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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

WILLIAM M. SOLEM, ELLEN G. SOLEM and JOHN DOES I-V, Plaintiffs, vs. MONTANA DEPARTMENT OF REVENUE, a department of the State of Montana, Defendant.	Cause No. DV-10-073 (D) Hon. Dan Wilson **PLAINTIFFS' RESPONSE TO MONTANA DEPARTMENT OF REVENUE'S MOTION FOR DECERTIFICATION OF CLASS, OR IN THE ALTERNATIVE TO REMOVE CLASS REPRESENTATIVES, AND PROVIDE ADDITIONAL NOTICE**

COMES NOW Plaintiffs, by and through counsel of record, and hereby submit their Response to Montana Department of Revenue's Motion for Decertification of Class, or in the Alternative to Remove Class Representatives, and Provide Additional Notice as follows:

I. INTRODUCTION

The DOR's Motion to Decertify the Class is based on false premises and mistaken assumptions regarding both the fundamental question underlying liability in this case and the appropriate remedy. This Court's finding that the Montana Department of Revenue's ("DOR") 2009 base lot model was improper and illegal applies equally to *all* landowners in Neighborhood 800, and the remedy for the DOR's improper and illegal assessment methodology is not a re-assessment of Neighborhood 800 property taxes using a reconfigured 2009 base lot model. Rather, as set forth in the Montana Supreme Court's *Barron* decision, the remedy is a re-assessment of property taxes for the relevant 2009 to 2014 period using the prior appraisal cycle's undisputed value. In the present case, this means property taxes must be re-calculated for Neighborhood 800 properties by relying upon the 2002 land appraisal values. This remedy will not prejudice any Class members, as nearly all class members will see a reduction in value. Even the rare class member that sees an increase in value will not be prejudiced, as such Class members would not be required to make any payment to the DOR.

On April 29, 2016, this Court issued an Order finding that all of the requirements of Rule 23(a)(1-4) and 23(b)(2) had been satisfied, and that certification of the Class was appropriate. Dkt 56. The Court's Findings of Fact, Conclusions of Law, and Order following trial on the liability phase of this matter does not change the Court's findings in the Class Certification Order. Following trial, every basis upon which the Class was certified remains true. Indeed, following trial it has become clear that rather than decertification, an expansion of the Class is warranted (please see Plaintiff's Motion to Amend the Class Definition at Dkt. 139). Accordingly, the DOR's Motion to Decertify the Class should be denied.

II. FACTUAL CLARIFICATIONS

A. The Focus Of This Litigation

The DOR's motion misconstrues the fundamental nature of this case, including the Solems' arguments throughout the course of this ten-year litigation, and this Court's holdings in its October 15, 2019 Findings of Fact, Conclusions of Law, and Order. The DOR attempts to cast the focus of this case as a question of whether land values arrived at using the DOR's 2009 base lot model were too high or too low, arguing that the Solems abandoned their claim the DOR had overvalued Neighborhood 800 properties, and argued instead at trial that the DOR had undervalued the properties. This is simply not the case.

The focus of the Solems' argument at trial was that the DOR's methodology was improper and illegal, not whether it resulted in valuations that were too high or too low. The Solems carried their burden of proving this at trial, and the Court held:

> In this case, the Plaintiffs have confronted and addressed, directly, the propriety of the DOR's methodology and, in particular, the application of the base lot model employed in Neighborhood 800 for the 2009 appraisal cycle and, having done so, revealed the defects in it and overcame any presumption of correctness in the methodology the law affords to the DOR and have shown that the DOR's methodology was both improper and unlawful… The Plaintiffs have met their burden of showing, on behalf of themselves and the members of the class, that the DOR, by adopting and imposing its 2009 base lot model in Neighborhood 800, employed a non-uniform method of appraisal, failed to value similar properties in a like manner, and failed to appraise the subject properties in a manner that is fair to all taxpayers.

Dkt. 128, Conclusions of Law, ¶¶ 74-75. Under the 2009 base lot model, there are likely some Neighborhood 800 properties that were overvalued, and there are likely some Neighborhood 800 properties that were undervalued. The point here is that none were *accurately* valued in that the methodology which the DOR relied upon did not result in market value appraisal. The failure to appraise at market value is what rendered the methodology improper and illegal.

It was the DOR's argument at trial, not the Solems', that the 2009 base lot model was manipulated to *undervalue* properties[1]. *See e.g.* Test. Scott Williams, Tr. Trnscr. Vol. I, 451:6-25. However, just as undervaluation was not a relevant or viable defense for the DOR at the liability phase of the case, it is also not a viable defense during the damages phase. Whether the properties in Neighborhood 800 were overvalued or undervalued is equally irrelevant at the damages phase of the trial, given the method of calculating damages as set forth in the Montana Supreme Court's *Barron* decision.

