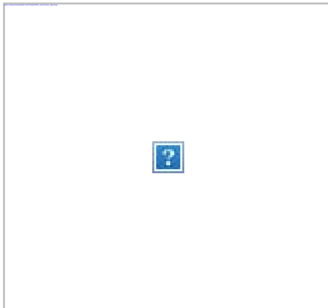
From:	Ryan Kral
To:	AG-PFASProposal
Cc:	Rhon Jones; Rick Stratton; Kelli Flanagan
Subject:	Response to RFP for PFAS Manufacturer Tort Litigation
Date:	Wednesday, June 5, 2019 3:48:18 PM
Attachments:	image001.png Beasley Allen Response to Michigan PFAS RFP.pdf

Ms. Synk,

Attached is Beasley Allen's submission in response to the State of Michigan's RFP concerning PFAS contamination.

Please let us know if you have any trouble opening the attached.

Thank you.



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Rhon E. Jones
Principal and Toxic Torts Section Head
rhon.jones@beasleyallen.com

June 5, 2019

VIA EMAIL

Ms. Polly Synk
Assistant Attorney General
State of Michigan
synkp@michigan.gov

RE: Department of Attorney General for the State of Michigan
Response to Request for Proposal for PFAS Manufacturer Tort Litigation

Dear Ms. Synk:

Please be advised that the law firm Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is pleased to submit its proposal to serve as Special Assistant Attorneys General to investigate potential environmental tort claims on behalf of the State of Michigan and the Department of Attorney General.

We look forward to the opportunity of discussing our qualifications further and the chance to work with your office.

Respectfully Submitted,

RHON E. JONES
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
218 Commerce Street
Montgomery, Alabama 36104

RESPONSE TO REQUEST FOR PROPOSAL TO SERVE AS SPECIAL ASSISTANT ATTORNEYS GENERAL FOR THE INVESTIGATION AND POTENTIAL LITIGATION OF PFAS CONTAMINATION IN MICHIGAN

Beasley Allen

BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.

Attorneys at law

218 Commerce Street
Montgomery, Alabama 36104
http://www.beasleyallen.com

Introduction

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. is pleased to submit this proposal to provide special counsel legal services for the investigation and potential litigation of claims against the manufacturers of PFAS-containing materials that have contaminated Michigan's environment. Beasley Allen has extensive local and national legal experience in complex, high stakes litigation. In addition, the firm has unique legal experience in successfully representing state governments in complex litigation matters.

Section 1: Bidder Contact Information

1.1 Identify the bidder's contact person for the RFP process. Include name, title, address, email, and phone number.

The contact person for this RFP is Rhon E. Jones, who is the section head attorney of Beasley Allen's Toxic Torts and Environmental litigation group. His contact information is as follows:

218 Commerce Street
Montgomery, Alabama 36104
Rhon.Jones@BeasleyAllen.com
(334) 269-2343

1.2 Identify the person authorized to sign a contract resulting from this RFP. Include name, title, address, email, and phone number.

Mr. Jones is also the person authorized to sign a contract regarding this RFP.

Section 2: Company Background Information

2.1 Identify the company's legal business name, address, phone number, and website.

The firm's legal name is Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. The requested contact information is below:

218 Commerce Street
Montgomery, Alabama 36104
(334) 269-2343
http://www.beasleyallen.com

2.2 Identify the State your business is organized in.

The firm is organized in Alabama.

2.3 Identify the location (city and state) that would have primary responsibility for this work if awarded a contract.

Although our firm also maintains an office in Atlanta, Georgia, the firm's headquarters in Montgomery, Alabama will have primary responsibility for the work.

2.4 Identify the practice group area, if applicable, proposed to handle the work.

The Toxic Torts and Environmental practice group will oversee the work.

2.5 Explain any partnerships and strategic relationships you have that would bring significant value to the State.

As discussed more fully below, our firm has extensive experience in litigating complex environmental cases and PFAS contamination cases in particular. Consequently, we have developed relationships with key experts who are also experienced in this subject matter. Therefore, we can quickly utilize our knowledge and these relationships to more efficiently investigate and, if necessary, litigate this case.

Our firm also has extensive experience representing states and local governments in a variety of matters. As a result, we have significant experience working with state agencies and are knowledgeable about the unique aspects in representing governmental clients.

Moreover, we plan to partner with local counsel in Michigan to further ensure our firms are readily available to meet and otherwise assist the Attorney General and other state agencies during this matter.

2.6 If you intend to use subcontractors to perform the work, disclose: (1) the subcontractor's organization; (2) a description of subcontractor's organization; (3) a complete description of the services or products it will provide; (4) information concerning subcontractor's ability to provide the services; (5) whether the bidder has a previous working experience with the subcontractor and, if yes, provide details of that previous relationship.

Our firm does not intend to use a subcontractor to assist with the legal work requested in the RFP. We do plan to use experts who specialize in certain fields (e.g. epidemiologists, chemists, hydrologists, hydrogeologists, engineers, environmental cleanup specialists, etc.) to assist in certain areas as needed. We have not presently engaged any experts to assist with this particular matter but have, as explained below, worked with these organizations before in other environmental matters. As the need for experts arises, we will comply with the applicable provisions in the Fee Agreement governing their retention.

2.7 Identify the name and title of the individuals you propose as key personnel. Attached resumés or CVs for each person.

The following attorneys will be assigned to work with the Department of the Attorney General: (1) Rhon E. Jones; (2) Richard D. Stratton; (3) J. Ryan Kral. Resumés for each are attached in Attachment A. Each attorney has extensive experience representing local water treatment facilities in litigation against users and manufacturers of PFAS products.

Section 3: Experience

3.1 Describe at least 3 relevant experiences supporting your ability to successfully perform the work set forth in the Statement of Work. Include a description of services provided and results obtained. Include contact information for the clients you represented.

Each of the below cases involved the subject matter of this RFP – PFAS contamination. Our firm's representation of both individual plaintiffs seeking medical monitoring and proper filtration as well as water treatment systems seeking effective filtration systems gives us the unique experience of representing a variety of plaintiffs who have been impacted by PFAS chemicals. Also, our firm has already established relationships with many experts who would likely be used in this matter. Most importantly, we have obtained extensive knowledge about 3M, DuPont, and other manufacturers of PFAS which will be invaluable in this litigation.

1. ***The Water Works and Sewer Board of the City of Gadsden v. 3M et. al* (Etowah County, Alabama Circuit Court; CV-16-900676); *The Water Works and Sewer Board of the Town of Centre v. 3M et. al* (Cherokee County, Alabama Circuit Court; CV-17-900049).**

   We currently represent two public water treatment systems in Alabama for PFAS contamination caused by carpet manufacturers located upstream in Dalton, Georgia. PFAS manufacturers, including 3M and DuPont, are also named as defendants, so we have extensive knowledge about the history, manufacture, use, and toxicity of PFAS chemicals. The lawsuits seek compensation for the water treatment systems to install a filtration system, such as granular activated carbon or reverse osmosis, capable of removing PFAS chemicals.

   Litigation is ongoing. The defendants are located in Georgia and, as a result, have contested personal jurisdiction in Alabama. The defendants' motions to dismiss were denied by the trial courts, but they have petitioned the Alabama Supreme Court to issue writs of mandamus to the trial courts ordering that they reverse their decisions. Oral argument occurred on June 4, 2019.

   Our firm provided all typical services during litigation: investigation, drafting pleadings (complaint, discovery requests, response to dispositive motions), responding to motions to dismiss and successfully arguing against those motions at

hearings, issuing third-party subpoenas, taking depositions, working with experts, and appearing before the Alabama Supreme Court.

The contact information for the clients is below:

The Water Works and Sewer Board of the City of Gadsden
Chad Hare, General Manager
(256) 543-2885
chare@gadsdenwater.org

The Water Works and Sewer Board of the Town of Centre
Al Shumaker, attorney for the Board
(256) 927-5581
ashumake@tds.net

2. ***Richard Rowe (lead plaintiff) v. E.I. Dupont De Nemours & Company* (N.D. New Jersey; 1:06-cv-01810).**

Our firm was co-lead counsel in representing plaintiffs in a class action lawsuit filed in 2006 against DuPont for contaminating their drinking water with PFAS, including PFOA, that were released into both the air and in water from its Chambers Works plant in Salem County, New Jersey. This case involved complicated assessments and quantifications of the risk to class members from PFOA exposure under public and private nuisance theories and assessments of federal and state standards.

In 2011, the parties agreed to an $8.3 million class injunctive relief-settlement with DuPont. The settlement offered class members one of two class benefits: (1) an in-home water filtration package; or (2) for those who already installed a filter, an incidental payment of equivalent value. Of the thousands of class members, only 27 individuals (less than 0.3% of the total estimated) chose to opt-out of the settlement.

Our firm provided various services throughout the 5 years we served as class counsel:
- Engaged in multiple communications with federal and state regulatory authorities and local drinking water systems that resulted in actions by the systems to reduce the level of PFOA in finished water delivered to class members.
- Worked extensively with scientific experts in a variety of fields (e.g. medicine, risk assessment, toxicology, computer forensics, and hydrogeology/chemical fate and transport). Such work included extensive and continuing monitoring and evaluation of emerging scientific studies and risk assessment issues over the course of the litigation.
- Oversaw the production of millions of pages of documents in discovery, handled responses to discovery, completed dozens of depositions all over the

country, most of which involved highly complex and expensive expert testimony. Discovery involved a number of highly contentious battles and related motion practice, including extensive work on a number of electronic discovery.
- Conducted class certification briefing and hearings (including appeals to the Third Circuit), complex dispositive motion practice, expert/Daubert motion practice, repeated mediations, and identifying/collecting/preparing hundreds of exhibits in preparation of trial plans.

The contact information for Mr. Rowe is below:

Mr. Richard Rowe
(856) 299-8345

3. *Felicia Palmer et al. v. 3M Company*, (Tenth Judicial Circuit, Minnesota; C2-04-6309)

Our firm represented the lead plaintiff in a putative class action alleging that 3M's Cottage Grove plant in Minnesota released significant amounts of PFOA and PFOS which contaminated the properties and drinking water supplies of six east-metro communities. We unsuccessfully tried the case in 3M's backyard which was, unsurprisingly, a difficult venue.

Although we were not successful, our work in this case was instrumental in kickstarting events which ultimately led to the State of Minnesota's $850 million settlement with 3M in February 2018. For example, we conducted blood and drinking water testing for hundreds of area residents to determine the extent of the contamination. The Minnesota Pollution Control Agency eventually used these results to establish PFOA and PFOS drinking water limits for the entire state. These limits were, in turn, essential in holding 3M accountable for its contamination throughout the state.

The services provided included drafting pleadings, conducting discovery, overseeing expert workup, conducting extensive testing, and being lead trial attorney.

The contact information for Ms. Palmer is below:

Ms. Felicia Palmer
(651) 769-1486

3.2 Provide publicly available motions, briefs, and other documents relevant to your experience in providing the legal services sought under this RFP.

Please see Attachment B for the requested documents. They include (1) in the Gadsden case, a Consolidated Answer in response to the Defendants' Petitions for Writ of

Mandamus to the Alabama Supreme Court; (2) in the Rowe case, the Plaintiffs' Memorandum in Support of Class Certification; and (3) in the Palmer case, Plaintiff's First Amended Class Action Complaint. Please note that 3M sought numerous protective orders in the Palmer case so, out of an abundance of caution, we elected to withhold other filings in this action due to potential confidentiality issues.

Section 4: Conflict of Interest

4.1 Provide detailed information regarding any prior, current, or anticipated future relationship with any manufacturer of PFAS or PFAS-containing products that could give rise to potential, actual, or apparent conflict of interest. Disclose such information for both the bidder and any proposed subcontractors.

No such conflict exists.

4.2 Disclose any actual, apparent, or potential conflict of interest between the bidder and State of Michigan.

No such conflict exists.

4.3 With respect to any information provided in response to the questions above, provide an explanation of why an actual, apparent, or potential conflict of interest would not arise, or the measure would be taken to avoid such a conflict.

Not applicable.

Section 5: SAAG Contract

5.1 Bidder must affirm agreement with the terms of the SAAG contract. If you do not agree, you must provide redline edits to the SAAG contract with your proposal and include justification for requesting deviation from its terms.

The firm agrees with the terms of the SAAG contract and, as a result, has no redline edits to provide.

Section 6: Fee Agreement

6.1 Bidder must submit a proposed fee agreement which: (1) aligns with the SAAG contract and (2) clearly sets forth how the bidder proposes to address payment in the event of recovery. See also SAAG contract, section 3, Compensation and Cost Reimbursement.

Please see Attachment C for a proposed fee agreement. Since we agreed to the terms of the SAAG contract, we modeled our proposed fee agreement after that and made a few minor modifications including those requested concerning the fee structure.

Appendix A

Resumés

Rhon E. Jones

Rhon Jones serves as Beasley Allen's Toxic Torts Section head in the firm's Montgomery, Alabama office and has been a practicing attorney for 28 years. He is actively involved in the opioid litigation on the local and national level, where he is serving as a member of the Litigating State Settlement Negotiating Team. Over the course of his career, Mr. Jones has established himself as a stalwart in cases of national significance and has participated in litigation where verdicts and settlements are valued at approximately $30 billion. Some of Mr. Jones' notable cases include the following:

- The *Deepwater Horizon* Oil Spill Litigation: Served as Plaintiffs' Steering Committee member, where he maintained various roles, including chairperson of the economic damages team, settlement negotiator, and significant contributor to the creation of business loss frameworks which have compensated Gulf Coast businesses $7.3 Billion.
- The *Deepwater Horizon* Oil Spill Litigation – Government Litigation: Mr. Jones served as the coordinating attorney for the State of Alabama and also represented 46 other cities and counties in the oil spill litigation. Ultimately, Mr. Jones was involved in negotiations that resulted in a $18.5 billion settlement to the federal government, the states and local governments. The settlement is considered the largest environmental settlement in United States history.
- The Monsanto PCB Contamination Case - Mr. Jones served as co-lead counsel in the litigation which resulted in a $700 million settlement for thousands of Alabama victims of PCB contamination. The settlement was the largest environmental settlement in the United States at the time, and still represents the largest one-time environmental private settlement in United States history.
- The Hot Fuel Multi-District Litigation – Mr. Jones served as Plaintiffs' Steering Committee member in the litigation, which ultimately obtained settlements in excess of $20 million. A major component of that litigation involved deceptive practice act claims in many states, including Georgia.

- TVA Coal Ash Spill – Mr. Jones played an integral role on behalf of claimants devastated by the coal ash spill in Kingston, Tennessee. TVA ultimately agreed to pay the claimants $27.8 million to resolve the claims.
- Carbon Black Pollution Case – Mr. Jones efforts led to verdicts and settlements in excess of $20 million arising from carbon black pollution in Alabama and Oklahoma.

Before his work in environmental and complex litigation, Mr. Jones spent years litigating on behalf of victims hurt by the deceptive acts of other major corporate interests. While litigating these cases, Mr. Jones recovered millions for his clients in litigation.

Due to Mr. Jones' experience in complex litigation, he has served as adjunct professor at the University of Alabama School of Law for the course "Advanced Torts: Complex Environmental Litigation." Mr. Jones has also taught torts at Faulkner University's Thomas Goode Jones School of Law. Mr. Jones has been recognized on a number of occasions as an expert in his field, including the below:

- Lawdragon 500 Leading Lawyers (The top 1% of lawyers in the nation).
- Martindale-Hubbell AV Preeminent Rating.
- Super Lawyers Designation, 2008-present.
- Best Lawyers in America
- President of the Montgomery Bar Association
- Alabama State Bar Pro Bono Award, 2007
- American Association for Justice, Section on Toxic, Environmental and Pharmaceutical Torts Executive Committee

Rhon received his undergraduate degree from Auburn University and his J.D. from the University of Alabama in 1990. He is licensed to practice in Alabama, but has litigated cases in courts across the country, including:

- U.S. Court of Appeals, Fifth Circuit (2018)
- U.S. Court of Appeals, Third Circuit (2010)
- U.S. Court of Appeals, Sixth Circuit (2009)
- U.S. District Court, Northern District of Florida (2008)
- U.S. Court of Appeals, Tenth Circuit (2008)
- U.S. Supreme Court (1997)
- U.S. Court of Appeals, Eleventh Circuit (1993)
- U.S. District Court, Middle, Northern and Southern Districts of Alabama (1991)
- U.S. District Court, Eastern District of Louisiana (2010)

Richard D. Stratton

Rick Stratton is currently assisting Beasley Allen's government clients in the opioid crisis, including Alabama, and he has more than 30 years of legal experience devoted entirely to civil litigation practice. He is based in Birmingham, Alabama. He has experience in a broad range of litigation, including products liability, medical liability, bad-faith and consumer litigation, workplace safety, environmental and toxic torts litigation, civil rights, commercial and vaccine claims. Since joining Beasley Allen in 2010, Rick's practice has been devoted solely to complex, high stakes litigation. He represented Alabama in its Natural Resource Damage Claims arising from the BP Oil Spill, which resolved as part of the $18.5 billion agreement to settle federal, state and local government claims in 2015. Rick was also appointed as Alabama Deputy Attorney General and assisted the State of Alabama in litigation of its economic damages associated with the spill. Rick also has appellate experience in both state and federal appellate courts across the country, including the United States Supreme Court.

Rick is an experienced, respected attorney. His peers have recognized him as a Martindale Hubbell AV-Preeminent Rated attorney. In 2017, Beasley Allen selected him as the Toxic Tort's Section Lawyer of the Year. He holds admissions and appearances in numerous courts, with the ability to appear in other courts Pro Hac Vice, such as the State of Washington:

- Alabama State Bar, 1986
- Florida State Bar, 1985
- U.S. District Court, Northern District of Alabama
- U.S. District Court, Middle District of Alabama
- U.S. District Court, Southern District of Alabama
- U.S. District Court, Northern District of Florida

- U.S. District Court, Middle District of Florida
- U.S. Court of Appeals for the Eleventh Circuit
- U.S Supreme Court

Rick received his undergraduate degree from the University of Florida in 1980 and his law degree from Samford University's Cumberland School of Law in 1985. While in law school, Rick served as a member of the Law Review and was also a member of the national moot court team.

J. Ryan Kral

Ryan, a Principal in the Toxic Torts Section, joined Beasley Allen in October 2011. Since then, his practice has concentrated primarily on the BP Oil Spill litigation, where he represented businesses, commercial fishermen, and individuals who suffered injuries resulting from exposure to oil and dispersants.

Ryan is currently assisting local governments in addressing harms posed by the nation's opioid epidemic. He also represents water systems against companies alleged to have polluted their water supply with perfluorinated chemicals.

Previously, he was part of the section's team that represented trucking businesses in the Hot Fuel multi-district litigation against oil companies which eventually resulted in over $20 million in settlements.

