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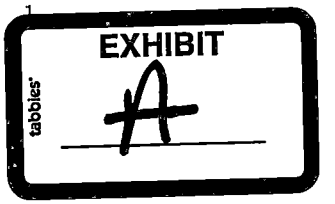
STATE OF INDIANA) LAKE COUNTY SUPERIOR/CIRCUIT COURT
) SS:
COUNTY OF LAKE) CAUSE NO. 2017 DEC 4 PM 3 51

Jury Demanded 45D05 17 12 CT 0206

MICHAEL A. BROWN
CLERK LAKE COUNTY COURT

CRISTOBAL ALVAREZ, C.A. by next friend Cristobal Alvarez, G.A. by next friend Cristobal Alvarez, MARAYA ALVAREZ, BARBARA ANDERSON, A.R.1 by next friend Barbara Anderson, A.R.2 by next friend Barbara Anderson, B.R.1 by next friend Barbara Anderson, B.R.2 by next friend Barbara Anderson, BRYONNA AUTERBERRY, A.G.1 by next friend Bryonna Auterberry, A.G.2 by next friend Bryonna Auterberry, A.G.3 by next friend Bryonna Auterberry, BRYTANNI AUTERBERRY, SHERRIE BAKER, INGRID BARBEE, N.H. by next friend Ingrid Barbee, V.B. by next friend Ingrid Barbee, V.R. by next friend Ingrid Barbee, LEAH BARDNEY, J.Y.1 by next friend Leah Bardney, J.Y.2 by next friend Leah Bardney, J.Y.3 by next friend Leah Bardney, TIMOTHY BARDNEY, DARIS BATES JR., DAVEN BELL, NANCY JEAN BELL, SHENNISE BOSTON, D.B.1 by next friend Shennise Boston, D.B.2 by next friend Shennise Boston, M.C.1 by next friend Shennise Boston, TONYA BOYD, M.B.1 by next friend Tonya Boyd, R.B. by next friend Tonya Boyd, ARNEETRICE BRIDGEMAN, A.L.4 by next friend Arneetrice Bridgeman, A.L.5 by next friend Arneetrice Bridgeman, K.B.1 by next friend Arneetrice Bridgeman, K.B.2 by next friend Arneetrice Bridgeman, K.S. by next friend Arneetrice Bridgeman, SCHAMACA BRITTON, T.B.1 by next friend Schamaca Britton, T.B.2 by next friend Schamaca Britton, BRIAN BROWN, DEVIN BROWN, A.B.2 by next friend Devin Brown, A.B.3 by next friend Devin Brown, M.R.1 by next friend Devin Brown, S.R.1 by next friend Devin Brown, JABARI BROWN, SHARATA BROWN, S.R.2 by next friend Sharata Brown, S.R.3 by next friend Sharata Brown, KATHY BRUNTY, A.B.1 by next friend Kathy Brunty, A.S.1 by next friend Kathy Brunty, D.M.1 by next friend Kathy Brunty, J.B. by next friend Kathy Brunty, L.B. by next friend Kathy Brunty, BRITTANIE BUIE, B.B. by next friend Brittanie Buie, CHRISTAN BUTLER, D.A. by next friend Christan Butler, D.J.1 by next friend Christan Butler, D.R. by next friend Christan Butler, BRIANA CATHEY, B.C.1 by next friend Briana Cathey, B.C.2 by next friend Briana Cathey, M.B.2 by next friend Briana Cathey, VEEDA CHANDLER, J.C.1 by next friend Veeda Chandler, J.C.2



by next friend Veeda Chandler, J.Q.1 by next friend Veeda Chandler, LUTRICIA CLAY, C.C.1 by next friend Lutricia Clay, M.C.2 by next friend Lutricia Clay, CANDICE COBB, F.C. by next friend Candice Cobb, T.C. by next friend Candice Cobb, ANAIYA COBB, THOMAS COBB, CLARISSA CRAWFORD, E.C. by next friend Clarissa Crawford, S.W.1 by next friend Clarissa Crawford, KATHRYN DAVIDSON, E.D. by next friend Kathryn Davidson, I.D. by next friend Kathryn Davidson, EBONY DAVIS, D.D.1 by next friend Ebony Davis, H.A. by next friend Ebony Davis, I.A. by next friend Ebony Davis, STEPHANIE DELGADO, A.R.3 by next friend Stephanie Delgado, E.R.2 by next friend Stephanie Delgado, U.R. by next friend Stephanie Delgado, KAMIA EDWARDS, B.E. by next friend Kamia Edwards, D.J.2 by next friend Kamia Edwards, SHERRY ESTRADA, J.R.1 by next friend Sherry Estrada, S.R.4 by next friend Sherry Estrada, KEMIQUA FUNCHES, K.F. by next friend Kemiqua Funches, M.W. by next friend Kemiqua Funches, KIERRA GAINES, A.W.4 by next friend Kierra Gaines, J.A. by next friend Kierra Gaines, MARQUETTA GAITER, I.S.1 by next friend Marquetta Gaiter, I.S.2 by next friend Marquetta Gaiter, I.S.3 by next friend Marquetta Gaiter, DANIEL GOMEZ SR., J.D.G. by next friend Daniel Gomez Sr., SUSIE GRANT, D.M.2 by next friend Susie Grant, M.E. by next friend Susie Grant, R.C. by next friend Susie Grant, Nicole Hall, QUINYATTA HARDY, C.C.4 by next friend Quinyatta Hardy, I.T. by next friend Quinyatta Hardy, M.T. by next friend Quinyatta Hardy, TAMARA HAWKINS, B.A.1 by next friend Tamara Hawkins, B.A.2 by next friend Tamara Hawkins, C.C.2 by next friend Tamara Hawkins, KEISHA HILL, A.H. by next friend Keisha Hill, D.M.3 by next friend Keisha Hill, BERNITA HILLARD, CHANELL HOLLIDAY, J.J.1 by next friend Chanell Holliday, J.J.2 by next friend Chanell Holliday, S.H.1 by next friend Chanell Holliday, S.H.2 by next friend Chanell Holliday, S.S. by next friend Chanell Holliday, DENA JACKSON, D.H. by next friend Dena Jackson, D.J.3 by next friend Dena Jackson, J.J.3 by next friend Dena Jackson, LATISHA JACKSON, S.L.U. by next friend Latisha Jackson, SHERRY JACKSON, A.J. by next friend Sherry Jackson, J.H. by next friend Sherry Jackson, SHARAUNDALYAN JAMES, CATHERINE JOHNSON, JABARI'EE JOHNSON, MARTRICE JOHNSON, JASMINE JONES, M.S.1 by next friend Jasmine Jones, THEOMYA JONES, PEREZ JOSEPH, TIKIA KING, A.K. by next friend Tikia King, N.K. by next friend Tikia King, TAMIKA LEWIS, A.L.1 by next friend Tamika Lewis, A.L.2 by next friend Tamika

Lewis, A.L.3 by next friend Tamika Lewis, G.L. by next friend Tamika Lewis, TENILLE LOVELACE, E.B. by next friend Tenille Lovelace, L.L. by next friend Tenille Lovelace, T.B.3 by next friend Tenille Lovelace, TAMMIE MOORE, J.J.4 by next friend Tammie Moore, VANESSA MOORE, D.B.4 by next friend Vanessa Moore, N.M.1 by next friend Vanessa Moore, S.R.5 by next friend Vanessa Moore, WILLIE MAE MOORE, MICAELA MORALES, C.O. by next friend Micaela Morales, E.Q. by next friend Micaela Morales, J.Q.2 by next friend Micaela Morales, TASHIMA MORRIS, B.M. by next friend Tashima Morris, D.M.4 by next friend Tashima Morris, T.M. by next friend Tashima Morris, FATIN MUHAMMED, E.M. by next friend Fatin Muhammed, J.M.1 by next friend Fatin Muhammed, L.L.M. by next friend Fatin Muhammed, N.M.2 by next friend Fatin Muhammed, NAKEIA NORWOOD, J.N. by next friend Nakeia Norwood, GEORGIA PARKER, D.N. by next friend Georgia Parker, I.J. by next friend Georgia Parker, L.N. by next friend Georgia Parker, T.J.1 by next friend Georgia Parker, TONONA PARKER, MONICA PEREZ, A.C. by next friend Monica Perez, M.P. by next friend Monica Perez, RANA PERSON, D.B.3 by next friend Rana Person, D.D.2 by next friend Rana Person, M.B.3 by next friend Rana Person, T.B.4 by next friend Rana Person, KEVIN POWELL, DESTINY PUENTES, DIANA QUINONES, J.Q.3 by next friend Diana Quinones, M.S.2 by next friend Diana Quinones, O.S. by next friend Diana Quinones, SARA ROBESON, E.R.1 by next friend Sara Robeson, I.R. by next friend Sara Robeson, CARMENCITA ROBINSON, C.R.1 by next friend Carmencita Robinson, C.R.2 by next friend Carmencita Robinson, C.R.3 by next friend Carmencita Robinson, J.P.1 by next friend Carmencita Robinson, L.H. by next friend Carmencita Robinson, CHANCE ROBINSON, JUDY ROSAS, J.M.2 by next friend Judy Rosas, M.U. by next friend Judy Rosas, R.M. by next friend Judy Rosas, JON ROSE, G.R. by next friend Jone Rose, J.R.2 by next friend Jon Rose, K.R.1 by next friend Jone Rose, M.R.2 by next friend Jone Rose, LUCHA SCOTT, WILLIAM C. SCOTT JR., MORGAN SHAW, IMANI SIMMONS, NNEKA SIMMONS, K.R.2 by next friend Nneka Simmons, ANIYAH SMITH, BRITANNY SMITH, K.M.1 by next friend Britanny Smith, K.M.2 by next friend Britanny Smith, LASANDRA SMITH, J.T. by next friend Lasandra Smith, V.S. by next friend Lasandra Smith, Z.G. by next friend Lasandra Smith, DUANE SNELLING SR., ALEJANDRO SORIA, A.S.2 by next friend Alejandro Soria, A.S.3 by next friend Alejandro Soria, HARVEY SPACE, PATRICE KANDI THOMAS, H.A.T. by next

friend Patrice Kandi Thomas, P.A. by next friend Patrice Kandi Thomas, ANNETTE VELEZ, C.C.3 by next friend Annette Velez, D.P. by next friend Annette Velez, M.V. by next friend Annette Velez, NAYESA WALKER, K.L.1 by next friend Nayesa Walker, K.L.2 by next friend Nayesa Walker, K.L.3 by next friend Nayesa Walker, OPHELIA WALKER, PRECIOUS WALKER, A.P.1 by next friend Precious Walker, A.W.1 by next friend Precious Walker, J.W. by next friend Precious Walker, RASHANDA WALKER, A.M.1 by next friend Rashanda Walker, A.M.2 by next friend Rashanda Walker, A.W.3 by next friend Rashanda Walker, PRINCESS WALLACE, A.F.1 by next friend Princess Wallace, A.F.2 by next friend Princess Wallace, A.W.5 by next friend Princess Wallace, SHONDOLYON WARNER, DEVON WARREN, I.M. by next friend Devon Warren, L.M. by next friend Devon Warren, Z.M. by next friend Devon Warren, JALISA WASH, D.G. by next friend Jalisa Wash, J.G. by next friend Jalisa Wash, MARCELL WASHINGTON, SR., SHENNA WATKINS, J.L. by next friend Shenna Watkins, S.F. by next friend Shenna Watkins, TREASURE WATKINS, GINGER WELLS, A.W.2 by next friend Ginger Wells, E.S. by next friend Ginger Wells, S.B. by next friend Ginger Wells, DOROTHY WHITE, N.P. by next friend Dorothy White, Z.W.B. by next friend Dorothy White, DEANNA WILLIAMS, T.J.2 by next friend Deanna Williams, KATRICIA WILLIAMS, C.E. by next friend Katricia Williams, J.E. by next friend Katricia Williams, LLOYD WILLIAMS, SHANNON WILLIAMS, S.W.2 by next friend Shannon Williams, S.W.3 by next friend Shannon Williams, S.W.4 by next friend Shannon Williams, CHETONIA WILSON, A.M.W. by next friend Chetonia Wilson, B.W. by next friend Chetonia Wilson, C.L.R. by next friend Chetonia Wilson, CARLEECIA WISEMAN-ECHOLS, DARREN WISEMAN, DARRIUS WISEMAN, LATRES WISEMAN, KAREN YOUNG, G.J.1 by next friend Karen Young, G.J.2 by next friend Karen Young, M.Y. by next friend Karen Young, KRISTY ZAJKOWSKI, A.P.2 by next friend Kristy Zajkowski, F.P. by next friend Kristy Zajkowski, J.P.2 by next friend Kristy Zajkowski, and R.Z.P. by next friend Kristy Zajkowski,

Plaintiffs,

v.

CITY OF EAST CHICAGO; EAST CHICAGO HOUSING AUTHORITY; EAST CHICAGO DEPARTMENT OF PUBLIC &

ENVIRONMENTAL HEALTH; INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; INDIANA STATE DEPARTMENT OF HEALTH; STATE OF INDIANA; and SCHOOL CITY OF EAST CHICAGO,

Defendants.

COMPLAINT

Cristobal Alvarez, C.A. by next friend Cristobal Alvarez, G.A. by next friend Cristobal Alvarez, Maraya Alvarez,Barbara Anderson, A.R.1 by next friend Barbara Anderson, A.R.2 by next friend Barbara Anderson, B.R.1 by next friend Barbara Anderson, B.R.2 by next friend Barbara Anderson, Bryonna Auterberry, A.G.1 by next friend Bryonna Auterberry, A.G.2 by next friend Bryonna Auterberry, A.G.3 by next friend Bryonna Auterberry, Brytanni Auterberry, Sherrie Baker, Ingrid Barbee, N.H. by next friend Ingrid Barbee, V.B. by next friend Ingrid Barbee, V.R. by next friend Ingrid Barbee, Leah Bardney, J.Y.1 by next friend Leah Bardney, J.Y.2 by next friend Leah Bardney, J.Y.3 by next friend Leah Bardney, Timothy Bardney, Daris Bates Jr., Daven Bell, Nancy Jean Bell, Shennise Boston, D.B.1 by next friend Shennise Boston, D.B.2 by next friend Shennise Boston, M.C.1 by next friend Shennise Boston, Tonya Boyd, M.B.1 by next friend Tonya Boyd, R.B. by next friend Tonya Boyd, Arneetrice Bridgeman, A.L.4 by next friend Arneetrice Bridgeman, A.L.5 by next friend Arneetrice Bridgeman, K.B.1 by next friend Arneetrice Bridgeman, K.B.2 by next friend Arneetrice Bridgeman, K.S. by next friend Arneetrice Bridgeman, Schamaca Britton, T.B.1 by next friend Schamaca Britton, T.B.2 by next friend Schamaca Britton, Brian Brown, Devin Brown, A.B.2 by next

friend Devin Brown, A.B.3 by next friend Devin Brown, M.R.1 by next friend Devin Brown, S.R.1 by next friend Devin Brown, Jabari Brown, Sharata Brown, S.R.2 by next friend Sharata Brown, S.R.3 by next friend Sharata Brown, Kathy Brunty, A.B.1 by next friend Kathy Brunty, A.S.1 by next friend Kathy Brunty, D.M.1 by next friend Kathy Brunty, J.B. by next friend Kathy Brunty, L.B. by next friend Kathy Brunty, Brittanie Buie, B.B. by next friend Brittanie Buie, Christan Butler, D.A. by next friend Christan Butler, D.J.1 by next friend Christan Butler, D.R. by next friend Christan Butler, Briana Cathey, B.C.1 by next friend Briana Cathey, B.C.2 by next friend Briana Cathey, M.B.2 by next friend Briana Cathey, Veeda Chandler, J.C.1 by next friend Veeda Chandler, J.C.2 by next friend Veeda Chandler, J.Q.1 by next friend Veeda Chandler, Lutricia Clay, C.C.1 by next friend Lutricia Clay, M.C.2 by next friend Lutricia Clay, Candice Cobb, F.C. by next friend Candice Cobb, T.C. by next friend Candice Cobb, Anaiya Cobb, Thomas Cobb, Clarissa Crawford, E.C. by next friend Clarissa Crawford, S.W.1 by next friend Clarissa Crawford, Kathryn Davidson, E.D. by next friend Kathryn Davidson, I.D. by next friend Kathryn Davidson, Ebony Davis, D.D.1 by next friend Ebony Davis, H.A. by next friend Ebony Davis, I.A. by next friend Ebony Davis, Stephanie Delgado, A.R.3 by next friend Stephanie Delgado, E.R.2 by next friend Stephanie Delgado, U.R. by next friend Stephanie Delgado, Kamia Edwards, B.E. by next friend Kamia Edwards, D.J.2 by next friend Kamia Edwards, Sherry Estrada, J.R.1 by next friend Sherry Estrada, S.R.4 by next friend Sherry Estrada, Kemiqua Funches, K.F. by next friend Kemiqua Funches, M.W. by next friend Kemiqua Funches, Kierra Gaines, A.W.4 by next friend

Kierra Gaines, J.A. by next friend Kierra Gaines, Marquetta Gaiter, I.S.1 by next friend Marquetta Gaiter, I.S.2 by next friend Marquetta Gaiter, I.S.3 by next friend Marquetta Gaiter, Daniel Gomez Sr., J.D.G. by next friend Daniel Gomez Sr., Susie Grant, D.M.2 by next friend Susie Grant, M.E. by next friend Susie Grant, R.C. by next friend Susie Grant, Nicole Hall, Quinyatta Hardy, C.C.4 by next friend Quinyatta Hardy, I.T. by next friend Quinyatta Hardy, M.T. by next friend Quinyatta Hardy, Tamara Hawkins, B.A.1 by next friend Tamara Hawkins, B.A.2 by next friend Tamara Hawkins, C.C.2 by next friend Tamara Hawkins, Keisha Hill, A.H. by next friend Keisha Hill, D.M.3 by next friend Keisha Hill, Bernita Hillard, Chanell Holliday, J.J.1 by next friend Chanell Holliday, J.J.2 by next friend Chanell Holliday, S.H.1 by next friend Chanell Holliday, S.H.2 by next friend Chanell Holliday, S.S. by next friend Chanell Holliday, Dena Jackson, D.H. by next friend Dena Jackson, D.J.3 by next friend Dena Jackson, J.J.3 by next friend Dena Jackson, Latisha Jackson, S.L.U. by next friend Latisha Jackson, Sherry Jackson, A.J. by next friend Sherry Jackson, J.H. by next friend Sherry Jackson, Sharaundalyan James, Catherine Johnson, Jabari'EE Johnson, Martrice Johnson, Jasmine Jones, M.S.1 by next friend Jasmine Jones, Theomya Jones, Perez Joseph, Tikia King, A.K. by next friend Tikia King, N.K. by next friend Tikia King, Tamika Lewis, A.L.1 by next friend Tamika Lewis, A.L.2 by next friend Tamika Lewis, A.L.3 by next friend Tamika Lewis, G.L. by next friend Tamika Lewis, Tenille Lovelace, E.B. by next friend Tenille Lovelace, L.L. by next friend Tenille Lovelace, T.B.3 by next friend Tenille Lovelace, Tammie Moore, J.J.4 by next friend Tammie Moore, Vanessa Moore, D.B.4 by next friend

Vanessa Moore, N.M.1 by next friend Vanessa Moore, S.R.5 by next friend Vanessa Moore, Willie Mae Moore, Micaela Morales, C.O. by next friend Micaela Morales, E.Q. by next friend Micaela Morales, J.Q.2 by next friend Micaela Morales, Tashima Morris, B.M. by next friend Tashima Morris, D.M.4 by next friend Tashima Morris, T.M. by next friend Tashima Morris, Fatin Muhammed, E.M. by next friend Fatin Muhammed, J.M.1 by next friend Fatin Muhammed, L.L.M. by next friend Fatin Muhammed, N.M.2 by next friend Fatin Muhammed, Nakeia Norwood, J.N. by next friend Nakeia Norwood, Georgia Parker, D.N. by next friend Georgia Parker, I.J. by next friend Georgia Parker, L.N. by next friend Georgia Parker, T.J.1 by next friend Georgia Parker, Tonona Parker, Monica Perez, A.C. by next friend Monica Perez, M.P. by next friend Monica Perez, Rana Person, D.B.3 by next friend Rana Person, D.D.2 by next friend Rana Person, M.B.3 by next friend Rana Person, T.B.4 by next friend Rana Person, Kevin Powell, Destiny Puentes, Diana Quinones, J.Q.3 by next friend Diana Quinones, M.S.2 by next friend Diana Quinones, O.S. by next friend Diana Quinones, Sara Robeson, E.R.1 by next friend Sara Robeson, I.R. by next friend Sara Robeson, Carmencita Robinson, C.R.1 by next friend Carmencita Robinson, C.R.2 by next friend Carmencita Robinson, C.R.3 by next friend Carmencita Robinson, J.P.1 by next friend Carmencita Robinson, L.H. by next friend Carmencita Robinson, Chance Robinson, Judy Rosas, J.M.2 by next friend Judy Rosas, M.U. by next friend Judy Rosas, R.M. by next friend Judy Rosas, Jon Rose, G.R. by next friend Jone Rose, J.R.2 by next friend Jon Rose, K.R.1 by next friend Jone Rose, M.R.2 by next friend Jone Rose, Lucha Scott, William C. Scott Jr., Morgan Shaw, Imani

Simmons, Nneka Simmons, K.R.2 by next friend Nneka Simmons, Aniyah Smith, Britanny Smith, K.M.1 by next friend Britanny Smith, K.M.2 by next friend Britanny Smith, Lasandra Smith, J.T. by next friend Lasandra Smith, V.S. by next friend Lasandra Smith, Z.G. by next friend Lasandra Smith, Duane Snelling Sr., Alejandro Soria, A.S.2 by next friend Alejandro Soria, A.S.3 by next friend Alejandro Soria, Harvey Space, Patrice Kandi Thomas, H.A.T. by next friend Patrice Kandi Thomas, P.A. by next friend Patrice Kandi Thomas, Annette Velez, C.C.3 by next friend Annette Velez, D.P. by next friend Annette Velez, M.V. by next friend Annette Velez, Nayesa Walker, K.L.1 by next friend Nayesa Walker, K.L.2 by next friend Nayesa Walker, K.L.3 by next friend Nayesa Walker, Ophelia Walker, Precious Walker, A.P.1 by next friend Precious Walker, A.W.1 by next friend Precious Walker, J.W. by next friend Precious Walker, Rashanda Walker, A.M.1 by next friend Rashanda Walker, A.M.2 by next friend Rashanda Walker, A.W.3 by next friend Rashanda Walker, Princess Wallace, A.F.1 by next friend Princess Wallace, A.F.2 by next friend Princess Wallace, A.W.5 by next friend Princess Wallace, Shondolyon Warner, Devon Warren, I.M. by next friend Devon Warren, L.M. by next friend Devon Warren, Z.M. by next friend Devon Warren, Jalisa Wash, D.G. by next friend Jalisa Wash, J.G. by next friend Jalisa Wash, Marcell Washington, Sr., Shenna Watkins, J.L. by next friend Shenna Watkins, S.F. by next friend Shenna Watkins, Treasure Watkins, Ginger Wells, A.W.2 by next friend Ginger Wells, E.S. by next friend Ginger Wells, S.B. by next friend Ginger Wells, Dorothy White, N.P. by next friend Dorothy White, Z.W.B. by next friend Dorothy White, Deanna Williams, T.J.2 by next friend Deanna

Williams, Katricia Williams, C.E. by next friend Katricia Williams, J.E. by next friend Katricia Williams, Lloyd Williams, Shannon Williams, S.W.2 by next friend Shannon Williams, S.W.3 by next friend Shannon Williams, S.W.4 by next friend Shannon Williams, Chetonia Wilson, A.M.W. by next friend Chetonia Wilson, B.W. by next friend Chetonia Wilson, C.L.R. by next friend Chetonia Wilson, Carleecia Wiseman-Echols, Darren Wiseman, Darrius Wiseman, Latres Wiseman, Karen Young, G.J.1 by next friend Karen Young, G.J.2 by next friend Karen Young, M.Y. by next friend Karen Young, Kristy Zajkowski, A.P.2 by next friend Kristy Zajkowski, F.P. by next friend Kristy Zajkowski, J.P.2 by next friend Kristy Zajkowski, and R.Z.P. by next friend Kristy Zajkowski (collectively "Plaintiffs"), by counsel, allege as follows:

1. The Plaintiffs are all former residents of the West Calumet Housing Complex (the "Complex") in East Chicago, Indiana.

2. As has been widely reported, each of the residents was exposed to dangerously high levels of highly toxic substances such as lead and arsenic that were present in the soil and air in and around the Complex.

3. A significant number of the Plaintiffs also attended the nearby Carrie Gosch Elementary School ("Carrie Gosch Elementary").

4. Like the Complex, the land upon which Carrie Gosch Elementary was built was heavily contaminated with lead, arsenic, and/or other highly toxic substances due to the fact that the school was built on land that had been used for lead manufacturing.

5. The Complex was operated by the City of East Chicago (the "City") through its agency the East Chicago Housing Authority (the "Housing Authority").

6. The City and the Housing Authority knew or should have known that the soil in and around the Complex was toxic, and that living at the Complex exposed residents to serious and permanent health risks.

7. The City and Housing Authority failed to disclose the pollution and resulting profound health risks to the Plaintiffs.

8. The Plaintiffs neither knew nor had reason to know of the dangerous substances in and around the Complex or the risks these substances posed to their health.

9. The School Corporation knew or should have known that Carrie Gosch Elementary had been built on a toxic waste dump, and that students who attended that school were being exposed to highly toxic chemicals.

10. Despite that knowledge, the School Corporation failed to warn the Plaintiffs and their parents of the dangers of attending an elementary school on land that was contaminated with toxic chemicals.

11. The Plaintiffs and their parents were unaware of the chemical contamination and attendant physical risks on the grounds of

12. The pollution at the Complex and Carrie Gosch Elementary School, and the fact that residents and students were being exposed to that pollution on a daily basis, was also well-known to the remaining governmental entities that have been named as Defendants in this action, namely the East Chicago Department of Public

& Environmental Health ("ECDH"); Indiana Department of Environmental Management ("IDEM"); Indiana State Department of Health ("ISDH"); and the State of Indiana. Despite these entities' knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions.

13. The Plaintiffs bring this action seeking damages for the physical and emotional harms caused by their exposure to lead, arsenic, and other contaminants at the Complex and Carrie Gosch Elementary School, all of which was the direct and proximate result of Defendants' failure to warn of the contaminations at these sites, Defendants' facilitating and allowing to allow the Plaintiffs to live and attend school at these locations, and Defendants' concealment of the toxic pollution and risk to health at these sites.

PARTIES

14. At all relevant times, each Plaintiff was a resident of Lake County, Indiana who resided at the Complex and was exposed to lead, arsenic, and/or other dangerous substances. Many of the Plaintiffs also attended elementary School at Carrie Gosch Elementary School.

15. Defendant the City of East Chicago is a municipal corporation organized under the general laws of the State of Indiana.

16. Defendant the East Chicago Housing Authority is a municipal corporation, pursuant to Indiana Code § 36–7–18–14, organized under the general laws of the State of Indiana.

17. Defendant School City of East Chicago is a municipal corporation,

pursuant to Indiana Code § 36–1–2–10, organized under the general laws of the State of Indiana.

18. Defendant East Chicago Department of Public & Environmental Health is a municipal corporation, pursuant to Indiana Code § 36–1–2–10, organized under the general laws of the State of Indiana.

19. Defendant Indiana Department of Environmental Management is a state agency organized under the general laws of the State of Indiana.

20. Defendant Indiana State Department of Health is a state agency organized under the general laws of the State of Indiana.

21. Defendant State of Indiana is a state governmental entity admitted pursuant to Article IV, Sec. 3, clause 1 of the Constitution of the United States.

FACTS

Construction of the Complex

22. In the late 1960's, authorities in East Chicago, Indiana began the process of developing a large-scale public housing complex, which would become the Complex.

23. In 1966, while engaged in a search for land for the Complex, then-Executive Director of the Housing Authority, Benjamin Lesniak, as reported by the Chicago Tribune, remarked that there was little available land except "in vacant areas which are surrounded by industries and undesirable residential areas."

24. With unpolluted land at a premium, the City and the Housing Authority concluded that they could either expend resources to "tear down existing deteriorating structures and replace them with public housing units" and locate the

Complex in an area suitable to residential housing or, as they ultimately chose to do, build the structure on a vacant area surrounded by industries that were, rightly so, undesirable residential areas.

25. The City and Housing Authority chose land that had recently been vacated by the Anaconda Lead Products Company ("Anaconda"), which manufactured white lead and zinc oxide from 1938 to 1965.

26. The land was also surrounded by the U.S. Smelter and Lead Refinery, Inc. ("USS Lead"), which operated a primary lead smelter from 1920 through 1973.

27. In 1973, USS Lead continued its lead operations, but converted to secondary smelting, recovering lead from scrap metal and old automobile batteries.

28. USS Lead finally ceased its lead operations in the area in or about December 1985.

29. Also nearby the Complex, and sufficiently close to continue to contaminate the Complex, are two lead facilities operated by Hammond Lead Products, LLC, Hammond Group, Inc., Halstab, LLC, and Halox, LLC.

30. Put simply, the site on which the Complex was constructed was surrounded and inundated by lead manufacturing.

31. As a result of the manufacturing the soil and environment in and around the area where the Complex was constructed was saturated with toxic substances, such as lead and arsenic, that are extremely hazardous to human health and wellbeing.

32. As a July 6, 2016 flyer sent by the United States Environmental Protection Agency ("EPA") to Complex residents explained: "High levels of lead have been found in yards in the West Calumet Housing Complex in East Chicago. Exposure to high levels of lead can cause a range of health effects, from behavioral problems and learning disabilities to seizures and death. Children 6 years old and younger are most at-risk because their bodies are growing quickly, and the effects of the lead can cause problems."

