

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT GREENEVILLE**

<b>BETH FREEMAN, Individually,</b>	)	
<b>and on behalf of all others similarly situated,</b>	)	
	)	
<b>PLAINTIFF,</b>	)	<b>NO. 2:08-cv-35</b>
	)	
<b>v.</b>	)	<b>CLASS ACTION</b>
	)	
<b>BLUE RIDGE PAPER PRODUCTS INC.,</b>	)	<b>JURY DEMAND</b>
	)	<b>Judge Greer</b>
<b>DEFENDANT.</b>	)	<b>Magistrate Inman</b>

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**SECOND AMENDED CLASS ACTION COMPLAINT**

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**NOW INTO COURT** comes the Plaintiff, Beth Freeman, pursuant to Rule 15 of the Federal Rules of Civil Procedure and by leave of Court, and files this Second Amended Class Action Complaint (the "Second Amended Complaint"), individually and on behalf of all others similarly situated.

This Amended Complaint is alleged upon information and belief, except as to those allegations which pertain to the named Plaintiff, which are alleged on her personal knowledge.

**I. NATURE OF ACTION**

1. This is a proposed class action for private temporary nuisance. Plaintiff and other Cocke County, Tennessee landowners whose properties abut or adjoin the Pigeon River allege that the Defendant, through operations at its pulp and paper mill ("Mill") located upstream on the Pigeon River in Canton, North Carolina, has substantially interfered with Plaintiff's and the proposed Class' rights to use and enjoy their downstream real property. Specifically, Plaintiff alleges that the

Defendant's Mill discharges waste, chemicals, and other contaminants<sup>1</sup> into the Pigeon River, that the Pigeon River is brown in color, has an odor, and is often filled with foam. Further, these chemical discharges (a) unreasonably alter the quality of water downstream in Cocke County; (b) substantially diminish the quality of the waters, the environment, and the recreational resources downstream in Cocke County; (c) substantially impair the quality of life of Plaintiff and the proposed Class, disrupting their lives and well-being; (d) cause Plaintiff and the proposed Class to suffer substantial disturbance in comfort or conveniences, including their peace of mind, threat of future injury that is a present menace, fear, stress, annoyance, and anxiety; and (e) cause Plaintiff and the proposed Class to suffer loss of rental value of their property.

2. Blue Ridge Paper Products, Inc. ("Blue Ridge") engages in a wood-pulp bleaching process at its Canton, North Carolina Mill which produces certain waste contaminants, chemicals, and other pollutants. The Mill is located in Canton, North Carolina and Blue Ridge uses water from the Pigeon River in its paper-making process. Although a small portion of the water evaporates during the paper-making process, most of the water used by Blue Ridge is discharged back into the Pigeon River.

3. These effluents are continuously released into the Pigeon River by Blue Ridge's Canton, North Carolina Mill and substantially diminish the quality of the waters, the environment, and the resources downstream along the Pigeon River in Cocke County, and further cause Plaintiff and all other landowners whose lands abut or adjoin the Pigeon River in those counties to suffer

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<sup>1</sup>Blue Ridge has admitted to discharging the following compounds into the Pigeon River: aluminum, arsenic, barium, boron, chloroform, iron, lead, magnesium, mercury, nickel, nitrate, nitrogen, oil and grease, phenol, surfactants, sulfate, titanium, and zinc.

discomfort, fear, stress, anxiety, and inconvenience, resulting in a private temporary nuisance. This nuisance has further resulted in injuries to the Plaintiff and all other landowners whose lands abut or adjoin the Pigeon River in Cocke County.

## **II. JURISDICTION AND VENUE**

4. This Court has diversity subject-matter jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005, which amends 28 U.S.C. §1332 to add a new subsection (d) conferring federal jurisdiction over class actions where, as here, “any member of a class of plaintiffs is a citizen of a State different from any defendant” and the aggregated amount in controversy exceeds \$5,000,000, exclusive of interest and costs.<sup>2</sup> This Court also has jurisdiction under 28 U.S.C. §1332(d) because “one or more members of the class is a citizen of a state within the United States and one or more of the Defendants is a citizen or subject of a foreign state.”

