UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

IN RE: HOOSICK FALLS PFOA CASES	Case No. 1:19-mc-00018-LEK-DJS
MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated, *Plaintiffs*, v. SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC., E.I. DUPONT DE NEMOURS AND COMPANY, INC., and 3M CO., *Defendants*.	Case No. 1:16-CV-00917-LEK-DJS

DEFENDANTS' JOINT OPPOSITION TO MOTION FOR CLASS CERTIFICATION

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Alexander Rpt.	Expert Report of Dominik Alexander, Ph.D., M.S.P.H., dated July 23, 2020 for the above-captioned action	Ex. 1	None
Baker Decl.	Declaration of Michele Baker, dated March 31, 2020 in the above-captioned action	Dkt. 151	Marked Partially Confidential
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Beck Rpt.	Expert Report of Barbara D. Beck, Ph.D., dated July 23, 2020 for the above-captioned action	Ex. 6	Confidential
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Ducatman Rpt.	Expert Report of Alan Ducatman, MD, submitted on March 27, 2020, for the above-captioned action.	Dkt. 162	Marked Partially Confidential
Ducatman Reb. Rpt.	Rebuttal Expert Report of Alan Ducatman, MD, dated September 11, 2020 for the above-captioned action	Ex. 11	Confidential
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Harrington Tr.	Transcript of Deposition of Kristin Harrington (Miller), taken on August 6, 2019 in the above-captioned action	Ex. 15	Marked Partially Confidential
Herzstein Rpt.	Expert Report of Jessica Herzstein, M.D., M.P.H, dated July 23, 2020 for the above-captioned action	Ex. 16	Confidential
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Huncik Rpt.	Expert Report of Mark D. Huncik, submitted on April 6, 2020 for the above-captioned action.	Dkt. 164	Confidential
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Savitz Rpt.	Expert Report of David Savitz, Ph.D., submitted on March 14, 2020 for the above-captioned action.	Dkt. 165	Marked Partially Confidential
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Shin *Burdick* Aff.	Affidavit of Hyeong-Moo Shin, Ph.D., sworn on April 8, 2019 in *Burdick v. Tonoga, Inc.*, Index No. 00253835 (N.Y. Sup. Ct., Rensselaer County)	Ex. 44	Marked Partially Confidential
Shin *Burdick* Reply Aff.	Reply Affidavit of Hyeong-Moo Shin, PhD, sworn on April 6, 2018 in *Burdick v. Tonoga, Inc.*, Index No. 00253835 (N.Y. Sup. Ct., Rensselaer County)	Ex. 45	None
Siegel Reb. Rpt.	Rebuttal Expert Report of Donald Siegel, Ph.D., dated September 10, 2020 for the above-captioned action	Ex. 47	Confidential
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Zabel Rpt.	Expert Report of Jeffrey Zabel, Ph.D., submitted on March 25, 2020 for the above-captioned action.	Dkt. 168	None
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PRELIMINARY STATEMENT

Ignoring myriad individualized issues inherent in their claims, Plaintiffs try to obtain certification of proposed classes asserting thousands of claims for alleged diminution-in-value damages and medical monitoring against four defendants by portraying this as a simple case based on a single alleged source and pathway of contamination. They assert that emissions from 1980 to 2003 from the McCaffrey facility in Hoosick Falls are the source of PFOA in all putative class members' private wells, drinking water, and blood, and universally caused diminution in property values, interference with property enjoyment or use, other property damages, and risk of future bodily injury for area residents. From this, Plaintiffs contend that their proposed classes are indistinguishable from the classes certified in two other PFOA-emission cases, *Burdick* and *Sullivan*. But the evidence developed here shows that this case is not the simple one Plaintiffs portray and is not *Burdick* or *Sullivan*.

Plaintiffs' claims implicate scores of individual differences that the federal courts of appeals have held preclude class certification in similar circumstances. Plaintiffs assert different legal claims against four differently situated defendants, some of whom manufactured, and others of whom processed, PFOA materials at different times. Different proposed class members have exposures to different sources of PFOA through several and different pathways, including air, water, consumer and occupational exposures. And they each have different medical histories entailing distinct susceptibilities and general states of health. Class members also lived in different homes or owned different types of properties, at different locations, and at different times. These individual differences pervade the claims of the putative classes, making it impossible to resolve them without deciding countless individual questions. And as the federal courts of appeals have repeatedly held, those individual questions predominate over any common questions that Plaintiffs

may identify, and they cannot be glossed over with "averages," "community-wide estimations," or "hypothetical, composite persons."

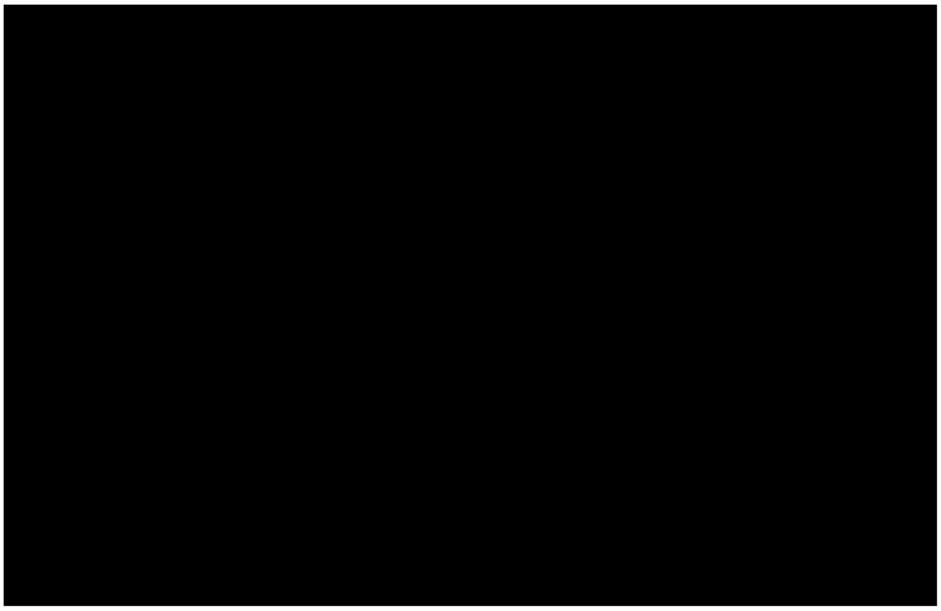
Trying to overcome these overwhelmingly individualized issues, Plaintiffs say that McCaffrey emissions tie the classes together. [redacted][1] [redacted]

The problems do not end there. Plaintiffs' experts also acknowledge that other PFOA sources affected the proposed class area. In particular, Plaintiffs' experts identified two former fabric coating facilities other than the McCaffrey facility that released PFOA ***into the proposed class area***: from the east, the former Chemfab facility in North Bennington, Vermont (*Sullivan* litigation), and, from the south, the Taconic Plastics facility in Petersburgh, New York (*Burdick* litigation).[2] [redacted]

[1] In support of their Motion for Class Certification, Plaintiffs proffered the expert reports of Alan Ducatman, M.D., David A. Savitz, Ph.D., and Edgard C. Gentle, III, in support of their medical monitoring claims; Jeffrey E. Zabel, in support of their property damage claims; Hyeong-Moo Shin, Ph.D., Mark D. Huncik, and Donald I. Siegel, Ph.D., in support of their fate and transport theories; and Nicholas P. Cheremisinoff, Ph.D., in support of certain standard of care theories. Dr. Cheremisinoff passed away prior to his deposition, and his opinions are subject to a motion to strike being filed concurrently herewith. In response, Defendants (collectively) proffered the expert reports of Jessica Herzstein, M.D., M.P.H., Dominik D. Alexander, Ph.D, and Barbara D. Beck, Ph.D., regarding medical monitoring; JLL Valuation and Advisory Services, regarding property damage; and Lyle R. Chinkin, M.S., Steven P. Larson, M.S., Manu Sharma, M.S., P.E., and Adam H. Love, Ph.D., regarding fate and transport.

[2] *See Sullivan v. Saint-Gobain Performance Plastics Corp.*, No. 5:16-cv-00125-gwc (D. Vt.); *Burdick v. Tonoga, Inc.*, Index No. 253835 (N.Y. Sup. Ct., Rensselaer Cty.). In stark contrast to the record here, the plaintiffs' experts in neither *Sullivan* nor *Burdick* opined that McCaffrey (or any other industrial facility) was a source of PFOA in the class areas proposed in those cases.

[redacted] Likewise, one of Plaintiffs' experts who submitted an opinion in *Burdick* conceded in this case (as he opined in *Burdick*) that the Taconic facility is responsible for PFOA in well water and soil within a 7-mile radius of the Taconic facility, which includes the southern portion of the proposed class area, [redacted][4]



[redacted]

[4] Plaintiffs' expert Dr. Siegel has also acknowledged the presence of PFOA from the Taconic facility in the Hoosic River, which runs through the proposed class area, near the Village of Hoosick Falls municipal wellfield.

[redacted] the modeling and other opinions of Plaintiffs' own experts demonstrate that the McCaffrey facility was the sole source of PFOA in virtually no part of the Proposed Class Area, confirming that this is not the simple, single-source case Plaintiffs purport it to be.[5]

Indeed, Plaintiffs and their experts also have ignored entirely numerous additional, localized sources of PFOA in the sprawling, 49-square-mile proposed class area. As reflected in Figure 2, within the Village of Hoosick Falls alone, the State of New York is investigating known PFOA use or detections at more than five different industrial sites. The State is also investigating PFOA detected at the Hoosick Falls Landfill and at two more industrial facilities near the northern and eastern borders of the proposed class area, and has identified several local fire stations that stored or used the type of firefighting foam that may contain PFOA.

[redacted]

[5] Plaintiffs' experts' own models and opinions defeat class certification, for the reasons discussed herein. Moreover, the key opinions supporting Plaintiffs' application are inadmissible under Federal Rule of Evidence 702 and *Daubert*, for the reasons discussed in Defendants' Joint Motion to Exclude Plaintiffs' Expert Testimony, filed concurrently herewith. Without those opinions, Plaintiffs' request for certification further collapses.

Plaintiffs attempt to explain these complications away by asserting that McCaffrey is variously the "major" or "predominant" or "primary" source of PFOA in the proposed class area. But their adjectives are not borne out by the actual soil and water sampling data. [redacted]

[redacted] Determining the source of PFOA on any individual property, in any individual well, in any individual's drinking water, or in any individual's blood thus will necessarily turn on individualized proof, meaning that Defendants have many factual defenses to liability that cannot be addressed on a classwide basis.

[redacted]

For these reasons alone, this case differs from Plaintiffs' portrayal of *Burdick* and *Sullivan* in substantial ways that demand that class certification be denied.[6] But this case also departs from those matters in other important and consequential respects. Unlike *Burdick* and *Sullivan*, which each involved allegations against a single defendant operating a single facility, Plaintiffs here have brought claims against four different Defendants, each with very different roles and defenses. Honeywell's predecessor and Saint-Gobain had various operations at McCaffrey and other facilities in Hoosick Falls, spanning different periods of time, over which the nature of their operations, materials used, and information received varied. Similarly, 3M, DuPont, and other companies manufactured different types of materials, allegedly sold different products to various facilities in Hoosick Falls, and provided different information to different purchasers over time. These complex and evolving facts bear directly on questions of liability and cannot be resolved on a classwide basis.

Plaintiffs here, unlike in *Sullivan*, attempt to bring class claims for diminution in property value. But they do so by offering a "preliminary model" that does ***not*** even account for ***whether PFOA was actually detected on any property***, let alone whether any such PFOA was emitted from the McCaffrey facility. This "preliminary model" purports to provide only an "average" diminution in value, something courts have regularly rejected as a sufficient basis for class certification. Furthermore, the model (i) ignores individual amenities and disamenities that impact individual property values; (ii) excludes numerous industrial, agricultural, and large residential properties that are part of the putative classes, (iii) models a geographic area that is different and

[6] Saint-Gobain, the defendant in *Sullivan*, continues to dispute the certification in that case, including the finding that the facility at issue was the sole or even primary source of PFOA exposure throughout the proposed class area there. Nevertheless, *Sullivan* is inapposite to the factual circumstances of this case.

broader than the proposed class area, and (iv) collapses properties from different proposed classes, involving public water and private wells, into the same output. Plaintiffs' model thus cannot overcome the multiplicity of individual, property-specific factors that determine not only whether a particular property experienced any loss of value attributable to PFOA, but also the amount and duration of any such loss of value.

Plaintiffs' request for classwide medical monitoring relief fares no better. Plaintiffs have made no effort to define what their proposed medical-monitoring remedy would actually be, declining to identify until a later phase of the case what medical testing it would include. At the same time, they ignore the widely varying PFOA blood levels and medical histories (among other individualized factors) of the thousands of putative class members that make entitlement to any medical monitoring a thoroughly individual question. Because "class members' actual exposure will vary depending on" a wide variety of individualized factors, and the "amount of exposure a person has experienced will affect his/her risk of disease," individual questions, rather than common questions, predominate. *Rowe v. E.I. duPont de Nemours & Co.*, 2008 WL 5412912, at *17 (D.N.J. Dec. 23, 2008).

These individual questions pervading Plaintiffs' claims preclude class certification under Rule 23(b)(3). And Plaintiffs cannot salvage any class treatment with their alternative pleas for certification under other subparts of Rule 23. Their request to certify a medical monitoring class under Rule 23(b)(2) fails because medical monitoring is not injunctive relief under New York law and any such class would lack the required cohesion. This Court should also deny Plaintiffs' suggestion to certify multiple issue classes under Rule 23(c)(4) because doing so would not materially advance the litigation as a whole, as individual trials would be required to determine

specific causation, injury, liability, and damages on a property-by-property and individual-by-individual basis.

In addition, material conflicts and disparities among the putative class members render the proposed class representatives inadequate and atypical. For instance, the asymptomatic named Plaintiffs seek only generalized medical monitoring on behalf of the PFOA Invasion Injury Class, while class members with present physical injuries have strong conflicting interests in pursuing immediate payment of damages. Similarly, the proposed representatives for the Municipal Water Property Damage, Private Well Water Property Damage, and Nuisance Damage Classes, who reside in single-family homes near [redacted], have conflicts with other class members who own different kinds of properties elsewhere in the class area.