33. Soil testing data available on the EPA's website also shows lead and arsenic levels in and around the complex that is many times greater than levels considered hazardous.

34. In late 1969, the developers of the Complex had initially decided to take an option on 15 acres of land then-owned by the Sinclair Refinery on Columbus Drive, just west of Roosevelt High School.

35. But then-Mayor of East Chicago, John B. Nicosia, reportedly became upset at the developer's decision and instead arranged for the Complex to be located on the old Anaconda property.

36. The City and Housing Authority decided to move forward with construction of the Complex on the inexpensive and less politically troublesome spot, despite their knowledge of the lead and other contamination.

37. In 1970, the construction contracts were signed and construction on the Complex began.

38. Construction was completed in or about 1973, and occupants moved in shortly thereafter.

The Defendants' Knowledge of Dangerous Conditions

39. For the next forty plus years, the City and Housing Authority operated the Complex without taking any measures to remediate the hazardous substances in the soil and air at the Complex or to otherwise protect the residents.

40. Worse yet, the City and Housing Authority, despite knowing of the dangerous levels of lead and other substances, did not inform the residents of those dangers until July 25, 2016, when current Mayor, Anthony Copeland, sent a letter to residents of the Complex notifying them of this danger.

41. But both the City and the Housing Authority knew of the dangers for decades.

42. For example, in 1985, the Indiana Department of Environmental Management ("IDEM") found lead contaminated soil adjacent to the Complex.

43. And in the same year, the Indiana State Department of Health ("ISDH") discovered that some children who resided at the Complex had high levels of lead in their blood.

44. In 1997, further samples and testing by IDEM and ISDH revealed contamination at and around the Complex and elevated levels of lead in children exposed to the area surrounding the Complex.

45. The City and/or Housing Authority were made aware of the results of those and other IDEM and ISDH investigations, but they never made residents aware

of these findings in particular or the dangers of contamination in general.

46. There were also investigations by the EPA over the course of several decades that concluded the land on which the Complex was constructed constituted a superfund site in need of remediation.

47. Beginning in 1985, the EPA began testing and otherwise addressing the contamination at the Site.

48. In 1993, the EPA entered into an administrative order of consent with one of the corporate entities that operated around the Complex: USS Lead.

49. On September 3, 2014, the EPA filed a complaint against two other entities that either operated or were successors in interest to facilities that operated on or around the current location of the Complex.

50. The EPA entered into a consent decree with those entities on or about October 28, 2014, providing for a $26 million settlement to provide cleanup costs.

51. Again, the City and/or Housing Authority were made aware of the EPA's findings.

52. The City and/or the Housing Authority continued to lease or otherwise furnish residential units to persons at the Complex despite knowing that the property was exposed to and contaminated with hazardous substances, which posed serious risks to the health and wellbeing of the tenants.

53. The City and/or Housing Authority never informed current or prospective residents of the Complex of the contamination dangers or the findings of high lead levels in residents.

54. The pollution at the Complex and Carrie Gosch Elementary School, and the fact that residents and students were being exposed to that pollution on a daily basis, was also well-known to the remaining governmental entities that have been named as Defendants in this action, namely the East Chicago Department of Public & Environmental Health; Indiana Department of Environmental Management; Indiana State Department of Health; and the State of Indiana. Despite these entities' knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions.

55. Each of the Defendants knew that the Plaintiffs were unaware of the contamination at the Complex and Carrie Gosch Elementary School, knew that the Plaintiffs were unaware of the dangers to their health, and knew that the Plaintiffs were continuing to expose themselves to these dangers and health risks on a daily basis due to their lack of knowledge, yet the Defendants took no steps to warn the Plaintiffs.

School City of East Chicago: Carrie Gosch Elementary School

56. In June 1958, construction began on the first iteration of Carrie Gosch Elementary.

57. Construction was completed on the first iteration of Carrie Gosch Elementary in 1959, with classes beginning in September of that year.

58. The land on which the first iteration of Carrie Gosch Elementary was constructed stood atop of the former USS Lead property.

59. USS Lead continued to operate in close proximity to Carrie Gosch

Elementary until USS Lead ceased operation at the site in 1985.

60. Just six blocks south of the first iteration of Carrie Gosch Elementary was Anaconda, which continued to manufacture white lead during the first half decade of the school's existence.

61. In the 1990s, the need for new facilities led to the construction of the second iteration of Carrie Gosch Elementary, which was built behind the first iteration, so that students could continue to attend class during the construction.

62. The new Carrie Gosch Elementary was dedicated in August 1999.

63. For two or more years, the construction of the new building took place while students continued to attend the old building next door.

64. An Indiana Department of Environmental Management (IDEM) office memo from August 28, 1997 stated, "Apparently during an ongoing lead exposure survey at and around the USS Lead facility located 1/4 mile southeast of the former Anaconda Lead site, EPA noticed an ongoing construction project at the Carrie Gosch Elementary School, located six (6) blocks north of the former Anaconda site. The concern being the possibility of increased lead exposure to the school children associated with the construction project (because of) the past lead facilities operation in what is now a residential neighborhood."

65. The EPA's 1997 investigation uncovered levels of lead contamination sufficient to meet the EPA's threshold for emergency action.

66. Not long after the EPA determined that emergency remediation was necessary in soil around Carrie Gosch Elementary, the East Chicago Health

Department conducted screenings of children in the area, determining that 35% at that time demonstrated elevated levels of lead.

67. The two school buildings occupy Zone 1 of the USS Lead Superfund site along with the Complex.

68. Despite the contamination already suffered by children who attended Carrie Gosch Elementary, the presence of dangerous levels of lead in soil samples, and the fear that construction would increase the dangers of lead exposure, construction of the new Carrie Gosch Elementary continued as did classes right next door in the initial Carrie Gosch Elementary.

69. And despite the dangers and the authorities' knowledge of the same, the School Corporation never took steps to reduce students' exposure to lead and other chemicals, and never warned students and families of these dangers or of the findings of elevated lead levels in a significant percentage of students.

Plaintiffs' Discovery of the Problem

70. After decades of silence, on July 25, 2016, East Chicago Mayor Anthony Copeland sent letters to residents of the Complex, including the Plaintiffs, stating:

Dear Resident:

Your health and safety are always my first priority.

When the City and the East Chicago Housing Authority ('ECHA') recently were informed by the EPA that the ground within the West Calumet Housing Complex was highly contaminated with lead and arsenic, we moved immediately to protect your safety, health, and welfare.

The identification of lead and arsenic poses potential dangers, and that is why I ordered the East Chicago Health Department to offer lead testing to you and your children. Now that we know the levels of lead in the ground in West Calumet Housing Complex, we feel it is in your best interest to temporarily relocate your household to safer conditions. ECHA is asking HUD to provide vouchers for safe, sanitary housing as soon as possible. Even though this may be a great inconvenience to you, it's necessary to protect you and your children from possible harm.

The staff of ECHA, including the Section 8 staff will be assisting you in the coming days, and we will continue to provide you with information as soon as it becomes available.

We ask for your patience and cooperation in this process.

71. Prior to the letter, each Plaintiff did not know that he or she had been exposed to hazardous levels of lead or other toxins at the Complex.

72. Prior to the letter, each Plaintiff did not know that he or she had been injured by his or her exposure to hazardous levels of lead or other toxins at the Complex.

73. Prior to the letter, the Defendants never informed or warned the Plaintiffs of these dangers.

74. Plaintiffs had no reason to know that they had been exposed to dangerous levels of lead and arsenic prior to receiving the letter from the Mayor.

75. Although the EPA, IDEM, and ISDH collected samples from the Site and its residences for more than two decades prior, the EPA did not inform Plaintiffs or other residents that they had been exposed to dangerous levels of lead or other

toxins at the Complex.

76. Prior to Plaintiffs' ultimate discovery of their exposure to hazardous levels of lead or other toxins, each Defendant acted intentionally to conceal from Plaintiffs that the soil and air in and around the Complex was contamination with dangerously high levels of hazardous substances such as lead arsenic, and other toxins.

77. As the July 6, 2016 EPA flyer acknowledged, "Lead is a naturally occurring heavy metal. It is commonly found at low levels in soil. Low levels of lead can be found in the air, water, food and dust in cities because of the widespread use of lead in man-made products. The federal government regulates the amount of lead in the air, water and soil. The levels of lead at the West Calumet Housing Complex are much higher than normal levels because of past industrial operations at the property."

78. The mere knowledge of lead in the soil meant nothing absent an understanding that the levels were dangerous to human health and wellbeing.

Plaintiffs' Injuries

79. Each Plaintiff was exposed to hazardous levels of lead and/or other toxins while a resident of the Complex and/or while a student at the Carrie Gosch Elementary School.

80. Each Plaintiff has suffered physical, mental, and emotional harm as a direct and proximate result of his or her exposure to the lead or other chemical contamination at the Complex and/or at the Carrie Gosch Elementary School.

CAUSES OF ACTION

81. The following is a non-exhaustive list of causes of action supported by the facts of this case. *ARC Constr. Mgmt., LLC v. Zelenak*, 962 N.E.2d 692, 697 (Ind. Ct. App. 2012) ("Under Indiana's notice pleading system, a pleading need not adopt a specific legal theory of recovery to be adhered to throughout the case."). These causes of action shall not in any way limit the legal bases for liability or recovery in this case.

COUNT I: NEGLIGENCE AGAINST CITY AND HOUSING AUTHORITY

82. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

83. The City and/or the Housing Authority owed a duty of reasonable care to the Plaintiffs.

84. Among other bases for that duty, as the owners and operators of the Complex, the City and the Housing Authority entered into residential leases with the Plaintiffs and for the benefit of the Plaintiffs.

85. At the time of enacting those leases, the City and the Housing Authority each knew that the soil and air in and around the Complex were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances.

86. The levels of lead, arsenic, and/or other hazardous substances were a dangerous condition.

87. The levels of lead, arsenic, and/or other hazardous substances constituted a latent defect.

88. Both the City and the Housing Authority each had actual knowledge of that latent defect.

89. The levels of lead, arsenic, and/or other hazardous substances were unknown to Plaintiffs, such that Plaintiffs were unaware of the dangerous conditions.

90. Due to their ignorance of these dangers, each of the Plaintiffs entered into leases to live at the Complex and resided at the Complex.

91. The Plaintiffs did not know that, by residing at the Complex, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

92. The levels of lead, arsenic, and/or other hazardous substances actually caused harm to each Plaintiff.

93. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Plaintiff.

94. Each Defendant actually knew or should have known that the lead and other hazardous particles have the potential to cause serious harm to the Plaintiffs.

95. As a direct and proximate result of each Defendant's breaches of its duties, Plaintiffs have suffered and continue to suffer financial, physical, mental, and emotional damages.

96. Plaintiffs were each a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's release of hazardous substances.

97. Each Plaintiff has suffered financial, physical, mental, and emotional

damages stemming directly from their exposure to lead and other hazardous particles.

COUNT II: NEGLIGENCE
AGAINST CITY AND SCHOOL CITY OF EAST CHICAGO

98. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

99. The School Corporation, in conjunction with the City, chose the location to build both the initial Carrie Gosch Elementary and the new Carrie Gosch Elementary.

100. The School Corporation and the City each new and had reason to know that the soil and air in and around the schools were hazardous to the students.

101. The levels of lead, arsenic, and/or other substances hazardous to human health constitute an unreasonably dangerous condition.

102. The City and the School Corporation each knew of the levels of lead, arsenic, and/or other substances hazardous to human health.

103. The levels of lead, arsenic, and/or other substances hazardous to human health were not identifiable by the students or the parents who attended Carrie Gosch Elementary.

104. The Plaintiffs who attended Carrie Gosch Elementary were invitees to the schools.

105. The City and the School Corporation each owed a duty of care to the Plaintiffs who attended Carrie Gosch Elementary to safeguard them and/or warn them of the dangers posed by the levels of lead, arsenic, and/or other substances

hazardous to human health present in and around the Carrie Gosch Elementary property.

106. The City and School Corporation neither warned its students and parents of the dangerous condition of lead, arsenic, and/or other substances hazardous to human health, nor did it take steps to remedy the dangerous condition.

107. Injury to the Plaintiffs who attended Carrie Gosch Elementary from exposure to lead, arsenic, and/or other substances hazardous to human health was foreseeable.

108. The Plaintiffs who attended Carrie Gosch Elementary from exposure to lead, arsenic, and/or other substances hazardous to human health were each foreseeable victims of the type of harm that has befallen each.

109. The Plaintiffs who attended Carrie Gosch Elementary have each suffered damage as a result of exposure to lead, arsenic, and/or substances hazardous to human health at the Carrie Gosch Elementary property.

COUNT III: NEGLIGENCE
AGAINST ECDH, IDEM, ISDH, AND STATE OF INDIANA

110. Plaintiffs incorporate the allegations set forth above and below as though set forth fully.

111. The ECDH, IDEM, ISDH, and State of Indiana owed a duty of reasonable care to the Plaintiffs, including without limitation the duty to warn the Plaintiffs of known risks to their health that had the potential to cause serious, life-altering injuries.

112. These Defendants each knew that the soil and air in and around the Complex and Carrie Gosch Elementary School were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances.

113. The levels of lead, arsenic, and/or other hazardous substances were a dangerous condition.

114. The levels of lead, arsenic, and/or other hazardous substances were unknown to Plaintiffs, such that Plaintiffs were unaware of the dangerous conditions.

115. Due to their ignorance of these dangers, each of the Plaintiffs entered into leases to live at the Complex and resided at the Complex, and many of the Plaintiffs attended school at Carrie Gosch Elementary School.

116. The Plaintiffs did not know that, by residing at the Complex and attending this school, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

117. The levels of lead, arsenic, and/or other hazardous substances actually caused harm to each Plaintiff.

118. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Plaintiff.

119. These Defendants took no action to inform the Plaintiffs or otherwise to safeguard them from the dangerous condition.

120. Each Defendant actually knew or should have known that lead and other hazardous particles have the potential to cause serious harm to the Plaintiffs.

121. As a direct and proximate result of each Defendant's breaches of its

duties, Plaintiffs have suffered and continue to suffer financial, physical, mental, and emotional damages.

122. Plaintiffs were each a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's release of hazardous substances.

123. Each Plaintiff has suffered financial, physical, mental, and emotional damages stemming directly from their exposure to lead particles and other hazardous particles.

COUNT IV: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

124. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

125. The conduct of the Defendants described above is extreme and outrageous.

126. The Defendants acted with reckless disregard toward the health, safety, and wellbeing of Plaintiffs and others.

127. The actions of defendants described above were both the cause in fact and proximate cause of emotional distress to each Plaintiff.

128. Each Plaintiff suffered severe emotional distress as a result of the Defendants' actions including emotional distress owing to each Plaintiff's own exposure to hazardous substances and the emotional distress caused by the knowledge and witnessing of the harm forced upon other members of each Plaintiff's household and family.

COUNT V: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

129. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

130. Each Plaintiff was exposed to a disease-causing agent or substance, including hazardous levels of lead.

131. The Defendants are responsible for exposing each Plaintiff to the disease-causing agent or substance.

132. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of contracting a future disease or illness.

133. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of a family member or other closely related person contracting a future disease or illness as the result of the exposure to disease-causing agents or substances due to the actions of the Defendants.

134. The Plaintiffs who are guardians and/or parents of other Plaintiffs have suffered the anguish and distress of witnessing injury and infliction of exposure to hazardous substances upon the children in their care.

135. Each Plaintiff has been directly impacted by disease-causing agents or substances as a direct result of the Defendants' actions.

136. The emotional distress suffered by each Plaintiff was proximately caused by exposure to the disease-causing agent or substance.

137. Each Plaintiff's fear of contracting a disease or of a loved one contracting a disease as a result of exposure to disease-causing agents is reasonable.

138. Each Plaintiff has seen an increase in risk of disease as a result of his or her exposure to the disease-causing agent or substance.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray that the Court enter judgment against the Defendants and in favor of the Plaintiffs in amounts that will fairly compensate them for those losses, harms, injuries, and damages they have and will sustain as a result of Defendants' wrongdoing; for punitive damages; and for all other just and proper relief.

DEMAND FOR JURY TRIAL

Plaintiffs respectfully demand trial by jury.

Respectfully submitted,

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STATE OF INDIANA)
)SS
COUNTY OF LAKE)

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM NO. FIVE
SITTING IN HAMMOND, INDIANA

CAUSE NO. 45D05-1803-CT-00003
SPECIAL JUDGE NANETTE K. RADUENZ

CRISTOBAL ALVAREZ, et al.,
Plaintiffs,

vs.

CITY OF EAST CHICAGO; EAST CHICAGO HOUSING AUTHORITY; EAST CHICAGO DEPARTMENT OF PUBLIC & ENVIRONMENTAL HEALTH; INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; INDIANA STATE DEPARTMENT OF HEALTH; STATE OF INDIANA; and SCHOOL CITY OF EAST CHICAGO,
Defendants.

Filed in Open Court

NOV 13 2018

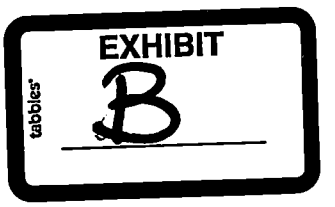
William E. Davis
Judge, Lake Superior Court
Civil Division, Court Room 5

ORDER FOR CORRECTION TO THE COURT RECORD

It has come to the Court's attention that an error occurred and pleadings intended to be filed in this case were received by the Clerk of the Court, but never file stamped nor were entries made into the Court Record. The error was not due to any neglect or omission on the part of the parties involved. The parties involved stipulated and agreed to the dates of the intended filing, and to the entry of this order.

IT IS THEREFORE ORDERED that the Clerk of the Court is ordered to file stamp the following documents and pleadings on the dates indicated and to correct the Court Record to reflect the following filings:

1. On July 9, 2018, the Defendants, the State of Indiana, Indiana Department of Environmental Management and the Indiana State Department of Health sent by certified mail and pursuant to Trial Rule 5(F)(3) the following documents:



a. Correspondence to the Clerk of the Court dated July 9, 2018;
b. a CCS;
c. Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health's Motion for Judgment on the Pleadings;
d. Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health's Memorandum in Support of Their Motion for Judgment on the Pleadings; and,
e. Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health's Motion for Hearing on Its Motion for Judgment on the Pleadings.

All five documents have been attached hereto, marked Group Exhibit A, and made a part of this Order.

2. The Court has received evidence of delivery of the documents identified in Paragraph 1, to the Clerk of the Court in Gary, Indiana on July 11, 2018. A copy of that evidence, which is correspondence from the United States Postal Service, is attached hereto and marked as Exhibit B and made a part of this order.

3. The Clerk of the Court is ordered to file stamp the five documents and pleadings identified in Paragraph 1 and enter the same on the Court Record as if filed with the Clerk of the Court on July 9, 2018.

4. On August 13, 2018, the Plaintiffs sent by certified mail and pursuant to Trial Rule 5(F)(3) the following documents:

a. Correspondence to the Clerk of the Court dated August 13, 2018;
b. a CCS;
c. Response to Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health's Motion for Judgment on the Pleadings.

All three documents have been attached hereto, marked Group Exhibit C, and made a part of this Order.

5. The Court has received evidence of delivery of the documents identified in Paragraph 4, to the Clerk of the Court in Gary, Indiana on August 15, 2018. A copy of that evidence, a copy of a signed green card, is attached hereto, marked as Exhibit D and made a part of this order.

6. The Clerk of the Court is ordered to file stamp the three documents and the pleadings identified in Paragraph 4 and enter the same on the Court Record as if filed with the Clerk of the Court on August 13, 2018.

7. On September 24, 2018, the Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health's Reply in Support of Its Motion for Judgment on the Pleadings was file stamped by the Clerk of the Court, but there does not appear to be an entry in the Court Record for the filing of this pleading.

8. The Clerk of the Court is ordered to enter the pleading on the Court Record showing that the pleading was filed with the Clerk of the Court on September 24, 2018.

SO ORDERED November 13, 2018

Nanette K. Raduenz

NANETTE K. RADUENZ, SPECIAL JUDGE

NOTICE: Pursuant to T.R. 72(D)
The Clerk is Ordered to serve a copy of this Entry on all Parties and Counsel of Record.

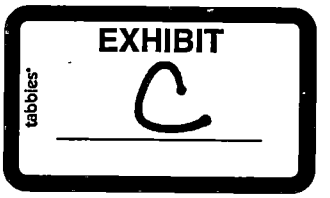
STATE OF INDIANA)		IN THE LAKE COUNTY SUPERIOR COURT
) SS:		
COUNTY OF LAKE)		SITTING AT HAMMOND, INDIANA
CRISTOBAL ALVAREZ, C.A. BY NEXT FRIEND CRISTOBAL ALVAREZ, et al.	)	
Plaintiffs,	)	CAUSE NO.: 45D03-1803-CT-0003
v.	)	Special Judge Nanette K. Raduenz
STATE OF INDIANA, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; INDIANA STATE DEPARTMENT OF HEALTH; et al	)	
Defendants.	)	

DEFENDANTS STATE OF INDIANA, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND INDIANA STATE DEPARTMENT OF HEALTH'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants, the State of Indiana, the Indiana Department of Environmental Management and the Indiana State Department of Health, (collectively hereinafter "State Defendants"), by counsel, and pursuant to Indiana Trial Rules 12(C), file their Memorandum in Support of their Motion for Judgment on the Pleadings.

INTRODUCTION

This matter arises from the presence of lead and other contaminants at the USS Lead Superfund Site ("the Site") in East Chicago, Indiana. The Plaintiffs allege the State Defendants failed to warn them of the dangers associated with the presence of lead and other hazardous substances at the West Calumet Housing Complex and Carrie Gosch Elementary School, which are contained



within the Site in East Chicago, Indiana. (Compl. at Count III, Count IV, Count V). The Plaintiffs bring three (3) distinct counts against the State Defendants, including: (1) Negligence, (2) Intentional Infliction of Emotional Distress, and (3) Negligent Infliction of Emotional Distress.

The Plaintiffs' Complaint fails to state a claim against the State Defendants as to each of the individual Counts. Each of the Plaintiffs' claims is barred by the statute of limitations, as well as by res judicata. Furthermore, the Indiana Tort Claims Act, Ind. Code § 34-13-3-6(a), bars the Plaintiffs' claims because the Plaintiffs failed to timely file a Notice of Tort Claim as required by the Act. Additionally, the State Defendants are immune from suit pursuant to the Indiana Tort Claims Act, §§ 34-13-3-3(7) and (10). The Plaintiffs' Complaint fails to state a claim for Intentional Infliction of Emotional Distress. For each of these reasons, the State Defendants are entitled to judgment on the pleadings.

STATEMENT OF FACTS

The Plaintiffs are former residents of the West Calumet Housing Complex (the "Complex") located within the current USS Lead Superfund Site (the "Site") in East Chicago, Indiana. (Compl. ¶1). Many of the Plaintiffs also attended the Carrie Gosch Elementary School (the "School"), also located within the Site. (Compl. ¶ 1). The Plaintiffs have brought suit against the City of East Chicago, the East Chicago Housing Authority, the East Chicago Department of Public & Environmental Health, the State of Indiana, the Indiana State Department of Health ("ISDH"), the Indiana Department of Environmental Management ("IDEM"), and the School City of East Chicago. The Plaintiffs filed a Notice of Tort Claim with the State of Indiana on October 27, 2016. They allege physical, mental, and emotional harm as a result of exposure to lead and other chemical contamination. (Compl. ¶ 80). The Plaintiffs' only allegation against the State Defendants in the

Complaint is that the State Defendants failed to directly warn the Plaintiffs of the dangers associated with exposure to lead and other chemicals present at the Site. (Compl. Count III).

Plaintiffs allege the City of East Chicago and/or the East Chicago Housing Authority were responsible for selecting the land upon which the Complex was constructed and entering into leases with the Plaintiffs. (Compl. ¶ 22-38). The City and Housing Authority began the process of developing the public housing Complex in the late 1960s. (Compl. ¶ 22). The Plaintiffs allege the then Executive Director of the East Chicago Housing Authority ("Housing Authority") was of the opinion that little land was available for the Complex, other than land "surrounded by industries and undesirable residential areas." (Compl. ¶ 23).

The Plaintiffs allege the City and Housing Authority decided to construct the Complex in an area unsuitable for residential housing due to the presence of industry in the area, as opposed to spending additional funds to tear down existing deteriorating structures elsewhere. (Compl. ¶ 24). Specifically, the Plaintiffs allege the land chosen by the City and Housing Authority included a location which had been home to the Anaconda Lead Products Company, which was in operation between 1938 and 1965, and the U.S. Smelter and Lead Refinery, Inc. ("USS Lead"), which operated a lead smelter between 1920 and 1973. (Compl. ¶ 25-26).

The Plaintiffs' Complaint specifies that the decision to construct the Complex on this location was ultimately made in 1969 by the then East Chicago Mayor, John Nicosia. (Compl. ¶ 35). While the developers of the Complex initially decided to take an option on 15 acres of land then owned by Sinclair Refinery, Mayor Nicosia "became upset" with that decision and arranged for the Complex to be built on the former Anaconda Lead site. (Compl. ¶ 35).

The City and Housing Authority began construction on the Complex in 1970. (Compl. ¶ 36-37). Residents moved into the Complex once construction was completed in 1973. (Compl. ¶ 38). The old Carrie Gosch Elementary School had been built in 1958, with classes beginning in September 1959. (Compl. ¶ 56). The new Carrie Gosch Elementary School building was constructed in 1999 directly behind the former school building and also within the area which is now the Superfund Site. (Compl. ¶¶ 61-62). The School was constructed on land formerly occupied by USS Lead, and USS Lead continued operations in close proximity to the School until 1985. (Compl. ¶ 58-59).

The United States Environmental Protection Agency ("EPA") began testing to address possible contamination at the Site in 1985. (Compl. ¶ 47). In 1993, the EPA entered into an administrative order of consent with USS Lead, designating the area as a Superfund site in need of environmental remediation. (Compl.¶¶ 46-47). On September 3, 2014, the EPA filed a complaint against two additional corporate entities responsible for polluting the Superfund Site. (Compl. ¶ 49). A Consent Decree was entered into among the parties, including the EPA, the State of Indiana, and the Indiana Department of Environmental Management ("IDEM"), on or about October 3, 2014, which required $26 million for cleanup costs. (Compl. ¶ 50). The City and Housing Authority were made aware of the EPA's findings of contamination at the Site. (Compl. ¶ 51).

Additionally, the Plaintiffs' Complaint also alleges that at various times throughout the EPA's extensive investigation into contamination at the USS Lead Superfund Site multiple investigations were completed by IDEM and the Indiana State Department of Health ("ISDH"). (Compl. ¶¶ 42-43). In 1985, IDEM found lead contaminated soil adjacent to the Complex, and

ISDH found high levels of lead in the blood of some children residing at the Complex. (Compl. ¶¶ 42-43).

The Complaint states that, later in 1997, IDEM and ISDH conducted additional testing which revealed contamination at and around the Complex as well as elevated levels of lead in children. (Compl. ¶ 44). During this time, construction on the new facilities for Carrie Gosch Elementary School were taking place behind the existing School grounds. (Compl. ¶¶ 61-68). The Plaintiffs allege IDEM prepared an office memo on August 28, 1997 which noted concerns of the possibility of "increased lead exposure to the school children associated with the construction project (because of) the past lead facilities operation in what is now a residential neighborhood." (Compl. ¶ 64). The Complaint states IDEM and ISDH informed the City and/or Housing Authority of the results of these findings, but that the information was not passed on to residents of the Complex. (Compl. ¶ 45). Additionally, the East Chicago Health Department conducted screenings of children in the area, determining that 35% at that time demonstrated elevated levels of lead. (Compl. ¶ 66).

The Plaintiffs' Complaint alleges the Plaintiffs were not aware of contamination at the USS Lead Superfund Site until July 25, 2016, when East Chicago Mayor Anthony Copeland sent a letter to residents of the Complex stating that residents would have to relocate due to elevated levels of lead contamination. (Compl. ¶ 70). The Plaintiffs' Complaint alleges that prior to the July 25, 2016 letter, the Plaintiffs had no reason to know the levels of lead at the USS Lead Superfund Site were dangerous to human health or wellbeing. (Compl. ¶ 78).

The basis for the Plaintiffs' claims for damages against the State Defendants is that IDEM's and ISDH's notice to the City and Housing Authority of their investigation and conclusions was insufficient. Instead, the Plaintiffs presumably allege the State should have bypassed the City and

Housing Authority of East Chicago and directly informed residents of the results of their environmental testing results.

RULE 12(C) STANDARD

Rule 12(C) of the Indiana Trial Rules provides that a motion for judgment on the pleadings can be filed by any party after the pleadings are closed but within such time as not to delay the trial. Indiana Rules of Trial Procedure 12(C). A motion for judgment on the pleadings is an attack on the legal sufficiency of the pleadings to state a redressable claim. *Steele v. McDonald's Corp.*, 686 N.E.2d 137, 141 (Ind.Ct.App. 1997). A Rule 12(C) motion is properly granted when there are no genuine issues of material fact and the facts shown by the pleadings clearly entitle the moving party judgment on its behalf. *Steele*, 686 N.E.2d at 141; *Gregory and Appel v. Duck*, 459 N.E.2d 46, 49 (Ind.Ct.App. 1984). For purposes of the motion, the moving party admits the truth of the factual allegations contained in the non-movant's pleadings and asserts that it is entitled to judgment as a matter of law. *Id.* at 50. The pleadings consist of a complaint and an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint and third-party answer. Trial Rule 7(A). Documents attached to the pleadings are also properly considered by the Court on a motion for judgment on the pleadings and do not convert the motion into one for summary judgment. *Gregory*, 459 N.E.2d at 50. Only when a motion for judgment on the pleadings relies upon matters extraneous to the pleadings will the motion be treated as a motion for summary judgment. Trial Rule 12(C); *Steele*, 686 N.E.2d at 141.