5. Venue is proper in this District pursuant to 28 U.S.C. §1391, as Defendant is “deemed to reside in any judicial district in which [they] are subject to personal jurisdiction” and the Defendant – through its operation of the Canton, North Carolina Mill and its continuous discharge of effluents into the Pigeon River – is subject to personal jurisdiction in Tennessee. Further, venue is proper because a substantial part of the events and omissions which have precipitated this claim occurred in Tennessee, a substantial part of the property at issue is situated in Tennessee, and a private temporary nuisance in Tennessee was created by the Defendant.

## **III. PARTIES**

6. Plaintiff Beth Freeman is a citizen and resident of Cocke County, Tennessee and owns real property adjoining and/or abutting the Pigeon River in Cocke County, Tennessee

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<sup>2</sup>See 28 U.S.C. §1332(d)(2), (6).

downstream from the Defendant's Canton, North Carolina Mill. She seeks to represent a Class of Cocke County, Tennessee landowners, as proposed below.

7. Headquartered in Canton, North Carolina, Blue Ridge Paper Products Inc., is a Delaware corporation. It is the leading producer of envelope and specialty papers and coated bleached board for food service packaging. Blue Ridge has eight plants in seven states, including its Mill in Canton, N.C., an extrusion coating plant in Waynesville, N.C., and six DairyPak converting plants in Athens, Ga.; Clinton, Iowa; Fort Worth, Texas; Morristown, N.J.; Olmsted Falls, Ohio; and Richmond, Virginia. The Canton Mill employees approximately 1,150 workers. Blue Ridge's principal executive offices are located at 41 Main Street, Canton, North Carolina 28716.

8. During the Class Period, as described in the proposed class definition, Blue Ridge was the owner of the Canton, North Carolina Mill formerly owned by Champion International Corporation (hereinafter "Champion"). Blue Ridge was formed after Champion announced in October 1997 that it was selling its Canton Mill operations. Blue Ridge was a 45% employee-owned company with 55% owned by KPS Special Situations Fund, a New York investment firm, and began operating the Canton Mill on or about June 1, 1999.

9. Whenever in this Complaint reference is made to any act, deed or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by and/or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of the corporation's business or affairs.

#### IV. FACTUAL BACKGROUND

10. A paper mill was established in Canton, North Carolina on the Pigeon River in the early 1900's. The Mill is approximately twenty-six (26) miles upstream from the North Carolina-Tennessee border. The headwaters of the Pigeon River are located at Sam Knob on Black Mountain, 30 miles southwest of Asheville, North Carolina. The river flows from Sam Knob north to Haywood County through Canton, North Carolina and continues through Cocke County, Tennessee. Blue Ridge's Canton Mill is located on the Pigeon River in Canton. The Pigeon River flows through the Mill and then along Interstate 40 for approximately 25 river miles to Waterville and the Progress Energy Hydroelectric Dam.

11. The Canton Mill has been operated in that locality for over 100 years. For nearly a century, the previous owner and operator of the Mill, Champion International Corp., used the Pigeon River as its own "private sewer." That unlawful use continued following Blue Ridge's June 1999 purchase of the Mill. The Pigeon River pollution, which limits the depth to which light could penetrate the water and also greatly impairs normal aquatic life, is obvious to even the most casual observer.

12. Many pollutants, including aluminum, arsenic, barium, boron, chloroform, iron, lead, magnesium, manganese, mercury, nickel, nitrate, nitrogen, oil and grease, phenol, surfactants, sulfate, titanium, and zinc are released by Blue Ridge's Canton, North Carolina Mill into the Pigeon River, with no warning to persons living downstream in Cocke County, Tennessee, and with no concern for possible damage to the ecosystem. As to the dangers posed by these pollutants identified in the Mill's discharge, a clinical toxicologist has testified that an individual living along this section of the Pigeon River should have "reasonable concern and take safeguards." Moreover, numerous

reputable institutions also agree that these chemicals have potentially adverse health effects, which indicates that the existence of these effects is generally accepted.

13. Plaintiff alleges that she – and proposed class members – are entitled to the agricultural, recreational, and scenic use and enjoyment of their lands and the water bordering their lands. As a result of Blue Ridge’s discharge of chemicals into the Pigeon River amounting to a private temporary nuisance, Plaintiff and the proposed Class have suffered injuries.