In short, the classes that Plaintiffs seek to certify under Rule 23 are plagued by individual questions of law and fact. To dodge that obstacle to class certification, Plaintiffs ask this Court to *presume* PFOA impact in the entire Proposed Class Area from a single source, the McCaffrey facility, despite the contrary modeling and testimony of their experts. They ask this Court to *presume* that they will develop a model capable of identifying and measuring alleged property value diminution across different types of property used for different purposes, even though they have been unable to produce such a model to date. And they ask this Court to *presume* that they will develop a medical monitoring remedy capable of uniformly providing necessary and efficacious medical testing for a large and diverse group of individuals, even though they have provided no explanation of how they would do so. The law does not permit such presumptions to sustain certification of a class, which is why many courts have rejected similar requests for class certification in mass tort cases like this one, including cases alleging PFOA in water. *See, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477–81 (8th Cir. 2016); *Gates v. Rohm & Haas Co.*, 655

F.3d 255, 262–74 (3d Cir. 2011); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727–28 (6th Cir. 2004); *Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365, 373–81 (S.D.W. Va. 2008); *Rowe*, 2008 WL 5412912, at *4–23. Because Plaintiffs fall far short of carrying their burden to satisfy the requirements of Rule 23, this Court should deny their motion for class certification.

ARGUMENT

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation omitted). "[A] party seeking to maintain a class action 'must affirmatively demonstrate … compliance' with Rule 23." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Merely *pleading* compliance is insufficient. *Id.* Class certification "is proper only if the trial court is satisfied, after a rigorous analysis" that all four of Rule 23(a)'s requirements and one of Rule 23(b)'s requirements "have been satisfied" with the necessary evidentiary proof. *Id.* at 33–34. "[T]he requirements of Rule 23 must be *met*, not just supported by some evidence." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006) ("*IPO"*) (emphasis added), *decision clarified on denial of reh'g,* 483 F.3d 70 (2d Cir. 2007); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). That analysis "will frequently entail 'overlap with the merits of the plaintiff's underlying claim.'" *Comcast*, 569 U.S. at 33–34 (citation omitted); *see also IPO*, 471 F.3d at 41.[7] Applying these principles, the classes proposed by Plaintiffs cannot be certified.

[7] Defendants dispute many of the purported "facts" in Plaintiffs' lengthy Statement of Facts, Pls. Mot. at 3-36, but focus here only on the factual disputes relevant to class certification. Honeywell and Saint-Gobain further incorporate by reference herein their Motion to Strike the Expert Report of Dr. Cheremisinoff, which addresses certain purported "facts." All Defendants specifically reserve their rights with respect to responding to Plaintiffs' Statement of Facts at the relevant time.

I. INDIVIDUALIZED ISSUES PREDOMINATE IN THIS MULTI-SOURCE, MULTI-DEFENDANT CASE

Class certification is improper here because the Court cannot decide essential elements of Plaintiffs' claims—injury, causation, relief, and state of mind—without addressing individual property-by-property and individual-by-individual questions of sources and pathways of exposure.

To obtain the requested certification of the proposed classes, Plaintiffs must show (among other things) that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Blyden v. Mancusi*, 186 F.3d 252, 269 (2d Cir. 1999).[8] The predominance "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Plaintiffs can satisfy that inquiry only "if resolution of some of the legal or factual questions … can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Myers*, 624 F.3d at 547 (quotation omitted). "What matters … is … the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotation omitted) (emphasis in original). Predominance is not satisfied where plaintiffs' claims do not "prevail or fail in unison." *In re Petrobras Sec.*, 862 F.3d 250, 273 (2d Cir. 2017).

Plaintiffs fail to satisfy the predominance requirement as to any of their proposed classes in this multi-source case spanning decades of operations. As the Supreme Court explained in rejecting class certification in *Amchem*, mass tort cases "present 'significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways.'" 521 U.S. at 625 (citation omitted) (alterations in original); *see also Blyden*, 186 F.3d at 270

[8] Alternatively, Plaintiffs seek certification of their proposed PFOA Invasion Injury Class under Rule 23(b)(2). We address that request in Section IV, *infra*.

(*Amchem* "sharply curtailed the ability to certify a class action pursuant to Rule 23(b)(3) in the mass tort context").

This is precisely the kind of case that does not qualify for class certification under *Amchem* and its progeny. While courts sometimes certify simple mass torts arising from a single event or accident, they do not certify cases, like this one, where the alleged injury is caused by exposure to "different [] products, in different ways, over different periods, and for different amounts of time." *Amchem*, 521 U.S. at 609; *see also Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 389 (E.D. Tenn. 2002), *aff'd,* 385 F.3d 713 (6th Cir. 2004). "Courts have repeatedly drawn distinctions between proposed classes involving a single incident or single source of harm and proposed classes involving multiple sources of harm occurring over time," concluding that certification must be denied for the latter. *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 241 F.R.D. 435, 447 (S.D.N.Y. 2007) ("*MTBE II*").[9] Numerous decisions are in accord.[10]

Plaintiffs assert four claims on behalf of the putative classes—negligence, strict liability, nuisance, and trespass—all of which will turn on individualized inquiries.[11] To prevail on their claims of negligence and strict liability, Plaintiffs will be required to prove that each Defendant owed and breached a duty ultimately running to each class member; that each class member was injured; and that each Defendant's allegedly breaching conduct caused each individual's purported

[9] For this reason, *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D. La. 2006), upon which Plaintiffs rely, is inapposite. Pls. Mot. at 67. That case involved a "single accident" (an oil spill) and a single defendant. *Id.* at 601, 604.

[10] *See, e.g.*, *Ebert*, 823 F.3d at 479–80; *Gates*, 655 F.3d at 272; *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 & n.23 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996); *In re Fosamax Prod. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008); *cf. Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1193 (6th Cir. 1988).

[11] Plaintiffs do not assert nuisance or trespass claims against DuPont or 3M, nor do they seek certification of a Nuisance Damages Class as against those Defendants. *See* Pls. Mot. at 39–40.

injury. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016). To prove nuisance, Plaintiffs must show that each Defendant's conduct caused a "substantial" and "unreasonable" interference with each class member's "use and enjoyment" of his or her particular property. *Nemeth v. K-Tooling*, 100 A.D.3d 1271, 1272 (3d Dep't 2012). And for trespass, Plaintiffs will be required to prove that each Defendant intentionally entered onto each class member's property without permission, causing injury to his or her right of possession. *See Ivory v. Int'l Bus. Machines Corp.*, 116 A.D.3d 121, 129 (3d Dep't 2014).

The elements of these claims cannot be proven on a classwide basis. Even if Plaintiffs could establish that some aspect of their claims meets the "common question" standard of Rule 23(a), the weighty individual issues that remain preclude them from meeting the "far more demanding" predominance standard of Rule 23(b)(3). *Amchem*, 521 U.S. at 623-24; *see also Comcast*, 569 U.S. at 34. *First*, the record evidence—including expert analyses and soil and water sampling data—refutes Plaintiffs' argument that all putative class members and their properties, based solely on their presence in the proposed class area, share common injuries attributable to PFOA air emissions from McCaffrey. *Second*, as to the proposed Municipal Water Property Damage, Private Well Water Property Damage, and Nuisance Damage Classes, Plaintiffs fail to account for critical variations within each putative class, relying instead on a model that is untethered from their theories of liability, injury, and damages. *Third*, as to their proposed PFOA Invasion Injury class, Plaintiffs fail to show that common classwide evidence would prove that each class member has sustained an injury, caused by each Defendant's alleged conduct, that would entitle each class member to medical monitoring.

A. Injury and Causation Cannot Be Resolved by Common Evidence for Each Property in the Proposed Class Area

The source of PFOA in each class member's blood, drinking water, and property is a question lying at the heart of this action. If that question requires individual class-member-specific determinations—as Defendants contend, the factual record shows, and many decisions have held in similar circumstances—then individual issues of causation, injury, and more will predominate over any common issues, precluding class certification under Rule 23(b)(3).

Attempting to avoid that outcome, Plaintiffs manufacture a proposed class area, as to which they ask the Court to assume that all included properties, wells, and individuals have been exposed to PFOA emitted from the stacks of the McCaffrey facility. But this so-called "Contamination Zone" is a fiction; it is not based on any scientific method or analysis and instead was drawn using geopolitical boundaries and Plaintiffs' expert Dr. Shin's admittedly "arbitrary" judgment.[12] As a result, the area encompasses properties and individuals that—under Plaintiffs' experts' own reasoning and modeling—were ***not affected*** by emissions from McCaffrey, and/or were ***affected by emissions from other sources***. Other PFOA sources provide an alternative explanation for PFOA present on individual properties and in individual wells within the proposed class area, and furnish individual defenses that preclude treating the source question as common.

[12] Plaintiffs' experts cannot agree on the bounds of the proposed class area. [redacted]

1. The Proposed Class Area Does Not and Cannot Describe Properties with a Common Presence and Source of PFOA

The record contradicts Plaintiffs' claim that every person or property in the proposed class area was affected by air emissions from the McCaffrey facility. Plaintiffs' expert Dr. Shin defined the proposed class area, relying on an air emissions model prepared by another of Plaintiffs' experts, Mr. Huncik. Shin Tr. 68:19–69:13. Yet while Dr. Shin says that the proposed class area defines those locations where the McCaffrey facility is the "primary" cause of PFOA, his method for determining that area is arbitrary and non-scientific. He testified at his deposition that the northern, western, and southern boundaries of the Proposed Area "are not based on any science regarding air dispersion" and are instead defined geopolitically, based on zip codes corresponding to the Town of Hoosick and Village of Hoosick Falls. Shin Tr. at 70–71; *see also* 2d Am. Compl. ¶ 230. Moreover, comparison of the boundaries of the proposed class area with Mr. Huncik's model of historic air emissions from McCaffrey reveals that there is no relation between the two.

Western Boundary. [redacted] Mr. Huncik, who developed that model, testified that he "cannot provide an opinion" on whether "all properties within the proposed class area were contaminated by air emissions of APFO from the McCaffrey Street facility."[13] Huncik Tr. 82:11–14. Plaintiffs thus have included in their proposed class area properties that—according to their own model—were ***not*** affected by emissions from McCaffrey.

[13] For purposes of this memorandum of law, the terms PFOA and APFO are used interchangeably.

Eastern Boundary. [redacted] Yet Dr. Shin testified that he applied "no objective criteria" to determine that boundary, including no threshold air deposition rate. Shin Tr. 72:9–14, 80:21–25. Instead, he visually compared two figures in Mr. Huncik's report and asked Plaintiffs' counsel to hand-draw the eastern boundary line. *See* Shin Tr. 70:5–11, 72:9–14, 74:5–78:12; *see also* Larson Rpt. at 5-8; Chinkin Rpt. at 38-39. As Dr. Shin testified, "there's no objective criteria" that defines the eastern boundary line that would enable a different expert to reach the same conclusions he did as to that boundary. Shin Tr. 80:21–81:5. This haphazard line-drawing cannot satisfy Plaintiffs' burden of proof, as Rule 23 requires that the class area "relat[e] to the defendants' activities" rather than merely be "arbitrarily … drawn lines on a map." *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 291 (W.D. Ky. 2008) (alterations in original) (quoting *Daigle v. Shell Oil Co.,* 133 F.R.D. 600, 602–03 (D. Colo. 1990)).

[redacted]

[redacted] As a result, the eastern boundary provides no reliable basis to distinguish between individuals who were purportedly affected by emissions from the McCaffrey facility, the Chemfab facility, both, or neither. Only an individual property-specific analysis could possibly do so.

Southern Boundary. Unlike with the eastern boundary, Plaintiffs did not even attempt to adjust the southern boundary of their proposed class area to exclude another source of PFOA air emissions that Plaintiffs' experts have acknowledged: the Taconic Plastics facility in Petersburgh, New York. Dr. Shin opined in New York state court that PFOA on properties within a 7-mile radius of the Taconic facility "originated from air releases of APFO from that facility." Shin *Burdick* Aff. ¶ 13(a); *see also* Shin Tr. 82:9–87:5. As Drs. Shin and Siegel acknowledge here, that 7-mile radius ***overlaps with the proposed class area in this case***.[14] Shin Tr. 91:21–23; Siegel Tr. 63:6–17; *see also* Larson Rpt. at 8, 11, 21; Chinkin Rpt. at 19–20; Sharma Rpt. at 93–94. In opining in this case that McCaffrey is the source of PFOA throughout that overlapping area, neither Dr. Shin nor Dr. Siegel mentioned their prior contrary opinions regarding PFOA from the nearby Taconic facility. Only when confronted with those opinions did Dr. Shin acknowledge that [redacted]

[14] At his deposition, Dr. Shin acknowledged that he offered inconsistent opinions in the Taconic litigation and in this matter as to the primary source of PFOA in that area of overlap. Shin Tr. 93:14–17.

[redacted] But Plaintiffs still made no effort to exclude this overlapping area when defining the southern boundary of the proposed class area.

Because the proposed class area includes individuals and properties unaffected by Plaintiffs' experts' modeled emissions or affected by air emissions from entirely different sources, Plaintiffs cannot rely on the class area as a proxy for common proof of causation or injury. The inconsistencies in Plaintiffs' theory demonstrate the need for individualized evidence to determine the existence and source of PFOA as to any particular individual or property. Given the need to determine whether contamination existed, and the cause thereof, on each individual property in the proposed class area, individual issues predominate, and certification is improper. *See Ebert*, 823 F.3d at 479–80; *see also Lee-Bolton v. Koppers Inc.*, 319 F.R.D. 346, 384–85 (N.D. Fla. 2017).

2. Other Sources of PFOA In and Affecting the Class Area Create Individualized Questions

There is another fatal problem with Plaintiffs' assumption that air emissions from the McCaffrey facility are the predominant source of PFOA supposedly present in every individual class member's blood or drinking water and on every individual class member's property. Plaintiffs' experts disregard numerous known and potential sources of PFOA affecting different parts of the proposed class area. Therefore, individualized evidence on the source question will be required at each property in the proposed class area, which precludes treating the issues of causation and injury as common.

Taconic Plastics. In addition to identifying air emissions from the Taconic facility as a source of PFOA within the proposed class area, *see supra* Section I.A.1, Drs. Shin and Siegel also have opined that PFOA from the Taconic facility was likely carried northward into the proposed class area by the Hoosic River. Shin *Burdick* Reply Aff. ¶ 5; Siegel Reb. Rpt. at 3. As Dr. Shin

explained, "Petersburg is south and then … Hoosick Falls is north and the[] Hoosic River flows from south to north," so "if there's some emissions going on in … Petersburg, then some PFOA may flow down to the Hoosic[] River to the class area." Shin Tr. 125:21–126:2. Likewise, Dr. Siegel testified that "with respect to the river, the PFOA [from the Taconic facility] … might be in the river near the [Hoosick Falls] municipal wellfield." Siegel Tr. 72:13–19. [redacted] Under the theories of Drs. Shin and Siegel, PFOA from the Taconic facility therefore entered the Hoosic River and flowed directly through the proposed class area, affecting certain properties, wells, and groundwater along the way, including the Village of Hoosick Falls' public drinking water supply wells, [redacted]

Additional Sources and Pathways of PFOA. The State of New York is currently investigating numerous other facilities in the Town of Hoosick and the Village of Hoosick Falls for PFOA releases. [redacted]

[redacted] Plaintiffs' experts ignore all of these sources.