ARGUMENT

I. The Plaintiffs' Claims are Barred by the Statute of Limitations and the State Defendants are Entitled to Judgment as a Matter of Law.

Indiana law provides that a cause of action arising from personal injury "must be commenced within two (2) years after the cause of action accrues." Ind. Code § 34-11-2-4(a)(1). A cause of action is said to have accrued when "the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Filip v. Block*, 879 N.E.2d 1076, 1082 (Ind. 2008) (citing *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)).

This cause of action was initiated on December 8, 2017. (Compl.). The Plaintiffs claim to have sustained injuries including "physical, mental, and emotional harm as a direct and proximate result of his or her exposure to the lead or other chemical contamination at the Complex and/or at the Carrie Gosch Elementary School." (Compl. ¶ 80).

Here, the Plaintiffs' Complaint alleges the Plaintiffs were "never informed or warned" about the dangers associated with lead or other toxic chemicals present at the School and/or Complex until they received a letter from East Chicago Mayor Anthony Copeland on July 25, 2016. (Comp. ¶¶ 70, 73). The Plaintiffs maintain they "had no reason to know that they had been exposed to dangerous levels of lead and arsenic prior to receiving the letter from the Mayor." (Compl. ¶ 74).

However, the Complaint also makes clear the Plaintiffs knew, or should have known based upon exercise of ordinary diligence, of the existence of lead and other chemicals in the areas of the School and Complex prior to July 25, 2016. In addition to the EPA, IDEM, and ISDH testing presumably being done in and around the Plaintiffs' homes in the 1980s and 1990s, the Plaintiffs'

Complaint acknowledges that the EPA entered into an administrative order of consent with USS Lead as far back as 1993. (Compl. ¶¶ 44, 47, 48). Furthermore, the Complaint acknowledges the EPA filed a complaint against two additional entities arguably responsible for costs associated with cleanup of the USS Lead Superfund site on September 3, 2014. (Compl. ¶ 49). The EPA's 2014 complaint resulted in another Consent Decree, which was entered in October 2014. (Compl. ¶ 50).

The procedural history of the USS Lead Superfund Site and the 2014 Consent Decree referenced in the Plaintiffs' Complaint is set forth in greater detail in *United States v. Atlantic Richfield* Co., 2018 U.S. Dist. LEXIS 21524, *5, 99 Fed. R. Serv. 3d (Callaghan) 1886, 48 ELR 20023, 2018 WL 798188, a February 2018 opinion of the United States District Court for the Northern District of Indiana, Honorable Judge Simon, in which the court ruled against a motion to intervene filed by residents of the West Calumet Housing Complex in the Consent Decree action discussed in the Plaintiffs' Complaint. *Id.* at 6.

The court in *Atlantic Richfield Co.* found that, in 2009, the area of East Chicago containing the Complex and the School were added to the Superfund's National Priority List, "signaling that the area was contaminated and that the contamination posed a risk to residents' health." *Id.* at 4. The EPA was thereafter required to select and execute a remediation plan pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et. seq. *Id.* at 5.

The EPA announced its proposed cleanup plan for the USS Lead Superfund Site in November, 2012, and thereafter invited the public to comment on the plan for a period of 60 days prior to selection of the final remedy. *Id.* at 5. Thereafter, a public meeting was held on July 25, 2012 to discuss the cleanup process. *Id.* After taking into account the prior studies, public hearing,

and additional public comments received, the EPA formally selected a remedy to address contamination at the Site, including the Complex and the School. *Id.* Later, on September 3, 2014, the United States and the State of Indiana brought a complaint against the additional corporate entities responsible for pollution at the Site, Atlantic Richfield and Dupont. *Id.* at 5.; (Compl. ¶ 49). On the same day, the United States and the State of Indiana filed a Notice of Lodging of Proposed Consent Decree in the Federal Register, which triggered an additional 30-day period for public comments. *Id.* A hearing on the proposed Consent Decree was held on October 28, 2014, at which time the Consent Decree was approved. *Id.* at 5-6; (Compl. ¶ 42-43).

After entry of the Consent Decree, in July, 2016, residents of the Complex were notified that soil testing had revealed high levels of contamination and that they were being asked to vacate their residences. *Id.* at 6. Thereafter, on November 1, 2016, residents of the Complex moved to intervene in the action on the grounds that their interests had been adversely affected by the lack of progress being made by the EPA in addressing the contamination at the USS Lead Superfund Site. *Id.* The court denied the motion to intervene on the grounds that the motion to intervene was untimely considering the residents of the Complex had inquiry notice of environmental contamination by at least July, 2012. *Id.* The court described in detail the notice received by the plaintiffs as follows:

> Prior to the filing of the complaint, the EPA engaged in extensive efforts to inform the citizens of the affected areas about the hazards and clean up and to solicit public comments since at least 2012. In July 2012, the EPA announced its proposed plan for the cleanup of the site and held a public meeting on July 25, 2012. The EPA advertised the public meeting in local English and Spanish-language newspapers and kept a copy of the proposed plan at the public library. Even more to the point, before the meeting, the EPA mailed to every resident living within two miles of the Site a copy of the proposed plan. At the meeting, 42 people attended, including 15 residents, the East Chicago Mayor, and local news organizations. Those in attendance provided oral comments on the proposed plan. The EPA also received written

> comments from both private citizens and parties that were potentially financially responsible for the cleanup.
>
> All of the public outreach described above occurred before this case was initiated. But considerable outreach has taken place since as well. The complaint in this case was filed September 3, 2014. On the same day, the government also filed the proposed Consent Decree. Notice of the lodging of the Consent Decree was published in the publicly available *Federal Register,* 79 Fed. Reg. 53,447 (Sept. 9, 2014). Moreover, the EPA and the Department of Justice issued a press release summarizing the substance of the Consent Decree, and a local newspaper ran an article about the Consent Decree. After I accepted the parties' Consent Decree, there were two additional public information sessions held to discuss the cleanup activities. Since that time, the EPA has engaged with residents as part of their efforts to test and clean up the contamination.

Id. at 11-12.

The court found that, given the above, the plaintiffs had been given adequate notice of contamination by at least July 2012, meaning the statute of limitations would have passed in July 2014. *Id.*

In response to the defendants' notice arguments, the plaintiffs in *Atlantic Richfield Co.* claimed that, although notice of potential contamination had been available for several years prior, it was not until the plaintiffs received a letter from the East Chicago Housing Authority notifying them the soil in the Complex was highly contaminated in July, 2016 that the plaintiffs were put on notice of the full magnitude of the problem. *Id.* at 13-14. However, the inquiry facing the court as to whether to allow the plaintiffs to intervene was not a question of when the plaintiffs became aware of the "precise nature of the impact" of the contamination, but instead on "how long the applicants knew or should have known that the litigation could impact their interests." *Id.* at 14. "In other words, it isn't about how bad the impact is; it's about whether there might be an adverse impact at all." *Id.*

The Court went on to explain that the area in question "is a Superfund site. By the very nature of this designation, the extent of the contamination is severe. The fact that it may be *more* severe than first thought doesn't change the analysis." *Id.* at 19 (*emphasis in original*). Judge Simon's analysis is instructive:

> The applicants raise a few issues with the Magistrate Judge's conclusions on this point: they attack the form of notice; they fault the Magistrate Judge for starting the clock two years too early; and they claim that the severity of the problem just became known to them. As to the form of notice, they argue that most residents disregarded these public mailings and announcements and that the publication of the Consent Decree via publication in the Federal Register, the EPA's press release, and one newspaper is too remote. To which I ask, what more could have been done by way of notice? Short of going door to door and personally telling each resident about the environmental hazard and the proposed remediation plan, it is difficult to imagine more effective notice. So I can't be as dismissive of the EPA's efforts as the applicants are: mailed notices, public meetings, and public court filings were sufficient in this case to put the applicants on notice that their rights might be impaired, especially considering that several residents did submit comments on the proposed plan and attended the July 25, 2012 public meeting.

Id. at 11-12.

Likewise, in this case, the Plaintiffs' cause of action accrued for the purposes of the applicable statute of limitations not when the "precise nature of the impact" was revealed by way of Mayor Copeland's letter in July, 2016, but when the Plaintiffs "knew or should have known" of a potential adverse impact on their health as a result of contamination. *See id.* at 14. As held in *Atlantic Richfield Co.*, residents of the Complex had sufficient notice of the environmental hazard at the USS Lead Superfund Site by the time of the advertised public meeting which took place on July 25, 2012, if not before. *Id.* at 12-13. Pursuant to Indiana Code § 34-11-2-4(a)(1), the statute of limitations passed on the Plaintiffs' claims on July 25, 2014. Each of the Plaintiffs' claims against the State Defendants are therefore barred, and the State Defendants' Motion should be granted.

II. The Plaintiffs' Claims are Barred by the Doctrine of Res Judicata and the State Defendants are Entitled to Judgment as a Matter of Law.

The matter of *United States v. Atl. Richfield Co.*,2018 U.S. Dist. LEXIS 21524, *5, 99 Fed. R. Serv. 3d (Callaghan) 1886, 48 ELR 20023, 2018 WL 798188, discussed in Part I above, is not merely persuasive authority on the topic of accrual of the statute of limitations in this case. Instead, because the passing of the statute of limitations was necessarily adjudicated in *Atlantic Richfield Co.*, that case operates as a bar to the Plaintiffs' claims under the doctrine of res judicata.

The doctrine of res judicata "prevents the repetitious litigation of disputes that are essentially the same." *Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 15 N.E.3d 1030, 1040 (Ind. Ct. App. 2014)(citing *Wright v. State*, 881 N.E.2d 1018, 1021 (Ind. Ct. App. 2008)). Res judicata is divided into two branches: claim preclusion and issue preclusion. *Id.* A plaintiff's claim is barred by issue preclusion where a claim requires "subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit." *Geico Ins. Co. v. Graham*, 14 N.E.3d 854, 858-859 (Ind. Ct. App. 2014). Former litigation as to a particular issue is only preclusive where the issue was expressly adjudicated in the former suit and not where the issue can be inferred only by argument. *Id.* Indiana courts utilize a two-part analysis to determine whether a particular claim is barred by issue preclusion. *Id.* First, the court must address whether: (1) the "party in the prior action had a full and fair opportunity to litigate the issue," and (2) "whether it is otherwise unfair to apply issue preclusion given the facts of a particular case." *Id.* In determining whether to apply issue preclusion, the court should utilize the following non-exhaustive list of factors: "(1) privity, (2) the defendant's incentive to litigate the prior action, and (3) the ability of the plaintiff to have joined the prior action." *Id.*

The term "privity" is described as "the identity of interests that may connect persons to such an extent that one not a party to an action may nevertheless be bound by the judgment in that action." *Microvote Gen. Corp. v. Ind. Election Comm'n*, 924 N.E.2d 184, 195 (Ind. Ct. App. 2010). Control over a prior action is not required for privity to exist. *Id.*, "([A]n entity does not have to control a prior action, or be a party to a prior action, for privity to exist"). Rather, "in determining the parties for res judicata purposes, this court looks beyond the nominal parties and treats those whose interest are involved as the real parties." *Id.*, (citing *State v. Speidel*, 181 Ind. App. 448, 392 N.E.2d 1172, 1176 (Ind. Ct. App. 1979)).

Here, the Plaintiffs are in privity with the intervenors in *Atlantic Richfield Co.* In *Atlantic Richfield Co.*, the intervenors were residents of East Chicago within the USS Lead Superfund Site, including the Complex, and "a community group they have formed." *Atlantic Richfield Co.* at 1-2. The Plaintiffs to this action and the intervenors in *Atlantic Richfield Co.* are connected by the interests associated with lead contaminants and other pollutants at the USS Lead Superfund Site. The interests of the residents in and around the Complex were addressed in *Atlantic Richfield Co.* The State of Indiana, as a party to the matter of *Atlantic Richfield Co.*, had adequate incentive to litigate identical issues in the former suit. The Plaintiffs' Complaint offers no evidence to suggest the Plaintiffs could not have joined in the *Atlantic Richfield Co.* action. Moreover, because the intervenors in *Atlantic Richfield Co.* were not identified by name in that proceeding, it may even be the case that some or all of the numerous Plaintiffs to this case actually were involved in the Complex community group which sought to intervene in *Atlantic Richfield Co.* Parties in privity with the Plaintiffs had a full and fair opportunity to litigate the issue of the statute of limitations in a former suit.

The question of whether the parties to *Atlantic Richfield Co.* were precluded from suit based upon accrual of the statute of limitations was necessarily adjudicated in that case. *Atlantic Richfield Co.*, 2018 U.S. Dist. LEXIS 21524, *5, 99 Fed. R. Serv. 3d (Callaghan) 1886, 48 ELR 20023, 2018 WL 798188. The district court held oral argument on the issue and issued a lengthy and well-reasoned opinion addressing the issue of the statute of limitations on the merits. *Id.* Ultimately, the intervenors' motion was denied on the sole grounds that the statute of limitations had passed in July 2014 at the latest. *Id.* The issue of at what point the residents of the Complex knew or should have known of their alleged exposure to contamination at the Site was necessarily adjudicated in the lawsuit of *Atlantic Richfield Co.* This Court should find the Plaintiffs' interests barred as a matter of law.

III. The Plaintiffs' Claims are Barred by the Indiana Tort Claims Act and the State Defendants are Entitled to Judgment as a Matter of Law.

Each of the Plaintiffs' claims against the State Defendants are precluded by the Indiana Tort Claims Act, Ind. Code § 34-13-3 et seq.

A. The State Defendants are Entitled to Judgment as a Matter of Law Because of the Plaintiffs' Failure to Timely File a Notice of Tort Claim as Required by the Indiana Tort Claims Act, Ind. Code. § 34-13-3-6(a).

Each of the Plaintiffs' claims against the State Defendants are further barred because of the notice requirements of the Indiana Tort Claims Act, which provides that "a claim against the state is barred unless notice is filed with the attorney general or the state agency involved within two hundred seventy (270) days after the loss occurs." Ind. Code. § 34-13-3-6(a). Failure to file a notice of tort claim within the requisite period entitles the State and/or its agencies to dismissal. *Indiana Dep't of Correction v. Hulen*, 582 N.E.2d 380, 380-81 (Ind. 1991). (Ind. 1991).

Indiana courts have held that the standard for addressing the timing of a loss under the Indiana Tort Claims Act is the same as the standard for determining the date of accrual with respect to the applicable statute of limitations. *Garnelis v. Ind. State Dep't of Health*, 806 N.E.2d 365, 371 2004 Ind. App. LEXIS 677 (Ind. Ct. App. 2004). For purposes of the Tort Claims Act, the loss is deemed to have occurred on the date on which the plaintiff "knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Id.* (citing *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)). As discussed in Part I above, the accrual date for the Plaintiffs' cause of action in this matter was, at the latest, July 25, 2012. The Plaintiffs were therefore required to submit a notice of tort claim to the State Defendants no later than April, 2013. However, the Plaintiffs did not submit their first Notice of Tort Claim to any of the State Defendants until October 27, 2016. (October 4, 2017 Notice of Tort Claim) Thereafter, the Plaintiffs filed a second Notice of Tort Claim on October 4, 2017, which purported to provide additional clarity as to the substance of the Plaintiffs claims. Therefore, the Plaintiffs claim is barred by the Indiana Tort Claims Act and the State Defendants are entitled to dismissal of each of the Plaintiffs' claims.

B. The State Defendants are Entitled to Judgment as a Matter of Law Because they are Immune from Liability as to each of the Plaintiff's Claims Pursuant to the Indiana Tort Claims Act, Ind. Code §34-13-3-3.

The Indiana Tort Claims Act immunizes government entities and their employees from liability where the alleged loss results from one or more of the sets of circumstances enumerated in the Act. Ind. Code §34-13-3-3. Whether the state is entitled to immunity is a question of law for the court. *Voit v. Allen County.*, 634 N.E.2d 767, 769 (Ind. Ct. App. 1994). Immunity assumes negligence but denies liability. *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988). In this

case, the State Defendants are entitled to immunity from each of the Plaintiffs' claims and this Court should enter judgment in favor of the State Defendants.

i. The State Defendants are Immune from Liability for Acts and Omissions of Anyone Other than the Government Entity or the Government Entity's Employee Pursuant to Ind. Code §34-13-3-3(10).

The Indiana Tort Claims Act provides government entities are not liable for "[t]he act or omission of anyone other than the governmental entity or the governmental entity's employee." Ind. Code §34-13-3-3(10). The Plaintiffs' Complaint recounts several allegedly tortious acts which contributed to the Plaintiffs' injuries, and which took place prior to the State Defendants' involvement in the matter of the Site.

The Plaintiffs allege the contamination of the soil at and around the Site was caused by the Anaconda Lead Products Company, which was in operation between 1938 and 1965, and the USS Lead, which operated a lead smelter between 1920 and 1973. (Compl. P 25-26). The Plaintiffs allege the City and Housing Authority were negligent in selecting the property upon which the Complex was built and in entering into leases with the Plaintiffs at the Complex as far back as 1973. (Compl. ¶¶ 22 – 31; 82 – 87). The Plaintiffs allege the City and School Corporation were negligent in choosing the location of both the updated Carrie Gosch Elementary School (constructed in 1999) and its predecessor School (constructed in 1958). (Compl. ¶¶ 56, 62, 99, 100). The Plaintiffs do not allege the State Defendants were responsible for the existence of contamination at the Site or the selection of the location of the Complex of either of the School buildings. The State Defendants may not be held liable for decisions in which the State had no involvement, and are entitled to immunity as to the same.

The Plaintiffs' primary allegation against the State Defendants is the alleged failure to warn the Plaintiffs of contamination at the Site. (Compl. ¶¶ 111, 119). However, the factual support given in the Complaint for this assertion leads to the conclusion that the impetus to warn residents of the Complex about elevated levels of lead or other contaminants fell to the City and/or Housing Authority. The Plaintiffs allege that "[I]n 1985, [IDEM] found lead contaminated soil adjacent to the Complex. 43. And in the same year, [ISDH] discovered that some children who resided at the Complex had high levels of lead in their blood." (Compl. ¶ 42, 43). The Plaintiffs go on to allege that the "City and/or Housing Authority were made aware of the results of those and other IDEM and ISDH investigations, but they never made residents aware of these findings in particular or the dangers of contamination in general." (Compl. ¶ 45)."

Presumably, leadership with the City and/or Housing Authority were the entities chargeable with disseminating the information to residents of the Complex, especially given that the City Mayor did in fact issue notice in the form of a letter to residents of the Complex discussing contamination levels on July 25, 2016. (Compl. ¶ 70). The City, Housing Authority and/or Mayor's decision to issue the letter on July 25, 2016, and not before, is not imputable to the State Defendants. Neither are the practices of Anaconda Lead Products Company and USS Lead imputable to the State Defendants. This Court should find the State Defendants entitled to judgment as a matter of law.

ii. The State Defendants are Immune from Liability for Any Loss Allegedly Resulting from the Performance of a Discretionary Function Pursuant to Ind. Code § 34-13-3-3(7).

Pursuant to the Indiana Tort Claims Act, the State Defendants are immune from liability for any loss allegedly resulting from the "performance of a discretionary function." Ind. Code § 34-13-3-3(7). In determining whether the government's act or omission is considered a discretionary

function, Indiana courts employ the "planning/operational" test. *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988). Acts and omissions involving "planning" are policy decisions involving "official judgment, discretion, weighing of alternatives, and public policy choices," and decisions weighing "competing priorities," "budgetary considerations," and "allocation of scarce resources." *Voit v. Allen County*, 684 N.E.2d 767, 769-770 (Ind. Ct. App. 1994). Losses allegedly arising from such acts and omissions are immune from suit. *Id.* Acts and omissions deemed "operational" are not immune. *Id.* An act or omission is considered "operational" where the government's decision involved "only the execution or implementation of already formulated policy." *Id.* To establish immunity for a discretionary function, the State bears the burden of proving that the challenged act or omission was a policy decision made by consciously balancing risks and benefits. *City of Indianapolis v. Duffitt*, 929 N.E.2d 231, 236 (Ind. Ct. App. 2010).

Here, the Plaintiffs' Complaint alleges the State Defendants "failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions." (Compl. ¶ 54). To the extent the State Defendants were involved in entry of the Consent Decree between the State, the EPA, and the responsible corporate entities, determinations of how the Site would be remediated were policy decisions entitled to immunity from suit. The Plaintiffs' Complaint alleges the first Consent Decree applicable to the Site was entered into in 1993, with additional corporate entities being added by Consent Decree in October 2014. The Consent Decrees resulted in a settlement which created a $26 million fund to be used for cleanup costs. Federal law dictates, and the Plaintiffs do not allege facts to dispute, that the selection of a cleanup program for a Superfund site be the result of policy considerations and the weighing of alternatives. CERCLA provides that, in choosing a remedial program, the EPA select an option that is: "protective of human health and

the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." 42 USCS § 9621(b)(1). Furthermore, when making decisions related to remediation plans, the EPA "shall specifically address the long-term effectiveness of various alternatives." 42 USCS § 9621(b)(1). The EPA must take into account:

> (A) the long-term uncertainties associated with land disposal;
> (B) the goals, objectives, and requirements of the Solid Waste Disposal Act;
> (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;
> (D) short- and long-term potential for adverse health effects from human exposure;
> (E) long-term maintenance costs;
> (F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and
> (G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

42 USCS § 9621(b)(1).

The EPA's selection of a remediation process from among multiple alternatives, and the State of Indiana's consideration and acceptance of the Consent Decree addressing same, as exemplified by its status as a party and a signatory to the Consent Decree, is the result of an exercise of discretion of the type shielded from liability by the Indiana Tort Claims Act. The selection of a remedial process involved considerations of the "competing priorities" of health, environment, costs and allocation of resources. The decisions made by the parties involved in the Consent Decree were policy-oriented and required the exercise of discretion, the weighing of alternatives, and public policy decisions. The State Defendants are therefore entitled to immunity and judgment as to each of the Plaintiffs' claims.

IV. The Plaintiffs' Complaint Fails to State a Claim for Intentional Infliction of Emotional Distress and the State Defendants are Entitled to Judgment as a Matter of Law.

The Indiana Supreme Court first recognized the tort of intentional infliction of emotional distress in *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991). This tort arises when a defendant: (1) engages in "extreme and outrageous" conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another. *Bradley v. Hall,* 720 N.E.2d 747, 752 (Ind. Ct. App. 1999). The intent to harm emotionally constitutes the basis of this tort. *Ledbetter v. Ross,* 725 N.E.2d 120, 123-24 (Ind.Ct.App.2000)

Despite its recognition of this tort, however, Indiana Courts have consistently held that the requirements to prove this tort are "rigorous." *Creel v. I.C.E. & Associates, Inc.*, 771 N.E.2d 1276, 1282 (Ind. Ct. App. 2002); *Ledbetter,* 725 N.E.2d 120, 124 (Ind.Ct.App.2000) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts,* § 12, at 61 (5th ed.1984). Accordingly, the question of whether the conduct at issue is "extreme and outrageous" may be decided as a matter of law. *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 523 (Ind. Ct. App. 2001). Conduct is considered "extreme and outrageous" if it is "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*, (citing *Bradley* at 752-53). Extreme and outrageous conduct is that "characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *Id.* Intent to cause harm to the plaintiff constitutes the basis of the tort of intentional infliction of emotional distress. *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991).

Here, the Plaintiffs' Complaint alleges the State Defendants "took no action to inform the Plaintiffs or otherwise to safeguard them from the dangerous condition" related to the presence of lead and other contaminants at the Site. (Compl. ¶ 119). An omission such as that alleged in the Plaintiffs' Complaint does not rise to the level of "extreme and outrageous conduct" required to prove the tort of intentional infliction of emotional distress. The Plaintiffs present no allegation that the State acted with malice or any intent to harm the Plaintiffs. The State Defendants are entitled to judgment as a matter of law on the Plaintiffs' claim for intentional infliction of emotional distress.

CONCLUSION

This Court should grant the State Defendant's Motion for Judgment on the Pleadings and find that the Plaintiffs' Complaint fails to state a claim upon which relief may be granted. First, the Plaintiffs fail to state a claim because their claims against the State Defendants are barred by the statute of limitations and by res judicata. The Plaintiffs' claims are also barred by the notice and immunity provisions of the Indiana Tort Claims Act, Ind. Code § 34-13-3-6(a). The Plaintiffs also fail to state a claim for Intentional Infliction of Emotional Distress. For each of the foregoing reasons, the State Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2018, the foregoing was served via the U.S. Postal Service on the following:

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STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

LAKE COUNTY SUPERIOR COURT 5

CAUSE NO. 45D05-1803-CT-000003

CRISTOBAL ALVAREZ *et al*

Plaintiffs,

v.

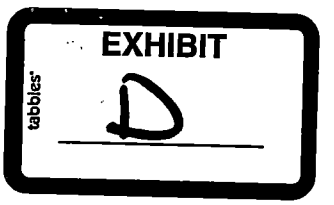
U.S. SMELTER AND LEAD REFINERY, INC. d/b/a U.S.S. LEAD REFINERY, INC., MINING REMEDIAL RECOVERY COMPANY, ARAVA NATURAL RESOURCES COMPANY, INC., MUELLER INDUSTRIES, INC., and UNITED STATES METALS REFINING COMPANY,

Defendants.

Special Judge
Hon. Nanette K. Raduenz

RESPONSE TO DEFENDANTS STATE OF INDIANA, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT AND INDIANA STATE DEPARTMENT OF HEALTH'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Plaintiffs in this lawsuit allege that the State of Indiana, Indiana Department of Environmental Management, and Indiana State Department of Health (collectively "State Defendants") are liable for failing to warn them of lead, arsenic, and other toxic pollution at the West Calumet Housing Complex where each of the Plaintiffs lived and at the Carrie Gosch Elementary School where the minor Plaintiffs attended school. As alleged in detail in Plaintiffs' Complaint, the State Defendants knew that the Plaintiffs were being exposed to lead and other



hazardous particles with the potential to cause serious harm on a daily basis, yet the State Defendants made absolutely no effort to warn the Plaintiffs that they were raising their families on a toxic waste dump. Instead, the Plaintiffs were left in the dark about what Northern District of Indiana Judge Simon candidly called an "environmental catastrophe." *United States v. Atlantic Richfield Co.*, 324 F.R.D. 187, 189 (N.D. Ind. 2018).

The State Defendants have filed a Motion for Judgment on the Pleadings, asking this Court to deny the victims of this catastrophe their day in Court. The Defendants have asked the Court to find that the Plaintiffs' claims are untimely based on the pleadings alone, and before the Plaintiffs have had the opportunity to develop the factual record on this quintessentially fact-sensitive inquiry. Aside from the fact that two federal judges in this district rejected this exact argument in related cases, the Defendants either ignore or fail to consider that **a vast majority of the Plaintiffs were minors at the time this case was filed**, meaning that their statutes of limitations had not even began to run. But even for the adult Plaintiffs, it is a question of fact when they discovered sufficient facts to know both that they were being exposed to toxic substances and the dangers that exposure presented. This simply is not an issue that should be decided at the pleading stage.

The remainder of the State Defendants' arguments fare no better. Claim preclusion (i.e. collateral estoppel) does not apply because *United States v. Atlantic Richfield Co.* did not adjudicate any issue relating to personal-injury statutes of limitations, instead determining "timeliness" under the right to intervene into an

EPA clean up action under Rule 24, and there was no privity between the Plaintiffs in this case and the would-be intervenors in that case. The Indiana Tort Claims Act Does not provide a basis for dismissal because notice was timely, liability is sought for the actions and inactions of the State Defendants themselves, and there has been no showing that the State Defendants' failure to warn or take any other actions to protect the Plaintiffs was a conscious decision involving the exercise of social, economic, or political policy. And, because reasonable minds can at least differ as to whether a government standing silent while knowing many of its most-vulnerable citizens are being poisoned is "extreme and outrageous" and whether the State Defendants acted with sufficient reckless disregard is a question of fact for a jury, there can be no judgment on the pleadings for the intentional infliction of emotional distress claim.

For all of the foregoing reasons, the Plaintiffs respectfully request that the Court deny the State Defendants' Motion for Judgment on the Pleadings, and allow the Plaintiffs their rightful opportunity to learn facts and prosecute their claims for the environmental catastrophe to which they were unwittingly exposed.

I. Relevant Allegations in Complaint

"The Plaintiffs are all former residents of the West Calumet Housing Complex (the 'Complex') in East Chicago, Indiana." [Complaint at ¶ 1]. "[E]ach of the residents was exposed to dangerously high levels of highly toxic substances such as lead and arsenic that were present in the soil and air in and around the Complex." [*Id.* at ¶ 2].

"The pollution at the Complex and Carrie Gosch Elementary School, and the fact that residents and students were being exposed to that pollution on a daily basis, was also well-known to the remaining governmental entities that have been named as Defendants in this action, namely the East Chicago Department of Public & Environmental Health; Indiana Department of Environmental Management; Indiana State Department of Health; and the State of Indiana. Despite these entities' knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions." [*Id.* at ¶¶ 12 & 54].