14. In a May 3, 1993 Order in a previous lawsuit against Blue Ridge’s predecessor, Champion, District Judge Thomas Hull indicated that he had “no intention of usurping the function of the government by attempting to put limits on what Champion may discharge from its plant.” Accordingly, as a result of the government’s exclusive function as “monitor” of the discharge of pollutants into the Pigeon River, those individuals or entities downstream from the Canton, North Carolina Mill who suffer injuries from the discharges may seek only monetary relief as a remedy. Accordingly, Plaintiff brings this action for monetary damages for the Defendant’s private temporary nuisance.

15. As a direct and proximate result of Defendant’s unlawful discharge of pollutants into the Pigeon River, Plaintiff and proposed Class members have suffered injuries, including, but not limited to: (a) the loss of enjoyment of their real property, (b) an impaired quality of life, (c) impaired quality of water, (d) personal discomfort, fear, stress, annoyance, and inconvenience, (e) loss of recreational use of the river, and (f) all other elements of a private temporary nuisance, including loss of rental value of their property, since the Pigeon River’s pollution is the only reason that an overnight rental industry has not developed along the river.

## V. CLASS ALLEGATIONS

16. Plaintiff Beth Freeman brings this action on behalf of herself and all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as representative of the following Class:

**All individuals who own or owned real property adjoining and/or abutting the Pigeon River in Cocke County during the period beginning on August 17, 2005 and ending on [February 21, 2008] OR [the date of trial].**

17. As shown below, the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure have been met.

18. This action meets all of the requirements of Rule 23 in that:

- (a) **Numerosity.** Plaintiff does not know the exact size of the proposed Class, but believes that there are approximately 300 members of the proposed Class and that the members of the proposed Class are sufficiently dispersed throughout the State of Tennessee to make joinder of all members impracticable.
- (b) **Typicality.** Plaintiff's claims are typical of all proposed Class members. Plaintiff and all proposed Class members have been and continue to be damaged by Defendant's conduct. Accordingly, by proving her own claims, Plaintiff will presumptively prove respective Class members' claims.
- (c) **Commonality.** Questions of law and fact arising out of Defendant's conduct are common to all proposed Class members, and such common issues of law and fact predominate over any questions affecting only individual proposed Class members. Class certification is appropriate under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues of law and fact include, but are not limited to, the following:
  - (i) Did Defendant discharge pollutants into the Pigeon River during the proposed Class Periods?

- (ii) Does Defendant's discharges constitute a private temporary nuisance, which substantially and unreasonably interfere with Plaintiff's and other proposed Class members' rights, within the Class Period described herein?
  - (iii) What compensatory damages are owed to Plaintiff and proposed Class members?
- (d) ***Adequacy of Representation.*** Plaintiff can and will fairly and adequately represent the interests of the proposed Class and has no interest that conflicts with or is antagonistic to the interests of such proposed Class members. Plaintiff has retained attorneys competent and experienced in class actions to ensure the adequate representation of absent Class members. No conflict exists between Plaintiff and proposed Class members. Plaintiff understands and appreciates her duties to proposed Class members under Rule 23 of the Federal Rules of Civil Procedure and is committed to vigorously protecting the rights of absent proposed Class members.
- (e) ***Superiority.*** Class certification is appropriate under Rule 23(b)(3) of the Federal Rules of Civil Procedure because a class action is the superior procedural vehicle for fairly and efficiently adjudicating the claims asserted given that:
  - (i) Common questions of law and fact overwhelmingly predominate over any individual questions that may arise, such that there would be enormous economics to the courts and the parties in litigating the common issues on a class-wide instead of a repetitive individual basis;
  - (ii) Plaintiff's claims and proposed Class members' claims arise from the same course of conduct, *i.e.*, Defendant's discharge of chemicals and other pollutants into the Pigeon River. Plaintiff and the proposed Class members also share the same legal rights, *i.e.*, the right of the waters' flow past their lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor;