Even as to the John Street facility, which Plaintiffs claim was a source of PFOA air emissions within part of the proposed class area, *see* Pls. Mot. at 1, 24, Plaintiffs make no attempt to differentiate wells, properties, or persons affected by that facility. But a factfinder would need to do so because the relevant factual circumstances for John Street are quite different than those for McCaffrey, as the John Street facility performed yarn coating operations that [redacted] and ended in 1996. *See* Pls. Mot. at 24.

Despite failing to consider these alternative sources in reaching their opinions, Plaintiffs' experts recognized at their depositions that the sources would likely have had localized effects on individual properties in the proposed class area. *See* Siegel Tr. 123:6–124:4, 125:7–127:24; Shin Tr. 121:19–22, 126:21–129:25; Huncik Tr. 189:5–202:23. Such localized effects mean that different class members would have different proof and face different defenses regarding alternative sources depending on the location of their property and the timing of their alleged PFOA exposure, necessitating an individual analysis of causation, injury, and other issues.

Background Levels. [redacted]

[redacted] While recognizing the potential significance of background levels attributable to sources other than McCaffrey, Plaintiffs' experts again gave those levels no consideration in forming their opinions. *See* Siegel Tr. at 136:14–19, 142:21–144:9; Shin Tr. at 119:11–120:3; Huncik Tr. at 231:12–234:10. But any factfinder would have to do so on a class member-by-class member basis.

[redacted]

[redacted]

Need for Site-Specific Proof. Ignoring the sampling data, Plaintiffs assert that other sources need not be considered because their experts have purportedly determined that McCaffrey air emissions are the [redacted] "predominant" source of PFOA in the proposed class area. [redacted] But such a classwide assessment could not prove causation, let alone injury, for any particular class member because the circumstances of different properties and individuals will necessarily vary. Defendants will defend against Plaintiffs' claims by presenting evidence that alternative sources account for PFOA on individual properties, in individual wells, and in individuals' drinking water or blood. Thus, Defendants' "defenses to individual claims" will turn on individualized proof, *see Dukes*, 564 U.S. at 367, and Plaintiffs have not satisfied their burden of showing that these defenses can be resolved on a classwide basis. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006) ("[I]t is the *plaintiff* who bears the burden of showing that the class *does comply* with Rule 23. It is not enough, therefore, for [plaintiffs] to argue that [defendant] failed to show that its … defense presents individual issues. Instead, the record must affirmatively reveal that resolution of the … defense on its merits may be accomplished on a class-wide basis.") (emphasis in original) (internal citations omitted).[15]

For example, Plaintiff Michele Baker argues that Defendants are liable for the presence of PFOA in her private well. Pls. Mot. at 38. [redacted]

[15] *See also EQT Prod. Co. v. Adair*, 764 F.3d 347, 367–69 (4th Cir. 2014); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 329 (5th Cir. 2008); *cf. IPO*, 471 F.3d at 41–42.

[redacted] Resolving Ms. Baker's claims will thus require, at the very least, an analysis of which sources [redacted] may be affecting her property, and whether those localized sources account for the presence of PFOA on her property, rather than the McCaffrey facility. *See id.; cf.* Siegel Tr. at 254:13–258:14. For a class member with a private well in the southeastern part of the proposed class area, the evidence and analysis will be entirely different. [redacted] As to that individual's claims, the analysis will focus on the Taconic facility and other nearby sources, to determine whether those sources—rather than McCaffrey—are responsible for the presence of PFOA in that individual's well. [redacted]

Common questions cannot predominate where the fundamental, threshold question of the source of PFOA requires individualized inquiries for each property and each class member. As the Eighth Circuit recognized in reversing certification of a class of property owners in *Ebert*, "[a]djudicating claims of liability will require an inquiry into the causal relationship between the actions of [defendant] and the resulting alleged … contamination." 823 F.3d at 479. But that inquiry turns on considerations "not suitable for class-wide determination," including whether the alleged contamination "threatens or exists on each individual property as a result of [defendant's] actions"; "if so, whether that contamination is wholly, or actually, attributable to [defendant] in each instance"; and whether "additional upgradient (or other) sources of contamination" were

affecting individual properties. *Id.*; *see also Gates*, 655 F.3d at 272; *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 306–08 (S.D. Ala. 2006); *Lee-Bolton*, 319 F.R.D. at 384–85.[16] Resolution of each putative class member's claims here likewise will require an individualized plaintiff-by-plaintiff, property-by-property, well-by-well analysis to determine whether PFOA in a particular well or on a particular property (if any) rises to the level of cognizable injury and whether air emissions from McCaffrey versus other pathways and other sources are the cause of the individual class member's alleged injury. Across the proposed classes, Plaintiffs' theory of common injury attributable to a common source—i.e., air emissions from McCaffrey—fails to establish that common issues predominate, particularly in light of the admissions of Plaintiffs' experts highlighted above. This alone is sufficient to deny Plaintiffs' motion.

B. Individual Issues Predominate for the Property Damage Classes

The individual analyses needed to determine the source of PFOA for class member properties are far from the only reason that individual issues predominate for the putative Municipal Water Supply Property Damage Class, Private Well Water Property Damage Class, and Nuisance Damage Class (collectively, "the Property Damage Classes"). The elements of and defenses to their claims—which assert injury to the value, use, and enjoyment of class member property under negligence, strict liability, nuisance, and trespass theories—are rife with individual

[16] *Bentley v. Honeywell International, Inc.*, 223 F.R.D. 471 (S.D. Ohio 2004), cited by Plaintiffs, is contrary to controlling Second Circuit law. Relying on *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156 (1974), the *Bentley* court erroneously accepted as true the plaintiffs' allegations that the defendants' facilities were the source of contamination and that defendants had engaged in "uniform" conduct. *See Bentley*, 223 F.R.D. at 476, 478–79, 481–82. Notably, the *Bentley* court recognized that "[i]f the Court were not required to accept Plaintiffs' theory of the commingled plume, then, of course, as Defendants argue, individualized issues about which of the many sources released what VOCs that migrated onto whose properties would predominate." *Id.* at 481. The Second Circuit has since explained that *Eisen* does not bar a court considering certification from examining the merits and that a court instead must do so when the merits are relevant to certification. *IPO*, 471 F.3d at 34, 41.

questions. All of those claims require proof of injury, causation, and damages, among other elements. *See, e.g.*, *Pasternack*, 27 N.Y.3d at 825; *Nemeth*, 100 A.D.3d at 1272; *Ivory*, 116 A.D.3d at 129. But the diverse circumstances presented by the disparate class-member properties—different PFOA levels, uses, disamenities, and PFOA sources—make the proof of those elements and the defenses to those issues necessarily individualized.

Courts routinely reject class certification for property-damage claims in similar circumstances. *See, e.g.*, *Ebert*, 823 F.3d at 475, 479–80; *Gates*, 655 F.3d at 259, 271–72; *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 209 F.R.D. 323, 344, 349–51 (S.D.N.Y. 2002) ("*MTBE I*"). And the utter deficiency of Plaintiffs' expert Dr. Zabel's "preliminary" model of alleged property value diminution confirms the impossibility of resolving these property claims on an aggregate basis. In short, there is no basis for certifying the Property Damage Classes.

1. Injury and Damages, If Any, Can Only Be Determined Property By Property

Only a property-by-property analysis could determine the existence, duration, and degree of any injury to value, use, or enjoyment of class member properties caused by Defendants' alleged conduct, especially where—as here—multiple factors influence individual property values and the use and enjoyment of any particular property within the proposed class area. Property markets, such as those in the Proposed Class Area, consist of a variety of neighborhoods with a variety of property types with a variety of land uses and submarkets, each with particular market characteristics and neighborhood influences that impact market pricing, as well as use and enjoyment. That is why the appraisal profession generally recognizes that "adverse environmental conditions including groundwater and drinking water concerns do not automatically decrease market prices and values" and that "the effect of changes in environmental conditions on real estate

prices and values can change over time." JLL Rpt. at 22.[17] As Dr. Zabel has acknowledged in his prior research, dozens of property characteristics impact valuation characteristics that he did not include in his model here. *See* JLL Rpt. at 134–35.

Courts, too, recognize that determining whether and how putative class members' properties declined in value will "hinge on property-specific determinations." *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 677 (S.D. Ala. 2005). For instance, in *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, the court found that common issues did not predominate where "the degree of [ ] contamination differ[ed] from property to property, and the nature and extent of mandatory relief necessarily [would] depend on site-specific examination." 209 F.R.D. at 350. Similarly, in *Osarczuk v. Associated Universities, Inc.*, the court determined that the predominance requirement was not met because resolution of plaintiffs' claims would turn on "questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners." 82 A.D.3d 853, 856-57 (2d Dept. 2011); *see also Georgia-Pacific Corp. v. Carter*, 265 S.W.3d 107, 114 (Ark. 2007) (recognizing individual issues regarding "whether and to what extent [defendant's] operation … constituted an unreasonable interference with[] the property owners' use and enjoyment of their property").

[17] In fact, "effects of groundwater and drinking water contamination on prices and values are typically temporary and end as control or remediation is implemented." JLL Rpt. at 115. Here, for example, while Plaintiffs claim that the Property Damage Classes' injuries are attributable to the presence of PFOA in drinking water, hundreds of private wells in the proposed class area had POETs to filter PFOA installed at various times over the past several years, beginning in 2016—including named Plaintiffs Michele Baker and Angela Corbett. *See* Baker Decl. ¶ 6; Corbett Decl. ¶ 6. Thus, the alleged injury, if any, suffered by each member of the Private Well Water Damage Class and Nuisance Damage Class will vary depending on whether and when a POET was installed. *See, e.g.*, 2d Am. Compl. ¶¶ 214, 216.

Here, no less than in those cases, the record evidence supports numerous property-specific defenses to diminution in value, which in turn compel a property-by-property analysis and preclude a classwide determination. Determining any alleged diminution in value depends on a host of characteristics that differ considerably across the diverse properties in the class area.

Varying PFOA Concentrations. [redacted] Even if the presence of any PFOA could diminish a property's value, the existence and extent of any diminution would depend upon the level of PFOA on the particular property. JLL Rpt. at 23.

Different Uses. Whether and how the presence of PFOA, or a given level of PFOA, on a given property affects its value or interferes with its use and enjoyment will also necessarily depend on the use of that property. *See, e.g.*, JLL Rpt. at 31–33. The putative class members use their properties in very different ways, including for residential, agricultural, and industrial purposes. *See id.* at 3, 29, 55. As Dr. Zabel acknowledges, residential, agricultural, industrial, and vacant properties are in entirely different markets, with their uses dictating different potential real estate prices, use, and enjoyment. *Id.*; Zabel Tr. 102:1–103:23. Even among residential properties there are differences, as some properties are owner-occupied while others are rented, which matters

because owners who occupy their property may be more sensitive to environmental issues than landlords. JLL Rpt. at 37–38.

Different Amenities. Virtually every property boasts different amenities, including its location, its heating system, the quality of the landscaping, whether it has stone countertops, and many, many more. *Id.* at 102–06. And depending on the nature and strength of a property's amenities, the alleged PFOA contamination might have quite different effects on the value of the property. For instance, the evidence suggests that certain property values in the proposed class area were *enhanced* by the installation of a point-of-entry treatment system ("POET") to remediate PFOA presence. *See id.* at 57, 65 & n.99.

Different Proximate Disamenities. Determining what, if any, effect Defendants' alleged conduct had on a class member's property value, enjoyment, or use requires assessing disamenities in close proximity to a given property. *See id.* at 40-54. For example, EPA has identified forty-two sites within the proposed class area as sources of hazardous or toxic substances, and NYSDEC identified thirteen sites as the subject of active or completed remediation or potential superfund sites. *Id.* at 46. And those disamenities have changed over time due to changes in property use and remedial efforts. *Id.* at 3, 18, 22–23, 31, 40–41. Other recognized disamenities include proximity to railroad tracks, high voltage power lines, residences of registered sex offenders, and flood hazards zones. *Id.* at 49–54. A property's proximity to any disamenities must be separately analyzed to determine their effect, if any, over time, and whether such disamenities, rather than PFOA, are the cause of any diminution in value, use or enjoyment. *Id.* at 2.

Multiple Sources of PFOA. Given the numerous PFOA sources affecting portions of the proposed class area, *see supra* Section I.A.2, each class member's claims will also require an individual assessment of whether any alleged diminution in value or nuisance was caused by

Defendants' alleged conduct or was instead wholly or partially caused by another source. *See* JLL Rpt. at 40–45.

2. Plaintiffs' Hedonic Regression Model Fails As a Proxy For Individualized Analyses of Injury, Causation, and Damages

Attempting to sidestep the litany of individualized issues necessary to resolve the claims of the Property Damages Classes, Plaintiffs rely on a "preliminary" hedonic regression model offered by Dr. Zabel as evidence of common harm. Pls. Mot. at 52; Zabel Rpt. at 2. But Dr. Zabel's model does not even purport to prove the existence of injury or the amount of damages on a classwide basis. Nor does it match Plaintiffs' theory of liability, model the proposed class at issue, or account for multiple variables affecting property sales. Instead, it presents only an estimate of the "average" diminution in value with demonstrably poor statistical reliability. Where, as here, "an expert's model is the basis for a plaintiff's claim of classwide impact and causation, a court is obliged to rigorously examine the soundness of that model at the class certification stage." *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 46 (S.D.N.Y. 2020); *see also In re Mirena IUS Levonorgestrel-Related Prod. Liab. Litig. (No. II),* 982 F.3d 113, 123 (2d Cir. 2020); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). "Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 255 (D.C. Cir. 2013).

In *Comcast Corp. v. Behrend*, the Supreme Court reversed class certification and held that plaintiffs relying on "a model purporting to serve as evidence of damages in [a] class action" must show that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." 569 U.S. at 35. Importantly, the model must account for the influence of other variables

and "must measure only those damages attributable to" plaintiffs' theory of liability.[18] *Id.*; *see also Roach*, 778 F.3d at 407. Plaintiffs' model fails to accomplish any of this.