"After decades of silence, on July 25, 2016, East Chicago Mayor Anthony Copeland sent letters to residents of the Complex, including the Plaintiffs, stating:

> Dear Resident:
>
> Your health and safety are always my first priority.
>
> When the City and the East Chicago Housing Authority (`ECHA_) recently were informed by the EPA that the ground within the West Calumet Housing Complex was highly contaminated with lead and arsenic, we moved immediately to protect your safety, health, and welfare.
>
> The identification of lead and arsenic poses potential dangers, and that is why I ordered the East Chicago Health Department to offer lead testing to you and your children. Now that we know the levels of lead in the ground in West Calumet Housing Complex, we feel it is in your best interest to temporarily relocate your household to safer conditions. ECHA is asking HUD to provide vouchers for safe, sanitary housing as soon as possible. Even though this may be a great inconvenience to you, it `s necessary to protect you and your children from possible harm.
>
> The staff of ECHA, including the Section 8 staff will be assisting you in the coming days, and we will continue to provide you with information as soon as it becomes available.
>
> We ask for your patience and cooperation in this process.

[*Id.* at ¶ 70]. "Prior to the letter, each Plaintiff did not know that he or she had been exposed to hazardous levels of lead or other toxins at the Complex." [*Id.* at ¶ 71].

"Prior to the letter, each Plaintiff did not know that he or she had been injured by his or her exposure to hazardous levels of lead or other toxins at the Complex." [*Id.* at ¶ 72]. "Prior to the letter, the Defendants never informed or warned the Plaintiffs of these dangers." [*Id.* at ¶ 73]. "Plaintiffs had no reason to know that they had been exposed to dangerous levels of lead and arsenic prior to receiving the letter from the Mayor." [*Id.* at ¶ 74]. "[T]he EPA, [Indiana Department of Environmental Management], and [Indiana State Department of Health] for more than two decades prior[.]" [*Id.* at ¶ 75]. But none of those entities or any other Defendant "inform[ed] Plaintiffs or other residents that they had been exposed to dangerous levels of lead or other toxins at the Complex." [*Id.* at ¶¶ 75 & 119].

"Prior to Plaintiffs' ultimate discovery of their exposure to hazardous levels of lead or other toxins, each Defendant acted intentionally to conceal from Plaintiffs that the soil and air in and around the Complex was contamination with dangerously high levels of hazardous substances such as lead arsenic, and other toxins." [*Id.* at ¶ 76].

"As the July 6, 2016 EPA flyer acknowledged, 'Lead is a naturally occurring heavy metal. It is commonly found at low levels in soil. Low levels of lead can be found in the air, water, food and dust in cities because of the widespread use of lead in man-made products. The federal government regulates the amount of lead in the air, water and soil. The levels of lead at the West Calumet Housing Complex are much higher than normal levels because of past industrial operations at the property.'" [*Id.* at ¶ 77]. "The mere knowledge of lead in the soil meant nothing

absent an understanding that the levels were dangerous to human health and wellbeing." [*Id.* at ¶ 78].

"Each Plaintiff was exposed to hazardous levels of lead and/or other toxins while a resident of the Complex[.]" [*Id.* at ¶ 79]. "Each Plaintiff has suffered physical, mental, and emotional harm as a direct and proximate result of his or her exposure to the lead or other chemical contamination at the Complex[.]" [*Id.* at ¶ 80].

"The Plaintiffs [have brought] this action seeking damages for the physical and emotional harms caused by their exposure to lead, arsenic, and other contaminants at the Complex and Carrie Gosch Elementary School, all of which was the direct and proximate result of Defendants' failure to warn of the contaminations at these sites, Defendants' facilitating and allowing [ ] the Plaintiffs to live and attend school at these locations, and Defendants' concealment of the toxic pollution and risk to health at these sites." [*Id.* at ¶ 13].

Plaintiffs assert three counts against the State Defendants:

COUNT III: NEGLIGENCE
AGAINST ECDH, IDEM, ISDH, AND STATE OF INDIANA

110. Plaintiffs incorporate the allegations set forth above and below as though set forth fully.

111. The ECDH, IDEM, ISDH, and State of Indiana owed a duty of reasonable care to the Plaintiffs, including without limitation the duty to warn the Plaintiffs of known risks to their health that had the potential to cause serious, life-altering injuries.

112. These Defendants each knew that the soil and air in and around the Complex and Carrie Gosch Elementary School were contaminated with dangerous levels of lead, arsenic, and/or other

hazardous substances.

113. The levels of lead, arsenic, and/or other hazardous substances were a dangerous condition.

114. The levels of lead, arsenic, and/or other hazardous substances were unknown to Plaintiffs, such that Plaintiffs were unaware of the dangerous conditions.

115. Due to their ignorance of these dangers, each of the Plaintiffs entered into leases to live at the Complex and resided at the Complex, and many of the Plaintiffs attended school at Carrie Gosch Elementary School.

116. The Plaintiffs did not know that, by residing at the Complex and attending this school, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

117. The levels of lead, arsenic, and/or other hazardous substances actually caused harm to each Plaintiff.

118. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Plaintiff.

119. These Defendants took no action to inform the Plaintiffs or otherwise to safeguard them from the dangerous condition.

120. Each Defendant actually knew or should have known that lead and other hazardous particles have the potential to cause serious harm to the Plaintiffs.

121. As a direct and proximate result of each Defendant's breaches of its duties, Plaintiffs have suffered and continue to suffer financial, physical, mental, and emotional damages.

122. Plaintiffs were each a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's release of hazardous substances.

123. Each Plaintiff has suffered financial, physical, mental, and emotional damages stemming directly from their exposure to lead particles and other hazardous particles.

COUNT IV: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

124. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

125. The conduct of the Defendants described above is extreme and outrageous.

126. The Defendants acted with reckless disregard toward the health, safety, and wellbeing of Plaintiffs and others.

127. The actions of defendants described above were both the cause in fact and proximate cause of emotional distress to each Plaintiff.

128. Each Plaintiff suffered severe emotional distress as a result of the Defendants' actions including emotional distress owing to each Plaintiff's own exposure to hazardous substances and the emotional distress caused by the knowledge and witnessing of the harm forced upon other members of each Plaintiff's household and family.

COUNT V: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST ALL DEFENDANTS

129. Plaintiffs incorporate the allegations set forth above and below as though set forth fully here.

130. Each Plaintiff was exposed to a disease-causing agent or substance, including hazardous levels of lead.

131. The Defendants are responsible for exposing each Plaintiff to the disease-causing agent or substance.

132. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of contracting a future disease or illness.

133. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of a family member or other closely related person contracting a future disease or illness as the result of the exposure to disease-causing agents or substances due to the actions of the Defendants.

134. The Plaintiffs who are guardians and/or parents of other Plaintiffs have suffered the anguish and distress of witnessing injury

and infliction of exposure to hazardous substances upon the children in their care.

135. Each Plaintiff has been directly impacted by disease-causing agents or substances as a direct result of the Defendants' actions.

136. The emotional distress suffered by each Plaintiff was proximately caused by exposure to the disease-causing agent or substance.

137. Each Plaintiff's fear of contracting a disease or of a loved one contracting a disease as a result of exposure to disease-causing agents is reasonable.

138. Each Plaintiff has seen an increase in risk of disease as a result of his or her exposure to the disease-causing agent or substance.

[*Complaint* at ¶¶ 110–38].

II. Standard Governing Motions for Judgment on the Pleadings

Either party may file a Trial Rule 12(C) motion once the pleadings have closed. 22 Stephen E. Arthur, *Indiana Practice: Civil Trial Practice* § 15.13(2) (2d ed. 2007). Rule 12(C) can be a valuable method for adjudicating disputes when it is used to assess the contentions and admissions of the full body of pleadings. *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 164 (Ind. Ct. App. 2005). When, however, a Rule 12(C) motion merely challenges the sufficiency of a plaintiff's complaint, the motion is to be assessed under the same dictates as Rule 12(B)(6). *Id.* at § 15.24; *Gregory & Appel, Inc. v. Duck*, 459 N.E.2d 46, 49 (Ind. Ct. App. 1984). As the Indiana Supreme Court has summarized:

> Where, as here, no evidence outside the pleadings has been presented, Trial Rule 12(B)(6) motions to dismiss a complaint for failure to state a claim are granted "only where it is clear from the face of the complaint that under no circumstances could relief be granted." Similarly, where a

> Trial Rule 12(C) motion for judgment on the pleadings raises the same defense as a Trial Rule 12(B)(6) motion without resort to matters outside the pleadings, judgment on the pleadings is appropriate only under the same conditions. That is, the motion for judgment on the pleadings should be granted "only where it is clear from the face of the complaint that under no circumstances could relief be granted." In applying this test, we take as true all well-pled material facts alleged in the complaint.

Culver-Union Twp. Ambulance Serv. v. Steindler, 629 N.E.2d 1231, 1235 (Ind. 1994) (citations omitted). "Dismissal of a complaint under Trial Rule 12(B)(6) is disfavored generally because such motions undermine the policy of deciding causes of action on their merits." *Droscha v. Shepherd*, 931 N.E.2d 882, 887 (Ind. Ct. App. 2010). Further mirroring the 12(B)(6) standard, "all reasonable inferences" are drawn "in favor of the non-movant." *Eskew v. Cornett*, 744 N.E.2d 954, 956 (Ind. Ct. App. 2001), *trans. denied.*

The substance of the State Defendants' Motion is clearly a Rule 12(B)(6) motion raised through Rule 12(C); the only pleading mentioned is the complaint. Because this Motion is a challenge for failure to state a claim, in the unlikely event that the Court grants the Motion, Plaintiffs are entitled to amend their complaint as a matter of right within ten days of the ruling. *Davis v. Ford Motor Co.*, 747 N.E.2d 1146, 1151 (Ind. Ct. App. 2001), *trans. denied.* Were this one of the other permissible grounds for a Rule 12(C) motion, no amendment would be permitted as a matter of right. *Gregory & Appel*, 459 N.E.2d at 49 n.2.

III. Argument

The State Defendants have asked this Court take the extraordinary step of entering judgment in their favor before the Plaintiffs have even had the chance to

conduct discovery. The State Defendants' primary argument is that the claims of the 300+ Plaintiffs' for being poisoned by toxic waste at the West Calumet Housing Complex and Carrie Gosch Elementary School are barred by the statute of limitations. That argument fails for many reasons. First and foremost, **the vast majority of the Plaintiffs are minors**, whose statutes of limitations had not even begun to run when this case was filed.

As for the adult Plaintiffs, when their statutes of limitations began to run is a fact-sensitive question that can only be decided after the factual record is developed. That is exactly why two federal district judges have ruled that the claims of the West Calumet Housing Complex residents cannot be dismissed as untimely at the pleading stage. The State Defendants' reliance on *United States v. Atlantic Richfield Co.* is wholly misplaced because it had nothing to do with statutes of limitation and never looked at the accrual date of personal injury claims, just the timeliness of when intervenors seeking to weigh-in on the EPA cleanup effort in a case closed two years earlier should have sought to intervene.

The State Defendants' arguments as to immunity are equally misplaced. The claims are against them for their own actions, thereby defeating any claim for immunity under Subsection (7). And they fail to demonstrate any policy dictating that they should not warn the Plaintiffs, defeating the assertion of immunity under Subsection (10).

Finally, the challenge to the claim for Intentional Infliction of Emotional Distress also fails because the conduct of a government not warning its most-

vulnerable citizens that they are living on top of an environmental catastrophe injurious to their and their children's lives is of at least a degree of severity such that reasonable minds may differ, necessitating resolution by a jury.

A. The Statute of Limitations is Not a Basis for Judgment Because (i) the Vast Majority of the Plaintiffs Were Minors Within Two Years of Filing the Complaint; and (ii) as Chief Judge Springmann and Judge Moody for the Northern District of Indiana Held on Motions to Dismiss Claims Arising from the Same Exposure at the Complex, Determination of the Timeliness of the Adult Plaintiffs' Claims is Premature at This Procedural Juncture.

1. Pursuant to Indiana Code § 34–11–6–1, Plaintiffs Who Were Minors Within Two Years of Filing This Action Have Unquestionably Timely Brought Their Claims.

Indiana Code § 34–11–6–1 tolls statutes of limitations for persons "under legal disabilities[,]" *id.*, which "includes persons less than eighteen (18) years of age . . . ." Ind. Code § 1–1–4–5(a)(24). Accordingly, a minor's accrued claim is not untimely unless brought more than two years after reaching the age of majority. I.C. § 34–11–6–1. This action was commenced on December 4, 2017. Consequently, any Plaintiff who did not reach eighteen years of age until on or after December 4, 2015, has unquestionably timely brought his or her claim. Of the 315 Plaintiffs, 206 meet this criterion.[1] Somehow, the State Defendants completely overlooked this glaring flaw in their argument with respect to the dozens of minor Plaintiffs.

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[1] In addition to each of the 196 Plaintiffs identified in the complaint by his or her initials, which is consistent with the policy of the Indiana Court of Appeals for identifying minors, *see Franklin v. Benock*, 722 N.E.2d 874, 876 n.2 (Ind. Ct. App. 2000) ("Although A.F.'s full name appears on the appellate briefs and on other documents of record in this case, we have chosen to follow our policy of referring to minors by their initials."), Maraya Alvarez, Brytanni Auterberry, Anaiya Cobb, Jabari'EE Johnson, Theomya Jones, Joseph Perez, Chance Robinson, Aniyah Smith, and Carleecia Wiseman-Echols also satisfy the criterion.

In a similar action pending before the United States District Court for the Northern District of Indiana, Judge Moody correctly observed that statute-of-limitations arguments for lead exposure at the West Calumet Housing Complex would not be proper against minors. *Walker v. City of East Chicago*, No. 2:16-CV-367, 2017 U.S. Dist. LEXIS 160729, at *40 n.5, 2017 WL 4340259 (N.D. Ind. Sep. 29, 2017) ("ARCO correctly recognizes that, under Indiana law, the statute of limitations is tolled for minor children until they reach the age of majority (see Ind. Code §§ 1-1-4-5(a)(24), 34-11-6-1), and therefore limits their argument to claims brought by the adult plaintiffs.").

Therefore, the State Defendants' argument patently fails when applied to those Plaintiffs who were not adults when this case was filed or who have become adults since December 4, 2015.

2. As Chief Judge Springmann and District Judge Moody Held in Other Actions Stemming from This Environmental Catastrophe, it is Premature to Determine the Timeliness of the Adult Plaintiffs' Claims at This Juncture.

Defendants' arguments regarding the adult Plaintiffs fare no better. Just as the Northern District of Indiana found when considering the exact same circumstances in *Rolan v. Atlantic Richfield Co.* and *Walker v. City of East Chicago*, it would be, at best, premature to decide the adults' statutes of limitations at the pleading stage.

"Generally, considering a statute of limitations on a motion to dismiss is inappropriate. A statute of limitations represents an affirmative defense. Because a plaintiff need not anticipate or allege facts that would defeat affirmative defenses, a

court typically cannot dismiss a complaint for failure to satisfy a statute of limitations until summary judgment." *FDIC v. Kime*, 12 F. Supp. 3d 1113, 1118 (S.D. Ind. 2014) (citation omitted).

> As the Indiana courts recognize, the date upon which a plaintiff "discovered facts which, in the exercise of ordinary diligence, should lead to the discovery of [causation] and resulting injury, is often a question of fact." *Van Dusen v. Stotts*, 712 N.E.2d 491, 499 (Ind. 1999). Generally, though, the plaintiff's suspicion, standing alone, about the source of her injury is insufficient to trigger the onset of the limitations period. *See Evenson*[*v. Osmose Wood Preserving Co.*, 899 F.2d 701, 705 (7th Cir. 1990)]; *Van Dusen*, 712 N.E.2d 491 at 499.

Nelson v. Sandoz Pharm. Corp., 288 F.3d 954, 966 (7th Cir. 2002).

In the context of exposure to injurious substances, Indiana applies a discovery rule such that "the statute of limitations . . . commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another." *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87–88 (Ind. 1985). Instructive in the exposure context is *Reed v. City of Evansville*, 956 N.E.2d 684 (Ind. Ct. App. 2011), *trans. denied.*

There, a family purchased a home in 2003. *Id.* at 688. "At some point, a discussion with their neighbors led them to believe that a sewer line ran underneath their home, and in March 2007, Steve Reed inquired of the City's contract operator for its sewer system whether this was true." *Id.* "The City confirmed the presence of the sewer line and obtained the Reeds consent to investigate whether it caused or was causing any environmental problems." *Id.* An investigation by the City "found mold in the crawlspace under the Reeds' home

among other problems[,]" in April 2007, but the owners were not informed of the finding. *Id.* at 689. "The City's examination also revealed a leak or breach where the Reeds' 'lateral connection' exited the home." *Id.* "From May to July 2007, the City worked on sealing off the sewer line underneath the Reeds' home, repairing the lateral connection, constructing an additional lateral line at the edge of the Reeds' property, and repairing and constructing a new driveway." *Id.*

> During roughly the same time period, in early 2007, the Reeds detected an odor in their home and hired SWAT Pest Management, Inc. ("SWAT") to investigate. SWAT issued a report to the Reeds on April 3, 2007, which indicates it found mold and that the sump pump (a device used to remove water accumulated in a basement) was not working properly. SWAT attempted to remove the mold but largely failed.
>
> The Reeds continued to have problems with mold, and in May 2008, the Reeds hired Happe & Sons Construction, Inc. ("Happe") to estimate the cost of the demolition and removal of the Reeds' current home and reconstruction of the same home in the same location. Steve Reed stated in an affidavit that "a representative of" Happe told him the "persistent mold and moisture condition was due to" the sewer line.

Id.

The Reeds filed a tort claim notice on June 7, 2008 for health problems they experienced as a result of mold exposure and filed suit July 29, 2008. *Id.* The City argued that summary judgment was merited because the notice was untimely, and the trial court agreed. *Id.* at 690.[2] The Indiana Court of Appeals, however, reversed. *Id.* at 691–93. The court explained:

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[2] The accrual date triggering the notice requirement under the Indiana Tort Claims Act is the same as that of the underlying cause of action itself. [*State Defendant's Memorandum* at 15] ("Indiana courts have held that the standard for addressing the timing of a loss under the Indiana Tort Claims Act is the same as the standard for determining the date of accrual with respect to the applicable statute of limitations." (citing *Garnelis v. Ind. State Dep't of Health*, 806 N.E.2d 365, 371 (Ind. Ct. App. 2004)).

Our supreme court has clarified that a claim subject to the discovery rule accrues when a plaintiff is informed of a "reasonable possibility, if not a probability" that an injury was sustained as a result of the tortious act of another, and that a person's "mere suspicion or speculation" as to causation of an injury is insufficient to trigger accrual. Degussa Corp. v. Mullens, 744 N.E.2d 407, 411 (Ind. 2001) (citation omitted).

This discovery rule allows suit by persons who "have a fair opportunity to investigate available sources of relevant information and to decide whether to bring their claims in court within the time limitations in the statute." Barnes v. A.H. Robins Co., Inc., 476 N.E.2d 84, 88 (Ind. 1985). . . .

The proper question is: when, in the exercise of ordinary diligence, did the Reeds learn of a reasonable possibility, if not a probability — and not by mere speculation or suspicion — that a causal relationship existed among the mold, the sewer line, and their injuries? See Degussa, 744 N.E.2d at 411.

Before answering this question, we pause to review a pre-*Degussa* decision, Allied Resin Corp. v. Waltz, 574 N.E.2d 913 (Ind. 1991). In Allied Resin, the primary issue was when the plaintiff knew or should have discovered that his alleged injury was caused by his exposure to chemicals at the place of his employment. The plaintiff's employer argued the plaintiff knew or should have discovered the causal relationship following an early visit to a doctor, who told the plaintiff that exposure to chemicals "possibly caused" the plaintiff's condition. *Id.* at 915. Our supreme court concluded the plaintiff did not know of the causal relationship until a subsequent diagnosis by another doctor, and that due to conflicting designated evidence, there was a genuine issue of material fact as to whether the plaintiff should have discovered the causal relationship earlier. This was a "fact-sensitive question . . . appropriate for resolution by a jury with appropriate instruction from the trial court." Id.

* * * * *

The designated evidence shows the Reeds were aware of the sewer line below their home, the mold, and their health problems in early 2007, but no designated evidence establishes that the Reeds could have discovered a reasonable possibility of a causal relationship. The designated evidence is conflicting as to whether, if at all, the Reeds were aware that the mold found in early 2007 was the same type as that which caused their health problems or property damage or revealed in any way that it was caused by the existence of or seepage from the sewer line. In addition, although not singularly determinative, the City does

> not direct us to designated evidence suggesting the Reeds knew the sewer's lateral connection to their home was at one time defective.
>
> * * * * *
>
> Liberally construing the designated evidence and reasonable inferences in favor of the Reeds as non-movants, we hold that a genuine issue of fact remains as to whether, in the exercise of ordinary diligence, the Reeds could have discovered a reasonable possibility of a causal relationship among the sewer line, the mold, and their health problems before mid-December 2007, which was 180 days before they provided notice in June 2008.

Id. at 691–93 (emphasis in original).

Here, the July 25, 2016 Letter from Mayor Anthony Copeland was the triggering event that allowed the Plaintiffs to understand that there was a reasonable possibility, if not a probability, that their injuries were caused by the Defendants' tortious acts. [*Complaint* at ¶¶ 40 & 70]. Before then, just like *Reed*, the Plaintiffs could not make the causal connection between their injuries and the tortious conduct of others. As alleged in the Complaint:

> 71. Prior to the letter, each Plaintiff did not know that he or she had been exposed to hazardous levels of lead or other toxins at the Complex.
>
> 72. Prior to the letter, each Plaintiff did not know that he or she had been injured by his or her exposure to hazardous levels of lead or other toxins at the Complex.

[*Id.* at ¶¶ 71–72]. And, like *Reed*, even if the Plaintiffs had some knowledge of the presence of lead, it is not enough to simply know of the condition; they must have sufficient information from which to identify the causal relationship. As the Complaint alleges:

> 77. As the July 6, 2016 EPA flyer acknowledged, "Lead is a naturally occurring heavy metal. It is commonly found at low levels in soil. Low levels of lead can be found in the air, water, food and dust in

> cities because of the widespread use of lead in man-made products. The federal government regulates the amount of lead in the air, water and soil. The levels of lead at the West Calumet Housing Complex are much higher than normal levels because of past industrial operations at the property."
>
> 78. The mere knowledge of lead in the soil meant nothing absent an understanding that the levels were dangerous to human health and wellbeing.

[*Id.* at ¶¶ 77–78].

Although the Defendants completely fail to mention it, their exact arguments were rejected by both Chief Judge Springmann in *Rolan v. Atlantic. Richfield Co.*, No. 1:16-CV-357-TLS, 2017 U.S. Dist. LEXIS 117437, at *31–36, 2017 WL 3191791 (N.D. Ind. July 26, 2017), or Judge Moody in *Walker v. City of East Chicago*, 2017 U.S. Dist. LEXIS 160729, at *37–40. Each of these cases arose in the same posture as Defendants' Motion, each pertained to former residents of the West Calumet Housing Complex, and each ruled that dismissal on statute-of-limitations grounds was inappropriate.

Just over a year ago, Chief Judge Springmann rejected the exact argument made by the State Defendants here. In rejecting the argument, she wrote:

> Whether the Plaintiffs' state law claims involve personal injury or property damage, Defendant DuPont argues that the Plaintiffs' claims are barred by the statute of limitations. An action for personal injury must commence within two years of the time the cause of action accrues and an action for property damage must commence within six years of the time the cause of action accrues. Once "a claimant knows or in the exercise of ordinary diligence should have known of the injury," the limitations period begins to run. "[A] motion to dismiss based on [the] failure to comply with the statute of limitations should be granted only where the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense."

Offering ample evidence from the public record, Defendant DuPont argues that the Plaintiffs knew or should have known of West Calumet contamination more than six years before bringing their claims. . . . For their part, the Plaintiffs argue that their claims are not barred under Seventh Circuit precedent. They argue that none of the factual allegations in the Complaint itself show that the Plaintiffs "clearly had notice of their claims outside of the limitations period."

The Court does not find that this evidence put forth by Defendant DuPont shows that the Plaintiffs' causes of action accrued outside the statute of limitations period. The evidence that Defendant DuPont attached to its Motion all relates to the EPA's plan in 2012. At that time, the Plaintiffs were notified that there would be a clean-up in their community and that EPA was organizing it. However, the Plaintiffs were under the impression that the clean-up would not impact their homes or require them to move. Although the Plaintiffs knew as early as 2012 that the Defendants' conduct was the reason for the clean-up, they did not know or have reason to suspect that the Defendants' conduct had harmed them in any tangible way. Indeed, the EPA's statement that "residents . . . will no longer be exposed to soil that poses a threat to human health," and that "land use of the properties will remain unchanged" as a result of its remediation, all support this assumption of the Plaintiffs.

But, that all changed in the Summer of 2016, when the Plaintiffs received different messages from governmental entities. One governmental actor advised them of hazardous substances on their properties, but then subsequently advised them to try to stay indoors, while others warned them that they had to relocate immediately, and that the EPA's "work is on hold" until there is more clarity with regard to the situation. It appears that this confusion could have been because the contamination of lead and arsenic at West Calumet was greater than previously anticipated, necessitating changes to the government's response. As such, the Plaintiffs only discovered how and how much the Defendants' conduct had harmed them—by incurring costs to investigate the contamination, "arrang[ing] for alternative temporary housing and relocations," and fearing future injuries from greater-than-anticipated levels of exposure—in Summer 2016, after the relevant authorities notified them.

Furthermore, the allegations on the face of the Complaint do not clearly show that the Plaintiffs "knew, or reasonably should have known" that they accrued nuisance and negligence claims against the Defendants outside of the statute of limitations period. For the Court to

> make such a determination at this stage would require a factually intensive endeavor, and thus inappropriate for a motion to dismiss.

Rolan, 2017 U.S. Dist. LEXIS 117437, at *31–36 (citations omitted). Two months later, Judge Moody adhered to the exact same logic and reasoning as Chief Judge Springmann and denied a similar motion to dismiss on statute-of-limitations grounds. *Walker*, 2017 U.S. Dist. LEXIS 160729, at *37–40.

The only "contrary" authority to which the State Defendants can point is the order denying intervention into the EPA enforcement action in *United States v. Atlantic Richfield Co.*, 324 F.R.D. 187 (N.D. Ind. 2018). But that order neither makes mention to nor even remotely considers any statute-of-limitations arguments. Instead it dealt entirely on "[i]ntervention in a case that has been closed for two years, and where there are settled expectations by the parties[.]" 324 F.R.D. at 189. The case was decided pursuant to Rule 24 of the Federal Rules of Civil Procedure, *id.* at 191,[3] not under the dictates of Rule 12, as *Rolan* and *Walker* were.

It did not even determine a statute-of-limitations accrual date because that is not the standard under Rule 24. Instead, Magistrate Judge Cherry's recommendation, which was on appeal to District Judge Simon, found that "the applicants had notice that their rights might be impaired by this litigation when the proposed Consent Decree was filed with the Court, published in the *Federal*

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[3] The standard for intervention governing that decision was provided by Rule24 of the Federal Rules of Civil Procedure. *Id.* at 191 "Under Rule 24(a), applicants must demonstrate that: (1) the application is timely; (2) the applicants have an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may impair or impede the applicants' ability to protect that interest; and (4) no existing party adequately represents the applicants' interest." *Id.* (citations omitted). The case never once mentions statutes of limitations.

Register, and summarized in EPA and Department of Justice press releases, and again when the final Consent Decree was accepted, mailed to residents, and discussed in the local newspaper. Yet, they still waited two years to intervene." *Id.* at 193. But "notice that their rights" relating to the EPA property cleanup "might be impaired" is a far cry from the "'reasonable possibility, if not a probability' that an injury was sustained as a result of the tortious act of another" necessary for accrual of a personal-injury cause of action. *Reed*, 956 N.E.2d at 691 (quoting *Degussa*, 744 N.E.2d at 411).

Put simply, the two federal courts to have considered the question of the statute of limitations in this exact context have said, consistent with Indiana law, that it could not be resolved on the pleadings. Either unaware or wanting to ignore these extraordinarily on-point decisions, the State Defendants try to oversell a decision addressing a different issue in a different procedural posture. Judge Simon's order is not even remotely unclear; it deals exclusively with intervention not accrual of a cause of action for personal injury.

B. Claim Preclusion (i.e. Collateral Estoppel) Does Not Apply Because *United States v. Atlantic Richfield Co.* Did Not Adjudicate Any Issues Relating to Statutes of Limitations; Notice of the Existence of the EPA Action is Wholly Distinct from Discovering the "Possibility, if not Probability" of Injuries Caused by the Tortious Acts of Others; There Was No Privity Between Plaintiffs and the Intervenors; and the Case Does Not Affect the Claims of the Minors Plaintiffs

Next the State Defendants contend that this case is subject to issue preclusion—classically known as collateral estoppel—on the issue of accrual of the statute of limitations because of the ruling in *United States v. Atlantic Richfield Co.*

The argument, however, is built on an obvious and fatal flaw.

The State Defendants argue:

> The question of whether the parties to Atlantic Richfield Co. were precluded from suit based upon accrual of the statute of limitations was necessarily adjudicated in that case. The district court held oral argument on the issue and issued a lengthy and well-reasoned opinion addressing the issue of the statute of limitations on the merits. Ultimately the intervenors' motion was denied on the sole grounds that the statute of limitations had passed in July 2014 at the latest.

[*State Defendants' Memorandum* at 14] (citations omitted). Thus, the entire proposition comes down to the assertion that "the passing of the statute of limitations was *necessarily adjudicated*" in that case. But the *Atlantic Richfield Co.* opinion literally says none of those things. It never mentions the statute of limitations; it never mentions an accrual date; it never mentions July 2014; and, above all else, it did not weigh in at all on the accrual of the statute of limitations for Plaintiffs claims here.

