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12
13 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
14

15
16 , individually, and on behalf of all others
similarly situated,

17 Plaintiffs,

18 v.

19 ASARCO, INC., a New Jersey corporation,

20 Defendant.
21

No.

CLASS ACTION COMPLAINT FOR
INJUNCTIVE RELIEF; MEDICAL
MONITORING; CLEANUP COSTS; AND
PUNITIVE DAMAGES

JURY DEMAND

22 This class action complaint is filed on behalf of the representative plaintiffs and all
23 others similarly situated against Asarco, Inc. ("Asarco"). The allegations below are made
24 upon information and belief, except those allegations that pertain to the representative
25
26

1 plaintiffs, which are, unless otherwise stated, alleged on knowledge. Allegations based on
2 information and belief are based in part on investigations conducted by counsel.

3 I. NATURE OF THE ACTION

4 1. Asarco's Ray Mine Complex consists of two sites located several miles apart.
5 The northern most of the sites is Asarco's Ray Unit. The Ray Unit consists of an open-pit
6 mine, a mill that produces concentrates from sulfide ores, and a leaching and solvent
7 extraction/electrowinning plant. The Ray Unit also has a copper smelter which is currently
8 maintained on standby status. The Ray Unit pit and dumps occupy an area of over three
9 miles long by one and one-half miles wide. The open pit is over 1,000 feet deep. The
10 community of Riverside, Arizona is across the street from the Ray Unit.

11 2. The second part of the Ray Complex is the 200 acre smelting plant in Hayden,
12 Arizona. The Hayden plant boasts, in part, the smelter and an acid plant. The people of
13 Hayden and Winkelman, Arizona, literally live in homes that are intermingled with smelting
14 operations. The towns of Hayden and Winkelman are largely hispanic, implicating a number
15 of Environmental Justice concerns. The town of Kearny, Arizona is a few miles north of
16 Hayden, between the Ray Unit and the Hayden Smelter.

17 3. For approximately two decades, the communities of Hayden, Winkelman,
18 Kearny, Riverside and the surrounding area, have been plagued with continuous releases of
19 toxic materials such as lead, arsenic, cadmium, and other heavy metals, as well as sulphur
20 dioxide and sulfuric acid, from Asarco's Ray Complex. Contaminants were emitted into the
21 air through the stack, as well as through "fugitive emissions" that allowed contaminants to
22 escape into the environment from other sources, such as dust blown from crushing,
23 transporting, smelter and mining operations.

24 4. Plaintiffs have suffered from a myriad of ailments such as, in part, various
25 cancers, difficulty conceiving/miscarriages, respiratory distress, birth defects, and serious
26 developmental challenges. These, and other ailments, experienced by the people living

1 around the Ray Complex are the types of problems generally associated with smelter/mining
2 emissions.

3 5. To help determine causation, plaintiffs undertook environmental testing in the
4 area. Plaintiffs tested dust in people's homes and took soil samples. The levels of lead and
5 arsenic found in and around people's homes, and even in the public schools and parks, were
6 dangerously high and exceeded Arizona State Residential Soil Remediation Levels.

7 6. Environmental sampling similarly demonstrated exceedances of Soil
8 Remediation Levels for cadmium and antimony. Moreover, the devastating effects of
9 sulfuric acid emissions are apparent throughout the area. Until recently, Asarco would
10 voluntarily repaint people's cars because of the acid damage caused by Asarco's operations.

11 7. Without question, the contamination deposited on the property of plaintiffs and
12 members of the class exposes both adults and children to significantly increased health risks.
13 Class members are exposed to the contamination in the soil, dust and air through several
14 pathways, including: inhalation of emissions and resuspended dusts; absorption through the
15 skin; and, through ordinary ingestion of small amounts of soil.

16 8. Arsenic is a poison. Long-term chronic exposure to arsenic can cause skin
17 cancer, lung cancer, liver cancer, bladder cancer, kidney cancer and colon cancer. Public
18 exposure to relatively low doses of arsenic can also cause spontaneous abortions, congenital
19 birth defects, low birth weight, skin hyperpigmentation, skin keratosis and, other non-cancer
20 vascular and neurological conditions.

21 9. Lead is a poison. Chronic exposure to the ingestion of lead is particularly
22 dangerous to young children, who tend to ingest more soil and more readily absorb lead into
23 the bloodstream. Lead causes IQ and attention-span deficits, renal disease, and other
24 cognitive, behavioral, cardiovascular, reproductive and neurological effects. Lead is also a
25 suspected human carcinogen. Any exposure to arsenic or lead above background levels
26 results in increased risks of significant adverse health consequences.

