

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

JAMELLE JOHNSON, ET. AL.,	:	April Term 2008
	:	
Plaintiffs,	:	
	:	
v.	:	No. 2012
	:	
JAMES M. WALSH, ET. AL.,	:	
	:	
Defendants.	:	COMMERCE PROGRAM
	:	
	:	Control Number 09073504
	:	
	:	

**ORDER**

**AND NOW**, this 2nd day of December 2011, upon consideration of Plaintiffs' Motion for Class Certification, all responses in opposition, all matters of record, after the parties' agreement to submit the issue for decision on the papers, after oral argument, and in accord with the Opinion issued simultaneously, it hereby is **ORDERED** that the class is certified as follows:

Subclass I:

Jamelle Johnson, Cathy Lewandoski, Ken Lewandowski, Richard Paulucy, Sabrina DReichart and class members who purchased properties developed or sold by ADK Development, Inc. in Port Richmond Gate without disclosure of contamination and restrictions on use of the property.

Subclass II:

Annmarie Farrell, John Hearn and members of the class who purchased properties developed or sold by TSA in Port Richmond Gate without disclosure of contamination and restrictions on use of the property.

It is further **ORDERED** as follows:

1. Every member of the above-described classes is included, unless a member files of record a written election to be excluded from the classes on or before June 29, 2012.

2. A proposed form of notice to the class shall be prepared by counsel for plaintiffs pursuant to Pa. R. Civ. P. 1712 (c) and shall be filed with the court and served upon counsel for defendants on or before January 9, 2012. Any objections to the proposed notice shall be filed with the court and served upon plaintiffs' attorney ten days thereafter.
3. A hearing on the proposed form of notice as well as objections thereto will be scheduled by separate order of the court.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL**

JAMELLE JOHNSON, ET. AL.,	:	April Term 2008
	Plaintiffs,	:
	v.	No. 2012
JAMES M. WALSH, ET. AL.,	:	
	Defendants.	COMMERCE PROGRAM
	:	
	:	Control Number 09073504
	:	

**FINDINGS OF FACT**

1. Plaintiffs are property owners who purchased homes which were sold and developed by ADK Development Corp.
2. The property is located in the Port Richmond section of Philadelphia.
3. The housing project is comprised of a single tract of land that is bordered by Thompson Street to the north, Tioga Street to the west, Edgemont Street to the south and Venango Street to the east. The project is known as Port Richmond Gate.
4. The Housing project was developed by defendants ADK Development Corporation, Inc. (hereinafter "ADK") and Thomson Street Associates (hereinafter "TSA").
5. The site consists of fifty-eight (58) modular construction two-story townhouses.
6. In 2001, Daniel Ryan (hereinafter "Ryan") and Keith Charlton (hereinafter "Charlton") purchased the vacant lot of land which is the subject of this litigation.
7. Prior to purchasing the lot, Charlton and Ryan retained James Walsh (hereinafter "Walsh") of ReMax Millennium (hereinafter "ReMax") to assist in evaluating the marketability of residential homes to be constructed on the Lot.
8. In 2001, Ryan and Charlton performed a site evaluation to determine whether any environmental hazards existed in the Lot.

9. On the advice of Walsh, Charlton and Ryan retained Dale Reiser of DCR Environmental to perform a Phase II study.<sup>1</sup>
10. The Phase II study revealed elevated levels of arsenic and lead.
11. Despite the findings of the Phase II study, Ryan and Charlton purchased the property.
12. On July 15, 2003, the property was conveyed to ADK.
13. Charlton and Ryan are the two principal shareholders of ADK.<sup>2</sup>
14. The conveyance of the property did not disclose any elevated levels of lead or arsenic or require any restrictions of use of the property.
15. ADK proceeded to develop and construct forty-six homes on the Lot and sold the homes to plaintiffs without deed restrictions or disclosure of elevated levels of lead and arsenic.
16. The remaining undeveloped lot was sold to TSA without deed restrictions or disclosure of elevated levels of lead and arsenic.
17. The principals of TSA are Charlton, Ryan and Mark Palermo.<sup>3</sup>
18. TSA developed and constructed twelve homes and sold the homes to the plaintiffs without disclosing the elevated levels of lead or arsenic and without deed restrictions.
19. ADK and TSA retained Walsh and ReMax as their brokers to assist in the sale of the homes to plaintiffs.
20. Walsh never disclosed the elevated levels of lead or arsenic to the purchasers of the homes.
21. Plaintiffs claim they have suffered damages as result of the elevated levels of lead and arsenic.