B. Application Of Damages

The DOR erroneously assumes that following the Court's Findings of Fact, Conclusions of Law and Order, the Solems and the Class are now bound to a higher valuation for the 2008 assessment cycle. The DOR even submitted as exhibits to its motion expert witness reports from Richard Hagar and Scott Williams, both of whom offer their opinions based upon the mistaken belief that this Court "has ordered that all sales must be utilized [in the base lot model], and the outliers are to be added back to that model." Dkt. 136, Def.'s Mt. to Decertify Class at Exh. A, Expert Report of Scott Williams at pp. 2; *see also* Dkt. 136, Def.'s Mt. to Decertify Class at Exh. A, Expert Report of Richard Hagar at pp. 8 ("The Court's requirement for the use of 'all' sales in the final statistical model reduces the credibility of the model's output…").

These assumptions are contrary to the plain language of this Court's findings, which stated:

> The Court, having found liability in favor of the Plaintiffs and all those similarly situated, *reserves the issues of determining damages and any other appropriate remedy for the next phase* of these proceedings pursuant to the prior bifurcation order

[1] It is worth noting here that at trial, William Solem testified that under the 2009 base lot model, his land value *increased by 437%* over the previous cycle's appraisal value, and that he believed the DOR had "grossly overvalued my land". Tr. Trnscr., Vol. I, 76:8-9; 77:17-21 (Mar. 11, 2019); *compare with DeVoe v. Dept. of Revenue of State of Mont.*, 263 Mont. 100, 866 P.2d 228 (1993) (finding no credible evidence to justify increasing the appraised value of plaintiff's property by an amount in excess of 100% from one appraisal cycle to the next).

(Dkt. No. 79). The Court will set a status conference for determining a scheduling order related to the next phase of this litigation.

Dkt. 125, Conclusions of Law, ¶ 77 (emphasis added). This Court reserved ruling on the measure of damages, and certainly did *not* order that the proper measure of damages is a re-assessment of the Neighborhood 800 properties using a revised 2009 base lot model. To be certain, this Court carefully catalogued the deficiencies in the DOR's 2009 base lot model which resulted in an unfair, unequal, and non-uniform assessment for Neighborhood 800 (*see esp.* Dkt. 128, Findings of Fact, ¶¶ 25-40), and articulated a number of alternatives to the DOR's flawed base lot model approach, only one of which was including additional sales in the model (*see* Dkt. 128, Findings of Fact, ¶ 41). However, the Court did *not* order the application of any such alternatives, and did not settle on any measure of damages that would result in higher land valuations. Rather, the Court reserved ruling on damages until the present phase of the litigation.

As set forth in the Solems' Motion for Partial Summary Judgment on Damages, the proper measure of damages for this case is clearly outlined in *Mont. Dept. of Revenue v. Barron*, 245 Mont. 100, 799 P.2d 533 (1990). Under *Barron*, the Solems and all similarly situated class members are entitled to have their 2008 appraised property values reverted back to their 2002 appraised value, and to have their taxes for the tax years 2009 through 2014 re-calculated using the 2002 appraisal value. The proper measure of damages is a refund of the difference between their property taxes as paid for each of the six years (2009 through 2014) at the improper and illegal 2008 appraisal rate, and the property taxes as calculated for each of the six years in the cycle (2009 through 2014) using the undisputed 2002 appraisal rate.

Given the DOR's stated concern at trial about the dramatic increase in property values between the 2002 and 2008 re-appraisal cycles, very few (if any) class members would experience an *increase* in tax assessments for this period by reverting to the 2002 appraised

value. However, even those rare class members who may potentially see an increase in land value and therefore in property taxes under this measure of damages would not be prejudiced.

The DOR ignores that the Solems, on behalf of themselves and the Class, have only ever sought recovery of *overpayments*. They are not seeking and have not sought payment from any class members who may have underpaid. The DOR did not file any counterclaims in this case, and has also never sought to recover any potential underpayments from Class members. This is particularly clear in the Court's April 29, 2016 Order Granting Plaintiff's Motion to Certify the Class. This Order explained that:

> The proposed class seeks, in part, a refund for any property owners where DOR's methodology resulted in an overvaluation. (Fourth Amended Complaint for Declaratory Judgment, p. 6.) *It does not request a payment from any property owners in the event DOR undervalued their property.*

Dkt. 56, ¶ 15 (emphasis added). The Class was certified on the understanding that no payment from any property owners would be sought in the event that the outcome of the litigation resulted in an undervaluation, and the same remains true today. Based on this fact, the Court explicitly found there was no antagonism between the Solems and the Class. *Id*. at ¶ 20.