1 to do so by governmental agencies or when sued by those living in the pollution left by
2 Asarco.

3 II. CLASS ACTION ALLEGATIONS

4 16. Plaintiffs bring this class action pursuant to Fed. R. Civ. P. 23.

5 17. Medical-Monitoring Class. Plaintiffs bring this action on behalf of themselves
6 and as representatives of all others similarly situated as a medical-monitoring Class. The
7 Medical-Monitoring Class is defined as all individuals:

8 Who for a period of at least one year resided, or in the future will
9 reside for at least one year, on property that is located within the
Class Area.

10 18. Excluded from the Medical-Monitoring Class are Asarco's officers, directors,
11 agents, current attorneys, current employees and representatives.

12 19. Members of the Medical-Monitoring Class will be referred to as the
13 "Residents."

14 20. The geographic area of the class or "Class Area" is identified in Exhibit A and
15 consists of the towns of Hayden, Winkelman, Kearny and Riverside, Arizona.

16 21. It is anticipated that as a result of class-certification discovery, and prior to
17 moving for class certification, that the definition of the class may be modified.

18 22. *Numerosity*. While the exact number is uncertain at this time, it is estimated
19 that the class contains approximately 6,000 people. The members of the proposed class are
20 thus so numerous that joinder of all members is impracticable and would not be a superior
21 method to resolve this controversy.

22 23. *Typicality*. Plaintiffs have incentives that align with those of absent class
23 members so as to assure that the absentees' interests will be fairly represented. Plaintiffs'
24 claims and those of the class members arise from the same practice or course of conduct
25 (toxic releases from the Ray Complex) and are based on the same legal theories. Indeed, the
26

1 representative plaintiffs are members of the proposed class they seek to represent and the
2 claims alleged by the representative plaintiffs are identical to the class' claims.

3 24. *Adequacy of Representation.* The representative plaintiffs will fairly and
4 adequately protect the interests of the class members that they represent. The representative
5 plaintiffs have no interests contrary to, or that conflict with, those of the proposed class. No
6 conflict exists between plaintiffs and class members because: (a) the claims of the named
7 plaintiffs are typical of the absent class members' claims; (b) virtually all of the questions of
8 law and fact at the liability stage are common to the class and overwhelmingly predominate
9 over any individual issues, so that by prevailing on their own claims, plaintiffs will
10 necessarily establish Asarco's liability as to all class members; (c) without the representation
11 provided by plaintiffs herein, virtually no class members will receive representation to
12 redress their injuries; (d) plaintiffs and their counsel have the necessary financial resources to
13 adequately and vigorously litigate this class action; and (e) plaintiffs are aware of the
14 fiduciary responsibilities to the class members and are determined to diligently discharge
15 those duties. To that end, plaintiffs have retained attorneys competent and experienced in the
16 prosecution and settlement of class actions, including environmental litigation.

17 25. *Common Questions of Law and Fact.* Common questions of law and fact exist
18 as to the members of the class. Such common questions of law and fact include, but are not
19 limited to:

- 20 (a) Whether Asarco proximately caused the Contaminants to be released
21 into the environment where the Residents could come in contact with them?
22 (b) Whether the Contaminants in the environment pose health risks?
23 (c) Whether the Residents have been significantly exposed to the
24 Contaminants?
25 (d) Whether exposure to the Contaminants has increased the Residents' risk
26 of contracting serious diseases or suffering other severe health consequences?

1 - (e) Whether the increased risk makes periodic medical examinations
2 reasonably necessary?

3 (f) Whether monitoring and testing procedures exist that can: (1) detect
4 exposure to contamination so that additional steps to minimize exposure may be taken; and
5 (2) make early detection and treatment of serious latent diseases possible and beneficial?

6 (g) What amount of money is necessary to establish a fund to pay for the
7 prudent medical monitoring of the Medical-Monitoring Class?

8 (h) Whether the plaintiffs are entitled to response costs from Asarco under
9 42 U.S.C. § 9607(a), and if so, how much?

10 (i) Whether a fund can be established and/or Asarco required to clean up
11 their mess and abate the ongoing imminent and substantial endangerment to
12 health and the environment it poses, either pursuant to notions of common law
13 nuisance and/or 42 U.S.C. § 6972, and if so, how much?

