23 a claim to get paid?

24 MR. BRUNSON: Yes.

25 THE COURT: So if we have these people out here who

1 don't read the notice, who don't do anything, they don't file a
2 claim, they are getting nothing, but they are having an access
3 easement imposed on their property?

4 MR. BRUNSON: That's correct.

5 THE COURT: That's -- you know, the thing about it,
6 your claims administrator is going to review this, and I think
7 they probably have all of the information that they need right
8 now to pay this claim.

9 MR. BRUNSON: You want us to pay the claim --

10 THE COURT: What the claim form said, you know, you go
11 get a certified copy of the deed where you acquired the
12 property. Okay. So they are going to have to go -- so they
13 are going to get a certified copy of the deed, or if you
14 inherited the property, tell us how you inherited the property,
15 but if this is to protect the people who are left behind and
16 they are the people that don't read these notices, they don't
17 opt out, they are not -- in that claim form -- I don't know how
18 many pages there are. And they are not going to get a copy of
19 their deed, they get zero, and they haven't benefited from
20 this.

21 MR. BRUNSON: Well, let's start with the point that we
22 are paying these people a substantial amount of money to get
23 their attention, to give them every incentive to return the
24 claim form, so I don't think that there's a one-to-one
25 relationship or anything close to that between the people who

1 may be left behind and the people who may not turn in a claims
2 form. It's speculative, of course.

3 THE COURT: Why don't you just pay them if you know
4 what you are going to -- if the difference between -- it's a
5 difference in the assessment? Why don't you just cut them a
6 check and send it to them, if you have -- and have them, you
7 know, either indemnify you, if they are not the true owner of
8 the property or something or that you are not giving money away
9 to people?

10 MR. BRUNSON: We have no problem as long as the money
11 gets to them, you know, we have no problem paying those claims.
12 That's not -- the issue's not, well, we will try and save
13 money.

14 THE COURT: I know it's not, but, you know, that may
15 be a problem with the claims procedure is that you know what
16 you're going to pay them. You can find out who owns the
17 property. You know, we're talking about maybe 14 people,
18 aren't we, in the well ban class, if all of his clients opt
19 out?

20 MR. BRUNSON: Fourteen or nineteen, I think, your --

21 THE COURT: Yeah, yeah, my numbers may be wrong, but
22 we will check that out, but --

23 MR. BRUNSON: But, again, Your Honor, at the
24 preliminary approval stage, this would seem to me not an issue
25 that would derail the settlement. This could be an issue that

1 afterwards -- because we will know when we get to the next
2 hearing if there is anybody in that category, and if there is,
3 again, we are happy to figure out a way to get the money to
4 them. That's really not the issue for us. We want to
5 complete --

6 THE COURT: I didn't think it would be, but it's if
7 they don't file the claim form, they get nothing.

8 MR. BRUNSON: I understand. I mean, it's -- I
9 understand your concern.

10 THE COURT: Okay. Thank you. Okay, Mr. Ledbetter.

11 MR. LEDBETTER: Thank you, Your Honor, and counsel. I
12 guess just to kind of start out, all cases, of course, are
13 different and unique and unusual, and this one is no exception.
14 I've never been involved in a case where I felt like the
15 defendant was working so hard to drive a wedge between my
16 clients and I. I hear this over and over, both in the press
17 releases they put out attacking what I'm doing as far as my
18 representation, and the statements made, it's almost like I
19 really don't represent the folks who have retained us to
20 represent them in this case, and we do represent them, and
21 we've represented them with the most professional and zealous
22 way that I know how to represent a client, and that is to look
23 out for their best interests. And so when Whirlpool came to us
24 early on and pitched this deal, and I'm talking about way back
25 before we filed suit or anything, and started talking about

1 some kind of global resolution, we wouldn't go along with it
2 because we knew from the get-go that, number one, these cases
3 are unique as most of these types of cases are. And they are
4 not good candidates for class treatment. They are not good
5 candidates under Arkansas law, which is, as you know, much more
6 liberal in classification certification than the federal
7 requirements for the Rule 23 commonality, typicality, and those
8 types of things, but even under Arkansas law where you can have
9 a trial on liability and split it off into individualized
10 claims on damages and other non-common issues, my experience
11 has been that these cases are hard to get certified, and
12 there's a reason, and that is that these claims and these
13 individual cases are unique. And we knew there weren't a whole
14 lot of folks involved relative to most class actions we see.
15 And we knew that individual circumstances, the duration that
16 folks had been out there, the concentrations of contaminants
17 under their property, all of these individualized issues would
18 ultimately have a potential to come up if we could not reach
19 settlement with them. So...