Failure to Calculate Individual Injury and Damages on a Classwide Basis. Dr. Zabel makes clear that his hedonic regression model is not intended to demonstrate that the existence of injury and the calculation of damages could be determined and measured across the entire class as required by *Comcast*. Instead, he seeks to calculate only an ***average*** diminished value for those properties included in his model and admits he cannot calculate the actual value-diminution for individual properties. Zabel Tr. at 46:2–16, 55:11–18. The use of averages as a "shortcut" is "a caution signal ... that class-wide proof of damages [i]s impermissible." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing class certification). "Attempts to meet the burden of proof using modeling and assumptions that do not reflect the individual characteristics of class members [are] met with skepticism." *Gates*, 655 F.3d at 266 (citations omitted). Courts deny class certification where "an average of the values" is calculated, because such an average "necessarily yield[s] a windfall to some [individuals] at the expense of others." *Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355 (5th Cir. 2005) (per curiam) (affirming denial of class certification). While an average value, if accurate, might estimate the total damages of the class, using it to determine the claim of any given individual in the class is "demonstrably wrong." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 54 (1st Cir. 2018). Here, Plaintiffs' model provides no assurance of even fact of injury, let alone a measure of any individual's actual harm.

[18] Otherwise, "the problem is not just that the Court will have to look into individual situations to determine the appropriate measure of damages; it is that Plaintiffs have not even told the Court what data it should look for." *In re MyFord Touch Consumer Litig.*, 2016 WL 7734558, at *15 (N.D. Cal. Sept. 14, 2016).

Failure to Isolate Harm Attributable to Plaintiffs' Theory. Dr. Zabel's model also fails under *Comcast* and like decisions because it does not "measure only those damages attributable to [Plaintiffs'] theory" of liability. *See, e.g.*, *Comcast*, 569 U.S. at 35; *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156–57 (8th Cir. 2017); *Cannon v. BP Prods. N. Am. Inc.*, 2013 WL 5514284, at *9–12, *15 (S.D. Tex. Sept. 30, 2013). Dr. Zabel fails to isolate the effect (if any) on property value, use, or enjoyment attributable to emissions from the McCaffrey facility. Glaringly, he testified that his model does ***not*** account for ***whether PFOA was actually detected in the water on any property***. *See* Zabel Tr. at 91:1–13. This alone is fatal, as a "putative class must first demonstrate economic loss—that is, the fact of damage—'on a common basis.'" *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 306 (3d Cir. 2016) (quotation omitted). As this Court has recognized, property damages and stigma damages of the type Plaintiffs seek can be recovered only by individuals who "suffered actual contamination" of their properties. *Donavan v. Saint-Gobain Performance Plastics Corp.*, 2017 WL 3887904, at *6 (N.D.N.Y. Sept. 5, 2017); *see also Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 504 (2d Cir. 2020) (holding diminution-in-value claims could be maintained by plaintiffs who "pleaded damage to their homes in the form of contamination of their drinking—and cooking—water and the need to incur remedial expenses"). Yet Dr. Zabel made no attempt to limit his model to those individuals with PFOA detected on their properties.

Moreover, even where PFOA was detected, Dr. Zabel made no attempt to distinguish between PFOA emissions from McCaffrey and other sources. *See* Zabel Tr. at 17:20–24. He testified that emissions from the former Chemfab facility (which Plaintiffs' other experts acknowledged) were "not relevant to [his] estimation of the impact of PFOA contamination on property values." Zabel Rpt. at 3 n.6. He likewise ignored numerous other potential sources of

PFOA in the proposed class area, including sites currently under State investigation. Zabel Tr. at 17:20–24. Where, as here, an expert's model fails to isolate the defendant's allegedly wrongful conduct as the cause of the identified harm, courts deny class certification. *See Webb*, 856 F.3d at 1156–57 (reversing class certification where model assumed, without evidence, that all properties along oil pipeline were actually contaminated); *Cannon*, 2013 WL 5514284, at *9–12, *15 (rejecting hedonic regression model that did not isolate alleged conduct).

Failure to Model Injury and Damages for the Putative Classes. Dr. Zabel's model also fails to match the putative Property Damage Classes. On the one hand, it is concededly overinclusive because it ***includes sales data from the "Excluded Eastern Area,"*** even though Plaintiffs expressly excluded properties within that area from the putative class definitions due to potential effects from the Chemfab facility. *See* Zabel Rpt. at 3 & n.6. On the other hand, it is underinclusive because it evaluates only some groups of single-family residential homes in the Village of Hoosick Falls, *id.* at 3–4, even though the putative classes include single-family homes throughout the proposed class area, as well as industrial properties, agricultural properties and other residential properties. Dr. Zabel testified that separate analyses would be required for each category of non-residential properties, possibly including individual-specific appraisals. *See* Zabel Tr. at 100:22–103:24.

Failure to Consider Relevant Factors. Finally, Dr. Zabel's model fails under *Comcast* and other precedents because it does not "rul[e] out or limit [ ] the influence of other variables." *Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 96 (2d Cir. 2015). Reliance on a model in support of class certification is improper where it does not "take into account certain relevant or confounding factors." *Schechner v. Whirlpool Corp.*, 2019 WL 4891192, at *8 (E.D. Mich. Aug. 13, 2019). For instance, in *Singleton v. Fifth Generation*,

the court held that a regression model calculating a product label's value failed to satisfy *Comcast* where it did not control for product quality. 2017 WL 5001444, at *22 (N.D.N.Y. Sept. 27, 2017); *see also In re Processed Egg Prods. Antitrust Litig.*, 2016 WL 410279, at *8 (E.D. Pa. Feb. 3, 2016).

Dr. Zabel's model fails to account for the very factors that his published writings concede are necessary for a hedonic regression of property value, including neighborhood quality, multiple other property and ownership characteristics that affect housing prices (*e.g.*, number of bedrooms and bathrooms, house style, school quality), and whether the relevant market was in equilibrium. A regression model's failure to control for such attributes "renders the model incapable of providing a damages figure that is consistent with [p]laintiff's liability case." *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *13 (N.D. Cal. Dec. 15, 2014).[19]

Because the claims of the Property Damage Classes cannot be resolved without individualized proof, and because the regression model offered by Plaintiffs contravenes *Comcast* and similar decisions, this Court should deny certification of the Municipal Water Property Damage Class, Private Well Water Property Damage Class, and Nuisance Damage Class.

C. Individual Injury, Causation, and Relief Predominate for the PFOA Invasion Injury Class

Plaintiffs' PFOA Invasion Injury Class fares no better. Their claims for medical monitoring—based on negligence and strict-liability theories—are likewise beset by thoroughly

[19] Given the many failings in Dr. Zabel's model, it is not surprising that his model falls short of generally accepted statistical measures of accuracy and precision and fails to explain more than half of the very relationship it purports to estimate. *See* Mem. of Law in Support of Defs. Joint Motion to Exclude Pls. Expert Testimony at 39-42. Dr. Zabel's model explains only 48.7% of the variation among the sale prices included in the model, meaning that 51.3% of the variation in prices is ***not*** explained by the model and would be attributable to other variables not accounted for in Dr. Zabel's model. JLL Report at 102.

individual questions of injury and causation. But the class also cannot be certified because Plaintiffs have failed to identify any details of the medical monitoring they propose, much less shown how such relief could be administered on a common, classwide basis.

In similar circumstances, federal appellate courts have overwhelmingly rejected certification of medical monitoring classes. *See, e.g.*, *Gates*, 655 F.3d at 269–70; *In re St. Jude Med., Inc.*, 522 F.3d 836, 841–42 (8th Cir. 2008) ("*St. Jude II*"); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) ("*St. Jude I*"); *Ball*, 385 F.3d at 728; *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1196, *amended*, 273 F.3d 1266 (9th Cir. 2001); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 130 (3d Cir. 1998); *Boughton v. Cotter Corp.*, 65 F.3d 823, 825-26 (10th Cir. 1995). Medical monitoring, they have explained, is "highly individualized," such that "common issues do not predominate over [the] individual issues that must be litigated to resolve the plaintiffs' claims." *St. Jude II*, 522 F.3d at 841.

That claims for medical monitoring are unsuited for class certification is particularly true here, as medical monitoring under New York law is an individualized ***damages remedy***.[20] *See Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013). Plaintiffs argue otherwise, relying on an expert report from Dr. Ducatman. But Dr. Ducatman recognizes that the suitability of medical monitoring will necessarily vary from person to person based on their own individual

[20] The New York Court of Appeals rejected a cause of action for medical monitoring and held that the relief is a form of damages for an existing tort based on a physical injury. *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013). The decision of the District of Vermont in *Sullivan*, 2019 WL 8272995, at *13 (D. Vt. Aug. 23, 2019), is therefore inapposite, since it certified a Rule 23(b)(2) injunctive class for medical monitoring based on a prediction that Vermont, unlike New York, would recognize medical monitoring as an equitable remedy. Thus, *Sullivan* did not even address the Rule 23(b)(3) predominance requirement, which is fatal to certification here. And in any event, Defendants respectfully submit that *Sullivan* erred in suggesting that a Rule 23(b)(2) class could avoid these problems of individual issues, because such classes must still show that all members are entitled to a "single injunction." *See Dukes*, 564 U.S. at 360; *see infra* Section IV.

characteristics. Ducatman *Sullivan* Tr. at 55:23–61:4. And he offers this Court no more than a vague framework of initial testing protocols, coupled with assurances that he will attempt to address these issues later, once the Court certifies the proposed class. Such a "wait-and-see approach" to class certification is improper. *See, e.g.*, *Fosamax*, 248 F.R.D. at 397.

Even if the alleged injuries of all putative class members could be resolved through a common medical monitoring ***remedy***—and they cannot—that still would do nothing to establish that all putative class members could prove the elements of their ***claims*** and overcome Defendants' ***defenses*** through ***common proof***. For both negligence and strict liability, New York law requires proof that each Plaintiff has a cognizable injury and that this injury was caused by each Defendant's alleged conduct.[21] Proof of those elements, as well as the applicable defenses, depends on individual evidence here. Those individual issues do not disappear merely because Plaintiffs may assert that they are entitled to some vague and non-specific "common" relief. And those individual issues foreclose certification of the proposed PFOA Invasion Injury Class.

1. The PFOA Invasion Injury Class's Negligence and Strict Liability Claims Will Turn on Individual Proof of Injury

The essential element of injury for medical monitoring claims cannot be decided without individual inquiries. In *Benoit*, the Second Circuit ruled that allegations of a "clinically demonstrable presence of toxins in the plaintiff's body" would be "sufficient to ground a claim for personal injury." 959 F.3d at 501. In doing so, however, the Court recognized that injury requires proof, not only that the plaintiff experienced a measurable amount of exposure, but also that the exposure created a significantly increased risk of disease. *Id.* at 498–502.

[21] *See Pasternack*, 27 N.Y.3d at 825 (negligence); *Read v. Corning Inc.*, 351 F. Supp. 3d 342, 357 (W.D.N.Y. 2018) (strict liability).

Here, Plaintiffs cannot demonstrate classwide "injury" under *Benoit*. Whether the particular PFOA blood level in a putative class member will put him or her at significantly increased risk of disease will necessarily be individualized. Plaintiffs assert that the class members are injured if they have "blood serum tests disclosing a PFOA level in their blood above the average background level of 1.86 µg/L." Pls. Mot. at 40–41. But this alone does not establish that any individual is at significantly increased risk of disease.[22] Dr. Ducatman admitted that the 1.86 µg/L level selected by Plaintiffs to define the class was simply the geometric mean of PFOA levels in blood among a sample of U.S. adults in 2013-2014, Ducatman Tr. at 245:18–246:6; was not meant to reflect anything having to do with increased risk, *id.* at 248:1–11; was chosen because, according to Dr. Ducatman, "you need to pick some arbitrary level," *id.* at 249:2–3; "was not based on the idea of a threshold," *id.* 249:8–9; and was "not chosen based on anything having to do with health effects," *id.* at 258:2–3. Likewise, Plaintiffs' expert Dr. Savitz conceded that the 1.86 µg/L level is not a "threshold" dose and is not "health-effect driven or determined." Savitz Tr. at 131:15–132:4, 150:2–19. Dr. Savitz also testified that "we don't have the scientific evidence to make a clear-cut judgment" as to a level at which PFOA would be either "safe below it or harmful above it." *Id.* at 86:16–87:4.

Because Plaintiffs' experts have not proffered evidence that a PFOA blood serum level of 1.86 µg/L (or any other blood serum level) would be a dose threshold for any disease, determining whether any putative class member is at risk of any disease, and for what disease(s), can only be assessed class member-by-class member. Different medical and personal histories, different

[22] "[A]ll chemical agents are intrinsically hazardous—whether they cause harm is only a question of dose. Even water, if consumed in large quantities, can be toxic." RSME at 636.

genetic makeup, and differing circumstances necessarily mean that there is no singular threshold that predicts increased risk. *See Rowe*, 2008 WL 5412912, at *12-13.

Among the class representatives, PFOA blood levels ranged from 22.2 to 186 µg/L, [redacted]. Moreover, as Dr. Savitz acknowledged, even individuals with the same dose may vary in their response to PFOA. Savitz Tr. at 80:1–15. For these reasons, "it would not be proper to treat all individuals with 'above background' (1.86 µg/L) PFOA exposures as being at increased risk of any disease, let alone all of the different health endpoints that Dr. Savitz addresses [in his report]." Alexander Rpt. at 7. Yet Plaintiffs offer no means to determine which particular class members, if any, received a dose of PFOA sufficient to cause any significantly increased risk of disease. As Dr. Alexander explained, determining "whether and to what extent" any particular person may be at increased risk of a specific disease due to exposure to PFOA—i.e., may have suffered a cognizable injury under *Benoit*—will require "determin[ing] the PFOA exposure level of the individual along with other relevant individual factors." *Id.*; *see also Rowe*, 2008 WL 5412912, at *13.

2. The PFOA Invasion Injury Class's Negligence and Strict Liability Claims Will Turn on Individual Proof of Causation

The claims of the PFOA Invasion Injury Class require resolution of all the individualized causation issues faced by the other classes, and then some. *See supra* Sections I.A, I.B. Not only will the sources of PFOA on any given property or in any given well be individualized, but so too will be the questions of where, when, how, and by whom each class member was exposed to PFOA. At least four additional individual considerations affect the causation inquiry as to elevated PFOA

blood levels in members of this class: (a) sources of drinking water; (b) consumer exposure; (c) occupational exposure; and (d) exposure at another residence.