14 26. *Superiority.* A class action is superior to other available methods for the fair
15 and efficient adjudication of this controversy, given the following: (a) common questions of
16 law and fact overwhelmingly predominate over any individual questions that may arise, so
17 that there would be substantial economies to the Court and the parties to litigating the
18 common issues in a class-wide, instead of a repetitive, individual basis; (b) the size and
19 complexity of each individual class members' claim is too small, and inextricably
20 interrelated with the other class members' claims, to make individual litigation against
21 Asarco practical or economically viable. By its very nature medical monitoring is a class-
22 wide, not individual, form of equitable relief using group-studies and information gathering
23 to formulate treatment protocols; (c) class treatment is required for optimal deterrence and
24 compensation and for limiting the court-awarded reasonable legal expenses incurred by class
25 members; (d) despite the relatively small size of individual class members' claims, their
26 aggregated volume, coupled with the economies of scale inherent in litigating similar claims

1 on a common basis, will enable this case to be litigated as a class action on a cost-effective
2 basis, especially when compared with repetitive individual litigation; and (e) no unusual
3 difficulties are likely to be encountered in the management of this case as a class action.

4 27. The prerequisites to maintaining a class action for injunctive relief exist: (a) if
5 injunctive relief is not granted, great harm and irreparable injury to plaintiffs and the
6 members of the class will continue; and (b) plaintiffs and the members of the class have no
7 adequate remedy at law for the injuries which are threatened to recur, in that, absent action
8 from this Court, Asarco can continue to release toxic and hazardous substances into the
9 community.

10 28. The prosecution of separate actions by members of the class would create a risk
11 of establishing incompatible standards of conduct for Asarco – for example, one court might
12 decide that the challenged conduct is illegal and enjoin further conduct, while another court
13 might decide that those same actions are not illegal. Individual actions may, as a practical
14 matter, be dispositive of the interests of the class.

15 29. Asarco has acted or refused to act on grounds generally applicable to the class,
16 thereby making appropriate final injunctive or corresponding declaratory relief with respect
17 to the class as a whole.

18 III. FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

19 A. Asarco's Contamination of the Area

20 30. People living in the Class Area have suffered and continue to suffer from a
21 myriad of ailments that can be attributed to smelting/mining operations. To help the
22 community determine causation, plaintiffs undertook investigatory sampling and monitoring.

23 31. Levels of arsenic in soils were as high as 508 mg/kg. Dust taken from the
24 Winkelman School Gym had 117.4 mg/kg of arsenic. Even the Hayden city playground had
25 57 mg/kg (the lower end of the spectrum) of arsenic. Dust taken from people's homes
26

1 demonstrated arsenic levels as high as 249.9 mg/kg. The State of Arizona Residential Soil
2 Remediation Level for arsenic is 10.0 mg/kg.

3 32. In Riverside, one person's attic dust contained 7,988.8 mg/kg of lead. Dust
4 taken from the Winkelman School Gym contained 443.4 mg/kg lead. Soil samples taken
5 from Hayden were as high as 1,132.8 mg/kg. Many of the homes sampled in the area had
6 lead in their attic dust that exceeded 1,000 mg/kg of lead. The State of Arizona Residential
7 Soil Remediation Level for lead is 400 mg/kg.

8 33. Similarly, samples of soil and dust for cadmium and antimony exceeded, not
9 only background levels, but Residential Remediation Levels as well. People's roofs and
10 automobiles exhibited visible signs of damage from exposure to sulfuric acid.

11 34. As a part of the smelting process, Asarco emitted contaminants into the air.
12 These contaminants included arsenic, lead, cadmium and other byproducts of the smelting
13 operation (the "Contaminants"). Contaminants were emitted into the air through the "Stack."
14 Contaminants were also emitted from other sources at the smelting site.

15 35. During its operations at the Site, Asarco knew or should have known that it was
16 emitting the Contaminants into the air. Asarco knew or should have known that the
17 Contaminants posed risks to human health. During certain periods, the Contaminants were
18 emitted from the Site in amounts exceeding the applicable state and/or federal emissions
19 regulations and/or standards.

20 36. Airborne Contaminants emitted from the Site were distributed by locally
21 prevailing winds and other meteorological conditions and deposited in the class area
22 continuously. Asarco knew or should have known that the Contaminants were being
23 deposited on properties not owned by Asarco.