Contrary to the DOR's assertion, William Solem never agreed that an increase in property taxes was the proper measure of damages. The DOR relies on an excerpt from Mr. Solem's deposition for this assertion, but ignores the context of the question. Mr. Solem, when asked what he would do if his taxes were to see an increase as a result of the litigation, responded that he had no problem paying taxes "*if that happens*" and clarified that he had no objection to paying taxes that are "fair and reasonable." There was never a concession that this would be the proper remedy however, and the taxes were determined by this Court *not* to be fair and reasonable. There is no danger of Mr. Solem or any other Class member having to pay the DOR based on a

valuation increase, because that is not a proper measure of damage under *Barron*, and is not a remedy that the Solems or the DOR have ever sought.

There are only two potential outcomes for class members under the *Barron* remedy. By reverting to the 2002 appraised values for the 2009 to 2014 taxable period, class members will either 1) realize an overpayment made to the DOR and recover the difference in the form of damages, or 2) realize an underpayment to their benefit and will *not* be compelled to pay the DOR the difference. The DOR's mistaken assumptions regarding the very nature of this case, the proper measure of damages, and the relief sought on behalf of the class undermines its arguments in favor of decertifying the Class. The DOR's request to decertify the Class, or alternatively to replace the class representatives, lacks merit and should be denied.

III. ARGUMENT

A. Legal Standard

Class action certification orders "are not frozen once made." *Rolan v. New W. Health Servs.*, 2013 MT 220, ¶ 15, 371 Mont. 228, 307 P.3d 291 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 586 U.S. 458, 133 S.Ct. 1184, 1202 n. 9 (2013) ("Rule 23 empowers district courts to 'alter or amend' class-certification orders based on the circumstances developing as the case unfolds")). A district court has broad authority in assessing the manageability of a class action under M.R. Civ. P. 23(c)(1)(C). *Rolan*, ¶ 15. In exercising its broad discretion in the class context, the district court "may consider any factor that the parties offer or the court deems appropriate to consider." *Id*. (quoting *Blanton v. Dept. of Pub. Health and Hum. Servs.*, 2011 MT 110, ¶ 38, 360 Mont. 396, 255 P.3d 1229); *see also* Mont. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment").

B. All Class Notice Requirements Have Been Satisfied

The DOR argues that the Class should be decertified because the Class was not provided with proper notice under Mont. R. Civ. P. 23(c)(2). The DOR provides no legal authority for this position, likely because none exists.

Mont. R. Civ. P. 23(c)(2)(A) provides that "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (Emphasis added). Pursuant to the Court's Class Certification Order, the Class has been certified as a Rule 23(b)(2) class[2]. (Dkt. 56, ¶¶ 23-24). The notice language is discretionary – the court *may* direct appropriate notice. Rule 23(c)(2)(A) (*compare with* Rule 23(c)(2)(B), which provides that for Rule 23(b)(3) classes, "the court *must* direct to class members the best notice…"). Notice is discretionary for Rule 23(b)(2) classes because inclusion in such classes is mandatory.

The Montana Supreme Court has explained that "[t]he key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Knudsen v. Univ. of Montana*, 2019 MT 175, ¶ 13, 396 Mont. 443, 445 P.3d 834 (citing *Jacobsen v. Allstate Ins. Co*., 2013 MT 244, ¶ 61, 371 Mont. 393, 310 P.3d 452) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360, 131 S. Ct. 2541, 2557 (2011)). Classes

[2] Rule 23(b)(2) allows for certification of a class where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole". The Solems' case was properly certified as a 23(b)(2) class because the question of whether the DOR illegally or improperly valued Neighborhood 800 properties applies equally to all Neighborhood 800 properties as all were valued using the same methodology. Moreover, the Solems' and the Classes' damages claims are secondary to the injunctive relief, and the damages claim is objectively determinable under *Barron*. Although damages are individual, the individual claims do not predominate over the class claim since all damages are determined by the same objective formula, in the same manner that all property taxes are assessed using the same objective formula.

certified under Rule 23(b)(1) and (b)(2) are "mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Wal-Mart*, 564 U.S. at 362, 131 S.Ct. at 2558.

In this matter, notice to Class members was not required. However, the Solems chose to give optional notice to members so as to allow elective participation in and attendance at the trial by those identified as members, and also so as to allow notice of potential claims for attorney fees from any benefit derived from the class action. This Court had discretion to approve "appropriate" notice to the Class, and did so in its May 23, 2018 Order Approving Class Notice. Dkt. 83.