The reason it does not is simple: the issue there was whether to permit citizens concerned with the EPA cleanup process at the USS Lead Superfund Site to intervene under Rule 24 of the Federal Rules of Civil Procedure in a case that had been closed two years before. *Atl. Richfield*, 324 F.R.D. at 191 ("Applicants seek to intervene in this matter via three avenues: Rule 24(a) and Rule 24(b) of the Federal Rules of Civil Procedure and § 113(i) of CERCLA.").[4] Whether discretionary intervention is appropriate requires a would-be intervenor to show: "(1) the

[4] The CERCLA intervention standard is essentially identical to that of Rule 24. *Id.* ("The only difference in these two provisions is that, under CERCLA, the burden for meeting the fourth factor — that no existing party adequately represents that applicants' interest — is the government's burden.").

application is timely; (2) the applicants have an interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may impair or impede the applicants' ability to protect that interest; and (4) no existing party adequately represents the applicants' interest." *Id.* at 191.

Timeliness in the intervention context is unrelated to the statute of limitations. *Red Rock Commodities v. M/V Kopalnia Szombierki*, 92 Civ. 6016 (LMM), 1994 U.S. Dist. LEXIS 11288, at *6, 1994 WL 440822 (S.D.N.Y. Aug. 12, 1994) ("As an initial matter, however, the Court notes that the statute of limitations does not have any talismanic significance with respect to the issue of timeliness."). It is "a determination to be made from all the circumstances." *Atl. Richfield*, 324 F.R.D. at 191 (citation and quotation marks omitted). It is not "a binary inquiry. Instead . . . it involves digesting various bits of information and arriving at a reasonable conclusion based on things like the length of time the intervenor knew or should have known of her or his interest in the case; the extent of the prejudice to the original litigating parties from the intervenor's delay; the extent of prejudice to the would-be intervenor if her or his motion is denied; and any usual circumstances.'" *Id.* (citation omitted).

Although timeliness was litigated, the statute of limitations was not. And that distinction is fatal to the State Defendants' argument. That is because "the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Issue preclusion does not extend to matters that were not expressly adjudicated and can be inferred only by argument." *Musgrave v.*

Squaw Creek Coal Co., 964 N.E.2d 891, 898 (Ind. Ct. App. 2012), *trans. denied.* The statute of limitations for the Plaintiffs' personal injury claims literally was "not expressly adjudicated."

But there is a much deeper flaw to the State Defendants' contention: that is what was at issue in the EPA action. As Judge Simon summarized:

> *This case concerns the Environmental Protection Agency's longstanding efforts to clean up a number of residential areas of East Chicago, Indiana* that, for decades, have been known to be polluted by the defendants, Atlantic Richfield Company and E.I. Du Pont De Nemours and Company. In the fall of 2014, the United States and the State of Indiana brought this action and simultaneously filed a Consent Decree. After holding a hearing on the proposed decree, I decided that it was fair and reasonable, approved the Consent Decree and promptly closed the case. Two years went by, and work began on the clean up of the affected areas. But somewhere along the way, a group of citizens became understandably frustrated with the lack of progress being made by the EPA. This frustration was borne out of the news that some citizens would have to evacuate their homes due to contamination levels more severe than previously thought.

Atl. Richfield Co., 324 F.R.D. at 189 (emphasis added). That is, the issue was cleanup of the contaminated land. The interest that "[t]he Magistrate Judge found that . . . the applicants first learned of . . . in July 2012" was the interest in the EPA cleaning up the property, not the "possibility, if not probability" that they had been physically injured by the tortious acts of others.

In fact, Chief Judge Springmann explained this exact point in denying the motion to dismiss in *Rolan*:

> The Court does not find that this evidence put forth by Defendant DuPont shows that the Plaintiffs' causes of action accrued outside the statute of limitations period. The evidence that Defendant DuPont attached to its Motion all relates to the EPA's plan in 2012. At that time, the Plaintiffs were notified that there would be a clean-up in their

> community and that EPA was organizing it. However, the Plaintiffs were under the impression that the clean-up would not impact their homes or require them to move. Although the Plaintiffs knew as early as 2012 that the Defendants' conduct was the reason for the clean-up, they did not know or have reason to suspect that the Defendants' conduct had harmed them in any tangible way. Indeed, the EPA's statement that "residents . . . will no longer be exposed to soil that poses a threat to human health," and that "land use of the properties will remain unchanged" as a result of its remediation, all support this assumption of the Plaintiffs.
>
> But, that all changed in the Summer of 2016, when the Plaintiffs received different messages from governmental entities. One governmental actor advised them of hazardous substances on their properties, but then subsequently advised them to try to stay indoors, while others warned them that they had to relocate immediately, and that the EPA's "work is on hold" until there is more clarity with regard to the situation. It appears that this confusion could have been because the contamination of lead and arsenic at West Calumet was greater than previously anticipated, necessitating changes to the government's response. As such, the Plaintiffs only discovered how and how much the Defendants' conduct had harmed them—by incurring costs to investigate the contamination, "arrang[ing] for alternative temporary housing and relocations," and fearing future injuries from greater-than-anticipated levels of exposure—in Summer 2016, after the relevant authorities notified them.

Rolan, 2017 U.S. Dist. LEXIS 117437, at *34–35 (citations omitted).

Further, the argument fails due to lack of privity between the would-be intervenors and the Plaintiffs in this case. Privity will be found where either the party to the subsequent action controlled the prior action or had its "interests [ ] represented by a party to the action." *Thrasher Buschmann & Voelkel, P.C. v. Adpoint, Inc.*, 24 N.E.3d 487, 497 (Ind. Ct. App. 2015) (citation and quotation marks omitted). That will occur only where "an entity is 'so identified in interest with another that he represents the same legal right.'" *Id.* (citation omitted).

It is not enough that a prior action advanced interests that would have been

advantageous to the party in the second action. That distinction is well exemplified by *Marsh v. Rodgers (In re Rodgers)*, 659 N.E.2d 171, 172–74 (Ind. Ct. App. 1995). There, a paternity action was commenced in Kentucky by the Commonwealth of Kentucky and the child's mother because the mother was a recipient of state benefits, which "obliged her to cooperate in the establishment of paternity against the alleged father. The parties negotiated a cash settlement of one thousand dollars, though Marsh never admitted paternity, and the action was dismissed with prejudice . . . ." *Id.* at 172. Fifteen years later, the child, through the mother, brought a petition to establish paternity in Indiana. *Id.* The father argued that the prior action in Kentucky barred the Indiana action. *Id.* The Indiana Court of Appeals determined that there was no privity between the child, who was the party at interest in the Indiana action, and either the Commonwealth of Kentucky or his mother in the Kentucky action. *Id.* at 173–74. The court explained:

> Michael was about two months old when the Kentucky complaint was filed, so he presumably did not "control" the action. The Kentucky action was initiated by the Commonwealth because Rodgers was receiving Aid for Dependent Children from the Commonwealth for Michael's support. By applying for AFDC benefits, Rodgers agreed to cooperate in the establishment of paternity against the alleged father under penalty of law, and the action was initiated primarily, if not solely, for purposes of collecting child support. The Jefferson County Attorney's complaint asked that Marsh be declared the father of Michael, and it asked for a reasonable sum for Michael's support, education, and maintenance, and for the reasonable expenses of Rodgers's pregnancy and confinement.
>
> Michael's interests were not identical to those of Rodgers, who was applying for AFDC benefits, nor those of the Commonwealth, which was seeking to limit its AFDC expenditures. *See Matter of Paternity of J.J.H.* (1994), Ind.App., 638 N.E.2d 815, 817, *reh'g denied, transfer denied* (noting that while a paternity action allows a child to secure a number of economic benefits from the father, the only interest the Department

> of Public Welfare has in a child's paternity action is the collection of child support). We have recognized that a child's interests in a paternity action can vary from those of the parents or the State in a number of significant ways:
>
> > The child's interests in a paternity determination include inheritance rights, social security survivor benefits, employee death benefits, and in some instances, proceeds of life insurance policies. A child's interests may also include the establishment of familial bonds, indoctrination into cultural heritage, and knowledge of the family's medical history.
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> *Clark v. Kenley* (1995), Ind.App., 646 N.E.2d 76, 79, *transfer denied.*

Id. at 173.

Like *Marsh*, the case before this court seeks to advance remedies—monetary damages—and interests—recovery for personal injury—that were not at issue in *Atlantic Richfield* or advanced by the intervenors whose focus was upon an increased say in the EPA cleanup effort. Just as in *Marsh*, there is no privity between the Plaintiffs and the *Atlantic Richfield* would-be intervenors because they sought to advance different interests, sought different remedies, and sought to recover for wholly different injuries.

And finally, as with the statute of limitations argument above and the notice of tort claim argument below, the State Defendants' argument has no merit at all when applied to the minor Plaintiffs. The State Defendants do not contend—because they cannot—that *Atlantic Richfield* held that the Plaintiffs' statute of limitations has passed. Instead, what they argue is that the *Atlantic Richfield* court held that cause of action accrued in July 2012. Even if the myriad flaws in that contention were ignored, it still does not change the fact that a minor has until two

years after reaching the age of eighteen to file suit. I.C. § 34–11–6–1.

C. The Indiana Tort Claims Act Does Not Provide a Basis for Dismissal Because Notice was Timely, Liability is Sought for the Actions and Inactions of the State Defendants Themselves, and there has been No Showing that the Failure to Warn was a Conscious Decision Involving the Exercise of Social, Economic, or Political Policy.

1. In Claiming the Tort Claim Notice was Untimely, the State Defendants Build Their Entire Argument on Impermissible Assertions Beyond the Pleadings; But Even if Accepted, the Argument Fails for the Same Reasons the Statute-of-Limitations Argument Fails.

The State Defendants' entire argument claiming that the tort claim notice was untimely must fail at this procedural juncture because there is no mention in the pleadings of a tort claim notice and when it was tendered. Every reference to dates of tort claim notices in the State Defendants' Memorandum is necessarily an assertion from beyond the pleadings and beyond the scope of their Motion. *Gregory & Appel*, 459 N.E.2d at 49 ("When considering a 12(C) motion directed to the merits, the court is confined solely to the pleadings to make the determination."); *see, e.g.*, *Taleyarkhan v. Purdue Univ.*, 837 F. Supp. 2d 965, 968–69 (N.D. Ind. 2011) (rejecting contentions of defendant that went beyond the pleadings as to notice of tort claim). There is no obligation to plead facts relating to a tort claim notice in a complaint. *Taleyarkhan*, 837 F. Supp. 2d at 968–69. [5]

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[5] Plaintiff's complaint does not contain facts regarding whether he did or did not provide defendant with the appropriate notice under the ITCA. However, "complaints need not anticipate and attempt to plead around defenses." True, "[a] litigant may plead itself out of court by alleging (and thus admitting) the ingredients of a defense," but a plaintiff's omission of facts from his complaint which would ultimately defeat an affirmative defense does not justify dismissal. Accordingly, plaintiff's silence on the ITCA in his complaint is not dispositive.

But even if we accept the October 27, 2016 date that the State Defendants advance, it is still not a basis for judgment on the pleadings. First, it does not impact the claims of any Plaintiffs who had not reached 18 years of age as of January 31, 2016—i.e., 270 days prior. The Indiana Supreme Court has "held 'the status of minority qualifies a person as "incapacitated" and postpones the deadline for the required notice of tort claim . . . .'" *City of Indianapolis v. Hicks*, 932 N.E.2d 227, 234 (Ind. Ct. App. 2010) (quoting *South Bend Community Sch. Corp. v. Widawski*, 622 N.E.2d 160, 162 (Ind. 1993)), *trans. denied.* Of the 315 Plaintiffs, 204 meet this criterion.[6]

Second, the exact same reasons that prohibit judgment on statute-of-limitation grounds applies with equal force to the tort claim notice. As the State Defendants acknowledge, "Indiana courts have held that the standard for addressing the timing of a loss under the Indiana Tort Claims Act is the same as the standard for determining the date of accrual with respect to the applicable statute of limitations." [*State Defendants' Memorandum* at 15] (citing *Garnelis v. Ind. State Dep't pf Health*, 806 N.E.2d 365, 371 (Ind. Ct. App. 2004)). Thus,

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> Defendant argues that plaintiff never provided notice of his tort claims to defendant prior to filing this lawsuit, providing the declaration of Roseanna Behringer, Secretary of the Board of Trustees of Purdue University, in support of its argument. The court's duty in evaluating a motion to dismiss is to evaluate the sufficiency of the complaint, not to examine evidence outside of the pleadings. The court could not consider Behringer's declaration unless it first converted defendant's Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment and allowed a reasonable time for both parties to submit materials pertinent to the motion.

Id. (citations omitted).

[6] In addition to each of the 196 Plaintiffs identified in the complaint by his or her initials, Maraya Alvarez, Anaiya Cobb, Jabari'EE Johnson, Theomya Jones, Joseph Perez, Chance Robinson, and Aniyah Smith also satisfy the criterion.

accepting the October 2016 date, the adult Plaintiffs timely filed their Tort Claim if their claims accrued on or after January 31, 2016. If, as Plaintiffs allege, they did not discover the causal connection between their injuries and the Defendants' tortious acts until the summer of 2016, [*Complaint* at ¶¶ 70–78], then their notice of Tort Claim was necessarily timely.

Given the Court's limited basis for inquiry at this procedural juncture, it is not possible to resolve the issue in the State Defendants' favor at this time.

2. Because the Actions for Which Liability is Alleged in the Complaint are the Actions of the State Defendants, They are Not Immune.

Pursuant to Indiana Code § 34–13–3–3(10), governmental entities are immune "in 'actions seeking to impose vicarious liability by reason of conduct of third parties' other than governmental employees acting within the scope of their employment. 'Under such circumstances, the alleged basis of governmental entity liability is the act or omission of a third person not within the scope of employment as a government employee.'" *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 481 (Ind. 2003) (citations omitted). But, "a governmental entity is not entitled to immunity pursuant to Indiana Code Section 34-13-3-3(10) if a loss results from its own negligence, that is, if a loss results from an act for which it 'can be held directly liable.'" *Bartholomew Cnty. v. Johnson*, 995 N.E.2d 666, 679 (Ind. Ct. App. 2013).

Here, Plaintiffs have squarely alleged that the State Defendants are liable due to their *own* acts. [*Complaint* at ¶ 12] ("Despite these entities' knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs'

exposure to these toxic conditions."); [*id.* at ¶ 54] (same); [*id.* at ¶ 119] ("These Defendants took no action to inform the Plaintiffs or otherwise to safeguard them from the dangerous condition."). That conduct is without doubt not subject to the immunity of Subsection (10). *See, e.g., Gary Cmty. Sch. Corp. v. Boyd*, 890 N.E.2d 794, 801 (Ind. Ct. App. 2008) ("Here, the Parents' complaint did not allege that GCSC was vicariously liable for the conduct of Burt; they alleged that GCSC was liable because of its *own* negligence in failing to exercise reasonable care and supervision for the safety of its students. Parents' claims against GCSC relate solely to the acts or omissions of GCSC's employees and not a third party. Therefore, GCSC is not entitled to immunity under IC 34-13-3-3(10)." (emphasis in original)), *trans. denied.*

Still, the State Defendants claim they are entitled to immunity because the "impetus to warn residents" fell on other parties. [*State Defendants' Memo.* at 17]. The State Defendants have cited to no authority nor has counsel for Plaintiffs been able to locate any that supports the proposition that governmental entities are entitled to immunity under Subsection (10) when other Defendants have also failed to warn. Nor would it make sense for any such authority to exist. Moreover, the State Defendants have not attempted any explanation or citation to a proposition of law that would support the assertion.[7]

Further weakening the argument is the Court of Appeals instruction that

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[7] Failure to develop an argument in a meaningful manner constitutes waiver. *See, e.g., Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), *trans. denied*; *Yudkin v. Rubenstein*, No. 1:14-cv-02119-JMS-DML, 2016 U.S. Dist. LEXIS 1746, at *5, 2016 WL 70848 (S.D. Ind. Jan. 6, 2016).

"[g]overnmental entities and their employees are subject to liability for torts committed by them unless they can prove that one of the immunity provisions of the ITCA applies. Because the ITCA is in derogation of the common law, we construe it narrowly against the grant of immunity. The party seeking immunity bears the burden of establishing its conduct comes within the Act." *Bartholomew Cnty. v. Johnson*, 995 N.E.2d at 671–72 (footnote, citation, and formatting omitted).

Accordingly, the State Defendants have no immunity under Subsection (10).

3. The Consent Decree Does Not Provide a Basis for Discretionary Function Immunity for the Indiana Department of Health Because it Was Not a Party to the Consent Decree; and it Does not Provide Immunity for the Other State Defendants Because It Does Not Prohibit Warnings or Otherwise Show that the Failure to Warn was a Conscious Decision Involving the Exercise of Social, Economic, or Political Policy.

As the Court is aware from prior briefing and argument,[8] the Indiana Tort Claims Act provides immunity for governmental entities engaged in "[t]he performance of a discretionary function[.]" Ind. Code § 34–13–3–3(7). The test utilized by the Indiana Supreme Court for determining when such immunity will apply looks to whether the conduct was planning or operational. *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 45 (Ind. 1988).

> Under the planning/operational dichotomy, the type of discretion which may be immunized from tort liability is generally that attributable to the essence of governing. Planning activities include acts or omissions in the exercise of a legislative, judicial, executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing

[8] The law on Discretionary Function Immunity was extensively briefed to this Court in Plaintiffs' *Response in Opposition to Defendant East Chicago Housing Authority's Motion to Dismiss* (Apr. 17, 2018).

> public policy. Government decisions about policy formation which involve assessment of competing priorities and a weighing of budgetary considerations or the allocation of scarce resources are also planning activities.

Id. "[W]hen no policy oriented decision-making process has been undertaken[,]" the governmental actor is exposed to liability. *Id.* at 47; 21 I.L.E., *Mun. Corps.* § 273 ("[T]he discretionary nature of a decision must be determined on a case-by-case basis because, rather than the decision itself being discretionary, it is the absence of a 'policy oriented decision-making process' that exposes a government entity to tort liability." (citations omitted)); *see, e.g.*, *Witco Corp.*, 762 F. Supp. at 837 ("Allowing the buildings . . . to remain empty was not a decision arising out of the weighing of priorities and alternatives, but was merely an operational decision, or indeed was the consequence of no decision having been made at all.").

The governmental entity claiming immunity bears the burden to "show[ ] that its omission was an official 'policy decision made by consciously balancing risks and benefits.'" *City of Beech Grove v. Beloat*, 50 N.E.3d 135, 136 (Ind. 2016) (quoting *Peavler*, 528 N.E.2d at 46). Although application of discretionary function immunity is a question of law, resolution of that question "'may require an extended factual development.'" *Birge v. Town of Linden*, 57 N.E.3d 839, 845 (Ind. Ct. App. 2016) (quoting *Peavler*, 528 N.E.2d at 46). Such factual questions cannot be resolved on a motion to dismiss. *Theis v. Heuer*, 264 Ind. 1, 5, 280 N.E.2d 300, 302 (1972); *see, e.g.*, *Birge*, 57 N.E.3d at 843–45.

Here, the Plaintiffs allege that the State Defendants failed to warn or take any other actions to protect the Plaintiffs. [*Complaint* at ¶¶ 12, 54 & 119]. "To show

that a failure to warn is covered by the discretionary function exception, the Government must show that the alleged failure to warn was itself a conscious decision involving the exercise of social, economic, or political policy." *Demello v. United States*, No. C16-5741 BHS, 2018 U.S. Dist. LEXIS 15867, at *9, 2018 WL 646925 (W.D. Wash. Jan. 31, 2018).[9]

The State Defendants rely exclusively on the Consent Decree filed in *United States v. Atlantic Richfield Co.*, No. 2:14-cv-312 (ECF No. 8-1) (N.D. Ind. Oct. 28, 2014). They claim that entry into the Consent Decree triggers immunity. They are wrong for two reasons: First, one of the three State Defendants, the Indiana State Department of Health, is not even a signatory or party to the Consent Decree. Accordingly, the State Defendants' arguments necessarily fail with regard to the Department of Health. And, second, nothing in the Consent Decree forecloses or otherwise addresses warnings. That is a far cry from the State Defendants carrying their burden to "show that the alleged failure to warn was itself a conscious decision involving the exercise of social, economic, or political policy." *Demello*, 2018 U.S. Dist. LEXIS 15867, at *9. Instead, "it appears that either there was no formulated policy with respect to warning residents . . . or, if there was a policy that residents be warned, it was deviated from . . . . In either instance . . . the [ ] failure to warn was operational in nature and not immune[.]" *Laws v. Water and Light Comm'n of*

[9] Authority interpreting the discretionary function immunity under the Federal Tort Claims Act is guiding to interpretation of the Indiana Tort Claims Act. *Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 949, 953 (Ind. Ct. App. 2000) ("Although we are not bound by the decisions of courts that have interpreted a similar provision of immunity under the [FTCA] we find those cases instructive."), *trans. denied.*

the Town of Greeneville, No. E2002-01152-COA-R3-CV, slip op. at 6–7, 2003 Tenn. App. LEXIS 631, 2003 WL 22071548 (Tenn. Ct. App. May 8, 2003).[10]

For these reasons, discretionary function does not apply.

D. Because Reasonable Minds Can At Least Differ as to Whether a Government Standing Silent While Knowing Many of its Most-Vulnerable Citizens are Being Poisoned is "Extreme and Outrageous" and Whether the State Defendants Acted with Sufficient Reckless Disregard is a Question of Fact for a Jury, There Can be No Judgment on the Pleadings for the Intentional Infliction of Emotional Distress Claim.

Finally, the State Defendants ask for judgment on the pleadings as to Count IV, the claim for Intentional Infliction of Emotional Distress ("IIED"), without further development of the record, because, they argue, their conduct purportedly was not sufficiently "extreme and outrageous" and because "[t]he Plaintiffs present no allegation that the State acted with malice or any intent to harm the Plaintiffs." [*State Defendants' Memorandum* at 21].

In order to state a claim for IIED, a plaintiff must show that defendants: "(1) engage[d] in extreme and outrageous conduct (2) which intentionally or recklessly (3) cause[d] (4) severe emotional distress to [plaintiff]." *Johnson v. Marion Cnty. Coroner's Office*, 971 N.E.2d 151, 162 (Ind. Ct. App. 2012), *trans. denied.*

The deciding factor in most every IIED case is whether the conduct was "extreme and outrageous." "[T]he Indiana Court of Appeals has held '[w]hat

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[10] As explained in *Response in Opposition to Defendant East Chicago Housing Authority's Motion to Dismiss* at 15–16 (Apr. 17, 2018), *Laws* is citable before this court because it is citable pursuant to the Tennessee rules governing precedent. *Allen Cnty. Pub. Library v. Shambaugh & Son, L.P.*, 2 N.E.3d 132, 134 n.2 (Ind. Ct. App. 2014); TENN. SUPREME CT. RULE 4(G)(1). And it is informative because Tennessee has adopted the standard for discretionary function announced by the Indiana Supreme Court in *Peavler*. *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 430–31 (Tenn. 1992) (adopting *Peavler*, 528 N.E.2d at 44–45).

constitutes "extreme and outrageous" conduct depends, in part, upon prevailing cultural norms and values' and *only in appropriate cases can this determination be made as a matter of law.*" *Pilkington v. Brown & Brown, Inc.*, No. 1:12-cv-00255-TWP-MJD, 2013 U.S. Dist. LEXIS 117652, at *21, 2013 WL 4479798 (S.D. Ind. Aug. 20, 2013) (quoting *Bradley*, 720 N.E.2d at 753) (emphasis added; second alteration in original).

When it is a close a call on which reasonable minds may differ, courts do not supplant their understandings of cultural norms for that of jurors. Restatement (Second) of Torts § 46, cmt. h ("Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability."); *see, e.g.*, *Bradley v. Hall*, 720 N.E.2d 747, 753 (Ind. Ct. App. 1999) ("In the appropriate case, the question can be decided as a matter of law. In this case, however, we decline to make that determination. . . . Reasonable persons may differ on the questions of whether Hall's conduct was extreme and outrageous and, if so, whether that conduct caused Bradley to suffer severe emotional distress." (citations omitted)); *Johnson*, 971 N.E.2d at 163 ("The Coroner's Office conduct may have been reckless, disrespectful, and offensive but reasonable persons may differ on whether this conduct reaches the level of extreme and outrageous necessary to satisfy the tort.");[11] *Pilkington*, 2013 U.S. Dist. LEXIS 117652, at *21 ("Ms.

[11] The Coroner's Office's conduct in *Johnson* was removing an extremely obese woman's remains from her home on a mattress, winching her onto a flatbed truck, and covering her remains with a carpet where defendants mistakenly believed that they did not have access to suitable transportation for the body.

Pilkington has presented sufficient factual questions upon which a jury should be permitted to determine whether Mr. Elmer's conduct was extreme and outrageous."); *see also Faraclas v. Botwick*, No. CV 020459655, 2002 CT 8039, 8042, 2002 Conn. Super. LEXIS 2188 (Conn. Super. Ct. 2002) ("Reasonable minds could disagree as to the severity of the behavior alleged. This being so, this court is loath to state, as a matter of law, that the conduct of the defendants was acceptable and was within the bounds which we, in civilized society, set. Given the pertinent case law, this is, admittedly a close call. For this reason, it is a call that the trier of fact must make.");[12] *Eason v. Alexis*, 824 F. Supp. 2d 236, 244 (D. Mass. 2011) ("Whether those allegations are enough to sustain an IIED claim is a close call, especially given the subjectivity inherent in deciding whether conduct is 'extreme and outrageous' and emotional distress is 'severe.' . . . Given that precedent and viewing the record in the light most favorable to the non-moving party, Eason's allegations are sufficient to avoid summary judgment on his IIED claim[.]").

Plaintiffs allege that "the fact that residents and students were being exposed to [the pollution at the Complex and Carrie Gosch Elementary School] on a daily basis[ ] was well-known to the" State Defendants. [*Complaint* at ¶¶ 12 & 54]. Yet, "[d]espite [their] knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions." [*Id.*]; *accord*

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[12] Although *Faraclas* is not a published decision, it is still subject to citation under Connecticut's rules governing precedent and is therefore a proper source of authority for this Court. *Allen Cnty. Pub. Library v. Shambaugh & Son, L.P.*, 2 N.E.3d 132, 134 n.2 (Ind. Ct. App. 2014) (unpublished decisions from state's permitting citation to unpublished decisions may be cited to Indiana courts); Conn. Rules of Appellate Procedure Practice Book 1998 §67.9.

[*id.* at ¶ 119 ("These Defendants took no action to inform the Plaintiffs or otherwise to safeguard them from the dangerous condition."). Each State Defendant "actually knew or should have known that lead and other hazardous particles have the potential to cause serious harm to the Plaintiffs." [*Id.* at ¶ 120]. And that "The Defendants acted with reckless disregard toward the health, safety, and wellbeing of Plaintiffs and others." [*Id.* at ¶ 126].

The State Defendants suggest that their conduct is not actionable because it amounts only to an omission. But a claim for IIED does not require direct action; it may be predicated upon the inaction of a party when its inaction results in harms where societal norms dictate it outrageous that action was not taken. *See, e.g. Baldonado v. El Paso Natural Gas Co.*, 176 P.3d 277, 282–86 (N.M. 2007) (firefighters who witnessed horrific deaths of campers following fireball from rupture of pipeline could pursue IIED claim against owner of natural gas pipeline for mental anguish because pipeline owner failed to take steps to insure the safety of the pipeline, knew the consequences of such failure, had been cited for safety violations, had experienced two prior pipeline explosions, and knew pipeline was around area used for camping but owner never shared any of that information with plaintiffs). Like *Baldonado*, the State Defendants knew the risks, never shared any of that information with the Plaintiffs, and the risks were catastrophic. *Atl. Richfield*, 324 F.R.D. at 189 ("It is not hyperbole to say that this case involves nothing short of an environmental catastrophe.").

In *Snyder v. Smith*, District Judge Sarah Evans Barker concluded, "The IIED

inquiry depends inescapably on 'cultural norms and values,' and it is our judgment that contemporary society has come to recognize the profound emotional scars left by sexual assault and to abhor the barbarity of a police officer's treating a victim with callousness and derision." 7 F. Supp. 3d 842, 874 (S.D. Ind. 2014) (citation omitted)). Plaintiffs respectfully submit that the same can be said for a government standing silent while knowingly exposing its most-vulnerable citizens to toxic substances when reasonable alternatives existed. No civilized society would tolerate such actions. If the mountain of media coverage is any evidence, then there can be no doubt that the conduct alleged in the Complaint satisfies the classic definition of extreme and outrageous conduct: that "in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts § 46, cmt. d.

At the absolute least, it is a close call in which reasonable minds may differ, appropriate for resolution by the jury at trial.

The State Defendants also challenge the IIED claim as lacking sufficient allegations of intentionality. Although intentionality is an element of the tort, IIED does not require actual intent to harm emotionally. Indiana has adopted Restatement (Second) of Torts § 46, cmt. i (1965) which provides:

> *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.[13]

[13] Section 500 defines "reckless disregard of safety" as:

Bradley v. Hall, 720 N.E.2d 747, 752 n.6 (Ind. Ct. App. 1999) (quoting Restatement (Second) of Torts § 46, cmt i); *accord Chivers v. Cent. Noble Cmty. Sch.*, 423 F. Supp. 2d 835, 857 (N.D. Ind. 2006) (applying Indiana law: "[T]he Restatement of Torts explains that the tort can occur not only where an actor desires to inflict severe emotional distress, but also where he knows that such distress is certain, or substantially certain, to result from his conduct." (citations omitted)); Stuart M. Speiser et al., 4A *The American Law of Torts* § 16:14 (2009) ("There is little—if, indeed, any—dissent among the more modern decisions that infliction of 'reckless' emotional distress is equally actionable as intentional.").

The Restatement provides two illustrations of the modest barrier necessary to meet the intentionality requirement:

> 15. During A's absence from her home, B attempts to commit suicide in A's kitchen by cutting his throat. B knows that A is substantially certain to return and find his body, and to suffer emotional distress. A finds B lying in her kitchen in a pool of gore, and suffers severe emotional distress. B is subject to liability to A.
>
> 16. The same facts as in Illustration 15, except that B does not know that A is substantially certain to find him, but does know that there is a high degree of probability that she will do so. B is subject to liability to A.