24 37. Plaintiffs and members of the class did not invite or grant permission to Asarco
25 to deposit the Contaminants on their Properties and in their community, nor did they invite or
26

1 grant permission to Asarco to leave the Contaminants on their Properties and in their
2 community.

3 38. Arsenic contamination such as that deposited by Asarco on the plaintiffs'
4 properties and in their community can cause lung cancer, skin cancer, liver cancer, bladder
5 cancer, kidney cancer, skin diseases and other severe health disorders.

6 39. Lead is a toxin.

7 40. The U.S. Department of Housing and Urban Development and the U.S.
8 Environmental Protection Agency noted the following in a March 1996 regulation.

9 *Lead affects virtually every system of the body. While it is*
10 *harmful to individuals of all ages, lead exposure can be*
11 *especially damaging to children, fetuses, and women of*
12 *childbearing age...*

13 * * *

14 Lead poisoning has been called "the silent disease" because its
15 effects may occur gradually and imperceptibly, often showing no
16 obvious symptoms. Blood levels as low as 10 µg/dL
17 [micrograms per deciliter] have been associated with learning
18 disabilities, growth impairment, permanent hearing and visual
19 impairment, and other damage to the brain and nervous system.
20 In large doses, lead exposure can cause brain damage,
21 convulsions, and even death.

22 (Emphasis added.)

23 41. In very small quantities, as low as 15 micrograms per deciliter of blood, lead
24 poisons the brain. Children with blood levels of 30 micrograms and higher show reduced
25 short-term memory, delayed reaction time, reduced ability to concentrate and diminished
26 Intelligence Quotients ("IQ"). Conservative estimates now indicate that an IQ drop of six
points in an exposed population can be explained by lead poisoning.

42. The preponderance of public health and scientific studies demonstrate that low-
level lead exposure has serious deleterious and irreversible effects on brain function, such as
lowered intelligence and diminished school performance, especially from exposures that
occur in early life; hearing deficits and growth retardation have also been observed.

1 43. - Children with high lead concentrations are likely to show substantially
2 decreased school performance that can require reading or speech therapy or the attention of a
3 school psychologist. Such decreased performance leads to lower IQs. Infants and children
4 ingest lead-contaminated dust and soil through normal mouthing behaviors. In the first two
5 to three years of life, it is normal for children to put toys in their mouth, suck their thumb and
6 fingers or other non-food items found in and around their homes. In the second year of life,
7 as children begin to play outdoors, it is normal for children to put dirt or soil in their mouth
8 or to ingest paint chips lying around the foundation.

9 44. In a 1996 report, the EPA found that children are particularly at risk from
10 environmental hazards in three ways:

- 11 (1) Because children's systems are still developing —
12 including rapid changes in growth and development,
13 immature body organs and tissues, and weaker immune
systems in infancy — they are more susceptible to
environmental threats.
- 14 (2) Because children eat proportionately more food, drink
15 more fluids, and breathe more air per pound of body
16 weight, and because they play outside more, they are more
exposed to environmental threats.
- 17 (3) Because children are least able to protect themselves, their
18 behavior — such as crawling on the ground or the floor —
exposes them to different environmental hazards.

19 45. Children living within the class area are thus at risk due to the lead
20 contamination resulting from Asarco's operation.

21 46. Other Contaminants deposited by Asarco in the community cause increase
22 cancer risk, as well as other human health hazards.

23 47. Plaintiffs and members of the class are exposed to Contaminants in their soil
24 through unintentionally ingesting, touching or breathing contaminated soils and dust. This is
25 of particular danger to children.
26

1 48. - Asarco has known or should have known since the early part of this century
2 that its copper smelting operations at the site emitted contamination into the air that fell on
3 adjoining properties and that these contaminants are hazardous to human health. Asarco
4 failed to exercise reasonable care to notify or warn plaintiffs and members of the class that it
5 was depositing Contaminants on their Properties and in their community. Asarco also failed
6 to warn of any known or suspected risks to the health and safety of plaintiffs and members of
7 the class as a result of the Contaminants accumulating on their Properties and in the
8 community.

9 49. Plaintiffs also conducted medical screening of the community for actual levels
10 of contaminants in blood and urine.¹

11 50. Diagnostic testing of adults and children in the area documented elevated
12 arsenic levels in urine and elevated blood lead levels and body burdens of bone lead,
13 particularly among children. For example, one child had a blood lead level of 39.6
14 micrograms/dl.