In 2018, Beasley Allen selected Ryan as the Toxic Torts Section Lawyer of the Year. That same year, Ryan was also included on the Super Lawyers' "Rising Stars" list and was recognized by the American Academy of Attorneys as a Top 40 Under 40 in Personal Injury in Alabama. Ryan is admitted to practice in the following courts:

- Alabama State Bar, 2011
- U.S. District Court, Northern District of Alabama, 2016
- U.S. District Court, Middle District of Alabama, 2015
- U.S. District Court, Southern District of Alabama, 2016
- U.S. Court of Appeals, Eleventh Circuit, 2017

<u>Appendix B</u>

Sample Pleadings

E-Filed
12/05/2018 12:36:42 PM
Honorable Julia Jordan Weller
Clerk of the Court

Nos. 1171182, 1171196, 1171197, 1171198, 1171199

IN THE SUPREME COURT OF ALABAMA

EX PARTE MOHAWK INDUSTRIES, INC.; MOHAWK CARPET, LLC; SHAW INDUSTRIES, INC.; J&J INDUSTRIES, INC.; LEXMARK CARPET MILLS, INC.; MFG CHEMICAL, INC.; THE DIXIE GROUP, INC.; DORSETT INDUSTRIES, INC.; KALEEN RUGS, INC.; ORIENTAL WEAVERS USA, INC.; AND INDIAN SUMMER CARPET MILLS, INC.

(In re: The Water Works and Sewer Board of the City of Gadsden v. 3M Company, et al.)

ON PETITIONS FOR WRIT OF MANDAMUS

FROM THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA
(CV-16-900676)

THE WATER WORKS AND SEWER BOARD OF THE CITY OF GADSDEN'S CONSOLIDATED ANSWER TO THE PETITIONS FOR WRIT OF MANDAMUS FILED BY PETITIONERS MOHAWK INDUSTRIES, INC., ET AL.

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Rhon E. Jones
Richard D. Stratton
Grant M. Cofer
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Counsel for Respondent The Water Works and Sewer Board of the City of Gadsden	

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I. SUMMARY – WHY THE PETITIONS SHOULD BE DENIED

The petitions should be denied because Alabama courts have personal jurisdiction over the Petitioners. Petitioners, carpet manufacturers and their chemical suppliers, have produced, supplied, used, and/or discharged perfluorinated chemicals ("PFC") that contaminated Alabama's waterways. Respondent, the Water Works and Sewer Board of the City of Gadsden ("Respondent"), alleged facts in its complaint establishing that Petitioners knew their actions were polluting Respondent's drinking water source, the Coosa River and that Respondent's damages were foreseeable to Petitioners. To the extent Petitioners argue Respondent has not offered sufficient evidence in support of the claims made in the Complaint[1], such argument is premature because the Petitioners have refused to produce meaningful discovery in this case.

---

[1] Several Petitioners go into detail explaining how the submitted evidence demonstrates why they did not engage in the conduct complained of in this action. As this Court ordered Respondent to file one consolidated answer in response to five separate petitions, Respondent refers the Court to its responses to those dispositive motions rather than reiterate those deficiencies here. The exhibits to those responses are discussed below and, as such, are included as appendices to this answer. *See* App. A.

At its heart, the Petitioners ask the Court to find that Alabama has no personal jurisdiction over Petitioners because they were not in Alabama when they caused toxic PFCs to be dumped into Alabama's waters. Petitioners sold or used these toxic chemicals to make carpets which they knew would be sold in Alabama, a state only 70 or so miles downstream of Petitioners' production facilities.

Petitioners do not dispute the harmfulness of these chemicals or even their contemporaneous knowledge of that harmfulness. These chemicals were sold or used by Petitioners because they imparted stain resistant properties that made Petitioners' products more desirable to consumers, and this is one of the ways Petitioners manage to produce 90% of the world's carpet market in Dalton, Georgia. The hazardous nature of these chemicals meant Petitioners had a duty to dispose of them safely, and this burden was knowingly accepted when Petitioners chose to use these chemicals to increase their sales. Petitioners chose to obtain and use dangerous chemicals for profit and then chose a cheap, convenient, and insufficient method of waste disposal. That method was to discharge waste to a rural water treatment facility that

Petitioners knew was incapable of treating and/or removing these toxic chemicals.

Petitioners cannot be allowed to pollute Alabama waterways and injure Alabama residents with impunity. This Court should deny their Petitions, so that they may be held responsible for their tortious actions in an Alabama court.

II. **STATEMENT OF RELEVANT FACTS**

Respondent is the public water supplier to residential and commercial customers located in Etowah County, Alabama. (App. B, Compl. ¶ 2). Respondent utilizes the Coosa River as its raw water source, drawing water from Lake Neely Henry in the Middle Coosa Basin which is located downstream from Dalton, Georgia. *Id.*

In 2016, Respondent discovered that its finished water supply was contaminated by PFCs and related chemicals, including, but not limited to, PFOA and PFOS which are the most commonly analyzed PFCs. *Id.* at ¶ 59. PFCs are a group of chemicals that are used, amongst other purposes, to impart water, stain, and grease resistance to textile products. *Id.* at ¶ 3. PFCs have been used in the manufacturing of carpet since the 1940s. (*See* App. C, *Perfluorinated Chemicals (PFCs): Perfluorooctanoic Acid (PFOA) & Perfluorooctane*

Sulfonate (PFOS) Information Paper, Remediation and Reuse Focus Group Federal Facilities Research Center, August 2015 at p. 2).

A total of 146 PFCs and 469 fluorochemicals have been identified as potentially able to degrade into perfluorinated carboxylic acids ("PFCAs"), including PFOA and PFOS. *Id.* at Appendix A, Attachment A, p. A-32. PFCs and fluorochemicals can break down into PFOS and PFOA after being released into the environment. *See* App. D, (*Perfluorinated Chemicals (PFCs)*, National Institute of Environmental Health Sciences, U.S. Department of Health and Human Services, July 2016 at p. 1). PFOS and PFOA, however, resist degradation through environmental processes and accumulate in the environment over time. *Id.* Both PFOS and PFOA are readily absorbed into the body and increase in concentration with repeated exposure. (App. B, Compl. ¶ 50).

The human health risks caused by exposure to low levels of PFOA and PFOS are well documented and include testicular cancer, kidney cancer, ulcerative colitis, thyroid disease, high cholesterol, and pregnancy-induced hypertension. *Id.* Due to the toxicity of these chemicals, in 2002 the EPA took action under the Toxic Substances Control Act to limit their

future manufacture and use. *Id.* at ¶ 54. In May 2016, the EPA issued a drinking water health advisory for PFOS and PFOA, warning that, in order to avoid health problems associated with exposure to these chemicals, the combined concentration of these chemicals in drinking water should be no greater than 0.07 parts per billion ("ppb"). *Id.* at ¶ 58.

PFCs, including PFOA and PFOS and their precursors, are supplied to manufacturing facilities upstream of Respondent's water intake, in or near the City of Dalton, Georgia. *Id.* at ¶ 3. Dalton is home to over 150 carpet manufacturers which collectively produce over 90% of the world's carpet supply. *Id.* at ¶ 46. PFCs have been supplied to and used by Dalton carpet manufacturers for many years to impart stain resistance to carpet during the manufacturing process. *Id.* Dalton chemical suppliers and carpet manufacturers discharge the wastewater from their operations into the City of Dalton's wastewater treatment system, and the effluent from this system is subsequently discharged onto a sprayfield bordered by the Conasauga River, a tributary to the Coosa River. *Id.* at ¶ 47-48. The EPA has determined that PFOS and PFOA are being released into the environment through Dalton Utilities' wastewater treatment system and has identified industrial

wastewater from Dalton carpet manufacturers as the source of these PFCs. *Id.* at ¶ 49.

Petitioners filed motions to dismiss and motions for summary judgment generally alleging that the court lacked personal jurisdiction.[2] On August 13, 2018, the trial court issued an order denying Petitioners' dispositive motions. (App. E, Order on Defendants' Dispositive Motions and Motions for Protective Order). The trial court found that "[Petitioners] have conducted activity directed at Alabama and that that activity is not 'random,' 'fortuitous,' or 'attenuated,' or the 'unilateral activity of another party or a third person.'" *Id.* More specifically, the trial court held that "the act of causing the chemicals to enter the Conasauga River is an act directed at Alabama." *Id.*

III. ARGUMENT

A. This Court Has Specific Personal Jurisdiction Over the Petitioners.[3]

1. ***Petitioners Have Sufficient Contacts With Alabama to Establish Specific Personal Jurisdiction.***

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[2] Petitioners have included copies of the relevant motions to dismiss as exhibits to their Petitions.

[3] Respondent does not challenge Petitioner Shaw Industries, Inc.'s argument that it is not subject to general personal jurisdiction

Petitioners argue specific jurisdiction in Alabama is lacking because they did not purposefully avail themselves of conducting activities in Alabama and none of the conduct giving rise to the action occurred in Alabama. These arguments, however, ignore the unique circumstances of water pollution cases which focus on the foreseeability of the injury in the forum state in determining whether jurisdiction is proper there.

A court may exercise specific personal jurisdiction over a defendant when (1) the defendant has sufficient minimum contacts with the forum state and (2) exercising jurisdiction would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 216 (1945). This test embodies the controlling due process principle that a defendant must have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp. v. Rudzwicz*, 471 U.S. 462, 472 (1985).

When evaluating claims of negligence, courts apply the purposeful availment test to determine whether the defendant has sufficient contacts with the forum state. Under this test, a defendant's contacts with the forum state must satisfy the

following criteria: (1) the contacts must be related to the Plaintiff's cause of action, and (2) the defendant must have purposely availed itself of the privilege of conducting activities within Alabama. *Hinrichs v. Gen. Motors of Canada, Ltd.,* 222 So. 3d 1114, (Ala. 2016).

Where the plaintiff alleges the defendant committed an intentional tort, the effects test may be applied to determine whether the defendant has the requisite contacts with the forum state. The effects test requires Respondent to show "that the defendant (1) committed an intentional tort (2) that was directly aimed at the forum, (3) causing an injury within the forum that the defendant should have reasonably anticipated." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 (11th Cir. 2009). Importantly, physical presence in the forum state is not necessary for jurisdiction as a physical entry into the forum state through "some other means" is a relevant contact. *Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984)).

However, the reasoning underpinning the purposeful availment and effects tests, and the products liability cases establishing the current jurisdictional analysis utilizing

those tests, is factually distinguishable from the instant environmental contamination case concerning a continuous tort that slowly occurs over time and foreseeably migrates from one state to another. Indeed, the United States Supreme Court has recognized that "even the simplest sort of interstate pollution case [is] an awkward vehicle to manage." *Ohio v. Wyandotte Chemicals Corp.*, 401 US 493, 504 (1971). Thus, any jurisdictional analysis must take into account the more complex nature of interstate environmental pollution cases such as that before this Court.

In similar water pollution cases, courts have not dismissed lawsuits for lack of personal jurisdiction when a resident sued a non-resident defendant that discharged pollution into water or released water into an adjoining state that ultimately caused damages in the forum state. *See, e.g. People of State of Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979) *vacated*, 451 U.S. 304 (1981) (water pollution originating in Wisconsin causing injury in Illinois)[4]; *International Paper Co. v. Ouellette,* 479 US 481

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[4] Although this decision was vacated by the United States Supreme Court, the Court specifically recognized that "personal jurisdiction was properly exercised and venue is also proper." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 312, n.5 (1981).

(1987) (water pollution originating in New York causing injury in Vermont); *Ohio v. Wyandotte Chemicals Corp.*, 401 US 493, 500-501 (1971) (water pollution from Canada causing damage in the U.S.); *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004), *aff'd* 452 F.3d 1066 (9th Cir. 2006) (finding personal jurisdiction in Washington over Canadian entity polluting water upstream); and *Horne v. Mobile Area Water & Sewer System,* 897 So.2d 972 (Miss. 2004) (release of water in Alabama causing property damage in Mississippi). Indeed, the Supreme Court specifically rejected one defendant's argument that "all state-law suits must be brought in [the] source-state **courts**." *Ouellette*, 479 U.S. at 499 (emphasis original). Thus, jurisdiction was deemed proper where the injury occurred.

Once the Plaintiff has satisfied its burden of establishing that the defendant has sufficient contacts with the forum state, the court must then evaluate whether the exercise of jurisdiction would be fair by considering

> [t]he forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the Plaintiff's power to choose the forum; the

> interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). The cornerstone of this inquiry is whether it would be fair to force a defendant to litigate in the selected forum. *International Shoe Co.*, 326 U.S. at 316. This ultimately turns on foreseeability and whether a defendant's conduct could have predictably caused an injury in the forum state. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). If so, then the defendant could reasonably anticipate being haled into court there.

2. *Petitioners Satisfy the Purposeful Availment and Effects Tests Because Their Actions Foreseeably Caused Injury in Alabama.*

The Petitioners' sale or use and discharge of PFCs and related chemicals upstream of Respondent foreseeably caused the complained of injury in Alabama. Moreover, their business activities were purposefully aimed at Alabama residents, thus making it fair to litigate here. Therefore, this Court has jurisdiction over the Petitioners.

As explained in Respondent's responses in opposition to the Petitioners' dispositive motions, the affidavits

submitted by the Petitioners failed to sufficiently controvert the complaint's allegations. Moreover, the pertinent time period is not limited to 2009 until present because PFCs have long been used in the carpet industry, persist in the environment for years, and were the subject of EPA regulation as far back as 2002. (App. B, Compl. ¶¶ 49, 54). Indeed, the "informational" papers Respondent submitted in support of its opposition briefs demonstrate that Petitioners knew, or should have known, this prior to 2009. The deficiencies highlighted by Respondent were sufficient for the Court to deny the Petitioners' dispositive motions and, at the very least, warrant additional discovery.

Based on the foregoing and the allegations in the complaint, the Petitioners sold or used materials containing PFCs and discharged wastewater containing these chemicals to the local wastewater treatment plant. They knew, or should have known, that PFCs and related compounds used in the manufacture of carpet are toxic to human health, and that they would pollute the water supply downstream of Dalton if discharged. The harm posed to those downstream of the Petitioners was certainly foreseeable because the health

hazards posed by these chemicals have been public knowledge for nearly two decades.

In 1999, the EPA began an investigation into the effects of PFCs after receiving public data on the global distribution and toxicity of PFOS. (*See* App. F, Aziz Ullah, *The Fluorochemical Dilemma: What the PFOS/PFOA Fuss is All About*, CLEANING AND RESTORATION, October 2006). This data showed that PFOS was persistent, unexpectedly toxic, and bioaccumulative (likely to accumulate in the tissues of living organisms). *See id.*. Only a few years later, the toxicity of these chemicals was so well documented that the EPA took regulatory action in 2002 to limit their future use and manufacture. (App. B, Compl. ¶ 56). The State of New Jersey subsequently adopted a drinking water health advisory in 2006 establishing a limit of 0.04 ppb for PFOA. *Id.* at ¶ 57. In order to provide protection from lifetime exposure to PFOA and PFOS, the EPA further recommends that the combined concentration of these chemicals in drinking water should be no greater than 0.07 ppb. *Id.* at ¶ 60.

In addition to the wealth of general public data establishing the dangers of PFC use and exposure, the Dalton carpet industry and their chemical suppliers have been on

notice for nearly a decade that the industrial wastewater discharged from their operations has introduced incredible levels of PFC contamination into the Coosa River Watershed. In 2008, the EPA's Office of Research and Development, in cooperation with the University of Georgia, published research establishing the existence of highly elevated levels of PFCs in the Conasauga River downstream of Dalton, Georgia. (*See* App. G, *EPA Q&As: Perfluorochemical (PFC) Contamination in Dalton, GA Prepared by U.S. Environmental Protection Agency (EPA)*, October 8, 2009, at p. 1). The EPA's subsequent investigation concluded that "industrial discharges to the Dalton utilities wastewater treatment plant, primarily from carpet manufacturers, have led to PFC concentrations in wastewater effluent, sewage sludge, composted sewage sludge, sprayfield soils, groundwater, and water samples from the Conasauga River and Holly Creek." *Id.* at 3. Additional studies have similarly determined that Dalton carpet manufacturers have introduced PFC pollution into the Coosa River Watershed through their industrial wastewater discharges. (*See* App. H, Peter J. Lasier et al., *Perfluorinated Chemicals in Surface Waters and Sediments from Northwest Georgia, USA, and Their Bioaccumulation in Lumbriculus Variegatus*, 30 Environmental

Toxicology and Chemistry 2194, 2194). The Petitioners cannot reasonably deny knowledge of the link between the carpet manufacturing industry in Dalton, Georgia, and PFOA/PFOS contamination in Georgia surface waters.

The Petitioners knew, or should have known through the exercise of reasonable diligence, that they were selling or were applying and discharging PFCs and related chemicals in their industrial wastewater, that they were thereby polluting the Conasauga River, and that it was natural and foreseeable that this pollution would flow downstream into Alabama and cause injury to Respondent. Petitioners purposefully continued to sell or apply and discharge PFCs knowing that the result of this practice was the contamination of the Coosa River's Watershed, which naturally flows across state lines into Alabama where it is utilized as Respondent's drinking water source. These acts gave rise to this action, were directly aimed at the residents of Alabama, and ultimately caused the injuries alleged by Respondent. Therefore, the Petitioners' contention that their connection with Alabama is based on "random, fortuitous, or attenuated" contacts is unavailing. This is sufficient for Alabama to have personal jurisdiction under the line of water pollution cases cited

supra. Petitioners' current attempt to feign ignorance as to the effect of their actions, and their attempt to shift blame to Dalton Utilities, is unconvincing.

Petitioners have misstated the holding of *Ex parte Covington Pike Dodge, Inc.*, 904 So.2d 226 (Ala. 2004) in support of their argument. In *Covington Pike Dodge*, the plaintiff filed suit against a Tennessee car dealership after a car accident in Alabama, alleging that the dealership had ownership or control over a vehicle involved in the accident and had negligently entrusted it to the driver. *Id*. at 229. The Court dismissed all claims against the dealership because evidence established it did not own the vehicle in question and did not have any supervisory power or control over the driver. *Id.* at 232. In other words, evidence established the dealership had no actual connection to the facts alleged in the lawsuit. In the instant case, however, Petitioners do not sufficiently rebut the allegations in Respondent's complaint and, as a result, are connected to the allegations of Respondent's suit.

Similarly, in *Ex parte Int'l Creative Management Partners, LLC*, --- So. 3d ---, No. 1161059, 2018 WL 672030 (Ala. Feb. 2, 2018), the Court held that personal jurisdiction

was lacking over a Delaware talent agency when the plaintiff alleged he sustained injuries at a concert in Alabama and that the talent agency had negotiated the booking of the band playing in the concert after being contacted by the Alabama concert venue. *Id.* at *6. However, the talent agency had no contacts with Alabama aside from having negotiated the booking of the band at the unsolicited request of an Alabama company. *Id.* The Court held that this connection was too tenuous to exercise personal jurisdiction over the talent agency. The same cannot be said of Petitioners' actions here which were directed at Alabama residents and foreseeably caused damage within the State of Alabama. Under such circumstances, Petitioners ties to Alabama are anything but tenuous.

3. Exercising Jurisdiction Over the Petitioners Comports With Due Process and Does Not Offend Traditional Notions of Fair Play and Substantial Justice.

Based on the conduct described above, it was foreseeable that the Petitioners' discharge of pollutants would impact Respondent and other downstream users in Alabama. Moreover, just as the Supreme Court of Mississippi determined the State had a "strong interest" in adjudicating the action filed by Mississippi residents injured by the release of water in

Alabama,[5] the State of Alabama likewise has a significant interest in preventing and remediating pollution of its public waters and chemical contamination of its public drinking water. A state may apply its own law to regulate multistate activity that impacts the state, so that application of the state's law is neither arbitrary nor fundamentally unfair. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). Alabama exercising jurisdiction to apply its own law to adjudicate this case is neither arbitrary nor fundamentally unfair.