(a) Sources of Drinking Water. Even if Plaintiffs could show a single source of PFOA in groundwater in the proposed class area—and they cannot—it would be to no avail because the alleged source of PFOA detected in class members' blood—drinking water—is not common among the class. Indeed, the putative class members consumed water from a multitude of sources that could account for the presence of PFOA in a particular class member's blood, raising questions of causation unique to each individual. For example, some class members received municipal water, and others water from private wells. *See* Pls. Mot. at 2–3. Some report that they have used only bottled water for drinking and cooking, *see, e.g.*, Love Rpt. at 35, and some have used activated carbon filters to filter their water, *see, e.g.*, Potter Tr. at 38:22–39:10. Some drink water at work or school, inside or outside the proposed class area. *See, e.g.*, Hickey Tr. at 97:7–17. Others drink water at other locations they visit for vacation or other reasons. *See, e.g.*, Carr Tr. at 228:12–16. These different sources of water may have had different levels of PFOA at different times, whether related or unrelated to Defendants' alleged conduct. A drinking water source close to a PFOA source may have had relatively lower PFOA if located upstream of the PFOA source. Conversely, a drinking water source further away may have had higher PFOA if located directly downstream of underground water movement. *See* Love Rpt. at 50. The unique behaviors of class members with respect to their drinking water sources present individualized questions as to their exposures and the cause of any allegedly increased risk of disease. "[T]he individualized nature of the causation inquiries is not surprising, as class members" consumed drinking water "at different times, for different periods, in different amounts," and from different sources. *In re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61, 66 (S.D.N.Y. 2002).

Even for the municipal water customers who drank water only from their homes (if there are any such individuals), the question of PFOA exposure would not be common because levels of PFOA in water drawn from the municipal system will vary at different locations and at different times. [redacted] Thus, personal exposure to PFOA attributable to the municipal water system will be unique among individual class members as well.

(b) Consumer Exposure. Still more individual questions are presented by the fact that drinking water is not the only source of PFOA in blood. PFOA is widespread in the modern world and can be found in many consumer products, each of which can lead to personal exposure. These products include pre-treated carpets, furniture upholstery, waterproof clothing, surface sealants, personal care products (*e.g.,* cosmetics, hair products, dental floss), car wax, photographic film, food containers (*e.g.*, pizza boxes, fast-food wrappers, and microwave popcorn bags), house dust, ski wax, and indoor and outdoor air. [redacted] Ducatman Rpt., Ex. F at 39–41; Ducatman Tr. at 141. [redacted] Because PFOA is ubiquitous in the environment, it is also ubiquitous in humans: 95% or more of Americans have detectable levels of PFOA in their blood. Ducatman *Sullivan* Tr. at 108:25–109:2. The geometric mean of 1.86 µg/l of PFOA in blood used to define the putative

class is just that—an average across a sample of all Americans. Thus, there are likely millions of Americans who have blood levels in excess of this average but who have no PFOA exposure other than to common consumer products. [redacted] To prove their claims, Plaintiffs must prove that each individual class member's PFOA blood levels are attributable to each Defendant's alleged role in contributing to emissions from McCaffrey rather than these consumer exposures. Because sources of PFOA exposure vary according to each class member's choices about the food they eat, the clothes they wear, and the types of leisure activities in which they engage, assessing whether any individual's PFOA blood level was caused by consumer exposure as opposed to drinking water affected by emissions from the McCaffrey facility will be inherently individualized as well.

(c) Occupational Exposure. For some class members, questions of causation will be further complicated by occupational exposure to PFOA. [redacted] Because PFOA is also present in certain aqueous firefighting foams, which are common at fire departments and "particularly at military sites, airports, and fire fighter training facilities," Ducatman Rpt., Ex. F at 28, class members who worked at one or more of the multiple fire departments in or near the proposed class area, or who worked at an airport or on a military base, may have been exposed via that route as well. *Id.* [redacted] The fact and extent of any occupational exposure will, of course, depend on an individual inquiry into each class member's individual employment history and the nature and duration of their responsibilities.

(d) Residential History Exposure. The residential history of each class member and their proximity to known and potential sources of PFOA also varies among the class. The population

in the proposed class area is dynamic; those who lived in it at one time may not live there any longer, and those who live there now may have lived other places. Hoosick Falls is not the only community where PFOA has been detected. Similar issues are present in the abutting town of Petersburgh, and just across the state line in Bennington and North Bennington.[23] [redacted] More broadly, other communities around the country have alleged similar issues, and a federal MDL has been established for cases involving PFOA and PFOS from firefighting foam. *See In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 357 F. Supp. 3d 1391 (J.P.M.L. 2018). Assessing the source of a class member's PFOA blood level requires an assessment of that individual's exposures at his or her other residences.

Causes of Alleged Increased Risk. In addition to individual questions as to the cause of each class member's exposure, the PFOA Invasion Injury Class also presents individual questions regarding the cause of each individual class member's alleged increased risk of disease. Inquiries into "whether class members face a significantly increased risk of developing a serious latent disease … require considering ***individual proof of class members' specific characteristics***." *Gates*, 655 F.3d at 270. "[P]ersonal health characteristics are just one of many individualized

[23] Several class representatives previously lived or worked in Bennington or Petersburgh and may be members of other classes even while they purport to serve as representatives of this one. For example, Plaintiff K.M. regularly [redacted] in Bennington, and K.M.'s mother, Kristin Miller-Harrington, worked full-time in Bennington almost her entire adult life. Miller-Harrington Tr. at 37:4–41:24, 51:4–7, 53:14–58:6. Plaintiff Kathleen Main-Lingener grew up in Bennington and at one point lived "directly across the street from Chemfab." Main-Lingener Tr. at 20:3–12. She has been living in Petersburgh since April 2017. *Id.* at 18:25–19:9. Plaintiff Charles Carr had numerous jobs in Bennington, Carr Tr. at 29:4–9, 40:12–13, and Plaintiff Silvia Potter commuted to a job in Bennington. Potter Tr. at 26:20–21. Plaintiff Michael Hickey's son, Plaintiff O.H., [redacted] in Petersburgh [redacted] Hickey Tr. at 135:5–14. Plaintiff Jennifer Plouffe's parents live in Petersburgh, and prior to 2016 she consumed water at their residence. Plouffe Tr. at 138:5–8. Addressing the unique exposure profiles and sources of just these named Plaintiffs—to say nothing of the absent class members—will be impracticable without extensive individual inquiries.

issues that pose a problem for the cohesiveness of the … class." *Rowe*, 2008 WL 5412912, at *12. Dr. Ducatman admits that "individual factors [are] important, for practically anything in health care." Ducatman Tr. 174:6–19; *see also id.* at 178:11–180:23. As Dr. Ducatman previously testified, with equal applicability here, there will be "considerable individual differences" among putative class members. Ducatman *Sullivan* Tr. at 55:25–61:4. In fact, there is great diversity among even the named Plaintiffs, with several having "multiple co-morbidities" [redacted], or risk factors [redacted]. Herzstein Rpt. at 24. "[E]ach class member's risk of disease will differ depending on his/her background risk of disease and susceptibility to PFOA," which "depend[s] largely on individual circumstances, such as gender, age, drug/alcohol use, nutrition, body mass index, physiology, behavior, medical history … and general state of health." *Rowe*, 2008 WL 5412912, at *17. Because increased risk "would necessarily depend upon the varied circumstances of the class members' exposure and other factors which may increase risk of disease," it is "not at all a common issue." *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 661 (M.D. Fla. 2001), *appeal denied as moot*, 400 F.3d 1286, 1297 (11th Cir. 2005).

3. Plaintiffs Fail to Define Their Proposed Medical Monitoring Remedy or Show It Will Be Warranted on a Classwide Basis

Plaintiffs attempt to avoid the numerous individualized issues inherent in the claims of the PFOA Invasion Injury Class by focusing instead on the "common" relief they seek: medical monitoring as consequential damages for all class members. Even if Plaintiffs could obtain certification on this basis—which they cannot—their argument must fail, as they have neither defined what their proposed medical monitoring remedy would entail, nor addressed the array of individual considerations necessary to determine whether monitoring would be warranted as to any particular class member.

The Relief Plaintiffs Seek Is Undefined. At the outset, Plaintiffs have made no attempt to define the medical monitoring remedy they seek. They nowhere identify the central aspects of their proposed monitoring—what actual medical tests would be included, for which conditions, for which class members, at which intervals, and for how long. As defense expert Dr. Herzstein explained, such factors are critical to assessing the need and justification for medical monitoring for participants in the program:

> [M]y problem with [Dr. Ducatman's] report is I don't see a careful, thoughtful analysis of those factors. And those factors are really important in thinking about medical monitoring for a group of people of any kind. And I would just like him to have thought through very carefully what is the specific disease, what is the hazardous exposure, what's the evidence that it causes a -- a disease. And who's at significantly increased risk? What -- what is the positive predictive value of the tests that might be done? And what are the harms? And, you know, what are the outcomes we're anticipating? That kind of thought process is what I would expect.

Herzstein Tr. at 132:17–133:5. In other words, because Dr. Ductaman does not actually propose any specific kind of medical monitoring, the Court cannot conclude that the suitability of medical monitoring Plaintiffs propose can be decided on a common basis.

Dr. Ducatman freely admits that these details are critical components of medical monitoring that must be defined. For instance, his reports state that "[t]he development of specific additional monitoring tests and evaluations, aside from blood testing, as well as the methodology to implement these tests, will be set forth in a future report," Ducatman Rpt. at 17, and [redacted]. Yet he specifically declined to furnish such information now. [redacted] ***But that says nothing about what the monitoring he proposes will include and therefore provides no basis to conclude that such relief would be warranted on a***

classwide basis. In other words, Dr. Ducatman has not "laid out justification for any medical monitoring program," as he has failed to define and justify its central aspects.[24] Herzstein Tr. 123:23-24. In relying on an undefined, amorphous program in support of certification of the class, Plaintiffs' experts "have done even less than the *Comcast* plaintiffs: Instead of providing an imperfect model [to seek certification], they have provided only a promise of a model to come." *Ward v. Apple Inc.*, 784 F. App'x 539, 541 (9th Cir. 2019). Plaintiffs cannot satisfy their legal burdens where, as here, "the district court will not actually see the model in action," but has just "the plaintiff's assurances it will be effective." *Carrera v. Bayer Corp.*, 727 F.3d 300, 311 (3d Cir. 2013). "Such assurances … are insufficient to satisfy Rule 23." *Id.*

Whether and What Monitoring Is Warranted Is an Individualized Inquiry. In any event, even if Plaintiffs had described the monitoring they seek, determining whether class members are entitled to medical monitoring and, if so, the type of monitoring warranted would require individual consideration of class-member-specific evidence. Common evidence cannot "prove the medical necessity of plaintiffs' proposed monitoring regime without further individual proceedings to consider class members' individual characteristics and medical histories and to weigh the benefits and safety of a monitoring program." *Gates*, 655 F.3d at 269. Thus, "each class member would ... have to demonstrate his/her specific exposure, how that exposure has increased his/her risk of disease, and his/her corresponding need for medical monitoring, all of

[24] At Dr. Herzstein's deposition, Plaintiffs' counsel suggested that defining a medical monitoring program at the class certification stage would be inappropriate because the plan might be modified during the merits phase of this case. Herzstein Tr. 124:7-11. But as Dr. Herzstein explained, the potential for an update to the program in the future does not excuse Dr. Ducatman's failure here to explain the features of the monitoring that he is proposing and his justifications for those features. *See id.* at 124:13–127:3, 132:17–133:5.

which would require medical expert testimony specific to each individual." *Rowe*, 2008 WL 5412912, at *21; *see also Rhodes*, 253 F.R.D. at 376.

To demonstrate that medical monitoring is warranted as consequential damages, *Caronia*, 22 N.Y.3d at 448, 451–52; *Benoit*, 959 F.3d at 501, [redacted] As discussed, determining whether putative class members are at an increased risk of disease and the cause or causes of such injury are inherently individualized inquiries, particularly given the significant variation among the members of the putative class here. *See supra* Section I.C.1–2. The need for medical monitoring "is an individualized inquiry depending on that patient's medical history, … the patient's risk factors …, the patient's general health, … and other factors." *St. Jude I*, 425 F.3d at 1122. Those inquiries are made all the more complicated by the fact that Plaintiffs seek monitoring not for one specific disease, but for a long and non-exhaustive list of health conditions. Savitz Rpt. at 7-19; Ducatman Rpt. at 7-8, 15-19.

Consider, for example, two individual class members who both allege they are at increased risk of high cholesterol and kidney cancer as a result of PFOA exposure. If one of those individuals failed to prove that she was at increased risk of kidney cancer due to PFOA exposure (for example, because Defendants offered evidence of her long family history of kidney cancer and personal behaviors like smoking), then medical monitoring that included screening for kidney cancer could not be awarded as "consequential" damages. Likewise, if the other individual failed to prove that he was at increased risk of high cholesterol due to PFOA exposure (for example, because Defendants offered evidence of his long family history of high cholesterol, obesity, and unhealthy lifestyle choices), he would not be entitled to monitoring for high cholesterol. Thus, while putative

class members may purport to seek the same relief, both their entitlement to relief and the particular relief they may receive as consequential damages will be contingent on individualized proof, making such determinations "unmanageable in the framework of a class action." *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 272 (S.D. Fla. 2003); *accord Rowe*, 2008 WL 5412912, at *21; *cf. Rhodes*, 253 F.R.D. at 380.

Furthermore, a medical monitoring program can "be contraindicated and potentially risky" for specific individuals, depending on that individual's characteristics and the particular monitoring sought. *Gates*, 655 F.3d at 269. [redacted] Yet Dr. Ducatman neither considered these risks nor evaluated their application to any class members—including the named Plaintiffs—in forming his class certification opinion. [redacted] *see also* Ducatman *Sullivan* Tr. at 156:9-16. Whether the benefits of monitoring exceed its risks will vary individually and cannot be resolved on a common basis. *Gates*, 655 F.3d at 269.

In addition, whether Plaintiffs' requests for monitoring are supplementary to any medical care that they normally receive is an individual question that affects whether medical monitoring is warranted. "[A] medical monitoring claim requires each plaintiff to demonstrate that the

medical monitoring regimen he had been or would have been prescribed … has changed due to the exposure," "taking into account individualized and personal factors such as genetics, medical history, etc." *Fiorentino v. Cabot Oil & Gas Corp.*, 2011 WL 5239068, at *7 (M.D. Pa. 2011). "[F]inding that the prescribed monitoring protocol is one that would not normally be recommended in the absence of an exposure … demands individualized rulings, because many of the individuals would normally be recommended to undergo exactly the same diagnostic screenings and tests based on [personal] risk factors" for reasons other than the alleged exposure. *Perez*, 218 F.R.D. at 272. "[T]he amount of monitoring a class member would require in the normal course of her treatment and illness, without the monitoring sought in this case, is an individualized inquiry into the medical needs and ongoing course of treatment for each class member." *Barraza v. C. R. Bard Inc.*, 322 F.R.D. 369, 382 (D. Ariz. 2017); *see also Rezulin*, 210 F.R.D. at 73. [redacted] *see also Rezulin*, 210 F.R.D. at 73. Plaintiffs make no effort to explain how such determinations could be made on a classwide basis.