15 51. A recent report by the EPA on air pollution from industrial plant sources in the
16 United States and the risk of cancer among persons living near these facilities, identified the
17 Asarco Ray Complex as one of the worst in the nation. According to the EPA, the toxic
18 releases from the Hayden smelter alone pose a maximum potential cancer risk to nearby
19 residents of at least 1 in 1,000 over a lifetime. According to the federal government, an
20 acceptable level of potential cancer risk is 1 in 1,000,000.

21 52. The Contaminants on plaintiffs' properties' and the surrounding areas have
22 exposed plaintiffs and members of the class to increased risk of disease and other human
23 health consequences. Plaintiffs and members of the class have been and will be required to
24 incur substantial costs for regular, periodic monitoring of their health in order to detect early:
25 (a) evidence of exposure to Contaminants in blood, urine or body tissues so that class

26 ¹ Approximately 300 individualized personal injury claims are being filed contemporaneously herewith.

1 members may take steps to minimize their exposure; and (b) onset of any disease or medical
2 condition related to exposure to the Contaminants so that early and effective treatment may
3 be undertaken.

4 5 **B. ASARCO'S TRADITION OF POLLUTION**

6 53. Toxic Release Inventory ("TRI")² data indicate that the Hayden smelter is the
7 number six polluter in the Country. In 1995, the Hayden smelter was the number nine toxic
8 waste polluter nationwide. In 1994, Asarco was the number two polluter nationwide, with 11
9 sites emitting 3,150 tons of toxic waste. The Hayden smelter was the top toxic polluter in
10 Arizona in 1995, with releases of 18.3 million pounds, representing more than half of all the
11 35.8 million pounds of toxic substances released in Arizona that year by 187 reporting
12 facilities.

13 54. Between 1991 and 1996, the Hayden smelter released into the air through the
14 stack and by fugitive air emissions, nearly 15,000 pounds of antimony, 166,000 pounds of
15 arsenic, 8,600 pounds of cadmium, nearly 4 million pounds of copper, 587,000 pounds of
16 sulfuric acid, 380,000 pounds of lead, and 215,000 pounds of zinc.

17 55. In 1996 alone, the Hayden smelter released 137,000 pounds of lead into the air
18 and 1.6 million pounds of lead on land. Moreover, in 1996, the Hayden smelter released
19 71,000 pounds of arsenic in the air and 401,200 pounds of arsenic on land. Regulatory
20 agency records report additional exceedance data on sulphur dioxide and sulphur trioxide
21 emissions.

22 **C. ENVIRONMENTAL ENFORCEMENT ACTIONS AGAINST ASARCO**

23 56. The Asarco Ray Complex has had a long history of environmental agency
24 enforcement actions against it for violations of a variety of state and federal regulations and
25

26 ² TRI data is based on self-reporting which generally underestimates that actual amount of contaminants released. Indeed, the majority of Asarco's fugitive emissions appear to be unmonitored.

1 laws relating to toxic substance emissions and pollution. Examples of only a few of the
2 enforcement actions are set forth herein.

3 57. On June 22, 1981, Asarco entered into a consent decree with the Environmental
4 Protection Agency to address violations of the Clean Air Act at the Hayden smelting plant.
5 These violations concerned particulate matter (e.g. arsenic, lead, etc.) and sulphur dioxide
6 emissions. Over a three-day period, Asarco's source tests for particulate matter indicated
7 that such emissions were nine times that allowed under applicable regulations.

8 58. On December 14, 1989, the Arizona Department of Environmental Quality
9 ("ADEQ") requested that Asarco perform fugitive emissions evaluation. On February 14,
10 1990, Asarco responded that such an evaluation would be conducted and arsenic emissions
11 would be evaluated in response to concerns over "excess cancer rates in the area." After
12 receiving Asarco's draft evaluation plan, ADEQ sent a letter to Asarco criticizing it for its
13 complete failure to address particulate/arsenic emissions. Asarco submitted a revised plan,
14 and ADEQ sent another letter to Asarco dated March 21, 1991, specifically criticizing
15 Asarco's repeated omission of arsenic emissions disclosures. Asarco submitted another
16 evaluation plan on November 18, 1991, again deleting any reference to arsenic emissions.