20 THE COURT: Explain it to me a little about what these
21 individualized issues are, because basically the primary claim,
22 at least as to the well ban class, is a trespass.

23 MR. LEDBETTER: That's right.

24 THE COURT: And it's devalued their property as a
25 result of that, and let's forget about punitive damages and

1 those type of claims. But what, what, what are the
2 individualized issues for those individuals in the well ban
3 class other than, say, a claim for punitive damages?

4 MR. LEDBETTER: Okay. So for -- depending upon your
5 location over the plume, and we have a plume map up here that
6 is based on our expert's evaluation of the plume that we think
7 is accurate. As you will see, the concentrations go from the
8 center where they are highest out to the outer area where they
9 decline as far as the amount of impact. So those who are
10 closest to the plume that live over the most concentration may
11 have issues with regard to vapor intrusion where there has been
12 some exposure. People may have been there longer and had to
13 deal with the issues of this investigation that have gone on
14 for some period of time. So the amount of annoyance,
15 interference, inconvenience which we contend under both the
16 Felton Oil case that, as Mr. Shemin said, I mean, I wasn't only
17 lead counsel, I was sole counsel on both the trial and the
18 appeal of that case. And we think under restatements 929, a
19 landowner is entitled to damages for inconvenience, annoyance,
20 disruption, loss of peace of mind and those types of things,
21 regardless of whether it's a temporary or permanent measure of
22 damages. Some of these are landlords and not actual residents.
23 So their degree of inconvenience and annoyance and that type of
24 thing would vary. Strictly from a diminution point of view, I
25 think that there is a possibility that those homes with higher,

1 those properties with higher contamination would have a higher
2 diminution than those that are further out.

3 THE COURT: I don't understand that. This is a plume
4 that is underground and it doesn't propose -- there's no health
5 hazard here involved at all.

6 MR. LEDBETTER: Well, they are not asserting --

7 THE COURT: Now, that we know of now, and I just don't
8 understand -- you know, the well ban class, of course, the
9 plume doesn't follow along street lines.

10 MR. LEDBETTER: Correct.

11 THE COURT: You know, it's -- and this is, you know,
12 the first, first couple of maps I've seen about where the plume
13 is, but looks like they pretty well have a pretty large area of
14 the well ban class there. I just don't understand how, if
15 you're in the well ban class, I don't understand how you're
16 more impacted. It just happens to be right beneath your house
17 or, you know, down the street.

18 MR. LEDBETTER: I've tried these cases and juries come
19 up with different results for different individuals. When
20 we've done the bellwether approach that we are doing in this
21 case.

22 THE COURT: But the measure of damages, you know, we
23 have no person. The measure of damages is going to be the
24 difference in fair market value before and after the trespass.

25 MR. LEDBETTER: If you use the permanent measure,

1 that's right. If you use cost of cleanup, it's going to cost
2 more to clean up a highly contaminated property than one that
3 has very low concentrations. And in the Felton Oil case --

4 THE COURT: You-all are getting way over my head
5 about -- you-all know more about this litigation than I do
6 about whether it was temporary or permanent, but it looks like
7 to me that, you know, the permanent damage can be any -- you
8 get the fair market value of the house. I guess it could be
9 worth nothing. You know, there's a finite amount as to what
10 the, what the permanent damages are. If a house is worth
11 \$50,000 and now it's worth zero, the damages are \$50,000. And
12 that would include use of enjoyment and any other claims.

13 MR. LEDBETTER: I think that it would not necessarily
14 include the inconvenience, the disruption, and the annoyance
15 that you endured during the period of time that you were --

16 THE COURT: What is an inconvenience that they are
17 experiencing out there?

18 MR. LEDBETTER: Well, so Mr. Brunson talked about the
19 drilling or these monitoring wells as being unobtrusive. They
20 are a drill rig that sets up on a person's property for some
21 period of time. And then you have people coming out there
22 doing activities on your property.

23 THE COURT: Yeah, but that -- it doesn't take long to
24 drill a water well 25 feet or eight feet or whatever, it just
25 doesn't.

1 MR. LEDBETTER: It takes a few days.

2 THE COURT: You know, take a few days. It would be
3 somewhat an inconvenience but somewhat of a minor
4 inconvenience.

5 MR. LEDBETTER: Yes, sir. In Felton Oil the jury
6 valued at \$25,000.

7 THE COURT: They were pretty generous, but, anyway...

8 MR. LEDBETTER: The test -- I'm sorry. The testimony
9 of our clients, of course, there's not been any depositions
10 taken, but in my experience, the testimony of what they have
11 been through with this is not that much different than other
12 cases I have handled where there was a fairly, as you described
13 it, generous award of damages for what they have experienced.