Because the PFOA Invasion Injury Class cannot prove its claims without individualized proof, and because Defendants' defenses to those claims will necessarily turn on individualized proof as well, certification of the putative class must be denied. Plaintiffs' attempt to use the medical monitoring remedy as an end-run around their obligation to prove injury, causation, and entitlement to consequential damages plaintiff-by-plaintiff should be rejected.

D. Individual State-of-Mind Questions Add to the Predominance of Individual Issues.

The individual issues in this case do not end with injury, causation, and entitlement to relief. Liability also requires proof of a particular state of mind, which is necessarily relative to both time and place. The state-of-mind of each Defendant presents an individual, rather than common issue. Different Defendants had different knowledge, at different times, about different PFOA products and processes used in different facilities. Accordingly, different class members would have very different evidence of any particular Defendant's state-of-mind depending when, where, and how the alleged PFOA exposures for that class member or his or her property supposedly happened. The resulting need for individual state-of-mind proof weighs heavily against class certification.

All of Plaintiffs' claims have state-of-mind requirements. Trespass requires a showing that the injury-causing conduct was intentional. *Ivory*, 116 A.D.3d at 129. For a negligence claim, liability hinges on reasonableness, which depends in part upon foreseeability. *Read*, 351 F. Supp. 3d at 356. For strict liability, Plaintiffs must show that Defendants engaged in "activity of sufficiently high risk of harm to others, especially where there are reasonable even if more costly alternatives." *Doundoulakis v. Town of Hempstead*, 42 N.Y. 2d 440, 448 (1977). And nuisance requires at least one of these mental states. *Copart Indus., Inc. v. Consol. Edison Co. of New York*, 41 N.Y.2d 564, 569 (1977). In addition to showing that the required mental states were lacking, Defendants will defend against liability by showing that their conduct was consistent with the then-current "state of the art"—a standard that is necessarily relative to the time and place of the conduct.[25]

[25] New York courts allow defendants to present state-of-the-art defenses in both negligence and strict products liability cases. *See e.g.*, *Magadan v. Interlake Packaging Corp.*, 45 A.D.3d 650, 653 (2d Dep't 2007); *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 437 (4th Dep't 1979).

Here, Plaintiffs' allegations show that state-of-mind evidence will be Defendant-, conduct-, location-, and time-specific. They allege that "3M invented PFOA in the 1940s and supplied DuPont with the chemical for decades." Pls. Mot. at 2. They say that DuPont began operations involving PFOA in the 1950s, *id.* at 7, and that 3M and DuPont purportedly became aware that PFOA accumulated in blood in the mid-1970s. *Id.* at 8. They further allege that it was not until the 1980s that the companies became aware that direct handling of PFOA could produce deleterious side-effects, and that they began providing "some limited information" in their MSDSs about the potential toxicity of APFO in dispersions in the 1990s. *Id.* at 10–11, 29. Plaintiffs also claim Honeywell's predecessor and Saint-Gobain released PFOA in operations in Hoosick Falls during different time periods, ranging from the late 1960s until 2003, over which time the nature of their operations, materials used, materials manufactured, and information received varied. *Id.* at 19–30. Even accepting Plaintiffs' allegations for purposes of argument, determining whether such activities were intentional, unreasonable, or abnormally dangerous requires a different analysis for different defendants, different activities, and different locations at each point along the continuum from the 1940s forward.

State of mind evidence will turn on a litany of inquiries regarding information, supplier relationships and conduct that changed over time, including:

- Which supplier defendants or other supplier(s) were selling which APFO- or PFOA-containing product(s) to which Hoosick Falls facility or facilities at any given time;
- the nature of information about APFO and PFOA available to a supplier defendant of APFO- or PFOA-containing product(s) at any given time;
- the nature of any information about APFO and PFOA in a particular product provided by the supplier to a processor defendant at any given time;
- the nature of any waste handling information for a particular product provided by the supplier to a processor defendant at any given time;

- the nature of any environmental information as to a particular product provided by the supplier to a processor defendant at any given time;
- the nature of any human health information as to a particular product provided by the supplier to a processor defendant at any given time;
- the nature of any abatement information or technology provided by the product supplier to a processor defendant at any given time;
- the nature of any other information about APFO and PFOA available to a processor defendant at any given time;
- the nature of information regarding APFO or PFOA available to the general public at any given time; and
- the information available to the putative class member at any given time.

While disagreements may arise between and among the parties as to how these issues will be resolved on the merits relative to any particular time period or Defendant, these individualized issues further compound the predominance of individual issues precluding certification of the proposed classes.

The resulting splintered state-of-mind evidence necessarily means that different class members would have very different cases. The claims and defenses for a class member who (or whose property) was exposed to PFOA in the northwestern part of the class area in the 1980s due to conduct during that period will differ from the claims and defenses for a class member exposed in the southeastern part of the class area in the last decade due to more recent conduct. And the claims and defenses for a class member who lived in the center of Hoosick Falls for decades will differ still from both of these. The nearly endless combinations of different timeframes, different locations, different conduct, and different Defendants destroy any possibility of common, classwide state-of-mind proof.

Many decisions hold that time-, conduct-, and defendant-specific reasonableness and similar state-of-mind inquiries preclude class certification. *See, e.g.*, *Fosamax*, 248 F.R.D. at 399,

401; *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 309–11 (N.D. Ohio 2007); *Perez*, 218 F.R.D. at 271; *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 208, 212 (D. Minn. 2003); *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 165–67 (S.D.N.Y. 2003); *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 66 (Ohio 2004). Here too, these complex and evolving questions of liability simply cannot be resolved on a common basis, which makes class certification inappropriate.

II. PLAINTIFFS DO NOT SATISFY THE TYPICALITY AND ADEQUACY REQUIREMENTS

Plaintiffs have not carried their burden of satisfying the intertwined Rule 23(a) requirements that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" and that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)-(4). "Typicality requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class members." *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010). In other words, "as the class representative's claims go, so go the claims of the class." *Fosamax*, 248 F.R.D. at 398–99. Adequacy requires that "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 231 (2d Cir. 2016) (citation omitted). Named plaintiffs "inadequately fill the role of class representatives" where "the action involves a host of legal and factual issues unique to them that are likely to distract from their representation of the class." *Kelly*, 609 F.3d at 479. Plaintiffs say little about either typicality or adequacy, simply insisting that each member of each proposed class presses the same claims based on the same injuries and seeks the same relief. Pls. Mot. at 57–60. In doing so, Plaintiffs ignore or downplay obvious conflicts and disparities among the putative class members that make the named Plaintiffs inadequate class representatives and their claims atypical of the class.

A. The Property Damage Class Representatives Are Atypical and Inadequate

Plaintiffs fail to show that the class representatives proposed for the Municipal Water Property Damage Class, Private Well Water Property Damage Class, and Nuisance Damage Class have typical claims and would adequately represent those classes. The relevant properties and wells are highly diverse—in terms of geographic location, PFOA sources, PFOA levels, sales timing, and property use and characteristics—giving class members materially different claims and interests from the class representatives.

Conflicts Based on Plaintiffs' Air Deposition Model. Plaintiffs' air emissions theory for PFOA contamination in the proposed class area creates intractable conflicts of interest and differentiates the proposed class representatives from large swaths of the classes. [redacted] The class representatives, meanwhile, have no incentive to develop such a theory. Courts in similar situations have found typicality lacking where "properties [were] not all similarly situated in relation to the Defendants' property," *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, at *11 (E.D. Ky. Mar. 29, 2018), or where "the analysis and ultimate determination of each plaintiff's claim [would] turn primarily on individualized inquiries into how the [substance at issue] affected each plaintiff's

specific property interest," *Mays v. TVA*, 274 F.R.D. 614, 625 (E.D. Tenn. 2011). This Court should find the same.

Conflicts Based on Proximity to Alternative Sources. Atypicality and inadequacy also result from the need for location-specific causation determinations. The properties and wells of putative class members are spread over the 49-square-mile proposed class area. [redacted] Across that area, one or more of an array of sources other than McCaffrey can account for the presence of PFOA on a given property, requiring individualized proof and defenses distinct from those of the proposed class representatives. *See supra* Sections I.A.2, I.B.1. [redacted] On the other hand, to the extent certain class representatives will be required to defend against particular alternative sources unique to them—[redacted] *see supra* Section I.A.2—other class members will be disadvantaged by the class representatives' need to address those sources, rather than focusing on sources more relevant to them and their properties. *See Modern Holdings*, 2018 WL 1546355, at *11; *Burkhead*, 250 F.R.D. at 295–96; *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 598–600, 603–04 (M.D. Pa. 1997).

Conflicts Based on Different Property PFOA Levels. Variations in private well PFOA levels generate additional typicality and adequacy problems. [redacted]

[redacted]

[redacted] Class members with lower well concentrations must predicate their claims on an implausible argument that *any* detection of PFOA suffices to establish a claim. Class members with higher concentrations [redacted], in contrast, will have little incentive to support such an argument, since they can point to higher levels on their own properties. In addition, such class members may pursue legal theories unique to them in light of these higher levels, such as invoking New York's recently adopted 10 ppt MCL or the EPA's 2016 LHA of 70 ppt. Each of these groups has conflicting claims, because each has an interest in arguing that different evidence is sufficient to establish their claims. *See Henke v. Arco Midcon, LLC*, 2014 WL 982777, at *10 (E.D. Mo. Mar. 12, 2014); *Reilly*, 965 F. Supp. at 598-600, 603-04.

Conflicts Based on Different Property Use and Characteristics. Variations in the characteristics and uses of properties is another source of atypicality and inadequacy for the proposed representatives of the Property Damage Classes. The properties of all class representatives are single-family detached homes that they and/or their families occupy. JLL Rpt. at 3, 30-35. But much of the class area is devoted to other uses such as agriculture, industry, and recreation, while other parcels are vacant or undeveloped. *Id.* at 30. Even among residential properties, nearly a third are rented, rather than occupied by their owners. *Id.* at 33. While the putative Nuisance Damage Class includes both real property owners and "lessors," none of its proposed representatives lease their properties, despite the fact that homeowners use and enjoy

real property in very different ways than lessors who rent the property. All of these variations affect the property damage and nuisance claims that the putative class members might assert.

Even among the owner-occupied residential properties, the value, use, and enjoyment of those properties are affected by factors atypical from those affecting the properties of the class representatives. [redacted] Many class members, however, live closer to the economic hubs in Albany and Troy, or live in the higher-rated Cambridge Central School District, or live near fewer (or different) disamenities. *Id.* at 34-52. Determining whether the class representatives suffered loss of value, use, or enjoyment of their properties as a result of Defendants' alleged conduct does not answer that question for all other class members. *See Palmer v. 3M Co.*, 2007 WL 1879844 (Minn. Dist. Ct. June 19, 2007) (individual issues predominated where "[e]ach plaintiff would … need to show that her individual use and enjoyment of the property has been altered or otherwise infringed upon because of the presence of PFCs in the water," which would require "inquiring into the lifestyles and practices of each and every plaintiff"); *see also Henke*, 2014 WL 982777, at *10; *Mays*, 274 F.R.D. at 625; *Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 647–48 (M.D. Ala. 2010); *Burkhead*, 250 F.R.D. at 295–96.

Conflicts Based on Timing of Sales. Conflicts of interest and differences in claims also arise because different members of the Property Damage Classes have different experiences and intentions regarding the sale of relevant properties. None of the proposed class representatives sold their properties after December 16, 2015; seven still own theirs, and one lost hers to foreclosure. JLL Rpt. at 35. But at least 248 likely putative class members did sell their properties.

Id. Those class members have very different evidence and interests in trying to prove property value losses than those who have not sold their properties. Current property holders have to pursue the dubious notion adopted by Plaintiffs that—despite the effective public and private water filtering in place since 2016—property values are currently, and will for the foreseeable future remain, lower than what they would otherwise be. Zabel Rpt. at 3. Such a strategy is *not* in the interests of class members who actually *sold* their properties, particularly those who did so in 2016, who would be better served by using actual pricing data and/or a more concrete model to prove their claims. The class representatives are neither adequate nor typical representatives for class members who sold.

Similarly, the interests of members of the Property Damage Classes who sold relevant properties *before* December 16, 2015 conflict with the interests of the rest of the class, including the class representatives.[26] Plaintiffs' diminution-in-value theory posits that property values did not fall due to PFOA detections until December 16, 2015. *See* 2d Am. Compl. ¶¶ 208, 228(i)–(ii). But Plaintiffs have proffered facts that class members who sold earlier could use to argue (if they were allowed) that PFOA detections affected property values as much as a year before that date:

- Plaintiff Michael Hickey testified that he tested municipal water and discovered PFOA in September or October 2014. Hickey Tr. at 51-53.
- "The Village conducted testing in fall 2014 that confirmed high levels of PFOA in the municipal water." 2d Am. Compl. ¶ 182.
- "As early as December 2014, municipal water supply users received a letter included with their bill that indicated testing for PFOA had, and would continue to occur. This was followed by letters in April, August and early December describing additional testing and treatment options…." Zabel Rpt. at 2.

[26] The class definition speaks to when the property was purchased but not when it was sold. *See* Pls. Mot. at 37 ("All individuals who are or were owners of real property that was supplied with drinking water from the Village of Hoosick Falls municipal water supply, and who purchased that property on or before December 16, 2015.").

To the detriment of class members who sold properties before December 16, 2015—and to the benefit of the class members who bought those very properties—Plaintiffs have chosen to claim property-value losses starting after that date. The resulting conflict of interest means that the class representatives cannot adequately represent pre-December 16, 2015 sellers.

Even among class members who have not sold their properties, there is no typicality. Some allege that they unsuccessfully tried to sell or refinance their homes, *see* Baker Tr. at 140–52; Main-Lingener Tr. at 137–38, providing individual evidence on value. Others allege that they would like to sell in the near term, *see* Potter Tr. at 67-68, which raises individual questions about the timing of a future sale and the duration of any price effect. And still others have no intention of selling, *see* Carr Tr. at 209; Plouffe Tr. at 75, which calls into question how any property-value diminution could have harmed them. The class representatives therefore do not have claims typical of the proposed classes.

B. The PFOA Invasion Injury Class Representatives Are Atypical and Inadequate

The divergent circumstances of the members of the PFOA Invasion Injury Class—different PFOA blood levels, health conditions, water sources, medical histories, medical care, and so on—make the claims of the six proposed class representatives highly atypical and generate multiple conflicts of interest that prevent them from adequately representing the class.