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1965). While Section 500's reference to physical harm may create confusion, the illustrations to Section 46 (discussed below) make clear that comment i has no physical harm requirement.

Restatement (Second) of Torts § 46, illus. 15 & 16.

Moreover, in the context of IIED, "[i]ntent is a question of fact[.]" *Williams v. Tharp*, 889 N.E.2d 870, 879 (Ind. Ct. App. 2008), *trans. granted on other grounds*, 914 N.E.2d 756 (Ind. 2009);[14] *see, e.g.*, *Johnson*, 971 N.E.2d at 162–63 ("Construing the designated evidence in favor of D.J., and mindful of Kelly's denial of any intentional infliction of emotional distress to D.J., we find that there is a genuine issue of material fact whether the Appellees' conduct is so outrageous that it satisfies the reckless element of the tort."); *Pilkington*, 2013 U.S. Dist. LEXIS 117652, at *21–22 ("Ms. Pilkington has also presented sufficient factual questions with regard to Mr. Elmer's intent. . . . The question of whether Mr. Elmer's numerous instances of inappropriate conduct would foreseeably provoke an emotional disturbance in the mind of a reasonable person is one to be answered by a jury, not this Court.").

Plaintiffs' allegations are certainly sufficient to proceed past the pleadings on the issue of intent. Indeed, they are more robust than even those the Indiana Court of Appeals found sufficient to survive summary judgment in *Johnson v. Marion County Coroner's Office*:

> Construing the designated evidence in favor of D.J., and mindful of Kelly's denial of any intentional infliction of emotional distress to D.J., we find that there is a genuine issue of material fact whether the Appellees' conduct is so outrageous that it satisfies the reckless element of the tort. Faced with a difficult situation, Kelly requested advice from Ballew on how to transport Smith's remains. Although Ballew was

[14] Cited with approval by *Bah v. Mac's Convenience Stores, LLC*, 37 N.E.3d 539, 550 n.8 (Ind. Ct. App. 2015), *trans. denied*; *Resendez v. Prance*, No. 3:16-cv-862 JD, 2018 U.S. Dist. LEXIS 52966, at *22, 2018 WL 1531788 (N.D. Ind. Mar. 29, 2018); *Lipscomb v. Indiana*, No. 3:11-cv-00481-PPS, 2013 U.S. Dist. LEXIS 57119, at *36, 2013 WL 1729237 (N.D. Ind. Apr. 19, 2013).

> informed of Smith's obesity and the fact that Digger Mortuary Services' employees had, albeit incorrectly, opined that they were not equipped to handle the remains, Ballew did not further investigate what other resources might be available. Rather, she followed the secretary's suggestion to call a tow truck. D.J.'s designated evidence reflects that the Coroner's Office had other resources at its disposal that could have been employed to transport Smith's remains in a more dignified manner.
>
> The Coroner's Office dragged Smith's body outside on a mattress, only covered by a sheet. While an attempt was made to shield her remains from the gathering pedestrians when winching the mattress onto the truck's flatbed, designated evidence shows media footage of Smith's remains being moved onto the flat bed and covered by a dirty carpet. Interviewed witnesses expressed their indignation and outrage over the Coroner's Office treatment of Smith. . . . The Coroner's Office conduct may have been reckless, disrespectful, and offensive but reasonable persons may differ on whether this conduct reaches the level of extreme and outrageous necessary to satisfy the tort. Accordingly, as there is a genuine issue of material fact, Appellees were not entitled to summary judgment on D.J.'s claim for intentional infliction of emotional distress. We reverse the trial court and remand for further proceedings.

971 N.E.2d at 162–63.

Here, Plaintiffs allege that "[t]he pollution at the Complex and Carrie Gosch Elementary School, and the fact that residents and students were being exposed to that pollution on a daily basis, was also well-known to the" State Defendants. [*Complaint* ¶¶ 12 & 54]; *accord* [*id.* at ¶ 112] ("These Defendants each knew that the soil and air in and around the Complex and Carrie Gosch Elementary School were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances."). The State Defendants "actually knew or should have known that lead and other hazardous particles have the potential to cause serious harm to the Plaintiffs." [*Id.* at ¶ 120]. Still, the State Defendants took no action to warn, reduce, or eliminate the Plaintiffs' exposure to the toxic conditions. [*Id.* at ¶¶ 12 & 54]. "The

[State] Defendants acted with reckless disregard toward the health, safety, and wellbeing of Plaintiffs and others." [*Id.* at ¶ 126].

The State Defendants' knowledge of the pollution and the danger it posed to the Plaintiffs who resided at the locus of the pollution is sufficient to meet the high degree of probability necessary to satisfy the intentionality element.

Because there are at least questions of fact as to whether the conduct is sufficiently extreme and outrageous and whether the State Defendants acted knowing of a high degree of probability that their actions would harm the Plaintiffs, the State Defendants should not be granted judgment on the IIED claim.

III. Conclusion

For these reasons, the State Defendants' Motion for Judgment on the Pleadings should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via first-class mail on August 13, 2018:

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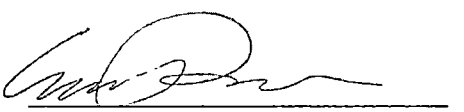

Eric S. Pavlack

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE LAKE COUNTY SUPERIOR COURT

SITTING AT HAMMOND, INDIANA

CRISTOBAL ALVAREZ, C.A. BY NEXT FRIEND CRISTOBAL ALVAREZ, et al.

Plaintiffs,

v.

STATE OF INDIANA, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; INDIANA STATE DEPARTMENT OF HEALTH; et al

Defendants.

45D05-1803-CT-3

CAUSE NO.: ~~45D05-1803-CT-0003~~

Special Judge Nanette K. Raduenz

DEFENDANTS STATE OF INDIANA, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND INDIANA STATE DEPARTMENT OF HEALTH'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants, the State of Indiana, the Indiana Department of Environmental Management and the Indiana State Department of Health, (collectively hereinafter "State Defendants"), by counsel, and pursuant to Indiana Trial Rules 12(C), file their Reply in Support of their Motion for Judgment on the Pleadings.

ARGUMENT

The State Defendants are entitled to judgment on the pleadings as to each claim set forth in the.Plaintiffs' Complaint.

I. The Plaintiffs' Claims are Barred by the Indiana Tort Claims Act and the State Defendants are Entitled to Judgment as a Matter of Law.

Each of the Plaintiffs' claims against the State Defendants are precluded by the Indiana Tort Claims Act, Ind. Code § 34-13-3 et seq. The Act provides immunity to government entities

from liability where the alleged loss results from one or more of the factual circumstances set forth in the Act, I.C. § 34-13-3-3. The question of whether a government entity is entitled to immunity is a question of law for the court. *Voit v. Allen County.*, 634 N.E.2d 767, 769 (Ind. Ct. App. 1994). In considering the application of governmental immunity, the issue of whether the act or omission of a government entity was tortious is immaterial, as immunity assumes negligence but denies liability. *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988).

A. The State Defendants are Immune from Liability for Any Loss Allegedly Resulting from the Performance of a Discretionary Function Pursuant to Ind. Code § 34-13-3-3(7).

The State Defendants are entitled to judgment as a matter of law for each allegation raised in the Plaintiffs' Complaint because "the government's failure to warn affected individuals of a health hazard is plainly a judgment which falls within the governmental immunity granted for discretionary functions." *Fairchild Republic Co. v. United States*, 712 F. Supp. 711, 716, 1988 U.S. Dist. LEXIS 16487, *11 (S.D. Ill. 1988) (citing *Cisco v. United States*, 768 F.2d 788, 788-89 (7th Cir. 1985)).

Pursuant to the Indiana Tort Claims Act, the State Defendants are immune from liability for any loss allegedly resulting from the "performance of a discretionary function." Ind. Code § 34-13-3-3(7). In determining whether the government's act or omission is considered a discretionary function, Indiana courts employ the "planning/operational" test. *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988). Acts and omissions are considered to fall into the "planning category" when they involve "official judgment, discretion, weighing of alternatives, and public policy choices," and decisions weighing "competing priorities," "budgetary considerations," and "allocation of scarce resources." *Voit v. Allen County*, 684 N.E.2d 767, 769-770 (Ind. Ct. App. 1994). A government entity is immune from liability for any alleged damages

arising from such acts and omissions regardless of whether the alleged acts or omissions could be found negligent. *Peavler* at 46.

In their Response, the Plaintiffs identify that the question of whether discretionary immunity applies to *omissions* presents a different question than when a court must address a defendant's *acts*. When the court must determine whether an *act* was discretionary in nature, the court need only look to the allegedly tortious act and consider whether the nature of that act was policy-making or operational. *Peavler* at 46. However, where an alleged *omission* is at issue, the court is presented with a different problem. To avail itself of the immunity to which it is entitled, a defendant who has allegedly committed a tortious *omission* cannot simply point to the factual circumstances surrounding a specific act, because no such act is alleged to have taken place.

Rather, in order to establish immunity, according to the Plaintiffs' reasoning, such a defendant would be required to prove that a full-scale discretionary analysis was conducted by the government anew each day on a continuous basis, each time resulting in an omission which allegedly injured the Plaintiffs. Here, the Plaintiffs' challenge to the application of discretionary immunity does just that. The Plaintiffs seem to be alleging that the State is not entitled to discretionary immunity unless the facts ultimately show a continuous reweighing and rehashing of the issue of adequately warning the Plaintiffs occurred on a continuous basis over the course of several decades. Unless it could be proven that officials of each of the State Defendants held a meeting each day between the 1980s and 2016 to reweigh in detail the sufficiency of the warnings issued to the Plaintiffs, then under the Plaintiffs reasoning, no immunity will apply. Under the Plaintiffs' reasoning, any year, month, or day upon which there was no express reweighing of the sufficiency of warnings on the part of the State Defendants would defeat immunity. Simply put, the complication is that omissions, as opposed to acts, are *continuous* in

nature – and the Plaintiffs ask this court to find that because the alleged omission was continuous, the exercise of discretion entitling the State Defendants to immunity must also have been continuous.

Thankfully, courts addressing similar factual circumstances have found such absurd factual findings are not required for a finding of discretionary function immunity. Instead, in factually similar cases involving the question of a government entity's duty to warn the public of hazards, courts have found that a failure to warn omission, by its very nature, gives rise to discretionary function immunity.

In *Cisco v. United States*, the court granted a government agency's motion to dismiss at the pleadings stage because the government's decisions on whether and when to warn the public were a discretionary function entitled to immunity. *Cisco v. United States*, 768 F.2d 788, 788-89 (7th Cir. 1985); citing 28 U.S.C. § 2680(a).[1] In *Cisco*, the members of several households in Jefferson County, Missouri, brought a tort action against the United States and the Environmental Protection Agency (EPA) for failing to warn them that a toxic chemical, tetrachlorodibenzo-para-dioxin, had been used as a residential landfill. *Id.* at 789. The plaintiffs contended that the United States and the EPA were negligent in failing to warn residents "that dirt contaminated by 2, 3, 7, 8 tetrachlorodibenzo-para-dioxin had been used as residential landfill, negligent in failing to require that the contaminated dirt be removed, and negligent in failing to protect the households from exposure to the toxin." *Id.* at 789.

The government moved to dismiss the plaintiffs' complaint on the grounds that the omissions alleged in the complaint fell within the discretionary function immunity provided by the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *Id.* at 788. The district court granted the

[1] As the Plaintiff's Response indicates, "[a]uthority interpreting the discretionary function immunity under the Federal Tort Claims Act is guiding to interpretation of the Indiana Tort Claims Act. *Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 949, 953 (Ind. Ct. App. 2000)." (Plaintiff's Response at fn 9).

government's motion to dismiss, and the plaintiffs appealed. *Id.* The United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the plaintiffs' complaint, finding the government's failure to warn the public of the contaminated residential soil was an omission immunized from suit as a discretionary function, the same immunity applicable to the State Defendants in this matter. *Id.*

In reaching its decision, the appellate court considered that none of the statutes or regulations applicable to the EPA contained a requirement that the EPA "warn property owners that residential landfalls [sic] have been contaminated by highly toxic wastes [. . .]." *Id.* at 789. Instead, statutes and regulations applicable to the EPA empowered the EPA to begin civil actions against violators responsible for dumping hazardous wastes, to test and monitor contamination, to authorize state and local officials to test and monitor contamination, and to remove hazardous wastes and provide for remedial action. *Id.*, citing 42 U.S.C. § 6902 (1976). The court found the legislature "has left to the EPA to decide the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous wastes." *Id.*

In *Cisco*, the court found that when "an agency makes decisions regarding the supervision of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985) (citing *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 820 (1984)).

> Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.... Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

Id.

In *Cisco*, the court held that in "deciding not to warn Cisco about the contaminated landfill and in deciding not to remove the contaminated dirt from the landfill, the EPA made political, social and economic judgments pursuant to its grant of authority." *Id.* at 789-90. The plaintiffs were not permitted to "challenge those judgments under [Federal Tort Claims Act] because they fall within the discretionary function exception." *Id.* at 790. Such issues are properly decided at the pleadings stage because the nature of a decision not to provide additional warning to the Plaintiffs necessarily implicates political, social, and economic judgments on the part of government defendants. *Id.*

Likewise, here, the Plaintiffs have not identified any specific requirement, and the Indiana legislature has imposed no specific requirement, upon the State Defendants to warn property owners of actual or suspected contamination. *See* Ind. Code § 13-12-3-1 *et al*; Ind. Code § 16-19-3-1 *et al*; 410 IAC 29-4 *et al*. Neither the Indiana Code nor the Indiana Administrative Code provide a specific requirement that any of the State Defendants provide warning to the public. *See* Ind. Code § 13-12-3-1 *et al*; Ind. Code § 16-19-3-1 *et al*; 410 IAC 29-4 *et al*. Like the government in *Cisco*, the State Defendants are entitled to judgment in their favor at the pleadings stage, as the alleged acts and omissions are protected by discretionary immunity as a matter of law.

Additionally, in *Harnish v. Liberty Farm Equine Reprod. Ctr., LLC*, the district court held discretionary function immunity required dismissal, at the pleadings stage, of a third party plaintiffs' complaint alleging a failure to warn against the government. *Harnish v. Liberty Farm Equine Reprod. Ctr.*, LLC, 2012 U.S. Dist. LEXIS 46978, *10-11, 2012 WL 1119762 (N.D. Ind. 2012). In *Harnish*, the owners of several valuable stallions brought suit against a breeding

facility after their horses contracted an equine disease called CEM while at the facility. *Id.* at 2-3. The breeding facility brought a third party complaint against the United States, alleging the government was also liable to the plaintiffs because it had failed to warn horse owners and the equine industry about the outbreak. *Id.* at 5. The government moved to dismiss the third party complaint on the grounds of immunity for the exercise of a discretionary function. *Id.* at 6.

The court granted the government's motion to dismiss, finding the United States was entitled to immunity from the third party plaintiffs' failure to warn claim. *Id.* at 10-11. The court held the alleged omission of failing to warn fell within the protection of discretionary function immunity because the decision to warn or not warn necessarily involves balancing safety concerns with economic concerns. *Id.* at 10, (citing *Maas v. United States*, 109 F.3d 1198, 1201 (7th Cir. 1997)). The court found:

> Finally, in alleging that the USDA was negligent in failing to warn of the CEM outbreak prior to 2008, the Stables reference discretionary conduct. These allegations suffer from the same problems as all of their allegations — the Stables don't allege any facts as to what the USDA knew at the time of the alleged outbreak, and whether a decision not to warn was made. **Even if they had alleged such facts, the decision of when and how to warn of a disease outbreak has been protected by the discretionary function exception. It can be costly to issue warnings. So the decision to warn about a certain peril requires balancing safety concerns with economic concerns, which is plainly a discretionary function.** *See Maas v. United States*, 109 F.3d 1198, 1201 (7th Cir. 1997) (stating that the decision not to warn balances "safety with economic concerns"); *Cisco*, 768 F.2d at 789 (finding that the EPA's decision not to warn about a contaminated landfill was a "political, social and economic judgment[] pursuant to its grant of authority. [The plaintiff] may not challenge those judgments under the FTCA because they fall within the discretionary function exception."). Further, the Stables doesn"t describe how a decision to warn or not to warn in this context somehow does not involve a choice. All in all, this is behavior that falls under the discretionary function exception, barring suit against the United States.

Harnish v. Liberty Farm Equine Reprod. Ctr., LLC, 2012 U.S. Dist. LEXIS 46978, *10-11, 2012 WL 1119762 (*emphasis added*).

The court in *Harnish* therefore makes clear that the discovery process is not needed where a claimant seeks to impose liability upon the government for a failure to warn, because the decision to warn or not warn is, by its very nature, a discretionary policy decision as a matter of law. *Id.*

Likewise, in *Fairchild Republic Co. v. United States*, the district court granted a motion to dismiss in favor of defendants, the United States and the United States Air Force, where a former aircraft mechanic alleged the government defendants negligently failed to warn him of dangerous levels of asbestos contained in exhaust system tape assemblies the mechanic worked with as part of his job duties. *Fairchild Republic Co. v. United States*, 712 F.Supp. 711, 715-16 (S.D. Ill. 1988). The court found the plaintiff's failure to warn claim "is squarely disposed of under *Cisco*, which holds that the government's failure to warn affected individuals of a health hazard is plainly a judgment which falls within the governmental immunity granted for discretionary functions." *Id.* at 716 (citing *Cisco v. United States*, 768 F.2d 788 (7th Cir. 1985)). Because each of the Plaintiffs' allegations against the State Defendants are protected by discretionary function immunity, the State Defendants are entitled to judgment as a matter of law as to the entirety of the Plaintiffs' Complaint.

B. The State Defendants are Immune from Liability for Acts and Omissions of Anyone Other than the Government Entity or the Government Entity's Employee Pursuant to Ind. Code §34-13-3-3(10).

The State Defendants are entitled to judgment as a matter of law as to each of the allegations contained in the Plaintiffs' Complaint, pursuant to Ind. Code § 34-13-3-3(10). Pursuant to ITCA, a government entity may not be held liable for "[t]he act or omission of anyone other than the governmental entity or the governmental entity's employee." I.C. § 34-13-3-3(10). In this case, the Plaintiffs' Complaint alleges the City and Housing Authority were

made aware of ISDH's and IDEM's findings in 1985 but did not warn the public. (Compl. ¶¶ 42 - 45). The Complaint further alleges the City, Housing Authority, and/or Mayor made the decision to issue a letter warning the Plaintiffs of alleged contamination in July of 2016. (Compl. ¶ 70). Assuming *arguendo* that the City, Housing Authority, and/or Mayor had notice of the State Defendants' findings and yet declined to issue a public warning, such decision is not a failing on the part of the State Defendants and may not be used to hold the State Defendants liable.[2]

Furthermore, the State Defendants have no statutory duty to provide any specific type of warning to the public, and no such duty is cited by the Plaintiffs in their Response. Indiana Code provisions applicable to the State Defendants do not require the State Defendants to issue warnings to the public. *See* I.C. § 13-12-3 et al; § 16-19-3 et al. The provisions of the Indiana Administrative Code do not contain any requirements that the State Defendants issue warnings to the public about specific public health or environmental issues, including the provisions addressing the Indiana State Department of Health's "Reporting, Monitoring, and Preventative Procedures for Lead Poisoning." *See* 410 IAC 29.

The Plaintiffs rely on the case of *Gary Community School Corporation v. Boyd* for the proposition a government entity is not entitled to immunity pursuant to Ind. Code § 34-13-3-3(10) when the government's alleged failure to act is at issue. 890 N.E.2d 794, 801 (Ind. Ct. App. 2008). However, the alleged tortious conduct at issue in *Boyd* is clearly distinguishable from the present case. In *Boyd*, the plaintiffs, a bereaved mother and father, brought suit against the Gary Community School Corporation after their son, a high school student, was shot and

[2] For purposes of this Motion for Judgment on the Pleadings, the State Defendants have assumed the truth of the allegations set forth in the Plaintiffs' Complaint, as required by Indiana Rule of Trial Procedure 12(C); *Gregory and Appel v. Duck*, 459 N.E.2d 46, 50 (Ind.Ct.App. 1984). Nothing in this Motion should be construed as a stipulation to any of the allegations set forth in the Complaint.

killed by another youth on the school premises. *Id.* at 787. The school corporation had hired two security officers who were both present at the school at the time of the shooting. *Id.* However, one officer was inside the building monitoring students pass through metal detectors. *Id.* In the minutes before the shooting, the officer who had been stationed outside the building encountered a student who had previously been suspended from school and escorted that student inside the building to bring him to the other officer. *Id.* While the officers were dealing with the suspended student, the shooter was able to enter the building and shoot Boyd. *Id.*

Boyd's parents brought suit against the school corporation, alleging the school corporation was negligent in "failing to exercise reasonable care and supervision for the safety of its students." *Id.* at 801. The school corporation argued it was entitled to immunity pursuant to Ind. Code §34-13-3-3(10)because the decedent's death was the result of the shooter's acts and not the school's omissions. *Id.* at 800-01. The court found immunity did not apply because the school officer's act of leaving students unsupervised was imputed to the school corporation. *Id.* at 801.

Here, the Plaintiffs have not alleged the State Defendants were charged with a specific duty, such as the duty to supervise students alleged in *Boyd.* Instead, the Plaintiffs argue the State Defendants should have taken it upon themselves to provide an additional measure of warning over and above the warnings that had been given by the EPA in 2012 and prior. The Plaintiffs allegations that the State Defendants failed to warn the Plaintiffs are in essence a criticism of the warnings that *were* given, by other defendants and nonparties. If the warnings provided to the Plaintiffs by other entities were tortuously insufficient, the State Defendants are not liable for that insufficiency, pursuant to Ind. Code §34-13-3-3(10). Furthermore, the State Defendants may not be held liable for the alleged contamination in the first instance, nor for the alleged

decisions surrounding the placement of the Complex and the School. As to each of the allegations contained in the Plaintiffs' Complaint, the State Defendants are entitled to judgment as a matter of law.

II. The Plaintiffs' Complaint Fails to State a Claim for Intentional Infliction of Emotional Distress and the State Defendants are Entitled to Judgment as a Matter of Law.

As discussed above, each of the Plaintiffs legal theories asserted against the State Defendants fails as a matter of law because the State Defendants are entitled to immunity for any allegedly tortious conduct pursuant to the Indiana Tort Claims Act. However, even if this Court were to find in favor of the Plaintiffs on the issue of immunity, the State Defendants are entitled to judgment as a matter of law on the Plaintiffs' claim of intentional infliction of emotional distress.

The Plaintiffs argue the State Defendants are not entitled to judgment as a matter of law on the Plaintiff's claim for intentional infliction of emotional distress (IIED) because reasonable minds may differ on whether the State Defendant's alleged omissions constitute "extreme and outrageous" behavior. Extreme and outrageous conduct goes above and beyond even that which is criminal. *Bradley v. Hall,* 720 N.E.2d 747, 753 (Ind. Ct. App. 1999) (citing Restatement (Second) of Torts, § 46)). For a defendant's act or omission to be considered extreme and outrageous, the conduct must have been "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Branham v. Celadon Trucking Servs., Inc.,* 744 N.E.2d 514, 523 (Ind. Ct. App. 2001) (citing *Bradley* at 752-53).

The cases relied upon by the Plaintiffs to argue against dismissal of their IIED claim at the pleadings stage were each based upon much more egregious acts or omissions than that at

issue here: a coroner transporting the corpse of an obese woman on a flatbed truck; the owner of a natural gas pipeline allowing campers to camp near the pipeline although there had been prior explosions and the owner knew the campers had no warning whatsoever about the pipeline; a police officer behaving callously to a survivor of sexual assault. *Johnson v. Marion Cnty. Coroner's Office*, 971 N.E.2d 151 (Ind. Ct. App. 2012), *trans denied.*; *Baldonado v. El Paso Natural Gas Co.*, 176 P.3d 277 (N.M. 2007); *Snyder v. Smith*, 7 F.Supp.3d 842 (S.D. Ind. 2014).

Here, the Plaintiffs argue the State Defendants failed to provide additional notice to them regarding the alleged contamination at the Superfund Site, over and above that which had already been provided to them by the EPA in 2012 and before. The Plaintiffs do not argue, as in the New Mexico case of *Baldonado*, that the injured parties lacked any warning at all; they instead argue the various warnings given were insufficient. The Plaintiffs also do not allege the State Defendants were responsible for the initial contamination of the Superfund Site, or the placement of the Complex and School. The Plaintiffs allegations against the State Defendants do not meet the very high bar required to prove the tort of IIED, and the State Defendants are entitled to judgment as a matter of law on that claim.

III. The Plaintiffs' Claims are Barred by the Statute of Limitations and the State Defendants are Entitled to Judgment as a Matter of Law.

As set forth in detail above, this Court should find the State Defendants are entitled to judgment on the pleadings as to each of the allegations set forth in the Plaintiffs' Complaint. However, even in the event this Court were to find in favor of the Plaintiffs on the issues of governmental immunity and intentional infliction of emotional distress, this Court should, at a minimum, find that the 109 individual Plaintiffs identified in the Plaintiffs' Response as having

reached the age of majority more than two (2) years prior to the filing of this lawsuit, should have their claims against the State Defendants barred by the statute of limitations.[3]

Indiana courts hold that a party is entitled to judgment on the pleadings not only where "the allegations in the complaint are so insufficient that the pleader has stated no claim for relief," but also where "the pleader has alleged sufficient facts to state a claim for relief but has also alleged facts that disclose a bar to the suit or claim (such as when the complaint establishes a statute-of-limitations defense)." *Mourning v. Allison Transmission, Inc.,* 72 N.E.3d 482, 487 (Ind. Ct. App. 2017).

The question of when a cause of action accrues is a question of law. *Cooper Indus. LLC v. City of South Bend,* 899 N.E.2d 1274, 1280 (Ind. 2009). While the Plaintiffs are correct that establishing a statute of limitations defense is sometimes fact-sensitive, as in run-of-the-mill governmental tort cases such as *Reed v. City of Evansville,* 956 N.E.2d 684 (Ind. Ct. App. 2011), *trans denied,* in this case the facts supporting the State Defendants' Motion are stated in the Complaint and are part of the public record, of which this Court may take judicial notice. *Davis v. Ford Motor Co.,* 747 N.E.2d 1146, 1149 (Ind. Ct. App. 2001). Based upon the allegations in the Plaintiffs' Complaint, this Court should find the State Defendants' affirmative defense established and dismiss this matter as to the over one hundred individual Plaintiffs over the age of majority for two years prior to the time the present lawsuit was filed on December 4, 2017. (Plaintiffs' Response at 12).

The Plaintiffs' Response correctly points out that Indiana courts use the discovery rule to address statute of limitations defenses in cases involving alleged exposure to injurious substances. The discovery rule mandates that the statute of limitations applicable to a plaintiff's

[3] The Plaintiffs' Response expressly concedes that of the 315 individual Plaintiffs, only 206 had not reached the age of majority within two (2) years prior to the filing of this lawsuit. (Plaintiffs' Response at 12).

claim "commences to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another." *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985). As the Plaintiffs point out, the test for application of the discovery rule is "when, in the exercise of ordinary diligence, did the [Plaintiffs] learn of a reasonable probability, if not a probability – and not by mere speculation or suspicion – that a causal relationship existed" between the alleged exposure and the claimed injuries. *Reed v. City of Evansville*, 956 N.E.2d 684, 691 (Ind. Ct. App. 2011) (citing *Degussa Corp. v. Mullens*, 744 N.E.2d 407, 411 (Ind. 2001)). When a plaintiff has only a mere speculation or suspicion that they may have been injured by an exposure, the time period for the statute of limitations is not commenced. *See id.* On the other hand, when a plaintiff knows, or should know through the exercise of ordinary diligence, that there is a reasonable probability of a causal relationship between an exposure and an injury, the statute of limitations begins to run. *See id.*

In their Response, the Plaintiffs conflate the discovery of a causal relationship with the discovery of the severity of their alleged injury. However, the two are different concepts. The discovery rule provides that the statute of limitations begins to run when a plaintiff knows or should know that a *causal relationship* exists between the alleged tortious act or omission and the plaintiff's injury. *Id.* The plaintiff need not discover the *severity* of the alleged injury in order for the statute to begin running. *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009) ("[f]or an action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred.")

The Plaintiffs' Complaint alleges as follows:

Plaintiffs' Injuries

> 79. Each Plaintiff was exposed to hazardous levels of lead and/or other toxins while a resident of the Complex and/or while a student at Carrie Gosch Elementary School.
> 80. Each Plaintiff has suffered physical, mental, and emotional harm as a direct and proximate result of his or her exposure to the lead or other chemical contamination at the Complex and/or at the Carrie Gosch Elementary School.

(Compl. ¶¶ 79-80).

Pursuant to Indiana law, the Plaintiffs need not have been aware that they had allegedly been exposed to a particular level of lead exposure prior to December 4, 2015 (two years prior to the filing of this lawsuit), but rather, whether they had experienced any lead exposure at all. In short, the State Defendants should be entitled to judgment as a matter of law if, at any point prior to December 4, 2015, a reasonable person in the Plaintiffs' position, acting with ordinary diligence, should have known there was a reasonable probability that they had sustained some ascertainable injury as a result of living on a Superfund Site supervised by the EPA.

Furthermore, the test for the discovery rule is not merely whether the Plaintiffs *knew or did not know* of a causal relationship between the alleged presence of lead and other toxins and their claimed injuries. Instead, the State Defendants are entitled to judgment as a matter of law if the Plaintiffs *should have known*, through the exercise of ordinary diligence, of the possibility of a causal relationship between the alleged toxins, the alleged acts and omissions of the Defendants, and their claimed injuries.