14 THE COURT: Okay. So we've got investigations,
15 inconvenience from drilling wells, what other are some of the
16 other individualized issues?

17 MR. LEDBETTER: Well, so the folks that live out there
18 who have found out recently in January of 2013 that they were
19 living on top of a plume of TCE that is anywhere from,
20 Mr. Brunson said eight feet, I think you could say the ground
21 water sometimes is more shallow, a few feet below the ground
22 surface, have concerns about how has impacted their lives. It
23 may not be a rational concern. There is still an open question
24 about vapor intrusion. He mentioned this issue of vapor
25 monitoring, and our disagreement, our disagreement boils down

1 to, and he said something that's just flat wrong, and I don't
2 know if he didn't listen to his story about hearing what you
3 want to hear. We've never asked them to do indoor air
4 monitoring. I understand the difference between indoor air
5 monitoring, subslab vapor monitoring and vapor wells or vapor
6 points that they are, they are proposing.

7 THE COURT: You know, I really don't want to get into
8 the --

9 MR. LEDBETTER: Sure.

10 THE COURT: -- what you-all tried to negotiate and
11 whatever. That's your own business. What I'm trying to
12 understand is that -- and you bring up vapor monitoring. You
13 know, what is that, and how does that impact the property?

14 MR. LEDBETTER: The possibility of vapor intrusion, in
15 other words, that these residents have been exposed to TCE
16 vapors is an open question. And it's something that ADEQ has
17 been trying to get Whirlpool to do for a long time.

18 THE COURT: But they haven't been able to do it
19 because they can't get access to the property.

20 MR. LEDBETTER: No, that's not true.

21 THE COURT: I'm just saying. I don't know. I haven't
22 read the --

23 MR. LEDBETTER: And you don't want to get into our
24 negotiations, but it's not because they can't get access. It's
25 because the way they want to do it is, in our expert's opinion,

1 a method that is designed to validate their conclusions they
2 have already reached that vapor exposure, vapor intrusion is
3 not an issue. We don't agree with that. ADEQ doesn't agree
4 with that. But there is an ongoing dispute. We attached the
5 letter --

6 THE COURT: Yeah, I saw that.

7 MR. LEDBETTER: -- recently --

8 THE COURT: What's ADEQ ordering them to do now?

9 MR. LEDBETTER: They are ordering them to do subslab
10 vapor monitoring, which is what we have asked for all along,
11 not indoor air monitoring. They say that the vapor points that
12 Whirlpool has proposed are an ineffective means of determining
13 vapor intrusion and they have told them to do subslab, and we
14 have told both Whirlpool and ADEQ that our clients, some of
15 them are here, will give access if they will do the subslab
16 vapor monitoring, and that will, that will determine whether or
17 not there has been in some of these homes, again, that are
18 closest to the center of the plume, whether vapor intrusion has
19 been an issue, whether they have actually been exposed to
20 unacceptably high concentrations of TCE vapors, and the
21 evidence on TCE continues to evolve, but it is more harmful.
22 It is now known to be more harmful than we thought four or five
23 years ago, and so this is a real issue that we think needs to
24 be developed, and that's -- we are doing discovery. We have
25 expert witnesses that we've retained --

1 THE COURT: Well, what about the fact that claims for
2 personal injury or health claims are excluded from the
3 agreement? If either your clients became a member of the class
4 and decided to stay in and it turned out that there's some
5 health risk as a result of vapor, they wouldn't be precluded
6 from suing Whirlpool, would they?

7 MR. LEDBETTER: If, if -- I mean, in your scenario,
8 and we've talked about this all along, that they don't seek a
9 release of health claims, that is correct, that those claims
10 would exist. But we are talking about -- the problem with a
11 health claim in my view is that when you have exposure to a
12 toxic chemical, you have a long latency period.

13 THE COURT: You have a what?

14 MR. LEDBETTER: A latency period between exposure and
15 onset of disease, and so in the meantime, if you have had a
16 significant exposure, you have additional rights and remedies
17 such as the possibility we could amend if we find that there is
18 an unacceptable amount of vapor exposure, medical monitoring,
19 and other remedies that currently aren't available because the
20 data is not there, and the reason the data is not there is that
21 Whirlpool has resisted doing what needs to be done to determine
22 is there an unacceptable risk.

23 THE COURT: Well, if the vapor monitoring is all about
24 determining whether there are healthcare claims and those are
25 exempted from the agreement, and those individuals, even if

1 they stay in the class, can sue Whirlpool, I mean, what's the
2 problem with it?