Conflicts Between Class Members With Illnesses or Conditions and Class Members Alleging Exposure Only. Because none of the proposed class representatives purports to experience any current health condition attributable to PFOA exposure, their interests conflict with those of class members who *do* allege such injuries.[27] The exposure-only class representatives

[27] While Plaintiffs exclude from the class "any individual who has filed a separate lawsuit for personal injury alleging PFOA-related illness," Pls. Mot. at 41 n.34, that exclusion does not

have limited their "invasion injury" claim to one for future medical monitoring, Pls. Mot. at 64, but absent class members with current health conditions have a strong conflicting interest in seeking immediate payments for damages attributable to their conditions, as well as targeted, in-depth treatment or monitoring related to the conditions. The proposed class representatives have neither the incentive nor the ability to seek such relief. In *Amchem*, the Supreme Court noted that "the interest of exposure-only plaintiffs" is "not aligned" with that of the "currently injured." 521 U.S. at 626. For this reason, courts have regularly found that conflicts of interest between injured and uninjured class members like those present here foreclose class certification. *See Ball*, 385 F.3d at 728 ("named plaintiffs who already have thyroid cancer have fundamentally different interests than those named and unnamed plaintiffs who do not"); *see also Amchem*, 521 U.S. at 626–28; *Palmer*, 2007 WL 1879844; *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 280 (M.D. Pa. 2002); *Rink*, 203 F.R.D at 662–64.

Compounding this conflict is the fact that a judgment on the class claim for medical monitoring could foreclose class members who purport to have current injuries from later seeking damages based on those injuries. Even the *risk* of such preclusion is a "possible prejudice … too great" to permit certification, *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 551 (D. Minn. 1999), because the mere "*possibility* that a subsequent court could determine that claims for personal injury … were barred by *res judicata* prevents the named plaintiffs' interests from being fully aligned with those of the class." *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 368 (S.D. Iowa 2008) (citing *Thompson*, 189 F.R.D. at 551); *see also Fosamax*, 248 F.R.D. at 401 (claim-splitting concerns resulting in possibility of res judicata in later litigation made class representatives

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eliminate class members who allege an existing injury and have not filed a separate lawsuit.

inadequate); *MTBE I*, 209 F.R.D. at 339–40 (same); *Brewer v. Lynch*, 2015 WL 13604257, at *10 (D.D.C. Sept. 30, 2015) (collecting cases).[28]

Conflicts Between Class Members Seeking Monitoring for Different Diseases. A similarly fatal conflict arises from the scope of the requested medical monitoring relief. The proposed class representatives seek classwide monitoring for a non-exclusive list of diseases or conditions that they claim are associated with PFOA exposure.[29] Absent class members might wish to seek monitoring for additional ailments that may or may not be included in Plaintiffs' proposed monitoring. A judgment with respect to the class representatives' medical monitoring request would almost certainly impede absent class members from bringing broader claims that would better serve their own interests. This naturally "implicates the adequacy of representation, because any medical monitoring regime set up here may foreclose future class members from seeking medical monitoring for a condition not suffered by any of these named plaintiffs." *Perez*, 218 F.R.D. at 272. The class representatives cannot adequately represent the proposed class while abandoning such claims.

Conflicts Between Class Members with Differing PFOA Blood Levels. Variances in individual PFOA blood levels among the class members also make the proposed class representatives inadequate and atypical. *See supra* Section I.C.1. For purposes of defining the

[28] Because the preclusive effect of a judgment in this case would be decided by a court in a later individual action, this Court cannot guarantee that its judgment would allow currently injured individuals to separately pursue personal injury claims. *See MTBE I*, 209 F.R.D. at 340.

[29] Dr. Savitz's report specifically identifies thyroid disease; ulcerative colitis; kidney, ovarian, prostate, and testicular cancer; increased uric acid levels; high cholesterol; elevated liver enzymes; impaired immune system response; and pregnancy induced hypertension. *See* Savitz Rpt. at 4-18; *see also* Ducatman Rpt. at 16-18. But as Dr. Savitz himself has recognized with respect to any purported link between these conditions and PFOA exposure, "the evidence from research has become weaker with the accumulation of additional studies" for certain conditions, and "little additional research [exists] to confirm or refute the original assessment" of the C-8 Panel as to others. *See* Steenland (2020a).

class, Plaintiffs assert that any exposure above a supposed "background" level of 1.86 µg/L warrants medical monitoring. Ducatman Rpt. at 11. By selecting such a low and admittedly arbitrary threshold despite the likelihood acknowledged by their own expert that health risk would vary according to the amount of PFOA in a person's blood, *see* Ducatman Tr. 121:13–122:16, 245:18–246:6, 248:1–11, 249:11–16, Plaintiffs have pitted class members with more elevated PFOA blood levels—like the proposed class representatives, whose levels range from 22.2 µg/L to 186 µg/L—against those with levels closer to the 1.86 µg/L threshold. The class representatives and those class members with PFOA concentrations approaching 10, 15, or 100 times greater than 1.86 µg/L have no reason to wed themselves to an exposure threshold that invites additional compelling defenses based on the absence of evidence linking health conditions to PFOA blood levels anywhere near 1.86 µg/L. *See supra* Section I.C.1; [redacted] Alexander Rpt. at 7. Class members with lower blood levels either will find their claims undermined or be forced to push back against other class members to pursue theories in support of that low threshold. Conversely, class members with higher levels may be prejudiced if the Court rejects Plaintiffs' over-reaching arguments about lower levels of exposure.

The claims of the class representatives are not therefore typical of, or adequate stand-ins for, the claims of class members with lower PFOA blood levels.[30] The choice to pursue a theory that helps class members with lower levels (and seems designed to support as broad a class as possible) to the detriment of class members with higher levels creates a serious intra-class conflict. Because claims for medical monitoring "depend[] on … levels of exposure," they defy typicality.

[30] The same can be said with respect to class members with PFOA blood levels that are significantly more elevated than the class representatives' levels. [redacted]

See Ball, 385 F.3d at 727-28; *see also Fosamax*, 248 F.R.D. at 400; *Perez*, 218 F.R.D. at 272; *Reilly*, 965 F. Supp. at 599-600, 604-05.

Conflicts and Other Differences in Personal Characteristics. The claims of the proposed class representatives also lack typicality because class-member personal characteristics relevant to questions of causation and medical monitoring vary enormously. *See supra* Section I.C. [redacted] It simply is untrue that an appropriate program of "testing and monitoring … varies little between individuals." Pls. Mot. at 59.

Here, many class members would likely prefer *different* monitoring regimes than those to be proposed by Plaintiffs, and the required proof would differ by individual. Plaintiffs admit the class representatives have "experienced more significant exposure or levels of PFOA accumulation" and that "they have different medical histories that may make them more or less susceptible to a PFOA-related condition" than other class members. Pls. Mot. at 58. [redacted] It thus is not correct to say that the class representatives and class members are seeking (or, more importantly, would be entitled to seek) the same remedy. For this reason too, the class representatives' claims are *not* typical of the class's. Typicality has not been established where "the risk of [disease] varies depending upon [an individual's] unique medical history and the circumstances surrounding his or her [exposure

to a product]." *Fosamax*, 248 F.R.D. at 400; *see also Ball*, 385 F.3d at 727-28; *Perez*, 218 F.R.D. at 272; *Modern Holdings,* 2018 WL 1546355, at *9.

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE CLASS TREATMENT IS THE SUPERIOR METHOD TO ADJUDICATE THEIR CLAIMS

Plaintiffs' motion should also be denied because they have failed to demonstrate that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Inherent in this burden is a duty to explain why alternative options are inferior to class proceedings. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017). Here, Plaintiffs' claims fail to satisfy the superiority requirement for three reasons. *First*, the claims are not "negative value claims" appropriate for class treatment. *Second*, the proposed classes are unmanageable because they would require a series of mini-trials for every putative class member to answer the threshold question of class membership, and further mini-trials to establish both injury and appropriate damages. *Third*, Plaintiffs fail to present a trial plan or explain how the medical monitoring remedy will be administered on a classwide basis.

A. The Claims of the Proposed Class Are Not Negative Value Claims

Plaintiffs' suggestion that their claims are "not … sufficient to incentivize an individual action" is demonstrably false. Pls. Mot. at 74–75. Courts have identified several factors that reveal when plaintiffs are bringing positive value claims, including:

- That the claims request substantial damages,[31]

[31] *See, e.g., Zinser*, 253 F.3d at 1190–91; *Castano*, 84 F.3d at 748; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299–30 (7th Cir. 1995); *Hostetler v. Johnson Controls, Inc.*, 2018 WL 3868848, at *8–9 (N.D. Ind. Aug. 15, 2018); *Fosamax*, 248 F.R.D. at 402–03; *MTBE I*, 209 F.R.D. at 351; *O'Neal v. Wackenhut Servs., Inc.*, 2006 WL 1469348, at *23 (E.D. Tenn. May 25, 2006); *Benner*, 214 F.R.D. at 173.

- That the claims request punitive damages or attorneys' fees,[32] or
- That individual actions have been filed asserting similar claims.[33]

Each of these factors demonstrate that Plaintiffs have not asserted negative value claims. As relief for their admittedly "not insignificant" claims, *see* Pls. Mot. at 75, Plaintiffs request significant damages, including for "substantial loss" of value to their real property, 2d Am. Compl. ¶¶ 13, 15, 18, 208, and for a broad medical monitoring program, *id.* at ¶¶ 264, 285, 306; Pls. Mot. at 36. They also seek broad monetary relief beyond compensatory damages, including exemplary and consequential damages, punitive damages, and attorneys' fees. 2d Am. Compl. ¶¶ 305–07, Prayer for Relief ¶¶ D–E.

Moreover, the proliferation of individual actions related to alleged releases of PFOA in and around the proposed class area demonstrates that potential recovery for each class member is not *de minimis*. Already, forty-four individual actions (61 plaintiffs) have been filed before this Court, and sixteen plaintiffs have filed individual actions in state court, most represented by the same counsel prosecuting the class claims here.[34] These individual actions seek relief similar to that sought here (i.e., property damage and/or medical monitoring), based on the same alleged conduct, often under the same causes of action. While some claims are filed in tandem with personal injury

[32] *See, e.g., Castano*, 84 F.3d at 748; *Hostetler*, 2018 WL 3868848, at *9; *Armstrong v. Whirlpool Corp.*, 2007 WL 676694, at *14 (M.D. Tenn. Mar. 1, 2007); *O'Neal*, 2006 WL 1469348, at *23; *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 225 (E.D. La. 1998).

[33] Fed. R. Civ. P. 23(b)(3)(B); *see also, e.g., Zinser*, 253 F.3d at 1191; *Fosamax*, 248 F.R.D. at 402–03; *MTBE I*, 209 F.R.D. at 350; *Rezulin*, 210 F.R.D. at 69; *Castano*, 84 F.3d at 748; *Benefield*, 270 F.R.D. at 652; *In re Medtronic, Inc.*, 1998 WL 35161989, at *9 (S.D. Ohio Feb. 11, 1998); *Brown v. Se. Pa. Transp. Auth.*, 1987 WL 9273, at *11 (E.D. Pa. Apr. 9, 1987).

[34] The abundance of individual actions relating to the Hoosick Falls area stands in sharp contrast to the facts of *Sullivan* and *Burdick*, where the courts observed "no one other than the named plaintiffs … ha[d] brought an action against defendant for the alleged contamination." *Sullivan*, 2019 WL 8272995, at *12; *Burdick v. Tonoga, Inc.*, 110 N.Y.S.3d 219 (Sup. Ct. July 3, 2018), *aff'd,* 179 A.D.3d 53 (3d Dep't 2019) (no indication of individually filed actions).

claims, *see* Pls. Mot. at 75 n.42, others are based solely on the accumulation of PFOA in blood, like the putative class members' claims. *See, e.g.*, *Benoit v. Saint-Gobain Performance Plastics Corp.*, 2017 WL 3316132, at *9 (N.D.N.Y. Aug. 2, 2017) (observing, in sixteen individual federal court actions, that "only twelve of the thirty-five plaintiffs allege current manifestation of disease or symptoms associated with PFOA exposure"), *aff'd in part, appeal dismissed in part,* 959 F.3d 491. These individual cases continue to be prosecuted, and new cases continue to be filed. *See, e.g., Decker v. Saint-Gobain*, Civ. No. 1:20-CV-1141 (LEK/DJS) (N.D.N.Y.) (filed Sept. 18, 2020). As these cases make clear, class certification is unnecessary to ensure individuals have an opportunity to assert their claims.

Plaintiffs ask the Court to ignore the prosecution of so many individual actions because "most of the individual suits filed seek claims related to the manifestation of a PFOA-related disease or health ailment," whereas the class here "does not seek relief for the development of such ailments." Pls. Mot. at 75 n.42. But the Southern District of New York in *In re Fosamax* rejected this exact argument that class treatment was warranted because class counsel had chosen to artificially limit class relief to medical monitoring damages: "There is no reason why class members must limit the relief they seek to dental monitoring." 248 F.R.D. at 402. The court explained that class treatment was not the superior method to resolve such claims:

> Hundreds of other Fosamax users have already filed suit against Merck seeking similar relief under many legal theories …. If these yield positive results for plaintiffs, more Fosamax users can be expected to come forward and prosecute their individual claims. In contrast, certification of the proposed monitoring-only class could lead to the result that class members who fail to opt out will be barred from later seeking damages by operation of res judicata.

Id. at 403. As in *Fosamax*, the plaintiffs in the individual actions assert a variety of claims under varying legal theories seeking various forms of relief in different combinations, all tailored to their particular alleged damages, often accompanied by requests for medical monitoring. Because

individuals have the ability to—and indeed already do—combine different damages claims efficiently in the same action, including standalone medical monitoring claims, there is no justification for certification of a standalone supposedly "negative value" medical monitoring class.

Nor does Plaintiffs' argument that certain efficiencies have resulted from pursuing this matter as a class action justify certification. Pls. Mot. at 75 n.42. As the Second Circuit has recognized, "those advantages could have been fully realized through the use of other consolidation techniques, such as consolidating all discovery relating to [the defendant's] liability without certifying a class." *Blyden*, 186 F.3d at 271. Indeed, courts addressing mass tort cases routinely hold that a superior method of adjudication is the use of pretrial coordination and discovery of individual cases, followed by individual adjudication. *See, e.g., Robertson v. Monsanto Co.*, 287 F. App'x 354, 363 (5th Cir. 2008); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1235 (9th Cir. 1996); *Reilly*, 965 F. Supp. at 605; *Fosamax*, 248 F.R.D. at 403; *Se. Pa. Transp. Auth.*, 1987 WL 9273, at *11. This Court is already using these procedural tools to achieve the efficiencies of coordinated discovery without the need to certify a class. *See* Amended Standing Order Regarding Hoosick Falls PFOA Cases, at 1, 5, *In re Hoosick Falls*, No. 1:19-mc-00018-LEK-DJS (Dkt. 1) (June 17, 2019).