At the very least, that standard is met in this case. The Plaintiffs ask the Court to find that a reasonable person exercising ordinary diligence would not have been put on notice that a potential environmental exposure injury existed when the EPA entered into an administrative order of consent with USS Lead, designating the entire area as a Superfund Site in need of environmental remediation in 1993. The Plaintiffs further ask this Court to find that a reasonable person acting with ordinary diligence would not have been put on notice of a potential

environmental injury when the EPA publicly announced a cleanup plan for the USS Lead Superfund Site and held a public meeting to discuss the cleanup on July 25, 2012. The Plaintiffs ask this Court to find that a reasonable person acting with ordinary diligence would not have realized a potential environmental injury existed even when the EPA printed English and Spanish announcements of the July 25, 2012 public meeting in local newspapers, posted the proposed cleanup plan at the public library, and "mailed to every resident living within two miles of the Site a copy of the proposed plan" in July 2012. *United States v. Atlantic Richfield* Co., 2018 U.S. Dist. LEXIS 21524, *5, 99 Fed. R. Serv. 3d (Callaghan) 1886, 48 ELR 20023, 2018 WL 798188 (N.D. Ind. 2018).

Unlike in the case of *Reed v. City of Evansville* relied upon by the Plaintiffs in their Response, the information available to the Plaintiffs in July of 2012 identified the causal relationship between the alleged environmental injuries and former industries in the area. In *Reed*, the government lost its summary judgment motion because the plaintiffs did not know their property damage was *caused* by the government's conduct. *Reed v. City of Evansville*, 956 N.E.2d 684, 691-93 (Ind. 1985). Reasonable people acting with ordinary diligence in possession of the information available to the Plaintiffs in July of 2012 should have known of a probability of "some ascertainable damage" caused by environmental contamination at that time. *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009). Furthermore, logic tells us that at any point at which the Plaintiffs should have been aware of the potential for injury caused by contamination, they should also have been aware that they had also not received what they would consider a sufficient warning from the State Defendants.

The question of whether the Plaintiffs knew their alleged exposure to toxic materials was of a particularly "hazardous level" is immaterial. Rather, the State Defendants are entitled to

judgment as a matter of law if the Plaintiffs knew or should have known that "some ascertainable damage" may have occurred as a result of the alleged exposure. *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009); *Atlantic Richfield* Co., at 14 ("it isn't about how bad the impact is; it's about whether there might be an adverse impact at all"). As in the case of *Atlantic Richfield*, the Plaintiffs had adequate notice of environmental contamination as of at least July 25, 2012. *Id.*

The Plaintiffs assert that *Atlantic Richfield* does not apply to the present matter because the court in that case was considering a motion to intervene rather than the filing of an independent civil lawsuit, as here. *Id.* at 2. However, regardless of procedural distinction, the court in *Atlantic Richfield* addressed the same considerations at issue in the present case: whether the plaintiffs had brought their motion timely within two years based upon a consideration of "the length of time the intervenor knew or should have known of her or his interest in the case," among others. *Id.* at 10 (citing *City of Bloomington, Ind. V. Westinghouse Elec. Corp.*, 824 F.2d 531, 534 (7th Cir. 1987)). The court determined—based upon the same facts at issue here—that the residents of the Complex knew or should have known contamination existed at the Site by at least July 25, 2012. *Id.* at 14. The cases of *Walker v. City of E. Chicago*, 2017 U.S. Dist. LEXIS 160729 (N.D. Ind. 2017) and *Rolan v. Atlantic Richfield Co.*, 2017 U.S. Dist. LEXIS 117437 (N.D. Ind. 2017), which predate the opinion of *Atlantic Richfield*, relied upon by the State Defendants, are inapposite.

In *Walker*, the defendants argued the plaintiffs should have been put on notice of their alleged environmental injuries "based upon a series of sporadic publications from the EPA dating back to 2006." *Walker* at 39. Here, as in *Atlantic Richfield*, the Plaintiffs' Complaint and the public record make clear that the Plaintiffs were given comprehensive public notice of

environmental contamination at the Site in July, 2012. In *Rolan*, the court addressed the statute of limitations in the context of the plaintiffs' Motion to Certify Class. *Rolan* at 1. In addressing the statute of limitations, the court in *Rolan* found that the plaintiffs' claims had not accrued until the Summer of 2016, when additional messages were received from the government indicating "the contamination of lead and arsenic at West Calumet was ***greater than previously anticipated,*** necessitating changes to the government's response." *Id.* at 34 (emphasis added). The court found "the Plaintiffs only discovered ***how and how much*** the Defendants' conduct had harmed them – by incurring costs to investigate the contamination, 'arranging for alternative temporary housing and relocations,' and fearing future injuries from ***greater-than-anticipated*** levels of exposure" in the Summer of 2016. *Id.* at 34 (*emphasis added*).

However, such considerations are not the standard for application of the discovery rule pursuant to Indiana law. *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009) ("[f]or an action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred."). As set forth in *Atlantic Richfield*, the inquiry facing the court as to whether to allow the plaintiffs to intervene was not a question of when the plaintiffs became aware of the "precise nature of the impact" of the contamination, but instead on "how long the applicants knew or should have known that the litigation could impact their interests." *Atlantic Richfield* at 14.

In this case, the Plaintiffs knew, or in the exercise of ordinary diligence, should have known, that a causal relationship existed between the alleged injuries, the Plaintiffs alleged exposure to lead and other toxins from prior industrial activity, and the alleged failure to warn on the part of the State Defendants and others, at least as far back as July 25, 2012. Therefore, the filing of the Plaintiffs' Complaint and completion of the Plaintiffs' Notice of Tort Claim were

untimely, and this Court should find the State Defendants are entitled to judgment as a matter of law as to each of the Plaintiffs claims. Ind. Code. § 34-13-3-6(a); *Indiana Dep't of Correction v. Hulen*, 582 N.E.2d 380, 380-81 (Ind. 1991).

IV. The Plaintiffs' Claims are Barred by the Doctrine of Res Judicata and the State Defendants are Entitled to Judgment as a Matter of Law.

In addition, this Court should find the Plaintiffs' claims barred by the doctrine of res judicata. The case of *United States v. Atlantic Richfield Co.* determined as a matter of law the question of when the residents of the Complex knew or should have known that some ascertainable injury may have occurred as a result of contamination at the Site. *Atlantic Richfield Co.*, 2018 U.S. Dist. LEXIS 21524, *5, 99 Fed. R. Serv. 3d (Callaghan) 1886, 48 ELR 20023, 2018 WL 798188. Because the doctrine of claim preclusion "prevents the repetitious litigation of disputes that are essentially the same," this Court should find the Plaintiffs claims barred as a matter of law. *Citizens Action Coalition of Ind., Inc. v. Duke Energy Ind., Inc.*, 15 N.E.3d 1030, 1040 (Ind. Ct. App. 2014) (citing *Wright v. State*, 881 N.E.2d 1018, 1021 (Ind. Ct. App. 2008)).

Res judicata applies to bar "subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit." *Geico Ins. Co. v. Graham*, 14 N.E.3d 854, 858-859 (Ind. Ct. App. 2014). The Plaintiffs' Response admits "timeliness was litigated" in the case of Atlantic Richfield. (Plaintiffs' Response at 23). In this case, the issues presented to the Court with respect to the State Defendants statute of limitations argument are "essentially the same" as the circumstances addressed by the court in *Atlantic Richfield*. Contrary to the Plaintiffs' Response, the Court in *Atlantic Richfield* addressed not only the narrow "interest in the EPA cleaning up the property," (Plaintiffs' Response at 24), but when the Plaintiffs should have known of the potential for contamination. *See id.* at 192. The State Defendants are entitled to judgment as a matter of law as to the Plaintiffs' claims.

The Plaintiffs reliance on a paternity action, *Marsh v. Rodgers (In re Rodgers),* 659 N.E.2d 171, 172-74 (Ind. Ct. App. 1995), in support of their argument for a lack of privity is inapposite. In *Marsh*, the court found the plaintiff could not have controlled the prior action because he was two months old at the time. *Id.* at 173. Furthermore, the plaintiff's interests in establishing paternity between himself and his father were not the same as the mother's interest in applying for government benefits in the prior suit, nor were they the same as the state's interest in limiting its expenditures on government benefits in the prior suit. *Id.* Here, in contrast, the Plaintiffs' interests associated with lead and other contaminants at the Superfund Site match the interests of the intervenors in *Atlantic Richfield.* The Plaintiffs' Response offers no argument that the Plaintiffs could not (or did not) join in the *Atlantic Richfield* lawsuit. Parties in privity with the Plaintiffs had a full and fair opportunity to litigate the issue of the statute of limitations in a former suit and this Court should find the Plaintiffs' Complaint barred by issue preclusion.

CONCLUSION

For each of the foregoing reasons, this Court should grant the State Defendant's Motion for Judgment on the Pleadings and find that the Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

Respectfully submitted,

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By: Ginny L. Peterson

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2018, the foregoing was served via the U.S. Postal Service on the following:

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45D01 1803-CT-00048

CASE NUMBER: ~~45D05-1803-CT-0003~~

SEP 24 2018

CAPTION: CRISTOBAL ALVAREZ, C.A. b/n/f Cristobal Alvarez, et al v. CITY OF EAST CHICAGO, et al

CLERK LAKE SUPERIOR COURT

The activity of the Court should be summarized as follows on the Chronological Case Summary (CCS):

Defendants State of Indiana, Indiana Department of Environmental Management and Indiana State Department of Health file Reply in Support of Its Motion for Judgment on the Pleadings.

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(TO BE DESIGNATED BY THE COURT)

This CCS Entry Form Shall Be:

[ ] Placed in case file
[ ] Discarded after entry on the CCS
[ ] Mailed to all counsel by: _Counsel _Clerk _Court
[ ] There is no attached order OR
The attached order shall be placed in the RJO: Yes[ ] No[ ]

DATE 9/24/18 APPROVED _____
Judge, Lake Superior Court

CERTIFICATE OF SERVICE

I certify that on September 24, 2018, service of a true and complete copy of the foregoing document was made upon all counsel of record by depositing same in the United States Mail in envelopes properly addressed to them and with sufficient first-class postage affixed.

Ginny L. Peterson
Ginny L. Peterson

KIGHTLINGER | GRAY LLP

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September 24, 2018

Via Certified Mail, Return Receipt Requested

Clerk, Lake Superior Court
Room Number Five
232 Russell Street
Hammond, IN 46320

Re: Cristobal Alvarez et al v. City of East Chicago et al
Case No.: 45D05-1803-CT-0003
Our File No.: 180236

Dear Clerk:

Please find enclosed Defendants, State of Indiana, Indiana Department of Environmental Management and the Indiana State Department of Health's Reply in Support of its Motion for Judgment on the Pleadings for filing in the above-captioned matter. We have enclosed a self-addressed, stamped envelope for your convenience in returning file-marked copies to us. Please note that this is being sent by **certified mail** and pursuant to Trial Rule 5(F)(3) should be file-stamped as of the date of mailing, **September 24, 2018.**

Thank you in advance for your cooperation in this regard. Please feel free to contact us should you have any questions or concerns.

Very truly yours,

KIGHTLINGER & GRAY, LLP

Ginny L. Peterson

Ginny L. Peterson

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SEP 26 2018
CLERK LAKE SUPERIOR COURT

Enclosures
GLP/alc
cc: All Counsel of Record (w/encl.)

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STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE LAKE CIRCUIT/SUPERIOR COURT

CAUSE NO. 45D01 1809 CT 00526

[1] **DESHEENA ADAMS**, individually, and as mother and next friend of
[2] **C.B.1**,
[3] **C.B.2**,
[4] **C.H.** and
[5] **C.A.**,
[6] **ROBERTO CABELLO, JR.**,
[7] **MARK COLE**,
[8] **RHONDA COLLIER**, individually, and as mother and next friend of
[9] **J.J.**,
[10] **ARCELIA CRUZ**,
[11] **ANGELINA GUTEIRREZ DE CRUZ**,
[12] **LETICIA M. DE LUNA**, individually, and as mother and next friend of
[13] **S.C.**,
[14] **I.L.**,
[15] **I.O.**, and
[16] **C.D.**,
[17] **DONETTA DILLON**, individually, and as mother and next friend of
[18] **A.D. 1**,
[19] **A.D.2**,
[20] **A.J.**,
[21] **D.S. 1**,
[22] **D.S.2**,
[23] **D.S.3**, and
[24] **D.S.4**,
[25] **LIDUVINA ESPINOSA**,
[26] **ANGELA ESPINOZA**, individually, and as mother and next friend of
[27] **A.E.1**,
[28] **R.E.**,
[29] **N.C.**,
[30] **A.C.**, and
[31] **K.C.**,
[32] **MARIBEL GAMEZ**, individually, and as mother and next friend of
[33] **A.G.1** and
[34] **A.H.G.**,
[35] **MICHELLE GARCIA**, individually, and as mother and next friend of

EXHIBIT
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[36] **E.C.**,
[37] **G.G.**,
[38] **M.G.**,
[39] **A.G.2**, and
[40] **J.G.**,
[41] **STEPHANIE GRIFFIN**,
[42] **RONNITA HALL**,
[43] **KENDRA MABRY**, individually, and as mother and next friend of
[44] **K.W.1**,
[45] **M.C.1**,
[46] **M.C.2**,
[47] **J.W.1**, and
[48] **J.W.2**,
[49] **AFRICA MCKINNEY**, individually, and as mother and next friend of
[50] **J.A.**,
[51] **J.M.**, and
[52] **D.W.**,
[53] **VANESSA MCKINZEY**, individually, and as mother and next friend of
[54] **A.W.** and
[55] **D.M.**,
[56] **WILLIE MOORE**,
[57] **MINERVA RAMIREZ**, individually, and as mother and next friend of
[58] **D.R.1**,
[59] **C.R.**, and
[60] **M.R.**,
[61] **ANGELENE RIVERA**, individually, and as mother and next friend of
[62] **D.R.2**,
[63] **A.R.1**, and
[64] **A.R.2**,
[65] **JOSE BLAS CRUZ ROQUE**, individually, and as father and next friend of
[66] **L.C.C.**,
[67] **DENNIS RUFFINS**, individually, and as father and next friend of
[68] **I.W.** and
[69] **L.W.**,
[70] **DESHUN SANDERS**,
[71] **ANGELA THORNTON**, individually, and as mother and next friend of
[72] **J.P.**,

[73] **MAXINE TUCKER**, individually, and as mother and next friend of
[74] **A.E.2**,
[75] **O.G.1**,
[76] **O.G.2**, and
[77] **L.G.**,
[78] **VALERIE MALLETTE**,
[79] **BREANNA WASHINGTON**, individually, and as mother and next friend of
[80] **C.W.** and
[81] **K.W.2**,
[82] **LASHARDAY WHITE**, individually, and as mother and next friend of
[83] **A.M.** and
[84] **J.D.**,

Plaintiffs,

v.

[1] **CITY OF EAST CHICAGO**,
[2] **EAST CHICAGO HOUSING AUTHORITY**,
[3] **SCHOOL CITY OF EAST CHICAGO**,
[4] **EAST CHICAGO DEPARTMENT OF PUBLIC AND ENVIRONMENTAL HEALTH**,
[5] **INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**,
[6] **INDIANA STATE DEPARTMENT OF HEALTH**, and
[7] **STATE OF INDIANA**,

Defendants.

AMENDED COMPLAINT FOR DAMAGES AND OTHER RELIEF AND REQUEST FOR TRIAL BY JURY

The Plaintiffs, **DESHEENA ADAMS**, and **C.B.1**, **C.B.2**, **C.H.** and **C.A.** by DESHEENA ADAMS as their mother and next friend, **ROBERTO CABELLO, JR.**, **MARK COLE**, **RHONDA COLLIER**, and **J.J.** by RHONDA COLLIER as his/her mother and next friend, **ARCELIA CRUZ**, **ANGELINA GUTEIRREZ DE CRUZ**, **LETICIA M. DE LUNA**, and **S.C.**, **I.L.**, **I.O.**, and **C.D.** by LETICIA M. DE LUNA as their mother and next friend, **DONETTA**

DILLON, and **A.D.1**, **A.D.2**, **A.J.**, **D.S.1**, **D.S.2**, **D.S.3**, and **D.S.4** by DONETTA DILLON as their mother and next friend, **LIDUVINA ESPINOSA**, **ANGELA ESPINOZA**, and **A.E.1**, **R.E.**, **N.C.**, **A.C.**, and **K.C.** by ANGELA ESPINOZA as their mother and next friend, **MARIBEL GAMEZ**, and **A.G.1** and **A.H.G.** by MARIBEL GAMEZ as their mother and next friend, **MICHELLE GARCIA**, and **E.C.**, **G.G.**, **M.G.**, **A.G.2**, and **J.G.** by MICHELLE GARCIA as their mother and next friend, **STEPHANIE GRIFFIN**, **RONNITA HALL**, **KENDRA MABRY**, and **K.W.1**, **M.C.1**, **M.C.2**, **J.W.1**, and **J.W.2** by KENDRA MABRY as their mother and next friend, **AFRICA MCKINNEY**, and **J.A.**, **J.M.**, and **D.W.** by AFRICA MCKINNEY as their mother and next friend, **VANESSA MCKINZEY**, and **A.W.** and **D.M.** by VANESSA MCKINZEY as their mother and next friend, **WILLIE MOORE**, **MINERVA RAMIREZ**, and **D.R.1**, **C.R.**, and **M.R.** by MINERVA RAMIREZ as their mother and next friend, **ANGELENE RIVERA**, and **D.R. 2**, **A.R.1**, and **A.R.2** by ANGELENE RIVERA as their mother and next friend, **JOSE BLAS CRUZ ROQUE**, and **L.C.C.** by JOSE BLAS CRUZ ROQUE as his/her father and next friend, **DENNIS RUFFINS**, and **I.W.** and **L.W.** by DENNIS RUFFINS as their father and next friend, **DESHUN SANDERS**, **ANGELA THORNTON**, and **J.P.** by ANGELA THORNTON as his/her mother and next friend, **MAXINE TUCKER**, and **A.E.2**, **O.G.1**, **O.G.2**, and **L.G.** by MAXINE TUCKER as their mother and next friend, **VALERIE MALLETTE**, **BREANNA WASHINGTON**, and **C.W.** and **K.W.2** by BREANNA WASHINGTON as their mother and next friend, and **LASHARDAY WHITE**, and **A.M.** and **J.D.** by LASHARDAY WHITE as their mother and next friend, and complain of the Defendants, **CITY OF EAST CHICAGO** (the "City"), **EAST CHICAGO HOUSING AUTHORITY** ("EHCA"), **SCHOOL CITY OF EAST CHICAGO** ("SCEC"), **EAST CHICAGO DEPARTMENT OF PUBLIC AND ENVIRONMENTAL HEALTH** ("ECDPEH"), **INDIANA DEPARTMENT OF**

ENVIRONMENTAL MANAGEMENT ("IDEM"), **INDIANA STATE DEPARTMENT OF HEALTH** ("ISDH") and **STATE OF INDIANA**. Pleading hypothetically and in the alternative, the Plaintiffs allege as follows:

INTRODUCTION

1. The Plaintiffs bring claims against the Defendants under Indiana law in order to recover monetary damages and other relief, in order to help redress losses they suffered as a result of the Defendants' tortious actions and/or omissions.

2. The Defendants allowed the Plaintiffs to reside on land they knew was contaminated with dangerously high levels of toxic substances, including lead and arsenic, and: a) failed to warn the Plaintiffs of the danger; b) actively concealed the danger from the Plaintiffs; c) allowed their agents and others to conceal the danger from the Plaintiffs; and/or d) assisted others in concealing the danger from the Plaintiffs.

3. For much of the twentieth century, industries operated near the intersection of 151st Street and Kennedy Avenue in East Chicago, Indiana (the "Site Center"), and northwest of the Site Center; over the course of decades, these industries released toxic pollutants into the environment including lead and arsenic.

4. These pollutants remain in the environment at dangerously high levels – in the soil and groundwater in particular – through the present day.

5. The Plaintiffs neither knew nor had reason to know of the dangerous substances in and around their homes, yards, school and neighborhood, or the risks these substances posed to their health.

6. The Plaintiffs and, as applicable, their parents were unaware of the chemical contamination and attendant physical risks.

7. The toxic contamination, and the fact that residents and students who lived and attended school near the Site Center were being exposed to that contamination on a daily basis, was also well-known to the Defendants. Despite their knowledge, Defendants consistently failed to warn Plaintiffs and/or failed to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions.

8. Plaintiffs seek damages for the physical and emotional harms caused by their exposure to lead, arsenic and other toxic contaminants, and for the financial and emotional harms caused by and for the financial and emotional harms caused by the intrusion of these contaminants onto their property, or into their homes and yards, all of which was a direct and proximate result of Defendants' failure to warn of the toxic contamination, Defendants' facilitating and allowing Plaintiffs to live and attend school on land that is essentially a toxic waste dump, and Defendants' concealment of the contamination and the risk it poses to Plaintiffs.

THE PARTIES

9. At all relevant times, each Plaintiff was a resident of Lake County, Indiana.

10. At all relevant times, with the exception of four Plaintiffs,[1] each Plaintiff was a resident of the public housing development in East Chicago, Indiana, known as the West Calumet Housing Complex.

11. Many of the Plaintiffs attended Carrie Gosch Elementary School.

12. At all relevant times, each Plaintiff was exposed to lead, arsenic, and/or other toxic substances.

[1] Plaintiffs MINERVA RAMIREZ, D.R.1, C.R. and M.R. were and are residents of a private, single family home located in what would become known as "Zone 1" of the Superfund Site. See below.

13. The City is a municipal corporation organized under the laws of the State of Indiana.

14. ECHA is a municipal corporation, pursuant to Indiana Code § 36-7-18-14, organized under the laws of the State of Indiana.

15. SCEC is a municipal corporation, pursuant to Indiana Code § 36-1-2-10, organized under the laws of the State of Indiana.

16. ECDPEH is a municipal corporation, pursuant to Indiana Code§ 36-1-2-10, organized under the laws of the State of Indiana.

17. IDEM is a state agency organized under the laws of the State of Indiana.

18. ISDH a state agency organized under the laws of the State of Indiana.

19. The STATE OF INDIANA is one of the fifty states that comprise the United States of America.

GENERAL ALLEGATIONS

20. In about 1973, the City and the ECHA opened a public housing development called the West Calumet Housing Complex (the "Complex") on the Site, northwest of the Site Center, south of Carrie Gosch School.

21. As early as 1980, the Defendants knew or should have known that a serious environmental problem, and an unreasonably dangerous condition or conditions, existed on the land surrounding the Intersection – land on which the Complex, numerous private residences, and the Carrie Gosch School[2] stood.

[2] Carrie Gosch School was established in the 1950's. A new facility of the same name was built to replace the old one in the 1990's, which was dedicated in 1999 and opened for the 2001 school year.

22. In 1980, one of the polluters received "interim status" under the Resource Conservation and Recovery Act ("RCRA") – identifying it as a hazardous waste management facility.

23. In 1985, ISDH found lead particulates downwind of one of the polluters and finds the polluter to be in violation of Indiana law.

24. In 1985, United States Representative Pete Visclosky asked the United States Environmental Protection Agency ("EPA") to designate the area surrounding the Site Center to be a "Superfund" site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"); Visclosky did so because ISDH had found lead contamination in the area surrounding the Site Center.

25. In 1992, an area near the Site Center was proposed for the Superfund National Priorities List ("NPL"), meaning that the area warranted remedial action.

26. In 1997, ISDH officials visited the area near the Site Center and noted that an elementary school (Carrie Gosch) was then being built on or near land once occupied by one of the polluters, and that residents of the Complex were growing gardens[3] on or near land once occupied by another one of the polluters.

27. In July, 1997, IDEM found lead levels as high as 1,400 ppm in surface soil on the Carrie Gosch property, which is more than double the maximum acceptable level.

[3] Plaintiff Willie Moore resided at the Complex from the 1970's until she was displaced in late 2016 or early 2017. During that time she maintained a vegetable garden outside her door at the Complex in the summers. Even though ISDH had identified and expressed concern over residents' gardens at the Complex as early as 1997, no one ever told Moore that there was any danger until just after July 25, 2016, when she became aware of a letter from East Chicago mayor Anthony Copeland advising her and the other tenants of the Complex to relocate because it was "highly contaminated with lead and arsenic [a known carcinogen]."

28. In August, 1997, IDEM noted in an internal memorandum that concerns had been raised about the fact that Carrie Gosch elementary school was being built on land that was contaminated with lead.

29. SCEC knew or should have known that Carrie Gosch School had been built on a toxic waste dump, and that students who attended that school were being exposed to highly toxic and chemicals including lead and arsenic, a known carcinogen.

30. Despite that knowledge, SCEC failed to warn the Plaintiffs and their parents of the dangers of attending an elementary school on land that was contaminated with toxic chemicals.

31. The toxic pollutants exist in dangerously high levels in the soil and groundwater within about a half-mile radius of the Site Center (the "Superfund Site" or the "Site"), and may exist at higher than normal levels within about a mile radius of the Site Center.

32. The toxic pollutants remain in the environment at levels high enough to require the Carrie Gosch elementary school (built on the Site, northwest of the Site Center) to close its doors less than twenty years after its dedication on August 29, 1999.

33. In May, 1998, ISDH prepared a report indicating that over 30 percent of children residing at or near the Complex, who had been tested in the study, had unacceptably high (greater than 10 mg/dL) levels of lead in their blood. The report indicated that lead exposure had consistently occurred in the area near the Complex, but noted that soil samples had not been taken near the homes of the children with elevated levels of lead, and that the status of remediation of the land on which Carrie Gosch school stood was unclear. The report recommended, among other things, that the area near Carrie Gosch School be remediated to prevent future exposure and that the soil near the affected children's homes be tested.

34. In 2003, more than half of 83 soil samples taken from residential yards near the Complex and the Site Center contained an unacceptably high (greater than 400 ppm) level of lead.

35. In 2004, the Site was referred to the EPA's Superfund program under CERCLA.

36. In 2006, fourteen residential properties at the Site were tested for lead contamination; twelve were revealed to have lead contamination in excess of 1,200 ppm – far higher than the 400 ppm standard.

37. In 2007, IDEM was involved in testing for contamination related to the transition of the Site to the Superfund program under CERCLA.

38. In 2008, IDEM was involved in proposing that portions of the Site be placed on the NPL, fifteen years after it was first proposed.

39. In 2008, contaminated soil was removed from 13 residential properties at the Site on an emergency basis.

40. In 2009, the Site is officially placed on the NPL.

41. In 2009 and 2010, high levels of lead and arsenic are detected in residential yards on the Site; the highest levels of lead and arsenic are detected within the Complex.

42. In 2011, contaminated soil was removed from more residential properties at the Site on an emergency basis.

43. Plaintiff MINERVA RAMIREZ now believes that the activity she observed around her home on the 4900 block of Grasselli in East Chicago it was part of the 2011[4] emergency soil removal. MINERVA RAMIREZ observed City workers and City vehicles at locations where she sometimes saw other workers wearing what she describes as "space suits" – likely "hazmat suits."

[4] MINERVA RAMIREZ has lived in the same residence for decades, and is not certain that what she witnessed occurred in 2011, but she currently believes that to be the case.

On at least several occasions, MINERVA RAMIREZ asked City workers what they were doing and if everything were "O.K." The City workers replied that there was nothing to worry about and that she should not bother herself about it. At no time during the interactions described above did the City workers inform MINERVA RAMIREZ that they were testing for or remediating lead or any other contaminants or that any danger might exist. At the time, MINERVA RAMIREZ assumed that the activity was associated with repairs to a natural gas main.

44. A significant time after the events described in the preceding paragraph, the EPA and, upon information and belief, officials from IDEM and the City, contacted MINERVA RAMIREZ and suggested that the soil in her yard should be removed and remediated. It was only then that MINERVA RAMIREZ realized what the workers she had seen previously were doing.

45. In 2014 the polluters reached a settlement agreement with the United States and/or the EPA under which they contributed $26 million to the superfund trust, and under which an "operating unit" (an area in which remediation activity will take place) on the Site was identified and was divided into three zones. The Complex and Carrie Gosch School were located in Zone 1. Zones 2 and 3 consist primarily of private, residential homes.

46. On July 25, 2016, East Chicago mayor Anthony Copeland abruptly sent a letter to the residents of the Complex, advising them to relocate because the Complex was "highly contaminated with lead and arsenic."

47. The City claimed it sent the letter and took the action described above because it had only just recently learned of the danger itself. The City's claims are simply false. As set forth above: in 1985, United States Representative Pete Visclosky called for the Site to be referred to the Superfund program; in 1997, officials from IDEM and ISDH mused that, perhaps it was not a good idea to build an elementary school on what amounts to a toxic waste dump, and informed

SCEC of their concern; MINVERVA RAMIREZ and others observed City and ECHA personnel working in concert with EPA and IDEM personnel on testing for and remediation of toxic contamination.

48. Plaintiff KENDRA MABRY, a former resident of the Complex, observed workers digging holes in yards at the Complex. Among the workers were ECHA personnel, City workers, and City vehicles (for example, on at least one occasion, KENDRA MABRY observed City workers and City vehicles performing traffic control when other trucks and apparatus were blocking the road). On at least several occasions, KENDRA MABRY asked these workers what they were doing. Just as they had done with MINERVA RAMIREZ, the workers told KENDRA MABRY there was nothing to worry about. One worker even told her flippantly that they were "digging for dead bodies." At no time prior to Mayor Copeland's July 25, 2016 letter did anyone inform KENDRA MABRY that there was, or could potentially be, any danger related to toxic contamination of the Site.