17 59. According to an ADEQ memorandum, dated January 3, 1992 concerning
18 monitoring data for 1990-1996, the Hayden smelter's annual average arsenic, cadmium, lead
19 and copper emissions exceeded the ADEQ's air quality guidelines. The amount of arsenic
20 being emitted was 165-times higher than the ADEQ's air quality guidelines for arsenic
21 emissions. Cadmium emissions were 24-times higher than the ADEQ's air quality guidelines
22 for cadmium.

23 60. The TRI reports on the Asarco Hayden facility reveal that Asarco dumped
24 antimony, arsenic, cadmium, copper, and lead into the Gila River between 1987-1990. In
25 1993 and possibly in 1996-1997, flooding of the nearby Gila River caused the river to
26

1 overflow the copper tailings that were dumped adjacent to the river resulting in tailings being
2 washed down the river.

3 61. Numerous eye witnesses have provided repeated accounts of Asarco illegally
4 disposing of toxic waste products, by-passing pollution control equipment, and even
5 doctoring environmental reports that are required to be filed with the federal government.

6 **COUNT I**

7 **CONTINUING TRESPASS**

8 62. Plaintiffs incorporate by reference the preceding allegations of this Complaint
9 as if alleged herein.

10 63. Through its acts and omissions in discharging and emitting dangerous
11 quantities of toxic substances, Asarco intentionally entered, or caused toxic substances to
12 enter, residential properties in the Class Area.

13 64. Asarco has committed common-law trespass by causing toxic substances to
14 invade plaintiffs' and class members' properties without their permission or invitation. This
15 trespass is ongoing and continuing.

16 65. Asarco's trespass has exposed plaintiff and members of the class to toxic
17 substances.

18 66. Plaintiffs have been injured by this trespass in that they have been exposed to
19 medically unsatisfactory levels of toxic materials.

20 67. The conduct and activities of Asarco that caused plaintiffs' and the class
21 members' injuries were gross and wanton in character, and done with such recklessness and
22 indifference as to consequences to constitute an evil motive justifying punitive damages.

23 **COUNT II**

24 **CONTINUING PRIVATE AND PUBLIC NUISANCE**

25 68. Plaintiffs incorporate by reference the preceding allegations of this Complaint
26 as if alleged herein.

1 84. - Asarco breached its duties of care by negligently releasing toxic substances or
2 allowing the release of such substances into the Class Area, which in turn caused Residents
3 to be exposed. Asarco further breached its duties of care by negligently failing to remove the
4 toxic substances from the Class Area and/or failing to warn Residents of the existence of
5 such substances and/or the harmful effects caused by them. Asarco further breached its duty
6 by failing to take adequate steps to protect the plaintiffs and the class from future and
7 ongoing exposures. Asarco's breaches are ongoing and continuing.

8 85. Asarco violated various city, county, state and federal statutes and regulations
9 designed to prevent the types of incidents that resulted in the releases at issue herein and
10 Asarco is negligent *per se*.

11 86. Asarco's negligence, in exposing the class members to known hazardous
12 substances, has proximately caused the class to suffer an increased risk of contracting illness,
13 emotional distress, mental anguish, inconvenience, and loss of use and enjoyment of
14 property.

15 87. The conduct and activities of Asarco that caused plaintiffs' injuries were gross
16 and wanton in character, and done with such recklessness and indifference as to the
17 consequences as to constitute an evil motive justifying punitive damages.

18 COUNT V

19 **RECOVERY OF RESPONSE COSTS UNDER CERCLA**

20 88. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.

21 89. Asarco is a "person" as defined by the Comprehensive Environmental
22 Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(21).

23 90. The plaintiffs, as individuals, are "persons" as defined by CERCLA, 42 U.S.C.
24 § 9601(21).

25 91. Asarco's site is a "facility," as defined by CERCLA, 42 U.S.C. § 9601(9).

26

1 92. - Asarco is an "owner and operator," as the phrase is used in CERCLA, 42
2 U.S.C. § 9607(a).

3 93. The plaintiffs' properties are "facilities" as defined by CERCLA, 42 U.S.C.
4 § 9601(9).

5 94. There has been a release or threat of a release of a hazardous substance from
6 defendant's facility. Asarco's release has caused plaintiffs to incur response costs. The
7 response action and resulting costs were necessary and consistent with the national
8 contingency plan.