- (iii) The type of use which Defendant has allegedly invaded is the same for all proposed Class members, *i.e.*, the right to reasonably use an adjoining watercourse for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. proposed Class members' right to such use is a property right inseparably annexed to the soil and passing with it as a part and parcel of it. These rights are not dependent upon the owner's actual use or appropriation of the flowing water. Accordingly, individualized hearings are not necessary to determine whether Defendant's interference with riparian rights was unreasonable;
  - (iv) Because the circumstances of this case do not require individualized hearings to prove the elements of nuisance, common issues of law and fact predominate over individual issues. The unique factual setting of this case also makes a class action the superior method of adjudicating this controversy;
  - (v) The size of each proposed Class member's individual damage claim is too small to make individual litigation an economically viable alternative, such that few proposed Class members have any interest in individually controlling the prosecution of separate actions;
  - (vi) Class treatment is required for optimal deterrence and compensation and for limiting the Court-awarded reasonable legal expenses incurred by proposed Class members; and
  - (vii) Despite the relatively small size of individual proposed Class members' claims, their aggregate volume, coupled with the economics of scale inherent in litigating similar claims on a common basis will enable this case to be litigated as a class action on a cost-effective basis, especially when compared to repetitive individual litigation.
- (f) ***Manageability.*** No unusual difficulties are likely to be encountered in the management of this class action, in that all questions of law or fact to be litigated at the liability stage are common to proposed Class members.

## **VI. CLAIM FOR RELIEF**

### **PRIVATE TEMPORARY NUISANCE**

19. Plaintiff re-alleges and incorporates by reference all of the foregoing paragraphs.

20. Defendant is liable to Plaintiff and Class members for intentionally and/or negligently creating a private nuisance in and along the Pigeon River in Cocke County, Tennessee in violation of Plaintiff's and the proposed Class members' rights to be free from substantial and unreasonable interference with the agricultural, recreational, and scenic use and comfortable enjoyment of their land and the water which borders their land, subject to the rights of upstream property owners to make reasonable use of the water, without excessively diminishing its quantity or its quality.

21. Defendant, by unreasonably using the land or the waterways (Pigeon River) adjoining such land, substantially interfered with the rights of Plaintiff and proposed Class members and have directly and proximately caused a private nuisance to downstream real property owners in Cocke County, Tennessee.

22. The substantial interference with the rights of Plaintiff and proposed Class members, including the use and enjoyment of their land, greatly exceeds the annoyance, inconvenience or interference with which each individual or community must normally tolerate.

23. As a direct and proximate consequence of the aforesaid acts of Defendant which constitute a private nuisance, Plaintiff and proposed Class members have suffered the following injuries:

- (a) A substantial diminution in the quality of the waters, environment, and recreational resources downstream;
- (b) An impaired quality of life and disruption of their lives and well being;

- (c) Personal discomfort, stress, annoyance and anxiety; and
- (d) Loss of rental value of their property.

24. Defendant is liable to Plaintiff and proposed Class members for all of the foregoing harm.

## **VII. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays:

1. That the Court declare this action to be a proper class action maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure and declaring named the Plaintiff to be the Class Representative of the Class.

2. That the Court adjudge and decree that Defendant has engaged in the unlawful conduct alleged herein.

3. That the Court adjudge and decree that such conduct is unlawful and a private nuisance, entitling Plaintiff and the Class to an award of compensatory damages.

4. That the Court award Plaintiff pre-judgment interest, costs and reasonable attorney's fees, as applicable.

5. That the Court award Plaintiff such other, further, and general relief as the Court deems just and proper.

6. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury of all claims asserted herein so triable.

Respectfully submitted, this 14<sup>th</sup> day of July, 2009.

**BALL & SCOTT**

BY: W. Gordon Ball  
W. Gordon Ball, Esq., BPR # 001135  
Thomas Scott, Esq., BPR # 001086  
Christopher T. Cain, Esq, BPR # 19997  
550 West Main Street, Suite 601  
Knoxville, Tennessee 37902  
(865) 525-7028  
(865) 525-4679

**CERTIFICATE OF SERVICE**

\_\_\_\_\_I, Gordon Ball, do hereby certify that on this date a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular mail. Parties may access this filing through the Court's electronic filing system.

This 14<sup>th</sup> day of July, 2009.

/s/ W. Gordon Ball

W. Gordon Ball