Moreover, as discussed above, the United States Supreme Court has recognized that state court jurisdiction is reasonable and appropriate over out of state water polluters whose pollution causes damages in the forum state. *See City of Milwaukee,* 451 U.S. 304, 312 n.5 (1981); *Ouellette,* 479 U.S. 481; *Wyandotte Chemicals Corp.*, 401 U.S. 493, 495 (1971). Indeed, a negligent act committed in one state that foreseeably affects an adjoining state has long been recognized to give rise to jurisdiction over that defendant by the adjoining state. *See* Restatement (Second) of Conflict

[5] *See Pakootas*, 897 So.2d at 982.

of Laws § 37 Comment (e) (1988) (the state has jurisdiction over a factory in an adjoining state that emits noxious fumes near a border that causes damages in the forum state). Requiring the Petitioners to litigate in Alabama where they injured an Alabama resident from conduct that would foreseeably impact Alabama residents, comports with notions of fair play and substantial justice.

Although certain facts in *Horne* and *Pakootas* are different than those before the court, the applicability to this case remains. In *Horne*, the Court determined that the Mobile Water Board '"purposefully directed" their activities to Mississippi property owners by opening' its spillway in Alabama. *Horne*, 897 So.2d at 989. The court emphasized the deposition testimony of a Board engineer and Mobile water employee established that there "was no question that the City [of Mobile] and Board knew the water would flow into Mississippi." *Id.* at 989-90.

Similarly, the *Pakootas* court found that exercising personal jurisdiction was reasonable over the defendant who polluted the waters upstream from the plaintiff. The court concluded that disposing hazardous substances upstream of a plaintiff was an intentional act expressly aimed at that

plaintiff, and which the defendant knew was likely to cause injury in the forum state. *Pakootas*, 2004 WL 2578982 at *3. The Court stated that exercising jurisdiction over the Canadian company comported with due process because the burden of travelling 10 miles to the Eastern District of Washington was not great. *Id.* at *4.

As explained below, the Petitioners' discharge of wastewater to Dalton Utilities does not absolve them of their liability because they were, or should have been, aware that the PFC contaminated wastewater survived treatment based on the publicly available studies mentioned above. Therefore, the foreseeability of the PFC contamination beyond Dalton Utilities' treatment system is no different than the foreseeability of harm in *Horne* or *Pakootas*. Consequently, the trial court correctly held that it had personal jurisdiction existed in the instant case.

B. <u>Discharging Their Wastewater to Dalton Utilities Does Not Absolve Petitioners of Liability</u>

Petitioners argue that their connections with Alabama are attenuated due to Dalton Utility's unilateral act of applying their wastewater on the land application system which ultimately contaminated Respondent's water supply. In

other words, Petitioners argue that Dalton Utilities' treatment, or alleged failure thereof, is an intervening cause which breaks the chain of causation and, consequently, any claim that Petitioners purposefully directed activities at Alabama cannot stand. This does not occur, however, if the intervening cause was foreseeable which is the cornerstone of proximate cause. *Alabama Power Company v. Taylor,* 306 So.2d 236 (1975). A defendant is held legally responsible for all consequences which a prudent and experienced person, fully acquainted with all the circumstances, at the time of his negligent act, would have thought reasonably possible to follow that act. *Prescott v. Martin,* 331 So.2d 240 (Ala.1976). This includes the negligence of others. *Williams v. Woodman*, 424 So.2d 611 (Ala. 1982).

A cause is considered the proximate cause of an injury if, in the natural and probable sequence of events, and without intervention of any new or independent cause, the injury flows from the act. *City of Mobile v. Havard*, 268 So.2d 805 (Ala. 1972). In order to be an intervening cause, a subsequent cause also must have been unforeseeable and must have been sufficient in and of itself to have been the sole "cause in fact" of the injury. *Vines v. Plantation Motor*

Lodge, 336 So.2d 1338, 1339 (Ala. 1976). If an intervening cause could have reasonably been foreseen at the time the tortfeasor acted, it does not break the chain of causation between his act and the injury. *Id*.

Petitioners' lack of control over their wastewater discharges from Dalton Utilities is not the pertinent issue, and Dalton Utilities' own control over its treatment and discharge of Petitioners' PFC-laden wastewater does not break the causal chain. Any supposed inability of Dalton Utilities to sufficiently treat and remove PFCs from its wastewater was certainly foreseeable based on publicly available documents. As discussed above, the Dalton carpet industry and their chemical suppliers have been on notice for nearly a decade that the industrial wastewater discharged from their operations has introduced incredible levels of PFC contamination into the Coosa River Watershed after passing through Dalton Utilities. Petitioners sold or applied PFCs and similar chemicals in their manufacturing processes and discharged contaminated water for an as of yet unknown time period. Petitioners cannot now be allowed to escape liability for their harmful conduct.

C. **Petitioners' Alabama Contacts Satisfy *Hinrichs.***

It is fair to litigate this case in Alabama because the Petitioners' suit-related business activities took place in Alabama, were purposefully aimed at Alabama residents, and the negative effects of Petitioners' activities foreseeably damaged Respondent in Alabama. *See Hinrichs* 222 So. 3d 1114.

It is important to keep in mind that the *Hinrichs* Court did not disturb the trial court's findings that GM Canada had purposefully availed itself of the privilege of conducting business in Alabama by placings its vehicles into the stream of commerce knowing that they will be distributed in Alabama. *See id.* Second, the Alabama Supreme Court did not disturb the trial court's finding that GM Canada could reasonably anticipate litigating Hinrichs' product liability claim in Alabama. *See id.* The only issue resolved by the Alabama Supreme Court on specific jurisdiction was whether Mr. Hinrichs' product liability claim was related to GM Canada's stream of commerce contacts with Alabama. *See id.* Furthermore, only four out of eight justices held that the product must be sold in Alabama to subject a manufacturer to specific jurisdiction over a product liability claim filed here. "The precedential value of the reasoning in a plurality

opinion is questionable at best." *Ex part Discount Foods, Inc.*, 789 So.2d 842, 845 (Ala. 2001).

Petitioners appear to argue that foreseeability is irrelevant to the Court's analysis following *Hinrichs*, but this is inaccurate. The *Hinrichs* decision evaluated whether a Canadian company that sold a car to a sister company also located in Canada, who subsequently sold that car to a man in Pennsylvania, could be sued in Alabama court after the Pennsylvania man moved to Alabama and got into a car accident within this state. The Court concluded that foreseeability based purely upon the "stream of commerce" theory was insufficient to conclude that personal jurisdiction existed under the circumstances of that case. *Hinrichs* did not, however, stand for the sweeping proposition that Defendants may somehow avoid being subjected to suit in Alabama when their actions foreseeably injured Alabama residents. As shown above, Respondent does not rely upon the stream of commerce theory which applies in product liability cases to establish personal jurisdiction over Petitioners in Alabama.

D. **Etowah County is the Proper Venue for this Action.**

Petitioner Oriental Weavers USA, Inc. is the only party to argue that Etowah County is not a proper venue under either Ala. Code §§ 6-3-7(a) or 6-5-430. Alabama law allows a corporation to be sued in one of four different venues:

> (1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of real property that is the subject of the action is situated; or
>
> (2) In the county of the corporation's principal office in this state; or
>
> (3) In the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in this state, at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or
>
> (4) If subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was doing business by agent at the time of the accrual of the cause of action.

Ala. Code §§ 6-3-7(a).

Although Oriental Weavers claims venue is not proper under any of the four subsections, venue is proper under subsection (1) because the real property at issue in this case is located in Etowah County. Respondent has alleged that its property, located in Etowah County, has been damaged by

the presence of PFC-contaminated water discharge upstream of its raw water intake source. Respondent further alleged that Petitioners have caused damage to its entire water system in the form of pollution with chemicals known to cause a wide range of serious human disease, including cancers. (App. B, Compl. ¶ 2). Petitioners' use and discharge of PFCs affected and interfered with Respondent's exclusive use and possession of its Etowah County property.

Venue is also proper under subsection (3) because Plaintiff's principal office is in Etowah County and Petitioners, as well as other defendants named in this action, do business by agent in Etowah County. *See Roland Pugh Min. Co. v. Smith*, 388 So.2d 977, 978-89 (Ala. 1980) (holding venue was proper for one defendant and, as a result, was proper to the other defendants which did not do business in the challenged venue). The Court in *Roland Pugh Min. Co.* specifically noted that "[u]nder ARCP 82(c), '(w)henever an action has been commenced in a proper county, additional claims and parties may be joined, … as ancillary thereto, **without regard to whether that county would be proper venue** for an independent action on such claims or against such parties.'" *Id* (emphasis added). Therefore, Etowah County is

the proper venue as long as it is proper with regard to one defendant.

Based on available information, venue is, at the very least, proper as to Petitioners Shaw Industries, Inc., Mohawk Industries, Inc., and Mohawk Carpet, LLC. Importantly, proof of a registered agent in a county "is not a prerequisite to a finding that the corporation is doing business in that county." *Ex parte Reliance Ins. Co.*, 484 So.2d 414, 418 (Ala. 1986). Instead, venue is proper over a foreign corporation if that corporation conducts "some of the business functions for which it was created." *Id.* at 417 (quoting *Ex parte Jim Skinner Ford, Inc.*, 435 So.2d 1235, 1237 (Ala. 1983)). One of these business functions includes engaging in the sale of its products. *See Ex parte Cavalier Home Builders, LLC*, 920 So.2d 1105, 1109-10 (Ala. 2005).

Shaw Industries, Inc.'s, website shows two different retailers sell its products within 15 miles[6] of Gadsden while the Mohawk Petitioners have one retailer.[7] Therefore, venue

[6] See https://shawfloors.com/stores. Counsel for Plaintiff used the zipcode for the Etowah County Courthouse (35901) in the search. Lowe's Home Improvement, Foote Brothers Carpet One, Alley's Floor & Wall Covering, and Knights Flooring.

[7] https://www.mohawkflooring.com/carpet-store/Gadsden_AL_35904/Alleys-Carpet-of-Gadsden. Alleys Carpet of Gadsden.

is proper as to Shaw Industries, Inc., and the Mohawk Petitioners because they do business in Etowah County which, in turn, means venue is proper as to all other defendants.

Petitioner Oriental Weavers USA, Inc., also seeks dismissal under Ala. Code. § 6-5-430 on forum non conveniens grounds and suggests that Dalton is the more appropriate venue. The burden is on the party seeking dismissal to prove a more appropriate forum outside the state exists, based on the location of acts giving rise to the lawsuit occurred, the convenience of parties and witnesses, and the interests of justice. Ala. Code. § 6-5-430; *Malsch v. Bell Helicopter Textron, Inc.*, 916 So. 2d 600 (Ala. 2005). All these factors must be positively found to justify dismissal. *Donald v. Transport Life Ins. Co.*, 595 So. 2d 865 (Ala. 1992).

A court is less likely to find it inconvenient for a corporation to litigate a case in a foreign state. *See Ex parte Integon Corp.*, 672 So.2d 497 (Ala. 1995) (holding trial court did not abuse its discretion in denying motion to dismiss based on forum non conveniens despite the fact that the corporate defendant's principal place of business was located in North Carolina, its president was resident of North Carolina, and many acts giving rise to claims in North

Carolina). This makes sense given that corporations can easily arrange for its witnesses and documents to appear in another state. In *Ex parte Integon Corp.*, the court determined that the plaintiff's principal place of business in Birmingham meant that Alabama was the appropriate forum. *Id.* Unlike the parties in that case that were states apart, Gadsden is only approximately 90 miles from Dalton. Petitioners are multi-million dollar corporations for whom the expenses to litigate this action in Gadsden are minimal. Consequently, Alabama is the most appropriate forum, and so the Court should also deny Petitioner's request to dismiss the action under forum non conveniens grounds.

E. Petitioners Have Not Met Their Burden of Showing Their Entitlement to a Writ of Mandamus.

"Mandamus is an extraordinary writ by which 'a party seeks emergency and immediate appellate review of an order that is otherwise interlocutory and not appealable.'" *Ex parte Brookwood Medical Center*, 994 So.2d 264, 268 (Ala. 2008). Mandamus is appropriate "where there is (1) a **clear legal right** in the petitioner to the order sought; (2) an **imperative duty** upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"

Id. (emphases added) (*quoting Ex parte Perfection Siding, Inc.*, 882 So.2d 307, 309-310 (Ala. 2003)).

As Respondent has shown above, Petitioners are subject to personal jurisdiction in Alabama and their Petitions should therefore be denied. Petitioners have not established a clear legal right to dismissal when Respondent has shown that Petitioners **knew** their use and discharge of wastewater containing PFCs would persist treatment at Dalton Utilities, would contaminate the Coosa River Watershed, and would foreseeably impact downstream water users such as Respondent.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petitions for a writ of mandamus.

Respectfully submitted,

s/ Rhon E. Jones

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 5, 2018, true and correct copies of the foregoing were served on the following via U.S. Mail:

Honorable William H. Rhea, III
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And on the following via electronic mail, pursuant to Rule 57 of the Alabama Rules of Appellate:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

RICHARD A. ROWE, ET AL., **Plaintiffs,** **v.** **E. I. du PONT de NEMOURS & COMPANY,** **Defendant.**	:	**Civil No. 06-1810-RMB-AMD** **CLASS ACTION**
MISTY SCOTT, **Plaintiff,** **v.** **E. I. du PONT de NEMOURS & COMPANY,** **Defendant.**	:	**Civil No. 06-3080-RMB-AMD** **CLASS ACTION**

ROWE PLAINTIFFS' MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION

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{W1261810.1}

I. INTRODUCTION

Over three years ago, Defendant E.I. du Pont de Nemours & Co. ("DuPont") agreed to resolve through a single, common program the claims of tens of thousands of individuals whose residential drinking water was contaminated with a toxic chemical known as "C-8" attributable to operations at DuPont's Washington Works Plant in West Virginia ("WV Plant").[1] In February 2005, a West Virginia trial court approved that class action settlement in *Leach v. E.I. Du Pont de Nemours & Co.*, No. 01-C-608 (Wood Cty. W.Va. Cir. Ct.) ("*Leach*"), which DuPont championed as a reasonable, science-based approach for addressing clean drinking water, water treatment, and potential medical monitoring relief. Yet, just a few months later, when C-8 was first reported to be in drinking water supplies outside DuPont's Chambers Works Plant in New Jersey ("NJ Plant"), DuPont inexplicably refused to extend any of these same benefits to the similarly-impacted New Jersey residents.

DuPont has refused to address the C-8 contamination issues in New Jersey as it did in West Virginia and Ohio, even after the New Jersey Department of Environmental Protection ("NJDEP") confirmed in February 2007 that levels of C-8 detected in the Penns Grove Water Supply Company ("PGWS") water supply and in certain private drinking water wells are higher than NJDEP's safety guideline for C-8 in drinking water. In *Leach*, DuPont agreed to provide clean

[1] C-8 is also known as PFOA, APFO, FC-143, DFS-1, and DFS-2 (Chemical Abstract Services # 3825-26-1).

water/water treatment and potential medical monitoring when the levels of C-8 were significantly below any existing regulatory limits or guidelines for C-8 in drinking water.

Plaintiffs Richard A. Rowe, Mary L. Carter, Michelle E. Tomarchio, Catherine A. Lawrence, and Kathleen K. Lemke, as parent and personal representative of DJL, Jr., a minor, (collectively "*Rowe* Plaintiffs") ask this Court to allow them to represent PGWS residential water customers and owners of residential water wells where C-8 has been found above the NJDEP safety guideline of 0.04 parts per billion ("ppb") in seeking to require DuPont to provide in New Jersey the same basic types of relief DuPont provided in West Virginia and Ohio for virtually identical water contamination. More specifically, *Rowe* Plaintiffs move for an Order certifying *Rowe* Plaintiffs and their counsel to represent a class of "all individuals who, for a period of at least one year since March 3, 2006, to the date of an Order certifying the class herein, either have been residential water customers of the PGWS or have had residential drinking water supplied by one of the private water wells listed on Exhibit A hereto" ("Class"), in connection with the claims against DuPont for clean water, suitable C-8 water treatment, medical monitoring, and biomonitoring[2] ("Class Claims"). *Rowe*

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[2] Biomonitoring measures the amount of a chemical in a person's blood while medical monitoring is geared toward detecting the onset of disease from the exposure. *See, e.g.,* Aff. of Shari A. Blecher in Support of *Rowe* Pls' Mot. For

Plaintiffs do not seek certification of any claims for money damages, such as claims for personal injury or property damages. *Rowe* Plaintiffs seek certification only of their common equitable and injunctive Class Claims.

II. STATEMENT OF FACTS

A. DuPont's Use and Release of C-8 Is Well-Established.

For decades, DuPont has released C-8 into the environment surrounding its West Virginia and New Jersey Plants and into the blood of people exposed to that contamination. DuPont's release of C-8 from its WV Plant into the environment and local water supplies is well-documented. *See Leach v. E.I. DuPont de Nemours & Co.*, 2002 WL 1270121, *3 (W.Va. Cir. Ct. 2002)(attached at Ex. 1 to Blecher Aff.). DuPont does not dispute that C-8 has also been released into the air and water from its NJ Plant. *See* Blecher Aff. at Exs. 19-22, 99 (DuPont's response to Requests for Admissions ("RFAs") 6-11) and 101 (DuPont's response to Interrogs. 3-8). DuPont's own testing has confirmed the presence of C-8 in groundwater under the NJ Plant and in the water it discharges into the Delaware River. *See id.* DuPont's own scientists and consultants claim that C-8 released into the air from DuPont's facilities likely falls to nearby soils in rain and then travels through the soil into groundwater and nearby drinking water supplies. *See*

Class Cert. ("Blecher Aff.") at Ex. 48 (Minn. Dep't of Health biomonitoring report p. 2). Biomonitoring for levels of a chemical in human blood, like routine monitoring of water wells, assesses the presence of contamination and any increases/decreases over time.

id. at Exs. 2-3. DuPont admits it cannot specifically identify any other source of C-8 in New Jersey water. *See id.* at Ex. 77 (DuPont's response to RFAs 32-36).

For decades, DuPont has been aware of its C-8 releases into the environment and the corresponding risks to human health. As early as 1954, DuPont's own employees expressed concerns about the toxicity of C-8. *Leach*, 2002 WL 1270121 at *4. An internal investigation by DuPont confirmed by 1961 that C-8 was toxic in animals and caused observable changes in certain organ functions; as a result of the investigation, DuPont's Toxicology Section Chief issued a warning that C-8 "be handled with extreme care." *Id*.

By 1978, when DuPont knew that C-8 was building up in the blood of workers exposed to the chemical, DuPont authorized an internal program to monitor the health of employees exposed to C-8 at both the West Virginia and New Jersey Plants. DuPont was "disturbed" when the testing revealed that C-8 might be causing "toxic effects" in some employees. *Id*. In particular, by December 1978, air sampling for C-8 and a review of medical records for certain employees exposed to C-8 indicated possible liver effects. *Id*. DuPont, however, decided not to share this toxicity information outside the company except on a "need-to-know" basis. *Id.* By March 1979, further evaluation of the NJ Plant employees indicated significantly higher incidences of allergic, endocrine, and metabolic disorders; disorders of skin and cellular tissue; and abnormal liver

function tests when compared to workers not so exposed. *See* Blecher Aff. at Ex. 23. As early as 1980, DuPont determined internally "C-8 is toxic," "people accumulate C-8," and "continued exposure is not tolerable." *Leach,* 2002 WL 1270121 at *4. In response, DuPont implemented additional medical testing of its C-8-exposed employees, including special testing of blood for C-8. *Id.*

In light of the mounting internal toxicity data, DuPont's own Director of Employee Relations recommended to management in 1982 that all "available practical steps be taken to reduce this [C-8] exposure because," among other things, "[a]ll employees, not just Teflon® area workers, are exposed" and "[t]here is obviously great potential for current or future exposure of members of the local community from emissions" leaving a plant site where C-8 is used. *Id*. DuPont, therefore, began a secret program of testing drinking water supplies near its WV Plant and found C-8 in public water supplies serving thousands of people as early as 1984. *Id.* Although DuPont's follow-up testing of water supplies near its WV Plant throughout the remainder of the 1980s and into the 1990s continued to show C-8 contamination, DuPont chose not to disclose that information to the local communities. *See id.* at *4-5. DuPont also did not even test any drinking water supplies near its NJ Plant, despite its knowledge of widespread contamination in West Virginia. *See* Blecher Aff. at Exs. 60 (DuPont's response to RFA 40) and 82 (DuPont's response to RFA 3-19 and 24-28).