The DOR specifically argues that the notice sent to Class members was deficient because it failed to convey to the class the risk that they may see an increase in their property valuation for the applicable 2009 to 2014 assessment period. The Class was not notified of this risk, and did not need to be notified of this risk, because this is not a risk and presents no potential detriment to Class members. The proper measure of damages under *Barron* is reversion to the prior appraisal cycle's land values – in this case the 2002 appraised land values. As the DOR acknowledged at trial, the 2002 values for Neighborhood 800 were substantially lower than the 2008 appraised values. Moreover, this Court's Class Certification Order already found that "[t]he class is seeking declaration regarding DOR's assessment methodology and a refund of any amounts overpaid by class members. It is not seeking payments from any members who may have underpaid." (Dkt. 56, ¶ 20). There simply is no risk to the mandatory 23(b)(2) Class members that would necessitate a notice, there is only potential gain which the mandatory class members will realize even without notice or opt-in. Because notice was not required in this case, and because the Court has already determined that the voluntary notice provided was

appropriate, the DOR's attempt to decertify the class on notice grounds fails, and its motion should be denied.

C. The Certification Requirements Under Rule 23(a) Remain Satisfied

Mont. R. Civ. P. 23(a) governs whether a class may be certified and sets forth four prerequisites necessary to sustain a class action:

(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; and
(4) The representative parties will fairly and adequately protect the interests of the class.

Chipman v. Northwest Healthcare Corp., 2012 MT 242, ¶ 43, 366 Mont. 450, 288 P.3d 193. In its Motion to Decertify the Class, the DOR does not challenge the numerosity requirement of Rule 23(a)(1). However, the DOR does suggest that the remaining three requirements – commonality, typicality, and adequate representation – are no longer satisfied. The DOR's arguments fail, as nothing in the Court's order following the liability trial changes this Court's prior application of Rule 23(a). Not only should the Class remain certified, based on the evidence at trial the Class is actually eligible for expansion.

1. The Commonality Requirement Remains Satisfied

Rule 23(a)(2) requires as a prerequisite to class certification that there are "questions of law or fact common to the class." Commonality exists where class members' claims "depend on a common contention that is capable of classwide resolution, 'which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke'." *Chipman*, ¶ 48 (quoting *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. at 2551). The focus is not on raising common questions, but rather on "the capacity of a classwide proceeding to

generate common *answers* apt to drive the resolution of the litigation." *Chipman*, ¶ 48 (quoting *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. at 2551) (emphasis original).

The DOR suggests that the commonality was originally met because the central issue in the case was "did the methodology overvalue the property?" The implication is that commonality no longer exists because the Court found the DOR's methodology undervalued the property. This position is simply wrong.

Whether the improper and illegal methodology resulted in an overvaluation or an undervaluation is not the relevant inquiry; that the methodology resulted in a value that did not reflect true market value is the relevant inquiry. Overvaluation versus undervaluation was not relevant to liability, and under *Barron* it is not relevant to a damages calculation. It has no impact on the commonality of the class, and is not a basis for decertifying the class.

The central issue in the case – the common question that binds all Class members – is whether the DOR's methodology used in valuing Neighborhood 800 was improper or illegal, not whether it overvalued or undervalued properties. This Court found unequivocally that the DOR's methodology was improper and illegal, which further solidifies the Class under the commonality requirement. As required by *Chipman*, the Court's *answer* to this question applies to all members of the Class, and in fact to all members of Neighborhood 800. As a result of this Court's Findings of Fact, Conclusions of Law, and Order (Dkt. 128), as a matter of law every landowner in Neighborhood 800 was subjected to an illegal and improper property tax assessment for the years 2009 through 2014, because the DOR's flawed 2009 base lot model was used in the valuation process for every one of the Neighborhood 800 properties for this period. Thus, the classwide proceeding has generated a common *answer* that drives the resolution of the litigation.

In the April 29, 2016 Class Certification Order, this Court found:

> Plaintiffs satisfy the commonality requirement of Rule 23(a)(2), M.R.Civ.P. because the question of law or fact common to the class is whether DOR's methodology values lakefront property in Neighborhood 800 according to its market value. DOR applied the same assessment methodology for all lakefront property owners in Neighborhood 800, so a resolution of the class' common contention will apply to all class members. No individual determinations regarding who is a member of the class will be necessary.

Dkt. 56 at ¶ 15. The same remains true today. The commonality requirement remains satisfied, and the DOR's Motion to Decertify the Class should be denied.