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<sup>1</sup> A Phase I study was also performed. A Phase I study looks into the history of the site to determine whether there are any potential risks that the property is or may be contaminated. A Phase II study is conducted on the property to determine if it is contaminated with hazardous substances.

<sup>2</sup> A suggestion of Bankruptcy was filed on behalf of ADK, Charlton and Ryan. On April 25, 2011, the automatic stay was lifted and this matter proceeded to a certification hearing.

<sup>3</sup> Palermo and other defendants were dismissed from the action by order of the court dated August 7, 2009.

22. Plaintiffs allege diminished value and loss of the use and enjoyment of the property.
23. Plaintiff's expert Val Britton, a registered professional geologist, opines that all of the properties in Port Richmond Gate are similarly contaminated with arsenic and lead at levels above Department of Environmental Protection (hereinafter "DEP") guidelines.
24. All the properties are subject to the same restrictions of use due to the contamination.
25. None of the purchasers of the properties were provided with the requisite disclosures required by Pennsylvania Law.
26. Pennsylvania's DEP has imposed uniform environmental covenants for each property.
27. Robert Simons, PH.D., an economist, opines that plaintiffs will suffer loss of value to their homes based on the restrictions of use of the properties and plaintiffs' and members of the classes' requirement to disclose the contamination to potential buyers when they sell the property.

### **CONCLUSIONS OF LAW**

1. The class is so numerous that joinder of all members is impracticable.
2. There are questions of law and fact common to the class.
3. Plaintiffs' claims and Defendants' defenses to them are typical of the class.
4. Plaintiffs will adequately represent the class.
5. A class action is a fair and representative method for adjudication of the controversy between the parties.

### **DISCUSSION**

The sole issue before this court is whether the prerequisites for certification are satisfied. The purpose behind class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious

litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate”.<sup>4</sup> For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

a) Where monetary recovery alone is sought, the court shall consider

- (1) whether common questions of law or fact predominate over any question affecting only individual members;
- (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
- (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
  - (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
  - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
- (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
- (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

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<sup>4</sup> DiLucido v. Terminix Intern. Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (1996).

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).<sup>5</sup>

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden “is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made.”<sup>6</sup> The moving party need only present evidence sufficient to make out a prima facie case “from which the court can conclude that the five class certification requirements are met.”<sup>7</sup>

Class certification is a mixed question of fact and law.<sup>8</sup> The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs’ right to recover are excluded from consideration.<sup>9</sup> Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, “courts in class certification

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<sup>5</sup> In the case at bar, Plaintiffs are seeking only monetary relief.

<sup>6</sup> Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (1985).

<sup>7</sup> Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002)(quoting Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 455 (1982).

<sup>8</sup> Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d.154 (2002).

<sup>9</sup> 1977 Explanatory Comment to Pa. R. Civ. P. 1707.

proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice.”<sup>10</sup> Accordingly, this court must refrain from ruling on plaintiff’s ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

“The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden.”<sup>11</sup> The *prima facie* burden of proof standard at the class certification stage is met by a qualitative “substantial evidence” test. The burden of persuasion and the risk of non-persuasion however, rests with the plaintiff.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action.<sup>12</sup> This philosophy is further supported by the consideration that “[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied.”<sup>13</sup>

Within this context, the court will examine the requisite factors for class certification.

## **I. Numerosity**

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<sup>10</sup> Janicik, 451 A.2d at 454,455.

<sup>11</sup> Debbs v. Chrysler Corp., 810 A.2d 137, 153-54 (Pa. Super. 2002); Janicik v. Prudential Inc. Co. of America, 451 A.2d 451, 455 (Pa. Super. 1982)). *See also* Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 189 (Pa. Super. 2002); Cambanis v. Nationwide Insurance Co., 501 A.2d 635 (Pa. Super. 1985).

<sup>12</sup> Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). *See also* Janicik, 451 A.2d at 454, *citing and quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10<sup>th</sup> Cir. 1968) (“in a doubtful case . . . any error should be committed in favor of allowing the class action”).

<sup>13</sup> Janicik, 451 A.2d at 454.