By 1987, DuPont's WV Plant employees were asking for DuPont's scientists at Haskell Laboratory to establish "an acceptable level for C-8 in community drinking water." *Leach*, 2002 WL 1270121 at *5. By 1991, DuPont scientists, after considering "the actual health effect to residents adjacent to" its Plants where C-8 was released, established an internal "Community Exposure Guideline" (CEG) of 1 ppb for C-8 in community drinking water that is "by definition one that we can expect 'lifetime' exposure of community residents without any expected ill effects." *Id*. Shortly after that internal CEG was set, as early as 1992, DuPont found C-8 as high as 3.9 ppb in the drinking water supplies near its WV Plant, *id*., and had sampling data detecting up to 410 ppb C-8 in water discharged from the NJ Plant into the Delaware River and up to 310 ppb in Delaware River water. Blecher Aff. at Ex. 25. By May 1993, DuPont's own sampling detected C-8 up to 3 ppb "at the New Jersey side" of the Delaware River. *See id.* at Ex. 26. Nevertheless, DuPont did not disclose any of that data to local communities near its Plants nor sample drinking water supplies near the NJ Plant for the same type of C-8 contamination found outside the WV Plant. *See id.* at Ex. 82 (DuPont's response to RFAs 3-19 and 24-28).

Although local residents were not warned of C-8 contamination in their drinking water, DuPont began providing special medical testing as early as 1979 to employees potentially exposed to C-8 at work. *See Leach*, 2002 WL 1270121 at

*6. When the WV Plant began sending its C-8 wastes directly to the NJ Plant for recovery in 1999,[3] DuPont offered all of its New Jersey workers who had "any potential for exposure to C-8" special, periodic medical testing, including testing for C-8 in blood. *Leach*, 2002 WL 1270121 at *6. DuPont also provided those employees with special protective equipment, including gloves, special apparel, and breathing equipment, and agreed to provide special medical testing and C-8 blood testing to at least one outside contractor whose employees may have been exposed to C-8 at a DuPont plant. *Id*. DuPont also has conducted long-term monitoring of the health of employees exposed to C-8, looking for evidence of cancer, liver disease, heart disease, diabetes, birth defects in children of the employees, and other potential adverse health effects associated with exposure to C-8. *See, e.g.,* Blecher Aff. at Exs. 12, 29, 42, 46, and 49.

DuPont even planned to publicly acknowledge its responsibility to provide C-8 blood testing to all members of the community surrounding the WV Plant exposed to C-8-contaminated drinking water when that contamination was finally revealed to the public during an earlier lawsuit against DuPont in 2000. *See Leach*, 2002 WL 1270121 at *6.[4] DuPont's public relations officials and attorneys

[3] *See* DuPont's Answer to *Rowe* Plaintiffs' Second Amended Complaint at ¶¶45-46 (Doc. No. 34); Blecher Aff. at Ex. 60 (DuPont's response to RFA 47).

[4] At the time, discovery was underway in a lawsuit against DuPont in West Virginia Federal Court by the Tennant family, who owned land near a DuPont-owned landfill where DuPont disposed of C-8 from its WV Plant, and counsel for

collaborated with a local water district to draft an October 2000 letter finally disclosing the C-8 contamination to that water district's customers, while simultaneously assuring them (inaccurately) that the water was safe. *Id*. DuPont drafted approved "standby questions and answers," including the anticipated question: "DuPont monitors employees' blood for [C-8]. Will DuPont test citizens' blood?" The response was "Yes, as requested by residents of the [water district], using established practices; that is, collection at one location and use of the same lab used for analysis of employees' samples." *Id*.; *see also* Blecher Aff. at Ex. 27. At the time DuPont prepared that response, the level of C-8 in the drinking water supplied by that West Virginia water district was one-tenth of DuPont's internal C-8 drinking water standard. *Leach,* 2002 WL 1270121 at *7.

DuPont's lawyers recognized that residents drinking water contaminated with DuPont's C-8 would not react well to finding out that, not only did DuPont know about the C-8 contamination problem and health risks for decades but DuPont actively covered it up. DuPont's in-house litigation counsel responsible

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the plaintiffs included some of the attorneys for *Rowe* Plaintiffs in this case (Robert Bilott and Larry Winter). In August 2000, discovery revealed that C-8 was contaminating drinking water near the WV Plant. That case, *Tennant v. E.I. du Pont de Nemours & Co.,* Case No. CA-6:99-048 (S.D.W.Va.) was settled in 2001. In an email from DuPont's in-house counsel , Bernie Reilly, at the time, Mr. Reilly noted: "The sh[..] is about to hit the fan in WV, the lawyer for the farmer finally realizes the surfactant [C-8] issue …. F[…] him. Finally the plant recognizes it must get public first, something I have been urging for over a year … We boned ourselves again, such is life in big and I suspect little companies." Blecher Aff. at Ex. 6 (Reilly email dated 8/13/00 (EID781981)).

for handling the C-8 litigation noted the following to his co-counsel at DuPont after the October 2000 letter was sent:

> In light of the interest the letter is getting I think we need to make more of an effort to get the business to look into what we can do to get the Lubeck [West Virginia] community a clean source of water or filter the C-8 out of the water. … We are going to spend millions to defend these lawsuits and have the additional threat of punitive damages hanging over our head. Getting out in front and acting responsibly can undercut and reduce the potential for punitives. … Our story is not a good one, we continued to increase our emissions into the river in spite of internal commitments to reduce or eliminate the release of this chemical into the community and the environment because of our concern about the biopersistence of this chemical.

Blecher Aff. at Ex. 67. DuPont nevertheless resisted C-8 disclosures[5] and any community blood testing or water treatment/clean-up efforts over the next several years, even as litigation slowly revealed the C-8 contamination and cover-up to the impacted communities near the WV Plant:

4/8/01 Email from DuPont In-House Counsel Bernie Reilly:

> Noose tightening on my favorite case, one of the Engineering mags has an April cover story "More Worry about Perfluorinated Chemicals", that would be both Scotchgard and the material 3M sells

[5] DuPont even sought a gag order from the court in *Tennant* to prevent plaintiffs' counsel from disclosing C-8 contamination data to public health authorities. The court refused DuPont's request. *See* Blecher Aff. at Ex. 6 (Reilly email dated 3/27/01 (EID781983))(DuPont's counsel, Bernie Reilly, notes on March 27, 2001 during the *Tennant* case, "Court yesterday did not agree to shut up plaintiff lawyer in our Parkersburg situation and today he [Robert Bilott] testifies [sic] an EPA hearing … A miracle the press has not picked this up yet, I am sure they will. And activists now have a web page for embarrassing company documents, I am sure ours will get there. … I told the clients to settle many moons ago. Too bad they still are in denial and don't think things can get worse, wrong again.").

> us that we poop to the river and into drinking water along the Ohio River.[6]

6/14/01 Email From DuPont In-House Counsel Bernie Reilly:

> Our situation at Parkersburg, WV, only getting worse, we will be in the U.S. News and World report in a couple weeks, and the environmental agencies very concerned about what to say when asked if the stuff we are putting into drinking water is "safe." We say it is, but are viewed as an interested party (rightly).[7]

9/01/01 Email From DuPont In-House Counsel Bernie Reilly:

> [W]e finally have been sued by the people drinking water from the Ohio river by our Parkersburg plant, will be tough one to defend, I do not believe we are hurting anyone, but I sure can't blame people if they don't want to drink our chemicals. The compound … is very persistent in the environment, and on top of that, loves to travel in water and if ingested or breathed wants to stay in the blood, the body thinks it is food, so pulls it from the intestine, the liver then dumps it back to the stomach because it can't break it down, then the intestine puts it right back into the blood.[8]

10/12/01 Email from DuPont In-House Counsel Bernie Reilly:

> Meeting with EPA was to tell them more about the people drinking our surfactant [C-8] from Parkersburg …. EPA … may order that we supply drinking water even if no real risk. A debacle at best, the business did not want to deal with this issue in the 1990s, and now it is in their face, and some still are clueless. Very poor leadership, the worst I have seen in the face of a serious issue since I have been with DuPont.[9]

10/13/01 Email from DuPont In-House Counsel Bernie Reilly:

> I go to Charleston Monday for a meeting Tuesday with WV

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[6] Blecher Aff. at Ex. 6 (Reilly email dated 4/8/01 (EDD0073864)).
[7] *Id.* (Reilly email dated 6/14/01 (EID781984)).
[8] *Id.* (Reilly email dated 9/1/01 (EDD0075341)).
[9] *Id.* (Reilly email dated 10/12/01 (EDD0076764)).

> regulators, we are also trying to convince them there is no emergency. They have drafted an order requiring us to figure out everywhere we have contaminated, to include from our stacks, plus commission a study of the health impacts of this material. … [W]e are exceeding the levels we set as our own guideline, mostly because no one bothered to do the air modeling until now, and our water test has [been] completely inadequate …. I have been telling the business to get out all the bad news, it is nice that we are now consulting with lawyers .. that .. are advising the same strategy. Too bad the business wants to hunker down as though everything will not come out in the litigation, god knows how they could be so clueless, don't they read the paper or go to the movies??[10]

10/20/01 Email from DuPont In-House Counsel Bernie Reilly:

> Drinking water results from the new test method for Parkersburg came in, miraculously less than 1 ppb! Now if the clients will only listen to us on doing free testing and giving away bottled water we might avoid punitive damages.[11]

11/28/01 Email From DuPont In-House Counsel Bernie Reilly:

> The big public meeting in Parkersburg, WV, is tomorrow evening, the plant manager is our speaker, I was on the line for some of the rehearsal, regrettably some of our business folks still are clueless on our vulnerabilities or the power of the agencies to shut us down, but generally they are being brought around as the noose tightens.[12]

1/12/02 Email from DuPont In-House Counsel Bernie Reilly:

> We learned late last week that the water supply in Little Hocking, Ohio, across the river from our Parkersburg plant, has levels of our surfactant [C-8] 7 times higher than our guideline, so that is bad news. … So in addition to all the agencies we have had on our butts, we now have Ohio and another EPA Region, not to mention the

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[10] *Id.* (Reilly email dated 10/13/01 (EDD0076791)).
[11] *Id.* (Reilly email dated 10/20/01 (EDD0077002)). In light of the recent large punitive damage judgment against DuPont arising from similar conduct at another West Virginia site, Mr. Reilly's concern was understandable. *See id.* at Ex. 103.
[12] *Id.* (Reilly email dated 11/28/01 (EDD0078793)).

> 20,000 people who drink the water supplied by Little Hocking with our surfactant [C-8] in it, likely it has been there for at least the last decade.[13]

2/9/02 Email From In-House Counsel Bernie Reilly:

> Public meeting in Little Hocking, Ohio, Monday evening to listen to citizen concerns about drinking our surfactant [C-8]. We should have checked this out long ago, but now our only choice is to share whatever we learn and trying to fix things, best current theory is air deposition from our stacks.[14]

3/18/02 Email From In-House Counsel Bernie Reilly:

> I have been beating on the client to get the word out for a long time, finally wore them down, they sure like to be able to say they were candid, but getting them to be candid when the news is bad is not easy.[15]

B. A Class Was Certified Against DuPont on Virtually Identical Facts Involving DuPont's Contamination of Drinking Water With C-8.

In 2001, following the public disclosure of DuPont's C-8 contamination near its WV Plant, residents brought a class action lawsuit against DuPont in the *Leach* case seeking cleanup of their contaminated drinking water and medical monitoring relief. *See Leach,* 2002 WL 1270121 at *1. When the *Leach* plaintiffs moved the court to certify the case as a class action, the court received extensive briefing of class certification issues and held a hearing in March 2002. DuPont argued (and submitted expert testimony) that class certification in the context of medical monitoring should be denied for lack of common "exposure, risk of contracting a

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[13] *Id.* (Reilly email dated 1/12/02 (EID781989)).
[14] *Id.* (Reilly email dated 2/9/02 (EID781990)).
[15] *Id.* (Reilly email dated 3/18/02 (EID781992)).

latent disease, and existence of a class-wide monitoring procedure capable of detecting disease." Blecher Aff. at Ex. 4 (pp. 2-13). After considering the class certification evidence and argument of the parties, the court rejected DuPont's arguments and entered an Order on April 10, 2002, certifying the *Leach* case to proceed as a class action against DuPont on behalf of "all persons whose drinking water is or has been contaminated with [C-8] attributable to releases from" the WV Plant, and certifying *Rowe* Plaintiffs' counsel to serve as class counsel. *Leach,* 2002 WL 1270121at *1.

C. C-8 Was Found to be Biopersistent, Toxic and Hazardous to Humans by April 2003.

The toxic and hazardous nature of the C-8 now poisoning New Jersey water supplies has been litigated with DuPont for over eight years. Discovery began in 1999 in *Tennant* and continued in *Leach*, involving dozens of depositions and interrogatories and DuPont's production of over a million pages of documents. *See* Blecher Aff. at Ex. 8 (pp. 2-4). By April 2003, the *Leach* plaintiffs had submitted much of this evidence to the court in support of motions for summary judgment and injunctive relief on plaintiffs' medical monitoring and blood testing claims. After reviewing that data, the *Leach* Court held that C-8 "is toxic and hazardous to humans and is bio-persistent, meaning that it is absorbed into and persists in the blood of humans exposed" to C-8. *Id.* at Ex. 9 (p. 2). Thus, those who drink C-8 will accumulate the poison in their blood where it then remains for many years and

builds up to high levels over time. *See id*. at Ex. 114 (pp. 335-336) (DuPont's own epidemiology expert acknowledges that C-8 is "bio-persistent" in humans). The court also entered an injunction ordering DuPont to pay for biomonitoring (C-8 blood testing) for all class members. *Id.*[16]

Fact discovery continued in *Leach,* with three issues even requiring resolution by the West Virginia Supreme Court, s*ee id.* at Ex. 8 (pp. 2-4),[17] and by the summer of 2004, the parties had exchanged extensive expert disclosures from dozens of different experts on the ultimate merits of the case. *See, e.g., id.* at Ex. 10. During the first deposition of one of plaintiffs' experts on August 31, 2004, the expert explained that "the epidemiological and scientific literature . . . indicates . . . that there is a risk of adverse human health effects from exposure to C-8" including "liver disease or liver effects" and "cancers," including "kidney cancer in particular, in those exposed to C-8." *Id.* at Ex. 11 (pp. 78-79). The expert noted "cholesterol abnormalities" that suggested potential cardiovascular implications. *See id.* at Ex. 11 (p. 87). A few days later, before any other experts were deposed, DuPont announced that it had agreed to settle the *Leach* case.[18]

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[16] The injunction was later overturned because of an alleged lack of written notice to DuPont of the motion.

[17] One issue was the extent to which documents confirming DuPont's cover-up of C-8 water contamination would be made public. The Supreme Court of Appeals allowed the release of that information in May 2004. *See, e.g., id.* at Ex. 5; s*ee also id*. at Exs. 67-69 (documents released by the West Virginia Supreme Court).

[18] Later discovery revealed that DuPont had learned prior to the deposition that its

D. In 2005, DuPont Announced That Providing a Common Clean Drinking Water/Water Treatment and Potential Future Medical Monitoring Program Was the Reasonable, Science-Based Way to Resolve Claims of Individuals Exposed to C-8 In Drinking Water.

On September 9, 2004, DuPont and the *Leach* plaintiffs publicly announced a settlement under which DuPont would address future medical monitoring claims and provide clean drinking water for all of the public and private water supplies near DuPont's WV Plant that were known at that time to be contaminated with C-8. *See Blecher Aff.* at Ex. 14. To insure the efficient implementation of the settlement, the parties agreed on a refined class definition[19] and created the plan eventually used to notify the approximately 70,000 class members. *See id.* at Exs. 8, 15-16. The jointly-prepared plan successfully notified tens of thousands of *Leach* class members using water company customer lists and private well records with no significant objections, and the settlement was approved in a fairness hearing on February 28, 2005. *See id.* at Ex. 16. The jointly developed class definition, notice plan, and judicially-approved settlement process resulted in

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own study had found "abnormal" affects on various serum lipids among employees exposed to C-8. *See id.* at Ex. 12; Ex. 51 (pp. 70-74 (Ex. 18)). DuPont also had just learned that similar, abnormal affects on serum lipids had been confirmed in Italian workers exposed to C-8. *See id.* at Ex. 13; Ex.51 (pp. 74-81).

[19] In 2003, the *Leach* court had defined water as "contaminated" with C-8 within the *Leach* class definition if it had "quantifiable" levels of C-8. *See id.* at Ex. 7 (p. 4). The parties later clarified that "quantifiable" meant above the then-existing laboratory quantification level of 0.05 ppb C-8, and specified which public and private water supplies had tested at or above 0.05 ppb C-8. *See id.* at Exs. 8, 15-16. Among the water supplies included within the *Leach* settlement was one where C-8 had been quantified at only 0.06 ppb. *See id.* at Exs. 15 and 18.

approximately 70,000 *Leach* class members receiving biomonitoring and diagnostic blood tests to determine (1) the levels of C-8 and other perfluorochemicals ("PFCs") in their blood; and (2) whether there are any indications of the onset of any disease.[20]

DuPont also agreed to implement a common procedure for addressing any future medical monitoring[21] deemed medically appropriate for any of the tens of thousands of class members. As part of this common medical monitoring approach, DuPont committed to set up a panel of three independent scientists (the "Science Panel") charged with determining for the entire class which C-8-related adverse health effects require medical monitoring, *see id.* at Exs. 8 (Ex. 1 at 22-27) and 15-17, and a separate panel of independent medical experts (the "Medical Panel") to design a specific medical monitoring program for the class. *See id.*

E. C-8 Was Found In New Jersey Drinking Water Only Months After Final Approval Of The *Leach* Settlement.

On March 3, 2006, a New Jersey newspaper first reported that C-8 had been found in PGWS tap water at levels between 0.04 ppb and 0.06 ppb. *See* Blecher Aff. at Exs. 58 and 71. In response, NJDEP asked DuPont to sample for C-8 in

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[20] Under the settlement, DuPont has designed and provided "state of the art" water treatment systems for the public and private water supplies in West Virginia and Ohio with C-8 at or above 0.05 ppb and has arranged for bottled water for customers of at least one of those public water systems where construction of the water treatment system was delayed. *See id.* at Ex. 17.