2. The Typicality Requirement Remains Satisfied

Rule 23(a)(2) requires as a prerequisite to class certification that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement ensures that the interests of the class representatives are aligned with the interests of the class, under the rationale that "a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class." *Chipman*, ¶53 (citation omitted). Typicality exists where the named plaintiff's claim "stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory." *Id.*

The DOR's argument with regard to typicality is the same as its argument with regard to commonality – namely that the Solems' claims stem from an undervaluation while the Class's claims stem from an overvaluation. Again, the DOR misses the mark here.

It is not the overvaluation or undervaluation of a property that drives this litigation. The "event, practice, or course of conduct" that drives this litigation is the DOR's method of property valuation, and its overall accuracy in valuation when using the 2009 base lot model. This Court unequivocally found that "the DOR, by adopting and imposing its 2009 base lot model in

Neighborhood 800, employed a non-uniform method of appraisal, failed to value similar properties in a like manner, and failed to appraise the subject properties in a manner that is fair to all taxpayers." Dkt. 128, Conclusions of Law, ¶ 75. The interest of the Solems in ensuring their lakefront property is appraised and taxed in a manner that is uniform, fair, and equitable is perfectly aligned with the Class's interests in ensuring the same treatment for their own properties.

Moreover, the remedial theory is the same for the Solems and the Class members regardless of whether the 2009 base lot model overvalued or undervalued individual properties. Under *Barron*, the remedy is to have all Neighborhood 800 properties re-assessed using the prior appraisal cycle's valuation, since the methodology of that prior appraisal cycle has not been challenged. The vast majority of landowners are expected to realize an overpayment in taxes under this measure of damages, and will be entitled to a refund. However, in any cases where reversion to the prior appraisal cycle results in an underpayment, no additional taxes will be collected, and such landowners will not suffer any detriment or prejudice.

In the April 29, 2016 Class Certification Order, this Court found:

> The Solems satisfy the typicality requirement of Rule 23(a)(3), M.R.Civ.P because they are lakefront property owners in Neighborhood 800 who timely paid their property taxes under protest and DOR applied the same assessment methodology to all lakefront property owners in Neighborhood 800.

Dkt. 56 at ¶ 15. The same remains true today. The typicality requirement remains satisfied, and the DOR's Motion to Decertify the Class should be denied.

3. The Adequate Representation Requirement Remains Satisfied

Rule 23(a)(4) requires as a prerequisite to class certification that "the representative parties will fairly and adequately protect the interests of the class." "Adequate representation requires that the named representative's attorney is qualified, competent, and able to conduct the

litigation and the named representative's interests are not antagonistic to the class interests." *Chipman*, ¶ 57. The DOR does not challenge the qualifications of class counsel. However, the DOR does argue that the class should be decertified, or alternatively that the Solems should be removed as class representatives, because the Solems' arguments at trial – namely that the DOR *undervalued* Neighborhood 800 properties – were antagonistic towards the Class' interest.

However, as set forth above, undervaluation was the DOR's argument, not the Solems'. The Solems set out to prove, and did successfully prove, that the DOR's methodology in appraising the Neighborhood 800 properties was improper and illegal. Whether the properties in Neighborhood 800 were overvalued or undervalued by the 2009 base lot model is frankly not relevant, given that the method of calculating damages under the *Barron* decision is reversion to the 2002 appraised value.

In its Class Certification Order, this Court found that "[t]here is no antagonism between the Solems and other class members because DOR applied the same assessment methodology to all lakefront property owners in Neighborhood 800." Dkt. 56, ¶ 20. This remains true today. The Solems and all of the landowners in Neighborhood 800 were subjected to the DOR's improper and illegal method of appraisal, which did not result in valuations at true market value. The Solems and all of the landowners in Neighborhood 800 are therefore entitled to have this injustice corrected in the manner set forth in *Barron*. Such a correction will not prejudice any of the Neighborhood 800 landowners, as even in the unlikely event that a landowner does see an increase in land value for the relevant time period, that landowner will not be required to make any refund to the DOR. The interests of the Solems continue to be perfectly aligned with the interests of the Class, and they should remain the Class representatives.

IV. CONCLUSION

The DOR fails to raise any viable basis under which this Court should decertify the Class, and the entirety of its argument is based upon a misunderstanding of the very nature of the claims, and of the appropriate remedy. The DOR's Motion to Decertify the Class should be denied in its entirety. Moreover, based on the Rule 23(a) elements discussed herein and the Court's findings in its Findings of Fact, Conclusions of Law, and Order (Dkt. 128), expansion of the Class definition to include *all* Neighborhood 800 landowners is appropriate, as set forth in the Plaintiffs Motion to Amend the Class Definition (Dkt. 139).

DATED this 31st day of July, 2020.

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