3 MR. LEDBETTER: Because I believe that the release,
4 the exemption from actual personal injury claims again is onset
5 of disease, and there is -- there are remedies available
6 between exposure and disease onset, if you can show significant
7 exposure.

8 THE COURT: Okay. Okay. Let's move on from vapor
9 monitoring to something else.

10 MR. LEDBETTER: All right. Let's do that. I agree.
11 So let me talk about some of things that we think are a problem
12 with this and you have, you have highlighted most of them
13 because, you know, we, we --

14 THE COURT: I tell you, one thing I'm real interested
15 in hearing from you about is the Rule 23(a) requirements for
16 class certification. You know, if your clients are going to
17 opt out, why do you care if the case is certified or not, if
18 they are going to pursue their own litigation?

19 MR. LEDBETTER: And if, if all of our clients decide
20 to opt out at this point, we believe we have met with our
21 clients as soon as this was announced, we've gone over it with
22 them. Of course, it changed from the original proposal to the
23 current proposal which was changed based on discussions that I
24 had with counsel about some of the problems that we saw with
25 this proposal. And instead of addressing all of our problems,

1 they addressed a handful of them, I think, again, to try to
2 sort of get the minimum amount of what they thought would drag
3 our clients into this. Whether or not every single client that
4 we represent will opt out, we haven't made that statement at
5 this point because they have got a decision to make, if you
6 decide to grant preliminary approval, and I agree with you, if
7 all of them opt out, then whatever happens with this, they
8 still have their individual claims and will continue down that,
9 down that road. And then I go back to the point that you just
10 made with Mr. Brunson, which is exactly right, is that this,
11 this agreement as proposed would impose a deed restriction that
12 is beyond anything I've ever seen, and I've negotiated as many
13 deed restrictions I think as any lawyer in Arkansas. It is in
14 perpetuity, and that is just not the way that I've ever seen
15 them done. It should be, as you noted, the remedial action
16 decision document -- in all of these cleanups, the goal is to
17 actually do remediation, and if you don't do remediation, then
18 that triggers what happened in Felton Oil, which is you can
19 recover cost of cleanup. What we believe Whirlpool is trying
20 to do is, through this perpetual deed restriction, is to be
21 allowed to not meet the cleanup goals that have been set in the
22 RADD.

23 THE COURT: Okay. Help me understand that a little
24 more.

25 MR. LEDBETTER: Okay. The deed restrictions that I'm

1 familiar with, and the ones that ADEQ -- that I've seen, they
2 even proposed in the limited situations where they have
3 actually been involved, because usually it's negotiated between
4 the company that's responsible for the impact and the
5 landowner, would have a provision in there that the deed
6 restriction can be removed once the cleanup goals are met and
7 there's no additional threat.

8 THE COURT: Okay.

9 MR. LEDBETTER: This one is in perpetuity.

10 THE COURT: Well, the deed restriction is in
11 perpetuity, but what about access?

12 MR. LEDBETTER: The access agreement is for a period
13 of time. Twenty years, I think.

14 THE COURT: Yeah.

15 MR. LEDBETTER: Twenty something years. And the
16 reason is, in my experience in doing these, and representing
17 both sides of the table in these cases, is at some point you
18 have done all of your post-remedy monitoring, whether or not
19 you end up meeting your cleanup goals, which are the current
20 cleanup goals, or you can later because you have some basis
21 such as a perpetual deed restriction, negotiate for less
22 stringent cleanup goals, but at some point you are going to
23 close those monitoring wells. Whirlpool is going to walk away
24 from this. So the need for access is not permanent, but the
25 need for restrictions to the property --

1 THE COURT: Well, the main restriction is they can't
2 drill water wells. Isn't that the main restriction?

3 MR. LEDBETTER: Uh-huh; right.

4 THE COURT: Who's going to drill a water well in their
5 backyard over on Ingersoll?

6 MR. LEDBETTER: I have no crystal ball to tell you
7 what's going --

8 THE COURT: I tell you what we know from property law,
9 that's property is just a bundle of rights, and that's a bundle
10 of right, the right to drill a water well. But the likelihood
11 of somebody drilling a water well is so remote that --

12 MR. LEDBETTER: Well, it is one of your property
13 rights, and you have a right to drill a property well at eight
14 feet to 25 feet if that's the lens of saturated ground water.
15 The deed restrictions that we do, prevent access to
16 contaminated ground water, because there's deeper ground water.
17 And this is a blanket drilling restriction without regard to
18 whether or not you're drilling in contaminated ground water or
19 not. But, Your Honor, all of this highlights what's going on
20 here, and what's going go on here is Whirlpool is dictating all
21 of these terms without sophisticated counsel on the other side
22 representing these property owners and saying, wait a second,
23 we need this access agreement to say such and such. We need
24 this deed restriction to say such and such and these are
25 reasonable terms.