[21] Blood testing for C-8 also was provided under the *Leach* settlement for all the approximately 70,000 Class members. *See id.* at Ex. 16.

water discharged from the NJ Plant, because such sampling was "important to protect public safety and the environment." *Id.* at Ex. 72. Follow-up testing of PGWS supply wells confirmed even higher C-8 levels, up to 0.190 ppb. *See id.* at Exs. 73, 74 and 78.[22] In 2007, NJDEP requested that PGWS conduct additional sampling for C-8 in its water supply, and PGWS asked DuPont to accept responsibility for such costs. *See id.* at Ex. 75-76. DuPont eventually agreed to pay those costs. *See id.* at Ex. 77.[23] Additional testing by *Rowe* Plaintiffs' counsel of PGWS tap water at the homes of Plaintiff Rowe and former Plaintiff D'Agostino revealed C-8 levels of 0.041 ppb (Rowe) and 0.066 ppb (D'Agostino), while private water well tests at the homes of Plaintiff Carter and Plaintiff Tomarchio revealed C-8 levels as high as 0.326 ppb (Carter) and 0.041 ppb (Tomarchio). *See id.* at Ex. 109. Extensive testing by NJDEP has not revealed any other public water systems or private water supply wells in New Jersey with C-8 levels above 0.04 ppb. *See id.* at 78.

Only months after DuPont publicly announced the program to provide clean water and potential medical monitoring for the communities surrounding its WV Plant with more than 0.05 ppb C-8 in their drinking water, DuPont inexplicably

[22] *See also id.* at Exs. 60 (DuPont's response to RFA 1) and 99 (DuPont's response to RFAs 21-23).

[23] This is not surprising, given that DuPont admits it cannot identify any other specific source for the C-8 in the drinking water at issue. *See id.* at Ex. 82 (DuPont response to RFAs. 32-37), 99 (DuPont response to RFAs 1-5), 100 (DuPont response to Interrog. 2), and 101 (DuPont response to Interrogs. 1-2).

refused to extend those same benefits in New Jersey when the same contamination (at levels even higher than the 0.05 ppb trigger for benefits in West Virginia and Ohio) was found in PGWS wells, PGWS tap water, and private wells.[24] DuPont's refusal to extend such benefits has persisted, even after NJDEP announced in February 2007 its initial safety guideline for C-8 of no more than 0.04 ppb in human drinking water. *See id.* at Exs. 41 and 79-81. Yet, even DuPont's own expert believes that "the effort should be made to have the exposure to the lowest level achievable." *Id*. at Ex. 114 (Buffler Depo., pp. 335-38).

DuPont has chosen, instead, to enlist the help of its well-connected consultants to lobby federal and state regulators and elected officials to support its new claim that it is unnecessary to address C-8 levels in drinking water even above the 0.05 ppb level justifying the clean water/water treatment and other benefits in West Virginia and Ohio or the 0.04 ppb safety guideline New Jersey's own State scientists selected.[25] In particular, rather than addressing DuPont's contamination

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[24] *See id.* at Ex. 79-81, 92 (pp. 122-125, 129-133) (PGWS representative Gary Ziegler confirms DuPont has refused repeated demands by PGWS to install carbon filtration systems at PGWS well sites).

[25] *See id.* at Exs. 24 (pp. 53-58, 62-65, 78-80, 88-98, 122-123, 126-137, 140-147, 150-155, 159-160, 165-170, 174-181, 184-249, 256, 262-264 and Depo. Exs. 7, 9, 11-13, 15, 18, 21-22, 28-31, 34-37, 39-40, 42-43, 45-47, 48-56 and 59-60 cited therein) and 83. *See also id.* at Exs. 103-104 (reflecting DuPont's earlier efforts to influence West Virginia's medical monitoring laws).

DuPont even hired former high-ranking USEPA officials to help influence USEPA's position and public statements on C-8 and its "safety." *See, e.g., id.* at Ex. 24 (pp. 35-37, 39-45, 88-98, 101-106, 126-130, 178-181, and 184-186 and

of water supplies in excess of the 0.04 ppb C-8 safety level, DuPont has been trying to pressure NJDEP to raise the guideline to a level above the levels found to date in New Jersey.[26]

DuPont's actions in this respect have been fully consistent with the overall C-8 strategy created almost five years ago by its consultant, The Weinberg Group:

> The constant theme which permeates our recommendations on the issues faced by DuPont is that DUPONT MUST SHAPE THE DEBATE AT ALL LEVELS. We must implement a strategy at the outset which discourages governmental agencies, the plaintiffs bar, and misguided environmental groups from pursuing this matter any further than the current risk assessment contemplated by the Environmental Protection Agency (EPA) and the matter pending in West Virginia. We strive to end this now. … [T]he threat of expanded litigation and additional regulation by the EPA has become acute. In response to this threat, it is necessary for DuPont to prepare an overall technical and scientific defense strategy … to take control of the ongoing risk assessment by the EPA, looming regulatory challenges, likely litigation, and almost certain medical monitoring hurdles. The primary focus of this endeavor is to strive to create the climate and conditions that will obviate, or at the very least, minimize ongoing litigation and contemplated regulation relating to [C-8]. … This battle must be won in the minds of the regulators, judges, potential jurors, and the plaintiff's bar. The recent certification by numerous federal courts of medical monitoring classes as well as the organization, sophistication, and financial strength of the plaintiff's bar require an aggressive, relentless strategy be implemented and driven by the manufacturers. Manufacturers must be the aggressors.

Depo. Exs. 18, 21-22, 30-31, 46-47 cited therein) (references DuPont's hiring of former USEPA officials, Linda Fisher, Michael McCabe, and Peter Robertson). EPA scientists have voiced concern over inappropriate political interference at the Agency. *See id*. at Exs. 110-112. That political pressure is suspected of impeding EPA's final assessment of C-8 risks. *See id*. at Exs. 115 (pp. 28-29) and 116.

[26] *See, e.g., id.* at Exs. 24 (pp. 113-114, 240-249, 256, 263-264 and Depo. Exs. 62-65) and 87.

Id. at Ex. 83 (attached letter from The Weinberg Group to DuPont dated 4/29/03) (emphasis in original). DuPont's counsel has paid for The Weinberg Group's services, including setting up alleged "expert panels" on C-8 issues, for years. *See id.* at Ex. 24 (Exs. 11-13, and 15). The activities of The Weinberg Group and the American Chemistry Council and its "experts" are now under Congressional investigation. *See id.* at Exs. 83-86.[27]

F. *Rowe* Plaintiffs Seek *Leach*-Type Injunctive and Equitable Relief for Those with Elevated C-8 Levels in Their Drinking Water.

In April 2006, *Rowe* Plaintiffs filed this lawsuit seeking the same type of clean water and monitoring benefits in New Jersey that DuPont agreed to provide to the communities surrounding its WV Plant with virtually identical C-8 drinking water issues. Each of the *Rowe* Plaintiffs understand that they are pursuing these common equitable and injunctive clean water/water treatment claims on behalf of all PGWS customers and specified private well users; and that they are not seeking to recover money damages for the proposed Class. *See* Affidavits of Rowe Pls in Support of Rowe Pls' Mot. for Class Cert. ("*Rowe* Affidavits") (being filed contemporaneously herewith and incorporated herein by reference).

Each of the *Rowe* Plaintiffs is either a residential water customer of PGWS or owner of a private well specified on Exhibit A hereto and has been for at least

[27] Even DuPont's own former employees have complained to federal regulators about DuPont's corporate cover-ups. *See, e.g., id.* at Exs. 106-107.

one year since C-8 was first publicly reported to be present in area drinking water on March 3, 2006. *See id.* *Rowe* Plaintiffs have confirmed their desire to represent the prospective class members in their common claims and have already sacrificed substantial time and personal privacy to pursue those claims on behalf of the proposed Class. *See id.* Each *Rowe* Plaintiff has been active in the litigation to date and is committed to remain so throughout the course of this litigation. *See id.*

Each *Rowe* Plaintiff has submitted to blood testing and invasive medical testing by DuPont, provided extensive data in response to DuPont's written discovery, and participated in lengthy depositions. *See id.* *Rowe* Plaintiffs have retained counsel who represented plaintiffs in the *Tennant* and *Leach* actions against DuPont, which resulted in the class-wide *Leach* settlement.

G. New Jersey Water Users Are Entitled to the Same Clean Water/Water Treatment and Monitoring/Testing Benefits That DuPont Provided Under *Leach*.

From the beginning of this case, *Rowe* Plaintiffs have noted that this case is essentially the same as the *Leach* case and that DuPont is wasting judicial resources by forcing relitigation of the same issues that have already been litigated in West Virginia courts for years. DuPont has repeatedly insisted, however, that there are significant factual and legal differences that required protracted fact and expert discovery in this forum before this Court even considered whether to allow New Jersey water users' claims to proceed against DuPont as a class. *Rowe*

Plaintiffs (and this Court) were, therefore, forced to endure well over a year of very expensive and contentious additional discovery, including review of *hundreds of thousands* of new documents totaling almost *3 million* pages, to try to learn what allegedly new and changed facts invalidated the science-based settlement approach in *Leach* that DuPont told the world was the reasonable and appropriate way to resolve these issues for similarly-impacted communities.

After a year of additional discovery, new evidence has only underscored the appropriateness of the relief agreed upon in *Leach*. Scientific, regulatory, and factual developments since the *Leach* settlement was announced in September 2004 have significantly elevated the level and urgency of concern about the toxicity of C-8 and its effects on humans exposed to C-8 in their drinking water:

- 12/6/04 – USEPA filed a Complaint against DuPont confirming that "EPA has identified potential human health concerns from exposure to [C-8]" and that EPA believes data showing levels of C-8 in the blood of residents exposed to C-8 in their drinking water "reasonably support[s] the conclusion of the substantial risk of injury to health or the environment." *See* Blecher Aff. *at* Ex. 28 at ¶ 10-39.

- 1/11/05 – DuPont publicly announced the results of its own study of employees exposed to C-8 at its WV Plant, which showed effects on cholesterol, triglycerides, uric acid, and iron. *See id.* at Ex. 29.

- 5/19/05 – DuPont publicly announced that it had been served with a subpoena by the U.S. Department of Justice's Environmental Crimes Section seeking C-8 information as part of a criminal investigation. *See id.* at Ex. 30.[28]

- 8/05 – University of Pennsylvania researchers announced that C-8 appears to

[28] The DOJ recently announced that it has suspended its investigation.

accumulate to the highest levels in the blood of the youngest children and the elderly exposed to C-8 in drinking water, urging parents on C-8-contaminated drinking water to use alternative drinking water supplies or bottled water, and advises pregnant women or women of child bearing age who may wish to become pregnant to avoid such C-8-contaminated water. *See id.* at Ex. 31.[29]

- 12/05 – DuPont agreed to pay a record $16.5 million to settle USEPA's claims that DuPont failed to report C-8 drinking water contamination and human health effects data. *See id.* at Ex. 32.

- 12/05 – A West Virginia Department of Health cancer study in areas with C-8-contaminated drinking water found increased rates of "some cancers previously hypothesized to be associated with [C-8] exposure." *See id.* at Ex. 33.

- 1/06 – A USEPA Science Advisory Board Panel issued a draft report recommending C-8 be labeled a "likely" human carcinogen. *See id.* at Ex. 34.

- 1/06 – DuPont announced it would phase out its use and production of C-8. *See id.* at Ex. 35; Ex. 54 (p. 2).

- 3/06 – USEPA proposed regulations prohibiting the future use and manufacture of materials related to C-8, citing concerns with the persistent, bio-accumulative, and toxic nature of the materials. *See id.* at Ex. 36.

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[29] Although these researchers reported that they did not find associations between C-8 exposure in drinking water and certain specific health effects among the very small group of individuals studied, they noted that they did not incorporate within the scope of the study some of the key health effects of concern with C-8 exposure, such as cancer and developmental effects. *See* Blecher Aff. at Exs. 31 and 87. NJDEP acknowledged these same fundamental limitations to the usefulness of the University of Pennsylvania study when DuPont tried unsuccessfully to spin the results of the study to NJDEP last year as proof of "no harm." *See id.* at Ex. 87.

Moreover, since this limited study of only a few hundred individuals several years ago, extensive C-8 blood test data and health-related information has been collected from approximately 70,000 individuals exposed to C-8-contaminated drinking water under the *Leach* settlement. This data will be used by the *Leach* Science Panel in a much more extensive, more comprehensive series of health studies. The results of that massive data collection effort are only now becoming available. *See id.* at Ex. 88; *see also id.* at Ex. 89.

- 5/30/06 – USEPA's Science Advisory Board approved a final report recommending C-8 be labeled a "likely" human carcinogen. *See id.* at Ex. 37.

- 7/06 – The Ohio Department of Health and Federal Agency for Toxic Substances Disease Registry ("ATSDR") issued guidance advising doctors with patients exposed to C-8 in their residential drinking water to recommend alternate drinking and to recommend against using such C-8-contaminated water to prepare infant formula. *See id.* at Ex. 38.

- 11/06 – USEPA noted in a Consent Order with DuPont that new C-8 studies have raised a "concern for public health" and that C-8 may "present an imminent and substantial endangerment to human health" at elevated drinking water levels. *See id.* at Ex. 39.

- 12/1/06 – Ohio EPA listed C-8 has a "toxic" air pollutant, noting that C-8 is a "possible human carcinogen and . . . is acutely or chronically toxic, causing liver damage." *See id.* at Ex. 40.

- 2/12/07 – NJDEP issued a guideline of no more than 0.04 ppb for C-8 in human drinking water. *See id.* at Ex. 41.

- 4/07 – DuPont disclosed results of studies on workers exposed to C-8 at its WV Plant revealing additional effects on serum lipid, calcium, and potassium, along with effects on reproductive hormone levels. *See id.* at Ex. 42.

- 4/07 – Minnesota's Department of Health ("MDH") declared C-8 "toxic" and determined that it "presents a present or potential hazard to human health" in human drinking water. *See id.* at Ex. 43.

- 6/07 – A study was released confirming adverse effects between C-8 exposure in 3M Company workers and serum lipids, liver enzymes, and certain thyroid hormones. *See id.* at Ex. 44.

- 7/07 – A Johns Hopkins University study confirmed adverse associations between low level C-8 exposure and human infant birth weight, ponderal index, and head circumference. *See id.* at Ex. 45.

- 8/07 – DuPont published a study confirming adverse effects on cholesterol and liver enzymes among C-8-exposed workers. *See id.* at Ex. 46.

- 8/07 – A Danish study confirmed adverse effects on birth weight of human infants exposed to low levels of C-8. *See id.* at Ex. 47.[30]

- 8/07 – MDH issued formal regulations for levels of C-8 in drinking water, noting liver, developmental, and immune system effects. *See id.* at Ex. 48.

- 9/07 – DuPont published an additional study confirming increased rates of death from diabetes, kidney cancer, and heart disease among employees exposed to C-8 at its WV Plant. *See id.* at Ex. 49.

- 2/08 – 3M released a University of Minnesota study confirming significantly elevated rates of death from prostate cancer, stroke, and diabetes among 3M workers exposed to C-8. *See id.* at Ex. 90.

- 2/08 – USEPA added C-8 to its draft list of priority chemicals for regulation under the federal Safe Drinking Water Act based on its finding, after evaluating "[a]dverse health effects associated with infants, children, pregnant women, the elderly, and individuals with a history of serious illness," that C-8 may occur in public drinking water systems "at levels of public health concern" and "regulation of such contaminant presents a meaningful opportunity for health risk reduction." *See id.* at Ex. 113 (pp. 9629-30, 9633 and 9652).

In light of these developments, it is not surprising that DuPont does not now dispute that there are associations between C-8 exposure and adverse health effects in humans. DuPont's awareness of these associations was confirmed in a deposition of DuPont's corporate epidemiologist in charge of the company's human health studies on C-8 and in a deposition of the Chair of DuPont's outside "Epidemiology Review Board ("ERB")," which is charged with advising DuPont

[30] *See also id.* at Ex. 50 (later adverse health effects linked to early developmental effects in humans).

on the interpretation and significance of developing human health data on C-8.[31] DuPont formally admitted its awareness of such associations during its Rule 30(b)(6) deposition[32] and in its responses to requests for admission in this case.[33] As recently as January 14, 2008, DuPont even publicly acknowledged that C-8 "has been associated with small increases in some lipids (*e.g.* cholesterol)" in C-8-exposed humans. *Id.* at Ex. 54 (p. 4).

DuPont has nevertheless served a slew of lengthy and duplicative[34] reports from an army of outside "experts" who apparently are prepared to argue to this Court that those same health effects do not exist and that no one drinking C-8 is at any risk of developing those adverse effects. Not surprisingly, Plaintiffs have disclosed that they also have retained experts who will be prepared to refute

[31] *See id.* at Exs. 51 (pp. 48-56, 70-86, 98-100, 111, 125-141, 147-148, 172-173, 191-193, 198-199, 234-237, 254-255, 284-288, 294) (and exhibits cited therein) and 52 (pp. 15, 27, 32-35, 74-84, 99-104, 106-129, 135-136, 139-142, 145-153, 158-168, 186-193, 198-199, 209-213) (and exhibits cited therein); *see also id.* at Ex. 114 (pp. 112-113) (DuPont class certification expert epidemiologist acknowledging "associations" between C-8 exposure and various human health effects).

[32] *See id.* at Ex. 53 (pp. 29-30, 75-80, 92-93, 96-97, 115-120, 122, 126-128).

[33] *See id.* at Ex. 82 (DuPont's response to RFAs 53-58, 63-66, and 69-72).

[34] *See id.* at Ex. 70. After one of DuPont's proposed experts, Dr. Elizabeth Anderson, was recently disqualified from testifying for DuPont in the similar *Rhodes* litigation against DuPont in West Virginia, *see id.* at Ex. 91, DuPont chose not to serve a report from Dr. Anderson in this case. Dr. Anderson, like DuPont's consultant The Weinberg Group, is now within the scope of a Congressional investigation relating to the chemical industry's use of paid "experts" to spin the "science" to government agencies evaluating health risks to the public of exposure to chemicals. *See id.* at Exs. 83-85. DuPont's own counsel acknowledged DuPont's efforts to "spin" the science in this case. *See id.* at Ex. 66 (p. 55).

DuPont's claims in this regard at trial on the merits.[35] Nevertheless, these issues are precisely what DuPont agreed should be resolved on a common, unified basis for all affected water customers through the Science Panel established under the *Leach* settlement. In the meantime, DuPont's own ERB has strongly cautioned DuPont to stop claiming that there are no adverse health effects associated with C-8 exposure[36] because recent scientific developments provide sufficient data to "question the evidential basis of DuPont's public expression asserting that [C-8] does not pose a risk to health." *Id.* at Ex. 57.[37]

II. ARGUMENT

A. *Rowe* Plaintiffs Propose a Practicable Class Definition.

Rowe Plaintiffs have proposed a class of "all individuals who, for a period of at least one year since March 3, 2006, to the date of an Order certifying the class

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[35] *Rowe* Plaintiffs have served preliminary expert reports from Dr. David Gray and Dr. Barry Levy. *See id.* at Exs. 55 and 56. These reports relate to the ultimate merits of *Rowe* Plaintiffs' claims and are not necessary to support any element of the Rule 23 class certification analysis. *Rowe* Plaintiffs have provided those reports now simply to show that they will have experts available to testify on such issues, including the common significant risk of harm to the proposed Class members and the need for a common blood testing and medical monitoring program based on particular health effects, at trial at the merits stage.