To be eligible for certification, the petitioner must demonstrate that the class is "so numerous that joinder of all members is impracticable."<sup>14</sup> A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually."<sup>15</sup> Plaintiff need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join."<sup>16</sup>

In the case at bar, plaintiffs' class consisting of individuals who purchased homes developed or sold by ADK is over 50 homeowners. Plaintiffs' class consisting of individuals who purchased homes developed or sold by TSA includes twelve homes. The court finds that the numerosity requirement has been satisfied.

## **II. Commonality**

The second prerequisite for class certification is "there are questions of law or fact common to the class."<sup>17</sup> Common questions exist "if the class members' legal grievances arise out of the 'same practice or course of conduct on the part of the class opponent."<sup>18</sup> Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all."<sup>19</sup> However, where the challenged conduct affects the potential class members in divergent ways, commonality may not

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<sup>14</sup> Pa.R.C.P. 1702(1).

<sup>15</sup> Temple University v. Pa. Dept. of Public Welfare, 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977).

<sup>16</sup> Janicik, 451 A.2d at 456.

<sup>17</sup> Pa. R. Civ. P. 1702(2).

<sup>18</sup> Janicik, *supra*. 133, 451 A.2d at 457.

<sup>19</sup> Weismer by Weismer v. Beechnut Nutrition Corp., 419 Pa. Super. 403, 615 A.2d 428 (1992).

exist.<sup>20</sup> “While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding.”<sup>21</sup>

In examining the commonality of the class’ claims, a court should focus on the cause of injury and not the amount of alleged damages. “Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification.”<sup>22</sup> Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis.<sup>23</sup> Related to this requirement for certification is whether trial on a class basis is a fair and efficient method of adjudication under the criteria set forth in Rule 1708. Another important requirement in determining whether a class should be certified are the requirements of Rules 1702 (a) (5) and 1708 (a) (1), whether common questions of law and fact predominate over any question affecting only individual members. In addition to the existence of common questions of law and fact, plaintiffs must also establish that the common issues predominate. Accordingly the analysis of predominance under Rule 1708 (a) (1) is closely related to that of commonality under Rule 1702(2).<sup>24</sup>

After reviewing the record created, the court finds that Plaintiffs’ claims satisfy the commonality requirement of Rule 1702 (a)(2). The common issue is whether defendants in developing and selling properties without disclosing the properties were contaminated with lead and arsenic should be held financially responsible for diminished property values. Plaintiffs seek

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<sup>20</sup> Janick , *supra*. 457.

<sup>21</sup> D’Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 338, 487 A.2d 995, 997 (1985).

<sup>22</sup> *See* Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (1992).

<sup>23</sup> Cook v. Highland Water and Sewer Authority, 108 Pa. Cmwlth. 222, 231, 530 A.2d 499, 504 (1987).

<sup>24</sup> Janick, *supra*. 451 A.2d at 461.

to redress a common legal grievance on behalf of the similarly situated property owners. Additionally, common questions of law exist such as whether defendants were aware of the contamination prior to the sale of the homes to the classes, whether defendants were aware of the contamination prior to the sale of the homes to the classes, whether the properties were contaminated, whether the defendants acted negligently, and whether defendants violated laws in failing to disclose contaminants. Plaintiffs have sustained their burden of demonstrating that common issues of fact and law exist to satisfy the requirement of commonality.

### **III. Typicality**

The third step in the certification test requires plaintiff to show that the class action claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests will advance those of the proposed class members.<sup>25</sup>

The named plaintiffs here are typical of those class claimants. The named plaintiffs have been harmed by defendants' development and selling of homes without disclosing that the land upon which the homes were built was contaminated with arsenic and lead above the DEP limits.

### **IV. Adequacy of Representation**

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class."<sup>26</sup> In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following: "(1) whether the attorney for the representative parties will adequately

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<sup>25</sup> DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (Pa. Super. 1996).

<sup>26</sup> Pa. R. Civ. P. 1702 (4).

represent the interests of the class, (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and (3) whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed."<sup>27</sup>

"Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession."<sup>28</sup> Here, defendants do not challenge plaintiffs' counsels' skill and therefore, the court presumes that counsel is skilled in their profession. "Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict."<sup>29</sup> The named class representatives' interests do not conflict with those of the proposed putative class. Accordingly, the court finds that no conflict of interest exists and the adequacy of representation has been demonstrated.

## **V. Fair and Efficient Method of Adjudication**

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. The requirements of 1708 shall be discussed below.