1 THE COURT: Well, I know that's your view, but, again,
2 why do you care if all of your clients opt out?

3 MR. LEDBETTER: If all of our clients opt out, I agree
4 with you. It's some -- it becomes -- the people that they are
5 saying they're not going to leave behind, who could be left
6 behind in all of this by having terms that you've approved,
7 that we view to be unfair, unreasonable, overly broad, and that
8 type of thing.

9 THE COURT: Okay. Is the lack of Whirlpool's access
10 to the well ban area, is that an impediment to what ADEQ is
11 asking them to do now?

12 MR. LEDBETTER: Not as far as I'm concerned because we
13 have offered access if they will do what ADEQ is asking them to
14 do. And if we opt out, we are not going to give them access
15 unless they do what ADEQ has asked them to do, as opposed to
16 doing something that we view and ADEQ views as an ineffective
17 means of determining the possibility of vapor intrusion.

18 THE COURT: Okay. Yeah. Go ahead.

19 MR. LEDBETTER: The suggestion I think that counsel
20 has not been engaged in litigation and discovery, we have. And
21 we have spent since January '13, when we got involved in this
22 case, significant time and significant money in developing
23 these cases. I can't speak for Mr. Shemin as to what he has
24 expended, but certainly we have done that. And I think that,
25 you know, that is one of the issues that Whirlpool keeps trying

1 to say that this is an early settlement and so on and so forth.
2 From our standpoint, we are getting our cases ready. I want to
3 address some of the things about, you know, the -- I don't know
4 if you care about the best case/worst case scenario.
5 Obviously, we disagree with that. In the Felton Oil case, the
6 woman's property was worth \$30,000. The last offer at trial
7 was \$50,000. The jury verdict was \$205,000. I have settled as
8 many ground water cases, I really believe, as any lawyer in
9 Arkansas, and probably tried as many, and we have had
10 diminutions ranging from or we've had total settlements that
11 were more than the total value of the property. But we've had
12 just diminution settlements approaching 92 percent, depending
13 upon the circumstances. And, again, different properties have
14 resulted in different awards or settlements depending upon how
15 impacted they were and upon what was going on there. So I
16 realize that Mr. Brunson is experienced and that -- but to
17 stand up here and tell you the best and worst case for us, is
18 just, I think, is not necessarily accurate. And I think he's
19 doing that for purposes for the benefit of our clients who are
20 here today to try to concern them as to what they can do. I
21 realize that litigation is risky. And that there's always the
22 risk of getting less at trial than you were offered in
23 settlement. We all know that. But to sit here and say as an
24 absolute that that's the case, is just something that we
25 disagree with. So I guess, you know, we have -- I was going to

1 talk to you about the way that all of this came about as far as
2 our negotiations with Whirlpool, but you don't want to hear
3 that. We weren't privy to what was going on between Mr. Shemin
4 and Whirlpool counsel as far as this proposed settlement.
5 Suffice it to say, after the settlement was announced, we were
6 approached about what can we do to bring you into this
7 settlement? We met with our clients. We went back. We made
8 proposals. We haven't been able at this point to reach a
9 satisfactory, what we think is satisfactory for the people we
10 represent, so that's what has us here today.

11 THE COURT: Okay. You know, the purpose of this class
12 action is to, according to Whirlpool's motion, they think they
13 are giving fair compensation to these landowners, but it also
14 gives them some finality and certainty. Isn't there a public
15 interest in getting this contamination cleaned up and bringing
16 some finality and certainty to what's going to occur with the
17 problem out at Whirlpool?

18 MR. LEDBETTER: Yes. Yes, it is. There is. And so
19 that concerns me about why do they want a perpetual deed
20 restriction if they are really going to clean up to the
21 standards that are set up in the RADD, so are we getting that
22 finality and certainty?