[36] Although discovery in this case has now revealed that DuPont's own ERB told DuPont back in March 2006, not to make such misleading statements, *see id.* at Ex. 57, DuPont's counsel stood before this Court during a July 13, 2007, hearing concerning DuPont's misleading communications to the public on the exact same issue and represented to the Court that "there is no evidence of any adverse health effects" from C-8. *See id.* at Ex. 66 (pp. 56-58).

[37] *See also id.* at Exs. 51 (and attached exhibits) and 52 (and attached exhibits).

herein, either have been residential water customers of PGWS or have had residential drinking water supplied by one of the private water wells listed on Exhibit A hereto." This Class satisfies even the most rigid definitional requirements for certification – it specifies an identifiable group (individuals whose residential drinking water was supplied by either PGWS or specified private wells), time (at least one year between March 3, 2006, and the date of class certification), location (PGWS service area and the three private well locations), and avenue of exposure (through their residential water supply), and, in doing so, facilitates the court's ability to objectively ascertain membership. *See Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D 471, 477 (S.D. Ohio 2004) (approving class of individuals owning or residing on property deriving its water from a municipal water system).

The Class is not defined in a way that requires any impermissible assessment of individual Class member dose or exposures. As explained by NJDEP's own C-8 experts, the nature and extent of potential risks of adverse health effects to entire communities exposed to a chemical in their drinking water is evaluated through standard, well-accepted risk assessment methods. *See, e.g.,* Blecher Aff. at Exs. 41 and 87; s*ee also id.* at Ex. 55. Because there are always going to be variations in the age, sex, weight, medical history, water consumption patterns, etc. among community water customers, this standard risk assessment method has been

specifically developed (and used for decades) to account for and address all of these potential "individual" variations within the community through the use of certain well-accepted, common variables (referred to as 'default values" and "uncertainty factors") that adjust the risk assessment calculations appropriately to capture all of these potential variations. *See id.* Through this standard risk assessment process, the risk assessor determines what particular level of the chemical in the community's drinking water presents an unreasonable or significant risk of harm to all members of the community, without any need to assess individual consumption patterns, medical histories, or internal dose levels. *See id.*[38] Through this process, NJDEP's scientists selected 0.04 ppb as its current safety guideline for C-8 in drinking water, thus allowing significant risk of harm to those exposed to C-8 in their water to be assessed on a common basis by focusing only on the level of C-8 in the drinking water. *See id.* at Exs. 41, 55, and 87.[39]

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[38] *See also id.* at Exs. 39 and 48 (reflecting similar risk assessment process/method followed by USEPA, the Minnesota Department of Health, and the State of North Carolina in evaluating community-wide health risks from C-8-contaminated drinking water on a common, community-wide basis).

[39] As explained by NJDEP, the presence of C-8 in drinking water necessarily will result in the build up of C-8 in the blood of the people drinking that water, because of the biopersistent and bioaccumulative nature of the chemical. *See, e.g., id.* at Ex. 87 (pp. MCCABE08168) ("PFOA levels in water significantly above the guidance level would result in blood levels above the levels typically seen in the general population. For every 0.01ppb reduction of the drinking water concentration, a decrease of approximately 1 ppb in the blood level is expected."). *See also id.* at Ex. 6 (Reilly email dated 9/1/01 (EDD0075341)). Thus, the NJDEP's 0.04 ppb C-8 safety level incorporates and accounts for the common risk

Given that NJDEP's 0.04 ppb safety guideline for C-8 in drinking water derived from this standard risk assessment process already incorporates water exposure and internal blood level considerations, *Rowe* Plaintiffs are proposing a Class definition that simply focuses on whether the potential Class members have received drinking water from the PGWS or the private wells listed on the attached Exhibit A – sources where C-8 has been detected above the NJDEP's 0.04 ppb safety guideline. Because, to *Rowe* Plaintiffs' knowledge, these are the only drinking water sources in New Jersey falling within that category, *Rowe* Plaintiffs have defined the Class based on use of those water supplies.

DuPont helped draft and agreed to a more complicated class definition in *Leach*. *See id*. at Exs. 8, 15, and 16. That class was defined as individuals who, for at least one year, had consumed drinking water containing 0.05 ppb or greater of C-8 attributable to releases from the WW plant that they received from any of six specified water districts or specified private water source that was the individual's sole source of drinking water at that location. *See id*. The proposed Class definition in this case removes qualifiers found in the *Leach* definition, including a level of C-8 and an attribution of releases to a DuPont plant; these are common liability questions properly addressed on the merits at trial. The proposed Class is ascertainable through the PGWS's customer records and *Rowe* Plaintiffs'

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arising from the internal dose to blood that will result from the community's exposure to C-8 in their drinking water above 0.04 ppb. *See id.*

private well documentation and is amenable to effective notice to Class members through the same type of notice program that DuPont helped create and implement in *Leach*. *See* Blecher Aff. at Ex. 92 (p. 48) (testimony from PGWS regarding ability to identify water customers from billing records).

B. *Rowe* Plaintiffs' Class Satisfies the Rule 23 Requirements.

For purposes of class certification, *Rowe* Plaintiffs need only satisfy the four elements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and fall within one of the categories in Rule 23(b). Fed. R. Civ. 23(a), (b); *Stewart v. Abraham*, 275 F.3d 220, 226 (3d Cir. 2001); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Plaintiffs are not required to prove the underlying merits of any claims as part of the class certification process. *See Chiang v. Veneman*, 385 F.3d 256, 262 (3d Cir. 2004) ("it is not necessary for the plaintiffs to establish the merits of their case at the class certification stage"). A court's analysis does not focus on whether a plaintiff will prevail on the merits of any substantive aspect of the plaintiff=s claims, but only on whether the procedural requirements of Rule 23 are met. *See Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 177 (1974) ("nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Florence v. Board of Chosen Freeholders of County of Burlington*, 2008 WL 800970, *6

(D.N.J. 2008) (attached to Blecher Aff. at Ex. 93) ("In considering whether certification is proper, courts refrain from inquiring into the merits of the action and accept the substantive allegations in the complaint as true.") (citing *Eisen*, 417 U.S. at 177-78); *Chiang*, 385 F.3d at 262 (same).

Further, courts in the Third Circuit give Rule 23 a liberal construction: "the interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing a class action." *In re Prudential Ins. Co. of Am. Sales Practices Litig*. ("*Prudential*"), 962 F. Supp. 450, 508 (D.N.J. 1997) (quoting *Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3d Cir. 1985)); *Florence*, 2008 WL 800970 at *6; *see also Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968). As this Court previously indicated, consistent with this approach, *Rowe* Plaintiffs are not required to prove that the C-8 in the water is actually "injurious to one's health" at the class certification stage – *Rowe* Plaintiffs need only present some colorable argument that it is toxic. Blecher Aff. at Ex. 59 (13:2-12); *see also Leach,* 2002 WL 1270121 at *8.

Rowe Plaintiffs have presented more than a sufficient basis for finding that the C-8 in the Class' drinking water is toxic. The only court to date to have considered evidence on C-8 toxicity held that "C-8 is toxic and hazardous to humans." Blecher Aff. at Ex. 9 (p. 2). Federal and state regulators have consistently warned over the last several years that C-8 is "toxic" and may present

an "imminent and substantial endangerment" to human health when present in drinking water. *See supra* text at 22-25 (and citations therein).[40] DuPont even admits that C-8 can be toxic to humans. *See, e.g.,* Blecher Aff. at Ex. 60 (DuPont response to RFAs 18-21) ("toxicology studies have demonstrated that [C-8] … can be toxic at the relevant does for a particular species").

As indicated above, the parties have disclosed over a dozen different experts who will be available to debate at trial the ultimate merits of the nature and extent of C-8's toxicity and the resulting need for clean water/water treatment and biomonitoring/medical monitoring for those exposed to the poison in their water, if and when resolution of such issues by this Court ever becomes necessary. *See supra* text, at 26-27 (and citations therein).

Determination of any disputed merits issues is, however, inappropriate and unnecessary at this time. *See Bentley*, 223 F.R.D at 479 ("The fact that Defendants' expert disagrees with Plaintiffs' expert … is neither surprising nor relevant. Such merit-based arguments are inappropriate at the class certification stage of the litigation. At this stage, the Court should not delve into the merits of an expert's opinion or indulge in 'dueling' between opposing experts."). Any dispute as to the scientific links between C-8 and human disease or the resulting

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[40] Agencies and independent scientists have advised parents not to let their children drink C-8-contaminated water and to not use such water for infant formula. *See id.* One state is even funding community-wide blood testing for those exposed to C-8-contaminated water. *See id.* at Ex. 48.

need for monitoring is a common issue for each putative class member and goes directly to the merits of *Rowe* Plaintiffs' claims.

1. Certification of the Class is Appropriate Under Rule 23(a).

Rule 23 provides for certification of a class action where (1) the class is so numerous that joinder of all members is impractical (the "numerosity" requirement); (2) there are questions of law or fact common to the class (the "commonality" requirement); (3) the claims or defenses of the represented parties are typical of those of the class (the "typicality" requirement); (4) the represented parties will fairly and adequately protect the interest of the class (the "adequacy" requirement); and at least one of the three potential bases for seeking class relief set forth in Rule 23(b) exists. Fed. R.Civ. P. 23(a), (b); *Baby Neal*, 43 F.3d at 55.

a. **The Proposed Class Satisfies the Numerosity Requirement of Rule 23(a)(1).**

The "numerosity" requirement of Rule 23(a)(1) "requires that the class be so numerous that joinder of all members is impracticable." *Florence*, 2008 WL 800970 at *6. "Impracticability does not mean impossibility but only the difficulty or inconvenience of joining all members of the class." *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 406 (D.N.J. 1990). While no minimum number of plaintiffs is required, "generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart*, 275 F.3d at 226-27.

Rowe Plaintiffs' proposed Class includes all individuals who, for a period of at least one year from March 3, 2006, to the date of an Order certifying the class herein, either have been residential water customers of PGWS or whose residential drinking water is supplied by one of the private wells listed on Exhibit A attached hereto. DuPont does not dispute that the PGWS has been serving several thousand residential water customers since C-8 was first identified as being present in the water supply on March 3, 2006. *See, e.g.,* Blecher Aff. at Ex. 92 (p. 25) (PGWS deposition). The proposed Class numbers in the thousands and easily satisfies the numerosity requirement.

b. **The Proposed Class Satisfies the Commonality Requirement of Rule 23(a)(2).**

Commonality only requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. "Because the requirement may be satisfied by a single common issue, it is easily met." *Id.*; *Chiang*, 385 F.3d at 265 (commonality "not a high bar").[41] Further, "commonality does not require that members of the class share identical claims." *Florence*, 2008 WL 800970 at *7;

[41] *See also Rosario v. Livaditis,* 963 F.2d 1013, 1017-18 (7th Cir. 1992) ("common nucleus of operative fact" sufficient); *Jenkins v. Raymark Indus., Inc.,* 782 F.2d 468, 472 (5th Cir. 1986) ("threshold of 'commonality= is not high," it "requires only that resolution of common questions affect all or a substantial number of the class members").

Baby Neal, 43 F.3d at 56 ("We underscore at the outset, however, that neither of these requirements [commonality nor typicality] mandates that all putative class members share identical claims, and the factual differences among the claims of the putative class members do not defeat certification."). "The simple question is whether there are issues common to all class members." *Yslava v. Hughes Aircraft & Co.*, 845 F. Supp. 705, 712 (D.Ariz. 1993). In cases where a group of people are injured by a defendant's policies or practice, commonality is readily found. *See Florence*, 2008 WL 800970 at *7 ("an allegation that the defendant's overall policy injured the plaintiffs satisfies the commonality requirement."); *Prudential,* 962 F. Supp. at 511 (defendant's common course of conduct toward plaintiffs satisfies commonality).

In cases arising from a chemical release, commonality is readily found based on the defendant's conduct in causing the release. *See, e.g., Yslava*, 845 F. Supp. at 713 (for medical monitoring claims, "proof of an exact or individual amount of exposure or particular risk level is not necessary. The core issues of liability and exposure are common to all class members. Commonality among the members exists notwithstanding certain factual variations.").[42] In addition, where there is

[42] *See also Meyer ex rel. Coplin v. Fluor Corp*., 220 S.W.3d 712, 719 (Mo. 2007); *Perrine v. E.I. duPont de Nemours & Co*, No. 04-C-296-2, slip op. at 28, 30 (W.Va. Cir. Ct. Sept. 14, 2006) ("[t]he presence of common issues is virtually axiomatic in mass toxic tort cases, for the very circumstance giving rise to liability, i.e., the release of hazardous material, is one which by definition affects all class

common, community-wide exposure to a toxic chemical, medical monitoring provides a common, community-wide remedy. *See Ayers v. Jackson Twp.*, 525 A.2d 287, 314 (N.J. 1987) (recognizing benefits of medical monitoring program in mass exposure case: "[t]he public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure").

This case contains an abundance of common factual and legal issues, including DuPont's tortious release of C-8 from its NJ Plant, contamination of PGWS and private residential well water resulting in significant Class-wide exposure, the hazardous nature of C-8, the increased risk of disease from exposure, the availability of biomonitoring and medical monitoring for diseases linked to C-8 exposure, DuPont's obligation to cease releasing C-8, and DuPont's obligation to remediate the contaminated water supply. In the virtually identical *Leach* case, DuPont itself argued that certain key, underlying common issues relating to the "potential toxicity and environmental impact of [C-8] . . . and the potential exposure of nearby residents to C-8" were so pervasive and fundamental to resolution of similar claims that the entire case should have been stayed pending a "resolution" of those common issues by State administrative agencies.[43] DuPont

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members") (attached to Blecher Aff. at Ex. 62); *Leach,* 2002 WL 1270121 at *9-11; *Foust v. Southeastern Penn. Transp. Auth.*, 756 A. 2d 112, 120-121 (Pa. Comm. Ct. 2000) (medical monitoring class certified despite individual issues).

[43] *Leach*, 2002 WL 1270121 at *10 (DuPont argued that *Leach* class claims were a single "toxic tort" claim that when reduced "to its essence, … is a 'medical

insisted that common issues of "risk of human health and the environment from C-8 exposures or releases" are "central to this lawsuit" and "resolution of the technical issues associated with exposure to and releases of C-8" and all "other such technical and complex issues raised by Plaintiffs' Complaint" are common underlying issues affecting resolution of the claims of all Class members.[44] When pressed by the *Leach* court, DuPont's counsel, Larry Janssen, eventually conceded the common nature of the claims in open court:

> The Court: There is one (1) item that's common here. DuPont has put a chemical called "C-8," whatever that is, into the water table of this area.
> Mr. Janssen: That's correct, Your Honor.
> The Court: Now, is it dangerous? I don't know. Or has it caused injury? I don't know. But isn't that a commonality?'
> Mr. Janssen: That is a commonality, Your Honor.[45]

DuPont's counsel in this case similarly recognized the common, cohesive nature of the claims here:

> Mr. Cohen: …In the end, this is a medical monitoring case. In the end, we think at best, at best it's a medical monitoring case about people who get their water from the Pennsgrove Water Company.[46]

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monitoring' case … of a purported class allegedly exposed to a substance.").

[44] *Id.* DuPont further identified the following common issues for a jury to decide: 1) "whether a particular chemical [C-8] poses a risk to human health, and if so, at what doses and through what routes of exposure (*e.g.* ingestion, inhalation, or dermal contact)"; 2) "whether a particular chemical [C-8] has the propensity to accumulate and persist in human populations and the environment"; and 3) "whether a particular chemical [C-8] has been released into the environment at sufficiently high concentrations so as to cause human populations distances away to be exposed above-risk incurring levels." *Id.*

[45] Blecher Aff. at Ex. 63 (*Leach* Class Cert. Hrg. Tr.) at 42:3-10.

DuPont is not alone in believing that equitable and injunctive relief can be applied on a community-wide basis. As explained above, when government agencies determine health risks from contaminated drinking water and the need for remedial measures, including abatement, cleanup, and biomonitoring, they do so on a common, community-wide basis, not an individual basis.[47] PGWS likewise recognized the community-wide impact of C-8 contamination in its water supply, demanding (unsuccessfully) that DuPont install suitable water treatment systems at its well fields. DuPont cannot, therefore, credibly challenge the existence of common, underlying issues affecting the claims of all Class members.

c. **The Proposed Class Satisfies the Typicality Requirement of Rule 23(a)(3).**

The requirements of "commonality" and "typicality" under Rule 23(a) tend to merge in most cases; they serve merely as guideposts for determining whether a class action is economical and whether the plaintiffs' claims and the class claims are sufficiently similar that the interests of the class members will be adequately protected. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Baby Neal*, 43 F.3d at 56; *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 269 (E.D. Mich. 2001). "The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent members." *Stewart*, 275 F.3d at

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[46] *Id.* at Ex. 108 (7/13/07 Hrg. Tr., at p. 89).
[47] *See, e.g., id.* at Exs. 39, 41, 48, 55, and 87.

227. A plaintiff's claim is typical, regardless of any factual differences among the class members, if it "arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Newberg on Class Actions* (4th ed. 1992), ' 3.13 at 328 (attached to Blecher Aff. at Ex. 64); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (claim of named plaintiff need only share the "same essential characteristics as the claims of the class at large"); *Prudential*, 962 F. Supp. at 518 ("Typicality lies where there is a strong similarity of legal theories or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the defendant.") (citations omitted). The "typicality" requirement of Rule 23(a)(2) "should be loosely construed" and, like commonality, does not require all class members' claims to be identical. *See Weinberger v. Jackson*, 102 F.R.D. 839, 844 (N.D. Cal. 1984).[48] "Indeed, even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Baby Neal,* 43 F.3d at 58.

Typicality is readily found where the defendant's behavior is central to each plaintiffs' claims. *See Stewart*, 275 F.3d at 227-28; *Baby Neal*, 43 F.3d at 57-58.

[48] *See also Florence*, 2008 WL 800970 at *8 ("the typicality requirement does not mandate that all putative class members share identical claims."); *Bentley*, 223 F.R.D at 482 ("As with the commonality requirement, substantial identity between the operative facts of the named plaintiffs and the class in general is not necessary."); *Leach,* 2002 WL 1270121 at *11-12.

This is particularly true when plaintiffs seek equitable relief:

> [C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individuals claims. Actions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold.

Baby Neal, 43 F.3d at 57-58 (citations omitted). Thus, named plaintiffs do not need to suffer the same exact injury as other class members to be typical, as long as they have been exposed to the same tortious behavior at the hands of the defendant. *See id.* at 58. "Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." *Id.* at 58 ("*Falcon* merely requires that the class representative prove that there is a pervasive violation and that the various injuries alleged all stem from that common violation.") (citing *General Tel. Co.,* 457 U.S. at 157-59).[49]

In this case, the *Rowe* Plaintiffs' claims are "typical" of the claims of the entire proposed Class. They all arise from the releases of C-8 from DuPont's NJ Plant into the drinking water supply, are based on the same tortious conduct by DuPont, involve the same increased risk of illness, and seek the same equitable and

[49] *See Olden*, 203 F.R.D. at 270 (claims "typical" where class exposed to same chemical releases); *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842, *3 (N.D.Ill. 2003) (typical despite differing levels of arsenic contamination) (attached to Blecher Aff. at Ex. 65).

injunctive forms of relief. This common factual and legal basis for the Class members' claims satisfies the "typicality" requirement of Rule 23(a)(3).

d. The Proposed Class Satisfies the Adequacy Requirement of Rule 23(a)(4).