### **1. Predominance of Common Questions of Law and Fact**

The most important requirement in determining whether a class should be certified under 1702 (a) (5) and 1708 (a) (1) is whether common questions of law and fact predominate over any question affecting only individual members. In addition to the existence of common questions of law and fact, plaintiffs must also establish whether common issues predominate. The analysis of

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<sup>27</sup> Pa. R. Civ. P. 1709.

<sup>28</sup> Janicik, 305 Pa. Super. at 136, 451 A.2d at 458.

<sup>29</sup> Id.

predominance under Rule 1708 (a) (1) is closely related to that of commonality under Rule 1702(2).<sup>30</sup> The court adopts and incorporates its analysis of commonality and concludes that the requirement of predominance has been satisfied.

## **2. The Existence of Serious Management Difficulties**

Under Pa. R. Civ. P. 1708 (2), a court must also consider the size of the class and the difficulties likely to be encountered in the management of the action as a class action. While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight. Problems of administration alone ordinarily should not justify the denial of an otherwise appropriate class action for to do so would contradict the policies underlying this device. Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring.<sup>31</sup> The Court sees no serious management difficulties in the trial of this case. Whatever management problems remain, this court will rely upon the ingenuity and aid of counsel and upon the court's plenary authority to control the action.

## **3. Potential for Inconsistent Adjudications**

Pennsylvania Rule 1708 (a) (3) also requires a court to evaluate whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. In considering the separate effect of actions, the precedential effect of a decision is to be considered as well as the parties' circumstances and respective ability to pursue separate actions. While there is significant risk of inconsistent adjudications if tried separately, because of the straightforward nature of the

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<sup>30</sup> Janicik, *supra*. 451 A.2d at 461.

<sup>31</sup> Buchanan v. Brentwood Federal Sav. and Loan Ass'n, 457 Pa. 135, 320 A.2d 117, 131 (Pa. 1974).

issues and facts involved, as a single certified class one case will determine liability and one verdict will establish all obligations. Any possibility for inconsistent verdicts is eliminated by certification.

**4. Extent and Nature of any Preexisting Litigation and the Appropriateness of this Forum**

Under Pa. R. Civ. P. 1708 (a) (4) and (a) (5), a court should consider the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues. The court is aware of no litigation which would conflict with this case. This court finds that this forum is appropriate to litigate the class claims.

**5. The Separate Claims of the Individual Plaintiffs are Sufficient to Support Separate Claims however Class Certification is Warranted.**

Rule 1708 (a)(6) and (7) requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. Thus, a court must analyze whether, in view of the complexities of the issues or the expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate claims.<sup>32</sup> Alternatively, the rules require that the court analyze whether it is likely that the amounts which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.<sup>33</sup>

In the case at bar, each potential class members' claim is sufficient in amount to support separate individual claims. Notwithstanding the class member's ability to bring its own individual claim, class certification is still warranted. Common questions of law and fact exist and predominate over the individual claims. Prosecution by individual class members could

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<sup>32</sup> Pa.R.C.P. 1708(a)(6).

<sup>33</sup> Pa.R.C.P. 1708(a)(7).

potentially create inconsistent and varying adjudications. Class certification would diminish administrative costs and promote judicial economy. Accordingly, having weighed the Rule 1708 requirements, this court finds that a class action is a fair and efficient method for adjudicating plaintiffs' claims.

### CONCLUSION

Based on the forgoing, Plaintiffs' motion for class certification is granted and the following class is certified:

Subclass I:

Jamelle Johnson, Cathy Lewandoski, Ken Lewandowski, Richard Paulucy, Sabrina DReichart and class members who purchased properties developed or sold by ADK Development, Inc. in Port Richmond Gate without disclosure of contamination and restrictions on use of the property.

Subclass II:

Annmarie Farrell, John Hearn and members of the class who purchased properties developed or sold by TSA in Port Richmond Gate without disclosure of contamination and restrictions on use of the property.

It is further **ORDERED** as follows:

1. Every member of the above-described classes is included, unless a member files of record a written election to be excluded from the classes on or before April 6, 2012.
2. A proposed form of notice to the class shall be prepared by counsel for plaintiffs pursuant to Pa. R. Civ. P. 1712 (c) and shall be filed with the court and served upon counsel for defendants on or before January 9, 2012. Any objections to the proposed notice shall be filed with the court and served upon plaintiffs' attorney ten days thereafter.

3. A hearing on the proposed form of notice as well as objections thereto will be scheduled by separate order of the court.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**