23 THE COURT: That RADD is so far above my ability to
24 understand, that somebody's going to have to explain it to me,
25 if it ever becomes an issue in this case, because I attempted

1 to go through and try to understand that. While you mentioned
2 that, I will ask you this. It looks like to me that there is
3 something planned that's going on for two years, and the end of
4 two years is it going to be re-evaluated --

5 MR. LEDBETTER: Correct.

6 THE COURT: -- and then make a determination about are
7 there other steps to take?

8 MR. LEDBETTER: That's the way it is currently
9 written, but it can be changed, and with a perpetual deed
10 restriction, we think the next thing that Whirlpool will ask to
11 do is to revise the RADD to say that what we've done, which is
12 the chemical treatment that they are doing, they are going to
13 do some additional source reduction, which our expert told us
14 early on that they hadn't characterized the full extent of the
15 source area. There's probably a phase-separated component of
16 this, a Dean Apple [phonetic], a dense-not-adequate-space-
17 liquid, component to the source area that's not adequately
18 being addressed, but they attacked the source area and then
19 they determined if that results in what's called natural
20 attenuation out away from the source area of the plume, whether
21 or not those concentrations are naturally declining mainly due
22 to dilution but some chemical processes that cause these
23 chemicals that are organic chemicals to break down, and if
24 there is not, the way the RADD is currently written, if natural
25 attenuation, the remedy of just monitoring outside of the

1 source area does not prove to be effective, then Whirlpool will
2 be required to come in and expend additional sums for active
3 remediation. But what you see over and over in these cases, if
4 you handle these cases, is that natural attenuation is not
5 effective. I'm working on a case now that they have been
6 trying to naturally attenuate it since 1991, and the TCE levels
7 are the same or higher, and so the question is can we somehow
8 get ADEQ to allow us to walk away from this by getting
9 institutional control such as a perpetual deed restriction to
10 allow us to leave it there? So the idea that it is going to be
11 cleaned up under this scenario I think is not necessarily one
12 that we can take to the bank.

13 THE COURT: Okay.

14 MR. LEDBETTER: I want to mention one thing about the
15 how the proposal got changed from paying the assessor's
16 diminution plus attorneys' fees.

17 THE COURT: I still, I still don't understand why you
18 care about that, if you don't -- if your clients are going to
19 opt out.

20 MR. LEDBETTER: And I can't tell you today that they
21 are all going to opt out, Your Honor.

22 THE COURT: Okay. Well, this is the proposal I have
23 in front of me.

24 MR. LEDBETTER: Yeah. And that's, and that's why I'm
25 going to talk to you --

1 THE COURT: And I either accept it or reject it.

2 MR. LEDBETTER: And that's why I want to talk to you
3 about the proposal and why we think it's not fair because the
4 assessor's appraisal of the pre-contamination, as you know,
5 they vary from property to property because they are just done
6 en masse. They don't necessarily catch all of the improvements
7 or the true condition of the properties like a true appraisal
8 would of those properties, so if you are lucky enough to have a
9 high appraisal for property assessment purposes, you get a
10 larger amount. If your appraisal for tax assessment purposes
11 was lower, you get a lower payment. But then they talk about
12 this option, this appraisal option that you can elect to have
13 an independent appraisal, and that, in my view, is the worst
14 idea in the world. And so it starts out with they, they, they
15 kept trying to suggest that it starts out with there being an
16 appraisal that is done before that would show the value of it
17 without regard to the tax assessment but just the value that it
18 was pre-contamination. But that's not what their document
19 says. Their document says that the independent appraisal --
20 appraiser will use the pre-contamination tax assessment value
21 and then make a determination with some unknown methodology as
22 to what the diminution has been, and they don't spell out the
23 methodologies.

24 THE COURT: You know, you know, when I looked at that,
25 and I saw that issue when I looked at it, and because -- and

1 they are going to correct it, but they call it the assessed
2 value rather than the appraised value. If you took the
3 assessed value and you took the value of the property after the
4 contamination, that might be more than what the assessed value
5 is because the assessed valued is only 20 percent of the
6 appraised value.

7 MR. LEDBETTER: If they truly used that, but I
8 think --

9 THE COURT: I don't think they have intended to do
10 that, but why -- so your -- you think the problem with that is
11 the fact that somebody doesn't go get a true market value
12 analysis as opposed to using the tax assessor's appraisal.

13 MR. LEDBETTER: Because we have had appraisals done
14 that looked at the market before January 2013. And they were,
15 as a rule, Mr. Brunson alluded to this, but he didn't tell you
16 the source of it, 12 to 13 percent higher than the assessment,
17 but that's an average. Within those appraisals, there were
18 some that the tax assessments, as I mentioned, the appraised
19 value for tax assessment purposes was much lower than what the
20 percentage was. A few of the assessments for tax purposes, the
21 appraisals for tax purposes were close to what the appraisers
22 came up with, but we think fairness mandates that you have to
23 look at the true fair market value before this became known and
24 not what the tax assessor --