B. Class Members Have A Compelling Interest In Controlling the Prosecution of Their Own Actions

The individual actions are also tangible proof of the class members' interests "in individually controlling the prosecution or defense of separate actions," a factor that further counsels against certification. *See* Fed. R. Civ. P. 23(b)(3)(A); *Rezulin*, 210 F.R.D. at 66. Courts have recognized that "[i]ndividual interests are at their peak in tort cases, and the strength of individual interests can be gauged in large part from the number of individual suits already filed." *McGuire v. Int'l Paper Co.*, 1994 WL 261360, at *8 (S.D. Miss. Feb. 18, 1994) (internal citations

omitted). As discussed with respect to the commonality, predominance, adequacy, and typicality requirements, the unique characteristics of the putative class members and their properties, and the conflicts among class members and among the proposed classes, give each individual plaintiff a compelling interest in determining which legal and factual theories will be in his or her best interest to pursue. *See Fosamax*, 248 F.R.D at 402 ("There is an insufficient basis to believe that all class members would prefer the proposed monitoring program to one designed with their own particular circumstances in mind."); *MTBE I*, 209 F.R.D. at 350 ("Class members whose wells are severely contaminated, or who have suffered personal injury, have a strong interest in controlling the prosecution of individual actions.").

C. Plaintiffs' Class Definitions Require Mini-Trials To Determine Who Is A Class Member

Plaintiffs' proposed classes also create inefficient and insurmountable manageability problems just to determine who is (and is not) a member. To be included in Plaintiffs' Property Damage Classes, each class member must show that his or her property was "supplied with drinking water" that was "contaminated" with PFOA. *See* Pls. Mot. at 37–39. Similarly, to be included in the "PFOA Invasion Injury Class," class members must show they "ingested *PFOA-contaminated* water at their residence" "for a period of at least six months between 1996 and 2016." *See id.* at 40 (emphases added). Despite being a predicate for all classes, Plaintiffs do not provide any objective measure of what rises to the level of "contaminated" water—i.e., whether this refers to any measurable amount of PFOA, amounts exceeding a regulatory maximum contaminant level, amounts exceeding a protective health advisory level, or some other criteria. *Cf. Vickers v. Gen. Motors Corp.*, 204 F.R.D. 476 (D. Kan. 2001). Plaintiffs likewise propose no clear method to calculate the requisite six months of water consumption to qualify as a member of the PFOA Invasion Injury Class; Plaintiffs do not explain, for example, whether this means a continuous six

months or six months in the aggregate. Establishing whether any given individual is a member of the proposed classes will therefore require a mini-trial to determine whether that individual's water qualifies as "contaminated" and/or whether they have met the water consumption requirement.[35] *Fisher*, 238 F.R.D. at 301. Where, as here, determining who is a class member will "require individualized fact-finding on a property-by-property" or person-by-person basis, courts routinely decline to certify the class. As in *MTBE I*, "[t]he task inherent in ascertaining the class members also renders this case unmanageable." 209 F.R.D. at 348; *see also Asacol*, 907 F.3d at 53–55; *Benefield*, 270 F.R.D. at 644–45.

Plaintiffs' proposed class definitions are also unmanageable and ill-suited for class treatment because they include class members who have not experienced any injury. "[N]o class may be certified that contains members lacking Article III standing. The class must … be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (collecting cases) (internal citations omitted). Here, Plaintiffs propose a "Municipal Water Property Damage Class" consisting of:

> All individuals who are or were owners of real property that was supplied with drinking water from the Village of Hoosick Falls municipal water supply, and who purchased that property on or before December 16, 2015.

Pls. Mot. at 37. Class membership therefore requires ownership of property supplied with municipal water, irrespective of the presence of PFOA. But the Village of Hoosick Falls' municipal water supply system was developed in the mid-1800s, decades before Defendants' alleged operations. Sharma Rpt. at 24. Because the class definition has no beginning date for property ownership, individuals who owned property exclusively before PFOA was allegedly used

[35] Because Plaintiffs' proposed class definitions make it infeasible to determine whether a particular individual is a class member, Plaintiffs also fail the implied requirement of ascertainability. *See Brecher v. Republic of Argentina*, 806 F.3d 22, 24–25 (2d Cir. 2015).

by Defendants are, by definition, class members. In other words, individuals whose property *never* contained PFOA—and who therefore do not have standing—are included in the putative class. Class certification is inappropriate where the proposed class "purports to include all property owners in this geographic area, regardless of whether the property is contaminated," *Lee-Bolton*, 319 F.R.D. at 383, or "has no temporal limitation," *Vickers*, 204 F.R.D. at 477. Furthermore, the class definition includes individuals who owned and sold property exclusively before the detection of PFOA in the municipal water supply and who therefore have no basis to claim that they experienced a diminution in property value as a result of the detection of PFOA. Where, as here, the putative class includes uninjured individuals who lack standing to pursue the claims asserted by the class, "[t]he need to identify those individuals will predominate and render an adjudication unmanageable." *Asacol*, 907 F.3d at 53–54.

D. Plaintiffs' Claims Are Unmanageable on a Classwide Basis

Plaintiffs' request to certify a Rule 23(b)(3) class also fails because Plaintiffs have failed to provide any plan as to how this case would be tried, or relief rendered, on a classwide basis. The manageability analysis "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen*, 417 U.S. at 164. "A critical need is to determine how the case will be tried." Fed. R. Civ. P. 23, advisory committee note (2003). Plaintiffs have not, and cannot, provide a manageable trial plan capable of presenting and determining the relevant issues on a classwide basis. "An increasing number of courts require a party requesting class certification to present a trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." *Id.* "For the most part, courts determine manageability by reviewing affidavits, declarations, trial plans, and choice-of-law analyses that counsel present." Manual for Complex Litigation (Fourth) § 21.142 (2004). Courts within this Circuit frequently consider such plans in their manageability analysis and deny

class certification where plaintiffs' proposed trial plan reveals that a "voluminous number of individual trials would be required after the class-wide trial." *Benner*, 214 F.R.D. at 170; *see also MTBE I*, 209 F.R.D. at 334.

Plaintiffs present no trial plan or other roadmap for how this case will proceed. They offer no explanation of how they intend to try a class case involving four defendants, ten named plaintiffs, four proposed classes, numerous facilities and alternative sources, numerous products and product information, decades of operations, and inconsistent and conflicting factual and legal theories, much less what common evidence they would present or how the many individual issues inherent in their claims would be resolved during or following a classwide trial. That Plaintiffs "submitted no real proposal as to how these claims can be tried on a class-wide basis" is alone sufficient to deny their motion. *Fosamax*, 248 F.R.D. at 403; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 776 (7th Cir. 2013) ("[I]f class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end."); *Asacol*, 907 F.3d at 58 (holding there must be "at the time of certification … a reasonable and workable plan … that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues").

Plaintiffs similarly offer no details as to how the classwide medical monitoring relief they seek would be implemented, or even what such monitoring would include. Dr. Ducatman admits he has not yet developed a specific plan, conceding that "[t]he development of specific additional monitoring tests and evaluations, aside from blood testing, as well as the methodology to implement these tests will be set forth in a future report." Ducatman Rpt. at 17; *see also supra* Section I.C.3; Ducatman Reb. Rpt. at 2–3; Ducatman Tr. at 26:23–28:10. Class certification is inappropriate where "the presence of so many individualized issues would make managing a class

action for medical monitoring inordinately difficult." *Rowe*, 2008 WL 5412912, at *22. Plaintiffs have provided no basis for this Court to conclude that developing and implementing a medical monitoring remedy would be manageable on a classwide basis.

IV. THE PFOA INJURY INVASION CLASS CANNOT BE CERTIFIED UNDER RULE 23(B)(2)

Plaintiffs alternatively seek to certify the PFOA Invasion Injury Class under Rule 23(b)(2). Rule 23(b)(2) provides 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***." Fed. R. Civ. P. 23(b)(2) (emphasis added).

Plaintiffs' argument is facially flawed. Certification under Rule 23(b)(2) is only appropriate "where the remedy sought is 'an indivisible injunction' that applies to all class members 'at once.'" *Amara v. CIGNA Corp.*, 775 F.3d 510, 519 (2d Cir. 2014) (quoting *Dukes*, 564 U.S. at 362). "Class actions based on claims for individualized monetary relief—implicating the due process rights of absent class members, who need not be given notice and opt-out rights pursuant to Rule 23(b)(2)—are impermissible under this provision." *Id.* Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages," *Dukes*, 564 U.S. at 360–61, and "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages," Fed. R. Civ. P. 23, advisory committee note (1966). The New York Court of Appeals' decision in *Caronia* and the Second Circuit's decision in *Benoit* leave no doubt that medical monitoring may only be recovered under New York law as ***consequential monetary damages***, not as a form of injunctive relief. *See Caronia*, 22 N.Y.3d at 448; *Benoit*, 959 F.3d at 501. Because medical monitoring can

be recovered only as monetary damages, the PFOA Invasion Injury Class cannot be certified under Rule 23(b)(2) as a matter of law.

Moreover, even if medical monitoring somehow could be considered injunctive relief, Plaintiffs fail to demonstrate that the proposed PFOA Invasion Injury Class is sufficiently cohesive, for the same reasons it fails to satisfy Rule 23(b)(3)'s predominance requirement. *See supra* Section I.C. "Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000). "The cohesiveness requirement is greater in a Rule 23(b)(2) class action [than in a 23(b)(3) action], because unnamed class members are bound by the action without the opportunity to opt out." *MTBE I*, 209 F.R.D. at 343 (alterations in original). Cohesiveness problems are particularly acute for medical-monitoring claims: "Proposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes." *Rhodes*, 253 F.R.D. at 371; *see also Gates*, 655 F.3d at 262–69; *Ball*, 385 F.3d at 727–28; *Boughton,* 65 F.3d at 827; *Barnes*, 161 F.3d at 143–46; *Rezulin*, 210 F.R.D. at 75. This is true specifically in the context of putative classes alleging PFOA exposure. *See, e.g., Rhodes*, 253 F.R.D. at 374–80; *Rowe*, 2008 WL 5412912, at *10–20.

Importantly, Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a *different* injunction." *Dukes*, 564 U.S. at 360 (emphasis in original). In deciding a Rule 23(b)(2) motion for class certification, a court must "ensure that individual issues do not pervade the entire action [because] the suit could become unmanageable and little value would be gained in proceeding as a class action if significant individual issues were

to arise consistently." *MTBE I,* 209 F.R.D. at 343 (quoting *Barnes,* 161 F.3d at 143) (internal quotation marks omitted). Medical monitoring, of course, necessarily requires individualized plans for each participant. *See supra* Section I.C.2. The class members will *not* "have the same monitoring program with the same monitoring tests looking for the same adverse health effects at the same frequency." Ducatman Tr. at 244:6–20. Because each class member would differ with respect to whether and what medical monitoring relief was warranted, the PFOA Invasion Injury class cannot be certified under Rule 23(b)(2).

V. CERTIFYING ISSUE CLASSES UNDER RULE 23(C)(4) WOULD NOT MATERIALLY ADVANCE THE LITIGATION

Finally, Plaintiffs cannot invoke issue certification for "liability" under Rule 23(c)(4) as an end-run around the individual questions that pervade each element of their claims. Pls. Mot. at 76–79. Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." When considering a proposed issue class, "a court must first identify the issues potentially appropriate for certification 'and ... then' apply the other provisions of [Rule 23], i.e., subsection (b)(3) and its predominance analysis." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (quoting *Gunnells v. Healthplan Servs.*, Inc., 348 F.3d 417, 439 (4th Cir. 2003)). Issue certification is permitted only if it would "materially advance a disposition of the litigation as a whole." *Benner*, 214 F.R.D. at 169; *see also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). "[I]ssue certification is not appropriate if, despite the presence of a common issue, certification would not make the case more manageable." *MTBE I*, 209 F.R.D. at 351 (internal quotation omitted). Where numerous "questions … would remain for individual adjudication" such that "issue certification would not

'reduce the range of issues in dispute and promote judicial economy,'" certification should be denied. *McLaughlin*, 522 F.3d at 234; *see also Welding Fume*, 245 F.R.D. at 312.

Here, Plaintiffs have failed to identify *any* questions that can be answered with a singular trial of evidence common to their proposed "liability" issue classes. Pls. Mot. at 77. Individualized issues of injury, causation, and state of mind—all of which bear directly on "liability"—permeate Plaintiffs' claims. *See supra* Section I. As a result, certifying "liability" issue classes here would not materially advance the disposition of this litigation as a whole because subsequent, individual trials would still be required to determine, *inter alia*, specific causation, injury, and state of mind on a property-by-property and individual-by-individual basis. For this reason, courts regularly reject similar requests in environmental contamination or toxic tort cases. *See, e.g.*, *Ebert*, 823 F.3d at 479; *Palmer*, 2007 WL 1879844; *Fisher*, 238 F.R.D. at 315; *MTBE I*, 209 F.R.D. at 353.

The same is true of Plaintiffs' alternative request that the Court certify one or more specific issues against each individual Defendant. *See* Pls. Mot. at 78–79. Plaintiffs provide no explanation for how these issues—four as to Honeywell, five as to Saint-Gobain, three as to 3M, and four as to DuPont—could be tried in any manageable way. *See id.* These issues, too, bear directly on each Defendant's liability and particularly on each Defendant's state-of-mind, and are inherently individualized, as explained in Section I.D. Even if any of those sixteen issues could qualify as "common" issues—which they cannot—a trial on one or more of them would not determine whether any particular Defendant is specifically liable to any particular Plaintiff, determine causation with respect to any individual, or determine whether (or the extent to which) any individual plaintiff suffered cognizable injury and damages as a result of a particular Defendant's conduct. Nor would it resolve any Defendant's affirmative defenses. Subsequent, individual trials with personalized proof would still be required to makes these determinations. *See, e.g.*,

McLaughlin, 522 F.3d at 234; *Hostetler*, 2018 WL 3868848, at *8.

Moreover, issue certification here would also violate the Reexamination Clause of the United States Constitution's Seventh Amendment. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States." U.S. CONST. amend. VII. It "entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues." *Castano*, 84 F.3d at 750; *see also Benner*, 214 F.R.D. at 174. Plaintiffs' proposed approach would require successive trials to examine the same facts and issues raised during the first classwide trial, including questions of general and specific liability, which will necessarily vary from member to member. *See supra* Sections I, II. After a trial on general "liability," each Plaintiff would again be required to individually prove which Defendant(s) specifically caused, and was liable for, that Plaintiff's harm. The same issues related to each Defendant's historical actions and knowledge would be at issue at both trials. In such situations, courts have consistently refused to certify issues classes because doing so would violate the Reexamination Clause. *See, e.g., Castano*, 84 F.3d at 751; *Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1303; *Benner*, 214 F.R.D. at 174.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for class certification.

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Respectfully submitted,

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