The "adequacy" requirement of Rule 23(a)(4) inquires into the qualifications of class counsel and the interests of the named plaintiffs in pursuing the class claims. *See Prudential*, 962 F. Supp. at 519. "The party challenging representation bears the burden to prove that representation is not adequate." *Id*. In this case, *Rowe* Plaintiffs' counsel are experienced litigators and appropriate counsel for the Class on the Class Claims.[50] Likewise, the *Rowe* Plaintiffs have no conflicts of interest and are appropriate class representatives.

With regard to the *Rowe* Plaintiffs, the inquiry "is to determine that the putative named plaintiff has the ability and the incentive to represent the claims of

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[50] DuPont itself attested to the experience of Plaintiffs' counsel in the *Leach* proceedings: "Members of the [*Leach*] Class Counsel team have extensive litigation and trial experience, including class action personal injury cases, as well as matters involving environmental contamination." Blecher Aff. at Ex. 16 (p. 3). *See also Rowe* Plaintiffs' Notice of Motion to Appoint Interim Class Counsel and Memorandum, Reply, and Affidavits of counsel in support (explaining adequacy of *Rowe* counsel under Rule 23(g)) (Doc. Nos. 58 and 66) and July 7, 2007, Letter to the Court (and exhibit) (Doc. No. 68), all of which are incorporated herein by reference. Since the Court last considered the class counsel issue, *Rowe* counsel has taken the lead (as opposed to *Scott* counsel) on noticing, preparing for, and taking every deposition of every DuPont fact and expert witness and other significant discovery issue through the close of class certification discovery last month. *See* Blecher Aff. at ¶ 119. *Rowe* counsel remains, therefore, adequate counsel for the Class under Rule 23(g).

the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individuals claims and those asserted on behalf of the class." *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988). This vigorous representation does not require knowledge of the minutiae of the case. *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir. 2007) ("A class representative need only possess a minimal degree of knowledge necessary to meet the adequacy standard.") (quotation omitted). And courts rarely find conflicts of interest in Rule 23(b)(2) class actions seeking only declaratory and injunctive relief because of the common relief sought. *Id*. As demonstrated above, each *Rowe* Plaintiff shares the interests of the Class in proving DuPont's liability for C-8 contamination and pursuing the requested equitable and injunctive relief for the impacted Class. They have a sufficient understanding of the facts in this matter, are aware of their responsibilities, have no conflicts, and are adequate class representatives.

2. Certification of the Class is appropriate under Rule 23(b).

a. Certification of the Class is appropriate under Rule 23(b)(1)(A).

Under Rule 23(b)(1), certification is appropriate if "[t]he prosecution of separate actions by or against individual members of the class would create a risk of ... [i]nconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party

opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Courts, therefore, have certified classes seeking both remediation and medical monitoring, as the pursuit of such claims through separate actions could create a risk of inconsistent or varying adjudications for the individual class members and establish incompatible standards of conduct for the defendants. *See, e.g., Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) ("It is unlikely that two different courts would tailor a remedial order in the same fashion, and it is therefore entirely conceivable that different remedial orders would contain incompatible provisions."). Medical monitoring actions are particularly appropriate for treatment under Rule 23(B)(1)(A). *See In re Teletronics Pacing Sys., Inc.,* 172 F.R.D. 271, 284-85 (S.D. Ohio 1997) ("The medical monitoring claim here is an ideal candidate for class certification pursuant to Rule 23(b)(1)(A) because separate adjudications would impair TPLC's ability to pursue a single uniform medical monitoring program."); *Perrine*, slip op. at 35 ("Cases involving remediation and medical monitoring are well-suited for class certification under Rule 23(b)(1)(A) and (B)."); *Leach,* 2002 WL 1270121 at *13 (citing cases).

DuPont has previously agreed that the existence of more than one proceeding to consider common factual and legal issues "creates a real danger of inconsistent rulings" in this very situation. *Leach*, 2002 WL 1270121 at *13. According to DuPont, the simultaneous existence of more than one proceeding in

which the common "technical issues" regarding the potential toxicity of C-8 and its effect on human health and the environment are addressed "gives rise to a real risk that DuPont could be subjected to inconsistent or even mutually-repugnant determinations." *Id.* at *13. In this case, the Class Claims seek abatement of C-8 releases from DuPont, remediation of contaminated water supplies through filtration and provision of alternate supplies in the interim, and implementation of a unified court-supervised biomonitoring and medical monitoring program. To avoid the potential for inconsistent orders directing the manner of abatement, remediation, and monitoring, the Class Claims should be certified under Rule 23(b)(1)(A).[51]

b. Certification of the Class also is appropriate under Rule 23(b)(2).

Under Rule 23(b)(2), certification is appropriate when the "party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) contains no predominance or superiority requirement, although it does require a measure of cohesiveness among the class members. *Barnes v. The American*

[51] In fact, it is only by certifying these claims to proceed on a class basis that DuPont is adequately protected from the risk of thousands of individual claims seeking potentially inconsistent and mutually repugnant determinations with respect to such issues.

Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998).[52] That cohesiveness is provided by the common injunctive relief arising from common conduct by the defendant. *See Barabin v. Aramark Corp.*, 2003 WL 355417, *1 (3d Cir. 2003) ("class cohesion … is presumed where a class suffers from a common injury and seeks class-wide injunctive relief") (attached to Blecher Aff. at Ex. 94). In fact, the requirements of Rule 23(b)(2) are "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58.

The Third Circuit has explained this "proper role of (b)(2) class actions in remedying systematic violations of basic rights of large and often amorphous classes." *Baby Neal*, 43 F.3d at 64. In fashioning injunctive relief, a court focuses on the defendant rather than on the plaintiffs. *Id.* at 63. Regardless of the number of class members, "the court's task is essentially the same. [In a case seeking to protect the rights of each child in state custody, the] court would not need to assure that every child received an 'appropriate' case plan, for instance. Instead, the court would assure that the DHS had an adequate mechanism for generating and

[52] In *Barnes*, the court ultimately denied certification because the plaintiffs' claims revolved around the allegation that each class member was, as a matter of fact, addicted to cigarettes and that the defendants had caused each class member to become addicted. To determine whether the defendants had actually caused addiction, it was necessary to inquire into individual smoking histories. In this case, by contrast, DuPont's contamination of the water supply and its responsibility for this community-wide exposure to C-8 is a common question. DuPont's contamination of the community water supply itself has created the increased risk of illness and it is this common increased risk that is at issue here – not whether C-8 actually caused someone's particular illness.

monitoring appropriate case plans." *Id.* at 63. The Third Circuit's reasoning applies equally to this proposed Class seeking clean water/water treatment and biomonitoring/medical monitoring relief and demonstrates how a common equitable remedy will provide class-wide relief: "all of the class members will benefit from relief which forces the defendant to provide…the services to which class members [are] entitled." *Id.* at 64.

Claims seeking equitable or injunctive relief to force a defendant to abate releases of chemicals fall squarely within the bounds of Rule 23(b)(2). *See, e.g., Olden*, 203 F.R.D. at 270 (certifying Rule 23(b)(2) class seeking injunctive relief ordering defendant to cease emitting dust from cement plant).[53] The establishment of a court-supervised monitoring program also has been recognized as a "paradigmatic request for injunctive relief." *In re Inter-Op Hip Prosthesis Litig.*, 204 F.R.D. 330, 349 (N.D. Ohio 2001).[54] The Eastern District of Pennsylvania

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[53] *Rowe* Plaintiffs have clarified repeatedly that they are not seeking to represent a class against DuPont for any money damages or individual injury/damage claims and that their primary focus has been and remains on securing equitable and injunctive relief, such as clean-up of their contaminated water and proper blood testing/medical monitoring. *See, e.g.,* Blecher Aff. at Exs. 79-80, and 96. *See also Rowe* Affidavits.

[54] *See also Gibbs v. E. I. duPont de Nemours & Co., Inc.*, 876 F. Supp. 475, 481 (W.D.N.Y. 1995) (court-administered medical monitoring fund is injunctive relief rather than monetary relief); *Day v. NLO, Inc.*, 851 F. Supp. 869, 886-87 (S.D. Ohio 1994); *Yslava*, 845 F. Supp. at 713; *Perrine*, slip op at 37 (certifying class seeking court-supervised medical monitoring program); *Allen v. Monsanto Co.,* No. 04-C-465, slip op. (W.Va. Cir. Ct. Jan. 8, 2008)(attached to Blecher Aff. at Ex. 98).

recently certified a medical monitoring class arising from contamination of a local water supply after finding the "cohesion" requirement satisfied; because of the minimum "danger point" of exposure, "individual differences in the amount of exposure, while perhaps increasing the statistical likelihood that an individual may develop a physical injury, do not affect the alleged basic need for medical monitoring that is common to all class members." *Gates v. Rohm and Haas Co.*, __ F.R.D. __, 2008 WL 465815 at *8 (E.D.Pa. 2008) (attached to Blecher Aff. at Ex. 95). The fact that the plaintiffs were seeking this common injunctive relief of medical monitoring rather than monetary damages underscored the cohesiveness of the class. *Id*.

In the present case, *Rowe* Plaintiffs' common claims for equitable and injunctive relief to abate and remediate DuPont's C-8 releases into the water supply and to provide for biomonitoring and medical monitoring, and DuPont's refusal to take the requested steps, involve claims where the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. 23(b)(2). Consequently, *Rowe* Plaintiffs' Class Claims for equitable relief in the form of abatement, remediation, and

monitoring should be certified under both Rule 23(b)(1) and Rule 23(b)(2).[55]

IV. CONCLUSION

For the foregoing reasons, *Rowe* Plaintiffs respectfully request, pursuant to Civil Rule 23, certification of this case to proceed on behalf of the Class with respect to the Class Claims seeking common injunctive and equitable relief in the form of clean water/water treatment, biomonitoring, and medical monitoring, and request certification of *Rowe* Plaintiffs and their counsel as adequate to represent the Class in connection with the Class Claims.

[55] As noted in footnote 53 *supra*, the Class Claims are equitable and injunctive in nature, not "monetary." Therefore, *Rowe* Plaintiffs believe that it is unnecessary to address certification under Rule 23(b)(3), which relates primarily to claims for money damages. If, however, this Court believes that the Class Claims are primarily monetary in nature (which *Rowe* Plaintiffs dispute), the Class Claims are still certifiable under Rule 23(b)(3) for the reasons cited by the *Leach* and *Perrine* courts, where common issues of release, toxicity, and community exposure "predominated" over individual ones on similar facts and the class action format was both "manageable" and "superior" to individual proceedings. *See also Collins v. Olin Corp.*, 248 F.R.D. 95, 2008 WL 59082, *5-7 (D. Conn. 2008) (attached to Blecher Aff. at Ex. 97) (mass toxic torts appropriate for Rule 23(b)(3) certification because defendant's conduct and potential effects create predominant common issues and class action is superior method of resolution). The Court has the authority to certify a class on particular issues if the Rule 23(b)(2) requirements were not met for the Class Claims or case as a whole. Fed. R.Civ. P. 23(c)(4); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006).

Respectfully submitted,

s/Shari M. Blecher

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STATE OF MINNESOTA

COUNTY OF WASHINGTON

DISTRICT COURT

TENTH JUDICIAL DISTRICT
CASE TYPE: Other Civil

Felicia Palmer, Sesario Briseno, Terry Maslowski, Pamela Maslowski, Gary A. Paulson, and Karen Paulson, individually and on behalf of all others similarly situated,

MAY 31 2005

Plaintiffs,

Civil File No: C2-04-6309

vs.

FIRST AMENDED CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

3M COMPANY,

Defendant.

Pursuant to Rule 23 of the Minnesota Rules of Civil Procedure, plaintiffs, individually and on behalf of a class of other people similarly situated, state as follows for their First Amended Class Action Complaint against defendant, 3M Company (hereinafter referred to as "3M").

NATURE OF ACTION

This is a civil action for declaratory relief, injunctive relief, equitable relief, and compensatory damages, including medical monitoring relief/reasonably necessary future medical care, on behalf of Plaintiffs and other class members for bodily injury, emotional distress and property damage arising from the intentional, knowing, reckless and negligent acts and omissions of the Defendant by causing the Plaintiffs and other class members, along with their

properties, to become contaminated with toxic substances. The contamination occurred in connection with 3M's manufacturing, production, processing, use, release, discharge and/or disposal of perfluorooctane sulfonate (PFOS), perfluorooctanoic acid (PFOA), and other perfluorinated chemical compounds at, originating from, and/or otherwise attributable to, 3M's facility in Cottage Grove, Minnesota (the "3M Plant").

JURISDICTION AND VENUE

Venue is proper in Washington County because the Plaintiffs are residents of Washington County; the Plaintiffs and their contaminated properties are located in Washington County; Defendant 3M does business, including but not limited to operating a manufacturing plant and disposing of wastes from such plant at various disposal site(s) in Washington County; and the wrongful acts complained of herein occurred in Washington County, Minnesota.

PARTIES

1. Plaintiff, Felicia Palmer, is currently a resident of Washington County, Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including but not limited to discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's

person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and her property.

2. Plaintiff, Sesario Briseno, is currently a resident of Washington County, State of Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and his property.

3. Plaintiff, Terry Maslowski, is currently a resident of Washington County, State of Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily

limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and his property.

4. Plaintiff, Pamela Maslowski, is currently a resident of Washington County, State of Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and her property.

5. Plaintiff, Gary A. Paulson, is currently a resident of Washington County, State of Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including

discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and his property.

6. Plaintiff, Karen Paulson, is currently a resident of Washington County, State of Minnesota. Plaintiff's property is located close to the 3M Plant and/or areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into Plaintiff's person and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the plaintiff and her property.

7. The class members, as defined more fully below, are residents of Washington County, State of Minnesota, and/or other areas affected by contaminants originating from and/or otherwise attributable to the 3M Plant, including but not limited to operations of the 3M Plant

and/or its disposal activities. The class members' properties are located near the 3M Cottage Grove Plant and/or areas affected by contaminants originating from or otherwise attributable to the 3M Plant. Toxic contaminants have emanated from the 3M Plant through releases from the Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such facility, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill. Those contaminants have emanated onto/into the class members' persons and/or property, groundwater, and/or well water through contaminated groundwater, surface water and/or community water and/or contaminated soil and/or through air emissions and have adversely affected the class members and the value of their properties.

8. Defendant 3M Company, Inc., individually and as successor to Minnesota Mining & Manufacturing (hereinafter "3M"), is a Delaware corporation with its principal place of business located at 3M Center, Saint Paul, Minnesota 55144. 3M owns and operates a manufacturing facility in Cottage Grove, Minnesota known as the "Cottage Grove Plant" (hereafter the "3M Plant"), which has also been known as the "Chemolite" plant since the 1950's when it became the home of Scotchgard Fabric Protector. 3M also operates a manufacturing plant in Decatur, Alabama.

GENERAL ALLEGATIONS

9. 3M operates a chemical and film manufacturing facility in Cottage Grove, Minnesota (the "3M Plant").

10. The 3M Plant is located on the northern bank of the Mississippi River, approximately 4.5 miles south of downtown Cottage Grove, and sits on an aquifer that is highly sensitive to ground water pollution.

11. The 3M Plant encompasses approximately 865 acres, including the processing plant areas.

12. The 3M Plant is comprised of numerous operating units, including a chemical manufacturing plant, a specialty film manufacturing plant, loading and unloading areas, materials storage areas, a closed landfill, a wastewater treatment plant, closed incinerator, and a gas station

13. In connection with its manufacturing operations at the 3M Plant, 3M synthesized/processed/manufactured and/or used perfluorooctane sulfonate (also known as PFOS), perfluorooctanoic acid (also known as PFOA), ammonium perfluorooctanoate (also known as APFO and/or FC-143) and other perfluorochemicals, including but not limited to C-4 through C-16, (collectively hereinafter, all such perfluorochemicals, are referred to as "PFCs").

14. PFOS is a member of a large family of sulfonated perfluorochemicals that are used for a wide variety of industrial, commercial, and consumer applications, including use as a component of soil and stain-resistant coatings for fabrics, leather furniture and carpets (under the Scotchgard line); in fire-fighting foams, commercial and consumer floor polishes; as cleaning products; as a surfactant in other specialty applications; and to develop pesticides.

15. PFOA is a fluorinated organic acid and is also a member of the family of perfluorochemicals or PFCs. PFOA is produced synthetically and does not occur naturally in the

environment. PFOA can be formed through the degradation or metabolism of other fluorochemical products, such as fluorinated telomers.

16. Certain polymers based on PFCs repel water and oil, and reduce surface tension.

17. 3M has manufactured at least some PFCs and molecules that can be metabolic precursors to them since 1948.

18. Manufacturing operations began at the 3M Plant in 1947, with PFOA production beginning by around 1976.

19. During all relevant times, the manufacture of PFOS and PFOA and/or other PFCs occurred at the 3M plant.

20. During its production of PFOS, 3M Company was the sole U.S. manufacturer of the PFOS family of chemicals, and in 2000 it was a 2.5 billion dollar business.

21. 3M manufactured sulfonyl-based fluorochemicals using the Electro-Chemical Fluorination (ECF) process.

22. 3M Company had three manufacturing sites in the United States using the ECF process: the 3M Plant in Cottage Grove, Minnesota; a Cordova, Illinois plant; and a Decatur, Alabama plant.

23. The manufacturing process for sulfonated perfluorochemicals is complicated. There are more than 600 intermediate manufacturing steps associated with the production of PFOS and PFOA-based products. Releases of PFOS, PFOA, and other PFCs into the environment can occur at each stage of the chemical's life cycle. They can be released when the chemical is synthesized, and continue during incorporation into a product, during distribution of the product, during use of the product, and during disposal.

24. During the production, synthesis and disposal of PFOS and PFOA, there are hundreds of process steps that require venting of the PFOS and PFOA products and other PFCs or that generate wastewater or solid waste.

25. There are three types of water discharges associated with the 3M Plant: storm water runoff, process wastewater and other non-storm water discharges into the Mississippi River.

26. Most of the surface drainage from the 3M Plant discharges into the Mississippi River. However, some drainage, particularly from the processing areas, is hard-piped to the on-site wastewater treatment plant before discharge.

27. Once released, PFOS and PFOA are persistent in the environment. The destruction of PFOS and PFOA only occurs through high temperature incineration.

28. PFOS and PFOA are not known to ever break down in water, soil, air, or the human body.

29. PFOA and PFOS are bioretentive substances.

30. PFOA and PFOS are bioaccumulative substances.

31. PFOA and PFOS are biopersistent substances.

32. PFOA and PFOS are animal carcinogens.

33. PFOA is a multisite carcinogen in rats.

34. PFOA is hepatotoxic (a toxin to the liver) to animals.

35. PFOA is associated with developmental effects in animals.

36. PFOA and PFOS pose an unacceptable risk to human health at a concentration of less than 1 ppb in human drinking water.

37. On information and belief, PFOA, PFOS, and related PFCs have been detected in the environment surrounding the 3M Plant and in the environment at and/or near off-site disposal areas where PFOS, PFOA, and related PFCs attributable to the 3M Plant have been disposed of and/or released by and/or under the control and/or direction of 3M.

38. PFOS, PFOA, and other related PFCs are subject to atmospheric dispersion associated with the prevailing wind patterns. This dispersion results in human exposure both on-site and off-site of the 3M Plant.

39. Air emissions also contaminate surrounding soils, water bodies and vegetative growth. This deposited PFOS, PFOA, and related PFCs leaches into the groundwater or runoff into surrounding surface waters where potential human exposure can occur. Further human exposure occurs as a result of incidental ingestion, dermal contact and inhalation by offsite residents.