25 THE COURT: Does that mean some appraiser is just

1 going to have to go out and get a bunch of comparables
2 before --

3 MR. LEDBETTER: We've had a number of pre-January '13
4 appraisals done already. We shared them with Whirlpool. We
5 did that in our initial disclosures. We shared those
6 appraisals that had been done before that. And on the adding
7 the one-third, the basis for that, they are bound by a
8 confidentiality agreement, but I'm not. The two landowners
9 that they settled with weren't represented by counsel, and so
10 they agreed to pay them their tax assessed reduction, the
11 reduction that the tax assessor did, plus an additional 33
12 percent. And so since those folks weren't represented by
13 counsel, they promptly went and told all of their neighbors who
14 are represented by counsel, we got a better deal than you
15 because we chose not to go with the lawyers and we got to keep
16 the extra third that Whirlpool has now tacked onto this because
17 they knew that we were going to to make that an issue, because
18 one of the hallmarks of fairness is all people within the same
19 class or subclass get treated equally. So the two that -- and
20 we've also been told that because of our negotiations, I think
21 Mr. Brunson even made reference to this, you know, they are
22 making this what they describe as a generous offer because of
23 the efforts that we've made. So that's where the one-third
24 came from was to combat that we would bring to your
25 attention -- but obviously it's still a situation where if, if

1 our clients -- I guess if we only represented one and everyone
2 else kept their powder dry, then they would have been allowed
3 to negotiate separately with Whirlpool like Miss Keith and Miss
4 Scroggin did and avoid Mr. Shemin taking any part of their
5 recovery or McMath Woods or Taylor Law Partners, but that's
6 where the extra third came from is we brought that to their
7 attention, that it came to our attention that they had settled
8 separate from this with two well ban landowners for the amount
9 of their diminution plus an additional one-third.

10 THE COURT: Okay.

11 MR. LEDBETTER: So that's the source, the source of
12 that.

13 THE COURT: Okay.

14 MR. LEDBETTER: Your Honor, we think these cases
15 should be and can be negotiated separately to a fair
16 resolution. But we think that it should be informed by
17 discovery and by true understanding of the worth of these
18 claims and the rights of these landowners out here, and that's
19 really why we are here. We think it ought to be fair and we
20 don't think that it's fair. I understand it's a great deal for
21 Whirlpool, because they get to pay what's a relatively small
22 sum of money and get their deed restriction that they know they
23 have got to have if they are going to walk away from really
24 having to clean this mess up and to get an access agreement
25 that they dictate as positioned to one that I've proposed that

1 really protects our landowners from the kind of disruption --

2 THE COURT: Let me, let me ask you this. Again, you
3 know, they love to use the term generous, but, you know, what
4 they are -- as I understand, what they are willing to pay under
5 the -- whether it's the assessment option or whether it's the
6 market value option, there are some figures you can come up
7 with here, but you are telling me that you believe that this
8 claim is worth far more than what the fair market value of
9 their property is, based on all of these elements of damages
10 that you have. You just told me that you've settled cases that
11 had fair market value of \$30,000, settled it for \$50,000, so
12 that whoever it was that got the \$50,000 and kept their
13 property.

14 MR. LEDBETTER: The Felton Oil case --

15 THE COURT: Sounds like you've had -- sounds like to
16 me you kind of have an inflated value of your claim.

17 MR. LEDBETTER: Felton Oil didn't settle for \$50,000.
18 We got a jury verdict of \$205,000 on a piece of property that
19 was worth \$30,000 because of contamination. I have settled
20 cases where the total settlement reflected more than a hundred
21 percent diminution in these kind of ground water contamination
22 cases because there are other elements of damages and there are
23 other risks, not the least of which is the risk of punitive
24 damages in this case.

25 THE COURT: Yeah. Okay.

1 MR. LEDBETTER: Thank you, Your Honor.

2 THE COURT: Thank you, Mr. Ledbetter. Okay. I've
3 heard from all the parties. Actually, Mr. Shemin has the
4 burden of proof, and if you want an opportunity to make any
5 further statement, I'll give you that opportunity.

6 MR. SHEMIN: No. Thank you.

7 THE COURT: I think I've heard it all.

8 MR. SHEMIN: Yeah, I think you have, too.

9 THE COURT: Okay. Let me tell you what I'm going to
10 do. There's -- I've heard a lot here today, and I appreciate
11 the efforts of all the lawyers, and what I will do is review
12 this and get an order out. I will tell you, though, it will
13 take us -- I'll try to get it as quickly as I can, but we are
14 somewhat overloaded right now. And I'm short one law clerk
15 right now. And we will try to get a decision as quickly as we
16 can because I know that you need to have a decision from this
17 pending motion. So I'm sorry I can't give you a time frame but
18 we will do the best we can as soon as we can. Okay.
19 Mr. Brunson?