9 95. Since it commenced operation of the Site, Asarco has continuously caused
10 particles of arsenic, lead, and other Contaminants to be deposited in the Class Area. As a
11 result of these releases, plaintiffs and the class have incurred necessary response costs,
12 including costs of investigation and monitoring of contamination, as well costs of public
13 health surveys and assessments. Plaintiffs and the class may incur further response costs in
14 the future. The incurring of these costs is consistent with the national contingency plan, 40
15 C.F.R. § 300.70.

16 96. Under CERCLA, 42 U.S.C. § 9607(a), Asarco is liable to the plaintiffs for all
17 response costs incurred as a result of Asarco's releases, in an amount to be proven at trial.
18 Asarco is also liable to the plaintiffs for interest on this amount.

19 97. The plaintiffs are also entitled to a declaratory judgment, pursuant to CERCLA,
20 42 U.S.C. § 9613(G)(2), stating that Asarco is liable to the plaintiffs for all future costs they
21 incur in response to contamination caused by Asarco's releases.

22 **COUNT VI**

23 **INJUNCTIVE RELIEF UNDER RCRA**

24 98. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.
25
26

1 99. - Asarco has contributed and continues to contribute to the past or present
2 handling or disposal of a solid or hazardous waste which may present an imminent and
3 substantial endangerment to health or the environment, pursuant to 42 U.S.C. § 6972.

4 100. Plaintiffs have given prior notice of the endangerment pursuant to 42 U.S.C. §
5 6972(b)(2)(A) and 40 C.F.R. § 254.3(a).

6 101. This Court should require Asarco to abate the endangerment, i.e., clean up its
7 mess and/or establish a fund in an amount sufficient for plaintiffs to pay for a legal and
8 appropriate cleanup.

9 **COUNT VII**

10 **INDEPENDANT CAUSE OF ACTION AND/OR REMEDY UNDER EACH**
11 **PREVIOUS CAUSE OF ACTION: MEDICAL-MONITORING**

12 102. Plaintiffs reallege the preceding paragraphs as if fully set forth herein.

13 103. As a result of Asarco's releases of lead, arsenic, and other contaminants,
14 plaintiffs and members of the classes have been significantly exposed to the contaminants.

15 104. Plaintiffs, and members of the medical-monitoring class, have a significantly
16 increased risk of contracting serious diseases as a result of the unwanted exposure. Those
17 diseases include, but are not limited to, lung cancer, skin cancer, liver cancer, bladder cancer,
18 kidney cancer, skin hyperpigmentation, skin keratosis, cognitive or behavioral disorders and
19 attention span deficits.

20 105. This increased risk of disease is exacerbated with respect to children who have
21 a higher likelihood of ingesting these contaminants.

22 106. The increased risk of such diseases makes periodic medical examinations
23 reasonably necessary.

24 107. Monitoring and testing procedures exist that: (a) can detect exposure to
25 contamination so that additional steps to minimize exposure may be taken; and (b) make
26 early detection and treatment of serious latent diseases possible and beneficial.

1 108. As a result of Asarco's actions (and omissions), Residents have suffered
2 damages equal to the amount necessary to establish prudent medical monitoring. The
3 amount of such damage will be proven at trial.

4
5 **RELIEF REQUESTED**

6 WHEREFORE, plaintiffs, on behalf of themselves and all others similarly situated,
7 pray the Court enter judgment against Asarco in favor of plaintiffs, and award the following
8 relief:

9 A. Entry of an Order certifying a Medical Monitoring class pursuant to Rule 23 of
10 the Federal Rules of Civil Procedure;

11 B. Entry of an Order permanently enjoining Asarco from operations that continue
12 to release toxic substances into the air and/or other noxious fumes or odors in and around the
13 Class Area;

14 C. Entry of an Order creating a Court supervised fund in an amount to be proven
15 at trial, which will pay for medical screening and monitoring for members of the Medical
16 Monitoring class. In view of the magnitude of the risks presented by the acts and omissions
17 of Asarco, damages for reasonable and necessary screening and ongoing medical
18 surveillance and counseling should include provision for the following:

19 i. necessary and appropriate scientific inquiry to determine the precise
20 magnitude of the risks to the Medical Monitoring class of adverse health effects and to
21 develop efficient and accurate early markers of likely disease;

22 ii. identification of appropriate medical interventions to prevent and/or
23 minimize adverse health effects (e.g. dietary supplements) and instituting a program to make
24 reasonable and necessary medical interventions available to the plaintiffs and the Medical
25 Monitoring class; and
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