49. Similarly, Plaintiff DENNIS RUFFINS observed ECHA workers spreading wood chips on areas in the Complex where exposed soil existed. DENNIS RUFFINS inquired as to what the workers were doing and was told simply that the wood chips were part of a landscaping and beautification project. DENNIS RUFFINS later learned that the wood chips were intended to keep the contaminated soil from blowing in the air and being breathed and ingested by Complex residents. At no time prior to Mayor Copeland's July 25, 2016 letter did anyone inform DENNIS RUFFINS that there was, or could potentially be, any danger related to toxic contamination at the Site. Other residents echoed DENNIS RUFFINS experience.

50. Upon information and belief, the workers spreading the wood chips were directed by City personnel and/or ECHA personnel to falsely tell residents like DENNIS RUFFINS that the wood chips were just part of a beautification project.

51. With the exception of the Plaintiffs, MINERVA RAMIREZ, D.R.1, C.R. and M.R. (the "Ramirez Plaintiffs"), the Plaintiffs are all former residents of the Complex.

52. The Ramirez Plaintiffs were and are residents of a private, single family home in Zone 3 of the Superfund Site, within Lake County, Indiana.

53. In 2016 a significant percentage, if not a majority, of Plaintiffs had recently moved to the Complex from various locations in Illinois – the result of a shortage of affordable housing choices in Illinois and elsewhere. Such persons had no personal knowledge of the Site's history, and were never warned of the danger presented by the "highly contaminated" environment at the Site. Even those like Plaintiff WILLIE MOORE, who had lived at the Complex for *three decades* and had planted a vegetable garden there each summer, was never warned of the danger until she learned of Mayor Copeland's July 25, 2018 letter. If thirty-year resident WILLIE MOORE did not know of the danger, relatively recent transplants, like KENDRA MABRY and DENNIS RUFFINS, had no chance to find out before Mayor Copeland sent his letter.

54. In the face of all that is recounted above, the City and ECHA were still signing leases and moving families *into* the Complex as late as September, 2016.

55. A has been widely reported after Mayor Copeland sent his July 25th letter and created a media maelstrom, each of the Site's residents was exposed to dangerously high levels of toxic substances that were present in the soil, groundwater and air in and around the Site including lead and arsenic, a known carcinogen.

56. A significant number of the Plaintiffs attended Carrie Gosch Elementary School.

57. Like the Complex and residential areas Zones 2 and 3 of the Superfund Site, the land upon which Carrie Gosch School was built was heavily contaminated with lead, arsenic, and/or other highly toxic substances due to the fact that the school was built on land that had been used for lead manufacturing (the Complex and Carrie Gosch School are in Zone 1 of the Superfund Site).

58. The Complex was operated by the City through its agency, ECHA.

59. The City and ECHA knew or should have known that the soil in and around the Site was toxic, and that living at the Complex, and in Zones 2 and 3, exposed residents to serious and permanent health risks.

60. The City and ECHA failed to disclose the pollution and resulting profound health risks to the Plaintiffs.

61. As recounted above, prior to Mayor Copeland's July 25, 2018 letter, the City and ECHA actively concealed the pollution and health risks from the Plaintiffs.

62. In the late 1960's, authorities in East Chicago, Indiana, began the process of developing a large-scale public housing complex, which would become the Complex.

63. In 1966, while engaged in a search for land for the Complex, then-Executive Director of the Housing Authority, Benjamin Lesniak, as reported by the Chicago Tribune, remarked that there "was little available land except in areas which are surrounded by industries and undesirable residential areas."

64. With unpolluted land at a premium, the City and ECHA concluded that they could either expend resources to "tear down existing deteriorating structures and replace them with public housing units" and locate the Complex in an area suitable to residential housing or, as they

ultimately chose to do, build the structure on a vacant area surrounded by industries that were undesirable residential areas.

65. The City and ECHA chose land that had recently been vacated by the Anaconda Lead Products Company ("Anaconda"), which manufactured white lead and zinc oxide from 1938 to 1965.

66. The land was also surrounded by the U.S. Smelter and Lead Refinery, Inc. ("USS Lead"), which operated a primary lead smelter from 1920 through 1973.

67. In 1973, USS Lead continued its lead operations, but converted to secondary smelting, recovering lead from scrap metal and old automobile batteries.

68. USS Lead finally ceased its lead operations in the area in about December 1985.

69. Also nearby the Complex, and sufficiently close to continue to contaminate the Complex, are two lead facilities operated by Hammond Lead Products, LLC, Hammond Group, Inc., Halstab, LLC, and Halox, LLC.

70. Further, near the Complex, and sufficiently close to continue to contaminate the Complex and surrounding areas within the Superfund Site, were other industries including a chemical plant that had manufactured the insecticide lead arsenate.

71. Put simply, the site on which the Complex was constructed was surrounded and inundated by lead manufacturing and the production of other toxic substances.

72. As a result of the manufacturing the soil and environment in and around the area where the Complex was constructed was saturated with toxic substances, including lead and arsenic, which are extremely hazardous to human health and wellbeing.

73. As a July 6, 2016 flyer sent by the United States Environmental Protection Agency ("EPA") to Complex residents explained: "High levels of lead have been found in yards in the

West Calumet Housing Complex in East Chicago. Exposure to high levels of lead can cause a range of health effects, from behavioral problems and learning disabilities to seizures and death. Children 6 years old and younger are most at-risk because their bodies are growing quickly, and the effects of the lead can cause problems."

74. Soil testing data available on the EPA's website also shows lead and arsenic levels in and around the Complex that is many times greater than levels considered hazardous.

75. In late 1969, the developers of the Complex had initially decided to take an option on 15 acres of land then-owned by the Sinclair Refinery on Columbus Drive, just west of Roosevelt High School.

76. But then-Mayor of East Chicago, John B. Nicosia, reportedly became upset at the developer's decision and instead arranged for the Complex to be located on the old Anaconda property.

77. The City and Housing Authority decided to move forward with construction of the Complex on the inexpensive and less politically troublesome spot, despite their knowledge of the lead and other contamination.

78. In 1970, the construction contracts were signed and construction on the Complex began.

79. Construction was completed in or about 1973, and residents moved in shortly thereafter.

80. For the next forty plus years, the City and ECHA operated the Complex without taking any measures to remediate the hazardous substances in the soil and air at the Complex or to otherwise protect the residents.

81. Further, the City and ECHA, despite knowing of the dangerous levels of lead and other substances, did not inform the residents of those dangers until July 25, 2016, when Mayor Anthony Copeland sent a letter to residents of the Complex notifying them of this danger.

82. The City and ECHA knew of the dangers for decades however.

83. For example, as referenced above, in 1985, the Indiana Department of Environmental Management ("IDEM") found lead contaminated soil adjacent to the Complex.

84. In the same year, ISDH discovered that some children who resided at the Complex had unacceptably high levels of lead in their blood.

85. In 1997, further samples and testing by IDEM and ISDH revealed contamination in and around the Complex and elevated levels of lead in children exposed to the area surrounding the Complex.

86. The City and/or ECHA were made aware of the results of those and other IDEM and ISDH investigations, but they never made residents aware of these findings in particular or the dangers of contamination in general.

87. There were also investigations by the EPA over the course of several decades, which concluded that the land on which the Complex was constructed constituted a superfund site in need of remediation.

88. Beginning in 1985, the EPA began testing and otherwise addressing the contamination at the Site.

89. In 1993, the EPA entered into an administrative order of consent with one of the corporate entities that operated around the Complex, USS Lead.

90. On September 3, 2014, the EPA filed a complaint against two other entities that either operated or were successors in interest to facilities that operated on or around the current location of the Complex.

91. The EPA entered into a consent decree with those entities on or about October 28, 2014, providing for a $26 million settlement to provide cleanup costs.

92. Again, the City and/or ECHA were made aware of the EPA's findings.

93. The City and/or ECHA continued to lease or otherwise furnish residential units to persons at the Complex despite knowing that the property was exposed to and contaminated with hazardous substances, which posed serious risks to the health and wellbeing of the tenants.

94. The City and/or ECHA never informed current or prospective residents of the Complex of the contamination dangers or the findings of high lead levels in residents.

95. The pollution at the Complex, at Carrie Gosch School, and in other residential areas at or near the Superfund Site, and the fact that residents and students were being exposed to that pollution on a daily basis, was also well-known to the remaining governmental entities that have been named as Defendants in this action, ECDPEH and IDEM, ISDH and the STATE OF INDIANA. Despite these entities' knowledge, they failed to warn Plaintiffs or to take other steps to reduce or eliminate the Plaintiffs' exposure to these toxic conditions.

96. Each of the Defendants knew that the Plaintiffs were unaware of the contamination at the Complex, at Carrie Gosch School, and in other residential areas at or near the Superfund Site, knew that the Plaintiffs were unaware of the dangers to their health, and knew that the Plaintiffs were continuing to expose themselves to these dangers and health risks on a daily basis due to their lack of knowledge, yet the Defendants took no steps to warn the Plaintiffs.

97. In June 1958, construction began on the first iteration of Carrie Gosch Elementary School.

98. Construction was completed on the first iteration of Carrie Gosch School in 1959, with classes beginning in September of that year.

99. The land on which the first iteration of Carrie Gosch School was constructed stood atop of the former USS Lead property.

100. USS Lead continued to operate in close proximity to Carrie Gosch School until it ceased operation at the site in 1985.

101. Just six blocks south of the first iteration of Carrie Gosch School was Anaconda, which continued to manufacture white lead during the first five years of the school's existence.

102. In the 1990s, the need for new facilities led to the construction of the second iteration of Carrie Gosch Elementary School, which was built behind the first iteration, so that students could continue to attend class during the construction.

103. The new Carrie Gosch School was dedicated in August 1999.

104. For two or more years, the construction of the new building took place while students continued to attend the old building next door.

105. An IDEM office memo from August 28, 1997 stated, "Apparently during an ongoing lead exposure survey at and around the USS Lead facility located southeast of the former Anaconda Lead site, EPA noticed an ongoing construction project at the Carrie Gosch Elementary School, located six (6) blocks north of the former Anaconda site. The concern being the possibility of increased lead exposure to the school children associated with the construction project as well as, [sic] the past lead facilities operation in what is now a residential neighborhood."

106. The EPA's 1997 investigation uncovered levels of lead contamination sufficient to meet the EPA's threshold for emergency action.

107. Not long after the EPA determined that emergency remediation was necessary in soil around Carrie Gosch School, ECDPEH conducted screenings of children in the area, determining that 35% at that time demonstrated elevated levels of lead.

108. The two school buildings occupied Zone 1 of the Superfund Site along with the Complex.

109. Despite the contamination already suffered by children who attended Carrie Gosch School, the presence of dangerous levels of lead in soil samples, and the fear that construction would increase the dangers of lead exposure, construction of the new Carrie Gosch School continued as did classes right next door in the first iteration of the school.

110. Despite the dangers and the authorities' knowledge of them, SCEC never took steps to reduce students' exposure to lead and other chemicals, and never warned students and families of these dangers or of the findings of elevated lead levels in a significant percentage of students.

111. After decades of silence by the Defendants, on July 25, 2016, East Chicago Mayor Anthony Copeland sent letters to residents of the Complex, including the Plaintiffs, stating:

> Dear Resident:
>
> Your health and safety are always my first priority. When the City and the East Chicago Housing Authority ("ECHA") recently were informed by the EPA that the ground within the West Calumet Housing Complex was highly contaminated with lead and arsenic, we moved immediately to protect your safety, health, and welfare.
>
> The identification of lead and arsenic poses potential dangers, and that is why I ordered the East Chicago Health Department to offer lead testing to you and your children. Now that we know the levels of lead in the ground in West Calumet Housing Complex, we feel it is in your best interest to temporarily relocate your household to safer conditions. ECHA is asking HUD to provide vouchers for safe, sanitary housing as soon as possible. Even though this may be a great

inconvenience to you, it□s necessary to protect you and your children from possible harm.

The staff of ECHA, including the Section 8 staff will be assisting you in the coming days, and we will continue to provide you with information as soon as it becomes available.

We ask for your patience and cooperation in this process.

112. Prior to the letter, each Plaintiff did not know that he or she had been exposed to hazardous levels of lead or other toxins at the Complex.

113. Prior to the letter, each Plaintiff did not know that he or she had been injured by his or her exposure to hazardous levels of lead or other toxins at the Complex.

114. Prior to the letter, the Defendants never informed or warned the Plaintiffs of these dangers.

115. Plaintiffs had no reason to know that they had been exposed to dangerous levels of lead and arsenic prior to receiving the letter from the Mayor.

116. Although the EPA, IDEM, and ISDH collected samples from the Site and its residences for more than two decades prior, the EPA did not inform Plaintiffs or other residents that they had been exposed to dangerous levels of lead, arsenic or other toxic substances.

117. Prior to Plaintiffs' ultimate discovery of their exposure to hazardous levels of lead or other toxins, each Defendant acted intentionally to conceal from Plaintiffs that the soil and air in and around the Complex was contamination with dangerously high levels of hazardous substances such as lead arsenic, and other toxins.

118. As the July 6, 2016 EPA flyer acknowledged, "Lead is a naturally occurring heavy metal. It is commonly found at low levels in soil. Low levels of lead can be found in the air, water, food and dust in cities because of the widespread use of lead in man-made products. The federal

government regulates the amount of lead in the air, water and soil. The levels of lead at the West Calumet Housing Complex are much higher than normal levels because of past industrial operations at the property."

119. The mere knowledge of lead in the soil meant nothing absent an understanding that the levels were dangerous to human health and wellbeing.

120. Each Plaintiff was exposed to hazardous levels of lead and/or other toxins while a resident of the Complex, while a student at the Carrie Gosch School and/or while a resident of the contaminated Zone 3 of the Superfund Site.

121. Each Plaintiff has suffered physical, mental, and emotional harm as a direct and proximate result of his or her exposure to the lead or other chemical contamination at the Complex, at the Carrie Gosch School and/or while a resident of the contaminated Zone 3 of the Superfund Site.

CAUSES OF ACTION

122. The following is a non-exhaustive list of causes of action supported by the facts of this case. *ARC Constr. Mgmt., LLC v. Zelenak*, N.E.2d 692, 697 (Ind. Ct. App. 2012) ("Under Indiana's notice pleading system, a pleading need not adopt a specific legal theory of recovery to be adhered to throughout the case."). These causes of action shall not in any way limit the legal bases for liability or recovery in this case.

COUNT I
(Negligence – Public Housing Plaintiffs v. The City and ECHA)

123. Plaintiffs incorporate the allegations set forth above and below by reference.

124. The City and/or ECHA owed a duty of reasonable care to the Plaintiffs who resided at the Complex[5] (the "Public Housing Plaintiffs").

125. Among other bases for that duty, as the owners and operators of the Complex, the City and ECHA entered into residential leases with the Public Housing Plaintiffs and for the benefit of the Public Housing Plaintiffs.

126. At the time of enacting those leases, the City and ECHA each knew that the soil and air in and around the Complex were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances.

127. The levels of lead, arsenic, and/or other hazardous substances in the air and soil at the Complex were an unreasonably dangerous condition.

128. The levels of lead, arsenic, and/or other hazardous substances constituted a latent defect.

129. The City and ECHA each had actual knowledge of that latent defect.

130. The levels of lead, arsenic, and/or other hazardous substances were unknown to the Public Housing Plaintiffs, such that they were unaware of the dangerous conditions.

131. Due to their ignorance of these dangers, each of the Public Housing Plaintiffs entered into leases to live at the Complex and resided at the Complex.

132. The Public Housing Plaintiffs did not know that, by residing at the Complex, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

[5] (All Plaintiffs herein except the Ramirez Plaintiffs)

133. The levels of lead arsenic and/or other hazardous substances actually caused harm to each Public Housing Plaintiff.

134. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Public Housing Plaintiff.

135. Each Defendant actually knew or should have known that the lead, arsenic and other hazardous substances have the potential to cause serious harm to the Public Housing Plaintiffs.

136. As a direct and proximate result of each Defendant's breaches of its duties, the Public Housing Plaintiffs have suffered and continue to suffer financial, physical, mental, and emotional damage.

137. Each of the Public Housing Plaintiffs was a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's breach of its duties.

138. Each Public Housing Plaintiff has suffered financial, physical, mental, and emotional damages stemming directly from their exposure to lead, arsenic and other hazardous substances.

COUNT II

(Negligence – Plaintiffs Who Attended Carrie Gosch School v. The City and SCEC)

139. Plaintiffs incorporate the allegations set forth above and below by reference.

140. In conjunction with the City, SCEC chose the location to build both the initial Carrie Gosch School and the new Carrie Gosch School.

141. SCEC and the City each knew and had reason to know that the soil and air in and around the schools were hazardous to the students.

142. The levels of lead, arsenic, and/or other substances in and around the schools are hazardous to human health and constitute an unreasonably dangerous condition.

143. The City and ECHA each knew of the levels of lead, arsenic, and/or other substances hazardous to human health.

144. The levels of lead, arsenic, and/or other substances hazardous to human health were not identifiable by the students or the parents who attended Carrie Gosch School.

145. The Plaintiffs who attended Carrie Gosch School were invitees in relation to the school, SCEC and the City.

146. The City and the SSCEC each owed a duty of care to the Plaintiffs who attended Carrie Gosch School to safeguard them and/or warn them of the dangers posed by the levels of lead, arsenic, and/or other substances hazardous to human health present in and around the Carrie Gosch School property.

147. The City and SCEC neither warned its students and parents of the dangerous condition of lead, arsenic, and/or other substances hazardous to human health, nor did it take steps to remedy the dangerous condition.

148. Injury to the Plaintiffs who attended Carrie Gosch School from exposure to lead, arsenic, and/or other substances hazardous to human health was foreseeable.

149. The Plaintiffs who attended Carrie Gosch School were each foreseeable victims of the type of harm that has befallen them, from exposure to lead, arsenic, and/or other substances hazardous to human health.

150. The Plaintiffs who attended Carrie Gosch School have each suffered damage as a result of exposure to lead, arsenic, and/or substances hazardous to human health at the Carrie Gosch Elementary property.

COUNT III
(Negligence – Public Housing Plaintiffs v. ECDPEH, IDEM, ISDH and the STATE OF INDIANA)

151. Plaintiffs incorporate the allegations set forth above and below by reference.

152. ECDPEH, IDEM, ISDH, and the STATE OF INDIANA each owed a duty of reasonable care to the Public Housing Plaintiffs, including without limitation the duty to warn them of known risks to their health that had the potential to cause serious, life-altering injuries.

153. These Defendants each knew that the soil and air in and around the Complex, at Carrie Gosch School and nearby residential areas within the Superfund Site including Zone 3 were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances.

154. The levels of lead, arsenic, and/or other hazardous substances were a dangerous condition.

155. The levels of lead, arsenic, and/or other hazardous substances were unknown to the Public Housing Plaintiffs, such that they were unaware of the dangerous conditions.

156. Due to their ignorance of these dangers, each of the Public Housing Plaintiffs entered into leases to live at the Complex and resided at the Complex, and many of the Plaintiffs attended school at Carrie Gosch School.

157. The Public Housing Plaintiffs did not know that, by residing at the Complex and attending this school, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

158. The levels of lead, arsenic, and/or other hazardous substances actually caused harm to each Public Housing Plaintiff.

159. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Public Housing Plaintiff.

160. These Defendants took no action to inform the Public Housing Plaintiffs or otherwise to safeguard them from the dangerous condition.

161. Each Defendant actually knew or should have known that lead, arsenic and other hazardous substances have the potential to cause serious harm to the Public Housing Plaintiffs.

162. As a direct and proximate result of each Defendant's breaches of its duties, each of the Public Housing Plaintiffs has suffered and continues to suffer financial, physical, mental, and emotional damages.

163. Each of the Public Housing Plaintiffs was a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's breach of its duties.

164. Each Public Housing Plaintiff has suffered financial, physical, mental, and emotional damages stemming directly from their exposure to lead particles, arsenic and other hazardous substances.

COUNT IV
(Negligence – Ramirez Plaintiffs v. All Defendants)

165. Plaintiffs incorporate the allegations set forth above and below by reference.

166. The City, ECDPEH, IDEM, ISDH, and the STATE OF INDIANA each owed a duty of reasonable care to the Ramirez Plaintiffs, including without limitation the duty to warn them of known risks to their health that had the potential to cause serious, life-altering injuries.

167. These Defendants each knew that the soil and air in and around the Ramirez Plaintiff's residence, within Zone 3 of the Superfund Site were contaminated with dangerous levels of lead, arsenic, and/or other hazardous substances.

168. The levels of lead, arsenic, and/or other hazardous substances were a dangerous condition.

169. The levels of lead, arsenic, and/or other hazardous substances were unknown to the Ramirez Plaintiffs, such that they were unaware of the dangerous conditions.

170. Further, the Defendants' actions and omissions, as set forth more fully above, lulled the Ramirez Plaintiffs into a false sense of security, denying them the chance to, among other things, remove themselves from the contaminated Site, refrain from actions (such as gardening and playing in the contaminated soil) that could increase their exposure to hazardous substances, and engage in remedial activities like removing contaminated dust from the inside of their residence.

171. Due to their ignorance of these dangers, each of the Ramirez Plaintiffs lost the chance to lessen their exposure to the hazardous substances in the air and soil at their residence.

172. The Ramirez Plaintiffs did not know that, by residing at their residence within Zone 3 of the Superfund Site, and that without taking remedial action and avoiding certain activities, they were exposing themselves and their families to extremely hazardous substances, including lead and arsenic.

173. The levels of lead, arsenic, and/or other hazardous substances actually caused harm to each Ramirez Plaintiff.

174. The levels of lead, arsenic, and/or other hazardous substances foreseeably caused harm to each Ramirez Plaintiff.

175. For years if not decades, even though they were well aware of the dangers, the Defendants took no action to inform the Ramirez Plaintiffs or otherwise to safeguard them from the dangerous condition.

176. Each Defendant actually knew or should have known that lead, arsenic and other hazardous substances have the potential to cause serious harm to the Ramirez Plaintiffs.

177. As a direct and proximate result of each Defendant's breaches of its duties, each of the Ramirez Plaintiffs has suffered and continues to suffer financial, physical, mental, and emotional damages.

178. Each of the Ramirez Plaintiffs was a foreseeable person to suffer the exact type of injuries that each has suffered as a result of each Defendant's breach of its duties.

179. Each Ramirez Plaintiff has suffered financial, physical, mental, and emotional damages stemming directly from their exposure to lead particles, arsenic and other hazardous substances.

COUNT V
(Intentional Infliction of Emotional Distress – All Plaintiffs v. All Defendants)

180. Plaintiffs incorporate the allegations set forth above and below by reference.

181. The conduct of the Defendants described above is extreme and outrageous.

182. The Defendants acted with reckless disregard toward the health, safety, and wellbeing of Plaintiffs and others.

183. The actions of Defendants described above were both the cause in fact and proximate cause of emotional distress to each Plaintiff.

184. Each Plaintiff suffered severe emotional distress as a results of the Defendants' actions including emotional distress owing to each Plaintiff's own exposure to hazardous substances and the emotional distress caused by the knowledge and witnessing of the harm forced upon other members of each Plaintiff's household and family.

COUNT VI
(Negligent Infliction of Emotional Distress – All Plaintiffs v. All Defendants)

185. Plaintiffs incorporate the allegations set forth above and below by reference.

186. Each Plaintiff was exposed to a disease-causing agent or substance, including hazardous levels of lead and arsenic, a known carcinogen.

187. The Defendants are responsible for exposing each Plaintiff to the disease-causing substances.

188. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of contracting a future disease or illness.

189. Each Plaintiff is currently suffering, or has suffered, from emotional distress associated with the fear of a family member or other closely related person contracting a future disease or illness as the result of the exposure to disease-causing agents or substances due to the actions of the Defendants.

190. The Plaintiffs who are guardians and/or parents of other Plaintiffs have suffered the anguish and distress of witnessing injury and infliction of exposure to hazardous substances upon the children in their care.

191. Each Plaintiff has been directly impacted by disease-causing substances as a direct result of the Defendants' actions.

192. The emotional distress suffered by each Plaintiff was proximately caused by exposure to the disease-causing substances.

193. Each Plaintiff's fear of contracting a disease or of a loved one contracting a disease as a result of exposure to disease-causing agents is reasonable.

194. Each Plaintiff has seen an increase in risk of disease as a result of his or her exposure to the disease-causing agent or substance.

COUNT VII
(Fraudulent Concealment – All Plaintiffs v. All Defendants)

195. Plaintiffs incorporate the allegations set forth above and below by reference.

196. Prior to Plaintiffs' ultimate discovery of their exposure to hazardous levels of lead or other toxins, each Defendant acted intentionally to conceal from Plaintiffs that the were being exposed to toxic contamination.

197. The Defendants' false statements, their failure to speak up when they knew of the dangers presented to Plaintiffs by the toxic contamination, their actions and omissions described herein, and others to be shown by the evidence, were part of a long-standing policy of silence and dissembling intended to conceal the danger posed to Plaintiffs by the toxic contamination. This deprived the Plaintiffs of the chance to, among other things, remove themselves from the contaminated Site, refrain from actions (such as gardening and playing in the contaminated soil) that could increase their exposure to hazardous substances, and engage in remedial activities like removing contaminated dust from the inside of their residence.

198. The Plaintiffs reasonably relied on the Defendants' statements, silence, actions and omissions to their detriment.

199. The Defendants benefitted from their tortious actions in that they delayed the costs they incurred, and that they will continue to incur, after the dangers were finally made public with Mayor Copeland's letter of July 25, 2016.

200. As a direct and proximate result of their reasonable reliance upon the Defendants' statements, silence, actions and omissions, each Plaintiff suffered damages of a personal and pecuniary nature.

COUNT VIII
(Breach of Contract and Implied Warranty – Public Housing Plaintiffs v. ECHA and the City)

201. Plaintiffs incorporate the allegations set forth above and below by reference.

202. In order to live at the Complex, the Public Housing Plaintiffs entered into lease agreements with ECHA substantially similar to the one attached hereto as **Exhibit A.**

203. ECHA is authorized to carry out rental abilities by the City as its agent.

204. By signing the lease agreement, the Public Housing Plaintiffs agreed to pay rent for residing at the West Calumet Housing Complex.

205. ECHA, as Management, was obligated to maintain the premises in a decent, safe and sanitary condition.

206. ECHA and the City promised and impliedly promised that the Complex was fit for human habitation.

207. ECHA and the City have admitted that the Complex is highly contaminated with lead and arsenic and, therefore, clearly not fit for human habitation.

208. ECHA and the City materially and irreparably breached its contracts and the implied warranty of habitability by failing to provide a safe environment for the Public Housing Plaintiffs and instead exposing the Public Housing Plaintiffs to a harmful and contaminated environment that is and was unfit for human habitation.

209. As a result of these Defendants' breach, the Public Housing Plaintiffs suffered damages for all amounts billed, charged and/or collected, whether paid or unpaid.

210. These Defendants' actions and/or omissions were the proximate cause of the Public Housing Plaintiffs' damages.

211. As a direct and proximate result of these Defendants' actions and/or failures to

act, Plaintiffs have suffered past, present and future personal injuries, including (but not necessarily limited to): various health problems, weight loss, shortened life expectancy, miscarriage, physical pain and suffering, mental anguish, medical expenses, medical monitoring expenses, wage loss, brain and developmental injuries, cognitive deficits, lost earning capacity, aggravation and exacerbation of pre-existing conditions, contract damages and exemplary damages.

COUNT IX
(Nuisance)

212. Plaintiffs incorporate the allegations set forth above and below by reference.

213. The contamination of soil and groundwater with lead, arsenic and other contaminants at, in, on, or beneath Plaintiffs' properties, and the contamination of the interior of Plaintiffs' properties, occurred and persists because of Defendants' acts and omissions including, but not limited to, their operation and maintenance of their facilities and equipment; their handling, storage, use, and disposal of hazardous substances; their failure to promptly and effectively address such contamination to prevent further migration of the contaminants; and/or their failure to abate such contamination known by Defendants to exist on Plaintiffs' properties.

214. For example, Defendants caused the lawns at the Complex to by mowed during dry weather, which in turn kicked up contaminated dust and allowed it to enter Plaintiff's homes and yards.

215. Defendants' contamination of Plaintiffs' homes, as well as Defendants' decades-long failure to address such contamination, has substantially interfered with Plaintiffs' reasonable use, development, and enjoyment of their properties.

216. Plaintiffs have incurred and continue to incur substantial damage as a result of

Defendants' contamination, constituting a continuing private nuisance.

COUNT X
(Trespass)

217. Plaintiffs incorporate the allegations set forth above and below by reference.

218. Defendants had a duty to prevent hazardous substances, including lead and arsenic, used and created at their facilities, from contaminating Plaintiffs' homes, yards and properties.

219. Defendants also have a duty not to allow the continuance of this wrongful trespass.

220. Defendants breached these duties by their wrongful acts and omissions resulting in, among other things, the stirring up of contaminated soil thus causing the migration of such contamination into Plaintiffs' homes and yards without consent of Plaintiffs.

221. The invasion of Plaintiffs' homes, yards and other real properties, exclusively possessed by Plaintiffs, by contaminated soil and other contaminated materials, was due to unreasonable, unwarranted, and unlawful conduct of Defendants and constitutes a wrongful trespass upon Plaintiffs' properties.

222. As a result of Defendants' wrongful trespass, the lawful rights of Plaintiffs to fully use and enjoy their properties have been substantially interfered with, causing Plaintiffs substantial damage.

PLAINTIFFS' REQUEST FOR TRIAL BY JURY

The Plaintiffs request a trial by jury of all issues set forth herein that are capable of being tried by a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 2018, service of a true and complete copy of the above and foregoing pleading or paper was made upon each party or attorney of record by electronic means, facsimile or depositing the same in the United States Mail in envelopes properly addressed to each of them and with sufficient first-class postage affixed.

Alex Mendoza