20 MR. BRUNSON: We appreciate that, Your Honor. One
21 issue that's just unique because of the procedural posture of
22 this case is that we have this pending class settlement and
23 then we have individual claims that Mr. Ledbetter has brought,
24 and discovery is ongoing and deadlines are coming up, and I'm
25 concerned, not knowing which Plaintiffs are actually going to

1 be there at the end of the day, about what to do with discovery
2 deadlines, and I would just like some guidance from the Court.

3 THE COURT: Well, the one thing you can do, you can
4 file a motion to extend the discovery deadlines in that case.

5 MR. BRUNSON: I think that's what we are likely to do,
6 but I just wanted to sort of take your temperature on that
7 issue.

8 THE COURT: Well, you can't know. What parties do
9 sometimes is if they can agree on amending -- I get this all
10 the time about amending scheduling deadlines, and we make
11 decisions based on when our trial date is and how it impacts
12 the filing of motions for summary judgment and so forth. But I
13 understand this is a complicated litigation, and so my, my
14 suggestion to you is that you, you know, file a motion to
15 extend the discovery deadlines.

16 MR. BRUNSON: Thank you.

17 THE COURT: You talking about, you talking about
18 what's in the scheduling order?

19 MR. BRUNSON: I am, Your Honor. We have, in
20 Mr. Ledbetter's cases, his expert was to be later this month,
21 and then ours is 30 days after that. Understandably I'm not
22 sure what Mr. Ledbetter's plans are with respect to his, but
23 certainly we would like to be able to take some Plaintiffs'
24 depositions, for example, before we disclose our experts, and
25 we are not really in a position to depose people who we are

1 trying to settle with under the class agreement. They are
2 absent class members. We would rather know who's in and who's
3 out before we really get into that --

4 THE COURT: Well, I can tell you it's going to be
5 effective from when my decision comes out. I will not have an
6 order out next week. I can tell you that. I mean, these
7 things are complicated and we have got to get a transcript of
8 what occurred here today and work on an order.

9 MR. BRUNSON: I fully understand that.

10 THE COURT: So file your motion in the other case, if
11 you need to.

12 MR. LEDBETTER: And, Your Honor, from our standpoint,
13 I mean, we are going to obviously sit down with our clients,
14 but what we are trying to void is having Mr. Shemin's case
15 essentially derail our case, if we are going to go forward with
16 it. We are having difficulty in the discovery process, and we
17 will deal that separately. I don't have a problem with
18 extending some of these deadlines, but I think that what we
19 don't want to do is to allow this thing to sort of get
20 highjacked anymore because of this Day case that we have sort
21 of not been willing to be a part of from the get-go --

22 THE COURT: Okay. Are you referring to the fact that,
23 let's just say, for example, that I do certify this case and
24 notice goes out, that until that date ends for the opt outs,
25 you are not going to have some --

1 MR. LEDBETTER: No.

2 THE COURT: -- know how it's going to affect the
3 discovery schedule in your case?

4 MR. LEDBETTER: No. I think what I'm trying to say
5 and not doing a very good job of it is is that we would be
6 concerned about just everything placed on hold as far as us
7 being able to do discovery and work our cases up pending a
8 decision in the Day case. We don't -- I don't have a problem
9 with extending some of these deadlines, but I would have a
10 problem with what would amount to a stay of our cases.

11 THE COURT: Well, I don't think it ought to stay your
12 litigation. I don't think -- we may extend some of the
13 deadlines for -- in the discovery. I don't think it ought to
14 stay your case, and I'll do my best to get an order out as soon
15 as I can.

16 MR. LEDBETTER: All right. Thank you.

17 THE COURT: Okay. Anything else?

18 MR. SHEMIN: No.

19 THE COURT: Okay. Good. Thank you.

20 (End of proceedings.)

21

22

23

24

25

C E R T I F I C A T E

1
2
3 State of Arkansas)
4 County of Sebastian)

5
6 I, Rick L. Congdon, a Registered Merit Reporter, and
7 Official Court Reporter for the United States District Courts,
8 Western District of Arkansas, do hereby certify that the
9 foregoing transcript, taken before me at the time and place
10 herein designated, consisting of pages 3 through 113 was taken
11 down by me in machine shorthand and then transcribed via
12 computer, either personally or under my supervision, and that
13 this transcript is a true, correct, and complete transcript of
14 said proceedings as reflected herein.

15 Signed this 7th day of October, 2014, in the City of Fort
16 Smith, County of Sebastian, State of Arkansas.

17
18 /s/ Rick L. Congdon
19 **RICK L. CONGDON, RMR, FCRR**
20 OFFICIAL COURT REPORTER
21 U. S. DISTRICT COURTS
22 WESTERN DISTRICT OF ARKANSAS
23
24
25