40. Exposure to offsite residents and contamination of off-site water and land continues to this day and results when wastewater effluence generated by the 3M Plant is dumped into the Mississippi River. As recently as February 2004, 3M dumped contaminated water measuring 127 parts per billion (ppb) of PFOA directly into the Mississippi River at the 3M Plant, far in excess of Minnesota Department of Health's current recommended Health Based Value of 7 ppb for PFOA in water.

41. Since December of 2004, PFCs have been detected in the public water supply of the City of Oakdale, Minnesota, and in numerous private wells within Washington County, Minnesota, including but not limited to wells in the Lake Elmo, Minnesota, area, which PFCs

originate from and/or are otherwise attributable to PFCs generated at, and/or disposed by and/or from, and/or otherwise released at and/or from the 3M Plant.

42. By 1979, 3M had determined that PFOA had the "potential for widespread distribution in the environment," and that PFOA was completely resistant to biodegradation.

43. PFOA levels were detected in 1999 in the plasma of fish eating birds, i.e., albatross nestlings (less than a year old) at Midway Island in the Pacific Ocean, and eagle nestlings in Minnesota and Michigan that were collected in 1989, 1992 and 1993.

44. Following the bird plasma studies, sixty liver samples collected by the U.S. Fish & Wildlife Service from various species of birds were analyzed. The birds were collected at a variety of sites across the United States. PFOS levels ranging from 6 parts per billion (ppb) to 2055 ppb were found in almost all species, excluding a non-fish eating species.

45. A 3M-sponsored study completed in June 2001, analyzed the concentrations of selected fluorochemicals, including PFOS and PFOA, in fish, water and sediments within the Tennessee River, in the vicinity of the 3M facility in Decatur, Alabama. Fluorochemicals were detected in all surface waters, sediments and fish collected from the sample locations in the Tennessee River.

46. 3M was aware as early as 1976 that at least some PFCs accumulate in human blood.

47. In 1976, 3M began medical monitoring of employees involved in PFOA production, by measuring serum levels of organic fluorine (OF) and performing medical assessments.

48. In the early 1980's, a PFC related to PFOA was detected in the blood serum and/or plasma of 13 female workers in 3M's Decatur facility.

49. Between 1983 and 1984, 3M documented increasing levels of a PFC related to PFOA in the blood serum and/or plasma of 3M workers.

50. A 1992 University of Minnesota study of workers at the 3M Plant found that "ten years of employment in PFOA production was associated with a statistically significant threefold increase in prostate cancer mortality."

51. By January 1999, PFOS and PFOA had been found in blood serum samples from multiple blood banks from diverse locations in the United States.

52. A study of blood serum from workers at 3M's Decatur facility, completed in August 1999, indicated that workers in the facility's film plant had approximately 3-4 times higher PFOS in their blood than samples obtained from U.S. blood banks. Chemical workers had even higher levels of PFOS in their blood.

53. Because PFOS and PFOA are not naturally occurring substances, all PFOS and PFOA in human blood are attributable to human activity.

54. 3M was aware by the late 1970s that PFOS and PFOA posed potential risks to human health.

55. PFOA toxicity was tested in rats as early as the late 1970s. Rats exposed to PFOA suffered liver damage and reductions in body weight.

56. Postnatal deaths and developmental effects, including decreases in fetal body weight, increases in external and visceral anomalies, delayed ossification and skeletal variations have also been observed in rats exposed to PFOA.

57 In 1981, 3M and DuPont Chemical Company became concerned that PFOA could cause birth defects in humans. During that time frame, DuPont monitored the PFOA levels and pregnancies of women employed and exposed to PFOA at its Teflon plant near Parkersburg, West Virginia. Five of seven exposed women gave birth; and of those five, two of the women gave birth to babies with birth defects – one an "unconfirmed" tear duct defect, and one confirmed with a nostril and eye defect (among other severe facial defects.)

58. In 1981, 3M was aware that PFOA crosses the placenta in pregnant women.

59. 3M was so worried about the risk of birth defects among children born to workers exposed to the PFOA that 3M transferred 13 female workers of childbearing age out of its plant in Decatur, Alabama, after PFOA was detected in their blood.

60. PFOA toxicity has also been tested in monkeys. Monkeys exposed to PFOA experienced death, anorexia, prostration and body trembling, lipid depletion in the adrenals, hypocellularity of the bone marrow, and atrophy of the lymphoid follicles in the spleen and lymph nodes.

61. PFOS and PFOA have been found to potentially cause liver problems, testicular tumors, mammary tumors, prostate problems, increases in estrogen levels, increases in cholesterol and triglycerides, changes in thyroid hormone levels, adverse effects to the thymus and other immunotoxic effects, increases in low birth weight in animals, and reproductive problems. Other PFCs, by virtue of their similarities to PFOS and PFOA in chemical structure and activity, have similar toxicity.

62. Despite 3M's knowledge that PFOS, PFOA, and other PFCs escape from the 3M Plant during production, synthesis or disposal, resist biodegradation, accumulate in the

environment, accumulate in human blood, and are hazardous to human health, 3M continued to produce, synthesize and dispose of PFOS, PFOA, and other PFCs without adequately notifying residents in the immediate vicinity of the 3M Plant of the full dangers of PFOS, PFOA, and other PFCs to their properties and their health. Indeed, despite knowledge to the contrary, 3M has repeatedly represented and continues to represent to the public, including to the public in the class area (in which Plaintiffs and the class members live), that its PFCs are safe and do not pose any health hazard, and otherwise misleadingly minimized to the public in the class area the extent of possible contamination off-site from the 3M Plant and the environmental and health risks that accompany such contamination.

63. On or about May 16, 2000, in a prepared press release issued by 3M regarding 3M's decision to phase out production of certain PFCs used in many products, and in a quote provided to, among others, the St. Paul Pioneer Press, 3M spokesmen (including Dr. Charles Reich, executive vice president for Specialty Material Markets at 3M) represented that "existing scientific knowledge indicates that the presence of these materials at the very low levels" detected in 3M's testing "does not pose a human health or environmental risk."

64. On or about December 27, 2000, 3M provided representations to the St. Paul Pioneer Press that "company officials [at 3M] stress there's no evidence of danger to humans" from PFOS. Although the company officials are not named, the article elsewhere quotes 3M's executive vice president of specialty materials, Charles Reich.

65. On or about April 12, 2001, 3M provided information to the St. Paul Pioneer Press that low levels of PFOS had been found in mammals, fish and birds throughout the world, according to a 3M-sponsored study. According to 3M's environmental health director, 3M had

embarked on a major campaign to discover any negative effects PFOS has on human health and the environment after 3M had found PFOS levels in the blood supply of some 3M workers three (3) years before, notwithstanding that 3M had begun medical monitoring of employees involved in PFOA production by measuring serum levels of organic fluorine and performing medical assessments in 1976, over twenty (20) years before. 3M's environmental health director also stated that 3M's research found that low levels of the compound show no harmful effects to human or environmental health.

66. On or about May 28, 2003, 3M represented to the St. Paul Pioneer Press that 3M had studied PFOS and PFOA for decades, and that at typical low levels found in products and elsewhere the chemicals posed no health or environmental risk. 3M also represented there are no risks for employees who handled or were exposed to the chemicals.

67. As recently as approximately August 15, 2004, 3M's medical director represented to the Associated Press that 3M began regularly testing its fluorochemical workers in 1976, consistently found fluorochemicals in their blood, but "found no adverse health effects in our workers" over the years.

68. In January of 2005, the Minnesota Department of Health (MDH) and the City of Oakdale, Minnesota disclosed that PFOS in concentrations as high as 0.97 parts per billion and PFOA in concentrations as high as 0.86 parts per billion had been detected in five (5) of six (6) wells supplying the Oakdale public water system that had been sampled.

69. The testing of those wells was part of an investigation initiated by the City, MDH, and the Minnesota Pollution Control Agency (MPCA) following the recent detection of PFOS and PFOA in groundwater beneath three (3) former waste disposal sites, the Abresch site, the

Washington County landfill, and the Woodbury landfill, where 3M had disposed of wastes containing PFCs originating from or otherwise attributable to the 3M Plant years ago.

70. In February of 2005, 3M reported that its own testing of the City of Oakdale public water supply wells revealed levels of PFOS in some of the wells exceeding 1 part per billion, which is above the MDH's current recommended Health Based Value of 1 part per billion for PFOS.

71. In April of 2005, the MDH reported that additional testing of private water wells in the Lake Elmo, Minnesota, area had indicated levels of PFOS above its current recommended 1 part per billion Health Based Value for PFOS in at least eight of the wells tested, with PFOS being found as high as 3.5 parts per billion in one of the wells, and the MDH stated that alternative drinking water and water treatment equipment should be provided to those individuals using the affected wells.

72. The concentrations of PFOS and PFOA in the various area public and private drinking water wells in which those perfluorochemicals were detected present unacceptable risks to the health of those consuming the water over an extended period of time.

73. In late 1999, the United States Environmental Protection Agency (EPA) began a priority review of PFOA under the Toxic Substances Control Act. The review resulted from EPA concerns about the developmental and reproductive effects of PFOA and concerns that blood samples taken revealed exposure to PFOA in the general U.S. population.

74. In September 2002, the Director of EPA's Office of Pollution Prevention and Toxics initiated a priority review of PFOA in all its forms.

75 During its priority review, the EPA determined that PFOA presents unacceptably high developmental and reproductive risks to humans. Based upon results from animal reproduction studies and a comparison of blood levels in people, EPA scientists concluded that children with the highest measured blood levels of PFOA have less than one-tenth the protection, or less than one-tenth the margin of safety, than the level the agency considers to be safe.

76. In February of 2005, the EPA Science Advisory Board's PFOA Human Health Risk Assessment Review Panel indicated that they would recommend that EPA revise its description of PFOA's human cancer relevance to reflect the fact that PFOA meets the criteria for characterization as a "likely" human carcinogen.

77. The PFOA Risk Assessment Panel also indicated that they would recommend, based on animal studies, limited human occupational epidemiological studies, and other scientific data, that EPA's PFOA risk assessment address the risk that PFOA causes various "endpoints" or adverse health effects in humans, including liver, testicular, pancreatic, and mammary or breast cancer; liver histopathology other than liver cancer; alteration of lipid metabolism; immunotoxicity and effects on hormonal systems; developmental effects; and neurotoxicity and effects on the behavioral function.

78. In 2000, under pressure from the EPA, and after years of disregarding the bioaccumulation and toxicity of PFOS, PFOA, and other related PFCs, 3M began to phase out production of the chemicals.

79. The releases of PFOS, PFOA, and other PFCs by 3M have adversely impacted and continue to adversely impact the Plaintiffs, the class members, and the value of those real

properties in which Plaintiffs and other class members have an ownership or another possessory interest.

80 The releases of PFOS, PFOA, and other PFCs were and continue to be a health hazard for Plaintiffs and other class members and have caused and continue to cause emotional and mental stress, anxiety, and fear of future illness among Plaintiffs and other class members

81. 3M, in spite of its knowledge, which was far superior to that of plaintiffs and other class members, negligently, carelessly, wrongfully and/or intentionally failed to disclose to citizens of the area surrounding the 3M Plant bio-persistence and toxicity concerns known to 3M relating to the use of PFOS, PFOA, and other PFCs and their release into the environment.

82. At no time since PFOS, PFOA, and other PFCs were first detected in humans, air, water and soil supplies has 3M ever fully disclosed to the public, including the persons in the class area, that PFOS, PFOA, and other PFCs were present in their environment.

83. 3M has known for several years that the discharge of PFOS, PFOA, and other PFCs from the 3M Plant is contributing to the levels of PFOS, PFOA, and other PFCs present in humans and the environment.

84. At no time since PFOS, PFOA, and other PFCs were first detected in humans and the environment has 3M provided or paid for medical monitoring for non-employee exposed individuals.

85. The releases of PFOS, PFOA, and other PFCs have adversely impacted the value of those real properties in which Plaintiffs and the other class members have an ownership or other possessory interest in property contaminated by PFOS, PFOA, and other PFCs.

86. The releases of PFOS, PFOA, and other PFCs have made and/or continue to make Plaintiffs and the other class members physically ill and/or otherwise physically harmed, and/or have caused and continue to cause associated emotional and mental stress, anxiety, and fear of current and future illnesses, including but not limited to, fear of significantly increased risk of cancer and other disease, among Plaintiffs and the other class members.

87. Each person who has ingested, will ingest, or has been or will be otherwise significantly exposed to PFOS, PFOA, and/or other PFCs through the tortious conduct of 3M has been, or will be, at an increased risk for real and present physical and biologic injury.

88. PFOA and PFOS are proven hazardous substances and or toxic substances. Other PFCs, by virtue of their similarities to PFOA and PFOS in chemical structure and activity, have similar toxicity, and, upon information and belief, are also proven hazardous substances.

89. There is a probable link between exposure to PFOS, PFOA, and/or other PFCs and subclinical or subcellular injury and/or serious latent human disease.

90. Each person who has been or will be significantly exposed to PFOS, PFOA, and/or other PFCs through ingestion and/or other significant exposure will have a significantly increased risk of contracting one or more serious latent diseases, including but not necessarily limited to those diseases, conditions, and/or adverse effects identified in Paragraphs 46, 50-57, and 72-73, relative to what would be the case in the absence of such exposure.

91. The increased risk of serious latent disease described in Paragraphs 84 and 85 makes it reasonably necessary for each person so exposed to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of such exposure.

92. Monitoring procedures exist that make possible the early detection of the diseases referenced in Paragraphs 84 and 85 above.

CLASS ACTION ALLEGATIONS

93. This civil action is an appropriate case to be brought and prosecuted as a class action by Plaintiffs against 3M pursuant to Rule 23 of the Minnesota Rules of Civil Procedure.

94. There exists a class of individuals who have been significantly exposed to PFOS, PFOA, and/or other PFCs through ingestion of or other significant exposure to contamination in the air, contaminated air, water and soil, including "all persons who have been or will be significantly exposed to PFOS, PFOA, and/or other PFCs through releases, whether direct or indirect, from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to the operation of and/or disposal of materials at or from such facility, by ingestion of or other significant exposure to quantifiable amounts of these materials in air, water or soil; and all persons who have an ownership or other possessory interest in property, whose value is adversely affected by PFOS, PFOA, and/or other PFC contamination, through releases, whether direct or indirect, from 3M's Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to the operation of and/or disposal of materials at or from such facility."

95. Because each of the named Plaintiffs have ingested or otherwise been significantly exposed to quantifiable amounts of PFOS, PFOA, and/or other PFCs in air, water, or soil, the named Plaintiffs have claims against 3M that are typical of the claims of the class members, and the named Plaintiffs will fairly and adequately protect the interests of the class with respect to the appropriate common issues of fact and law.

96. The named Plaintiffs have hired counsel who are competent to prosecute this action for and on behalf of the Plaintiffs and the class.

97. The prosecution of this civil action by all Plaintiffs in separate actions: (1) would create a risk of inconsistent or varying adjudications with respect to individual members of the class; (2) could, as a practical matter, be dispositive of interests of other members of the class who were not parties to the separate actions; and (3) may substantially impair or impede Plaintiffs' ability to protect their interests.

98. 3M has acted or refused to act on grounds generally applicable to the class making declaratory, injunctive and equitable relief appropriate for the whole class

99 On information and belief, the class includes tens of thousands of persons and therefore class members are so numerous that it would be impracticable to join all of them as named Plaintiffs in this action.

100. There are questions of law and fact common to the members of the class that predominate over any questions affecting only individual class members, including, but not limited to the following:

a. Whether 3M is liable to the Plaintiffs and the class for compensatory, equitable and injunctive relief, including medical monitoring relief/reasonably necessary future medical care.

b. Whether 3M trespassed on the property of the Plaintiffs and the Class and therefore liable for compensatory relief.

c. Whether 3M created a private nuisance rendering 3M liable to the Plaintiffs and the class.

d. Whether 3M is liable to the Plaintiffs and the class for damages proximately caused by 3M's negligence.

e. Whether 3M is liable to the Plaintiffs and the class for causing a continuing trespass of their bodies and property.

f. Whether 3M committed a battery on Plaintiffs and the class and is thereby liable for compensatory relief.

g. Whether 3M is liable to the Plaintiffs and the class for causing a continuing battery.

Other common factual and legal issues are apparent from the allegations and causes of action asserted in this Complaint.

101. The claims of Plaintiffs as Class Representatives are typical of the claims of the members of the Class.

102. Plaintiffs will fairly and adequately protect the interests of the Class because the interests of Plaintiffs as Class Representatives are consistent with those of the members of the Class.

103. Prosecution of a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

104. The interests of members of the class, as to common questions of law and fact, in individually controlling the prosecution of separate actions do not outweigh the benefits of a class action as to those issues.

105. Any difficulties in management of this case as a class action are outweighed by the benefits of a class action with respect to disposing of common issues of law and fact as to the large number of litigants, and it is desirable to concentrate the litigation in one forum for the management of this civil action.

FIRST COUNT

BREACH OF DUTY AND NEGLIGENCE

106. Plaintiffs and the other class members incorporate the allegations contained in Paragraphs 1 through 101 of this Complaint as if fully restated herein.

107. In connection with its operation of the 3M Plant, 3M has had and continues to have a duty to operate and manage the 3M Plant and its related wastes in such a way as to not create a nuisance or condition causing any injury or damage to human health or the environment.

108. 3M breached its duty of care by negligently operating and managing the 3M Plant and conducting other operations and activities at the 3M Plant, including but not limited to off-site waste disposal activities, in such a manner as to negligently cause, permit, and allow the release of PFOS, PFOA, and/or other PFCs into the environment, thereby contaminating the air, soil, and drinking water of Plaintiffs and the other class members.

109. 3M's negligent acts and omissions proximately caused and continue to proximately cause damage to Plaintiffs and other class members in the form of bodily injury and property damage, in addition to creating conditions that are harmful to human health and the environment, for which 3M is liable, including liability for all appropriate medical monitoring of Plaintiffs and other class members.

110. Medical diagnostics and testing are available that, if utilized, can detect the latent illness(es) or disease(s), including but not necessarily limited to those diseases, conditions, and/or adverse effects identified in Paragraphs 46, 50-57, and 72-73, to which Plaintiffs and other class members have been exposed. Therefore early detection and treatment of the latent disease(s) or illness(es) is possible and beneficial to Plaintiffs and other class members who have ingested PFOS, PFOA, and/or other PFCs.

111 As a proximate result of the aforesaid acts and omissions, 3M and those acting for and on its behalf and as agents, ostensible agents, employees, conspirators and joint venturers of others, contaminated the environment with PFOS, PFOA, and/or other PFCs, which were ingested by Plaintiffs and the class which Plaintiffs seek to represent, and Plaintiffs and the other class members were injured as herein alleged.

112. The aforesaid acts and omissions of 3M were negligent, and as a proximate result, Plaintiffs and the class members have suffered and will in the future suffer some or all of the following damages:

a. Expenses reasonably necessary for future medical care, including the monitoring of the latent illness(es) or disease(s) associated with ingestion of and/or other significant exposure to PFOS, PFOA, and/or other PFCs;

b. Medical and hospital bills for diagnostic and preventative treatment and for treatment of injuries;

c. Physical injury, both temporary and permanent;

d. Property damage, both temporary and permanent;

e. Severe and significant emotional distress and mental pain and suffering;

f. Humiliation, embarrassment and fear;

g. Loss of enjoyment of life;

h. Annoyance and inconvenience; and

i. Other damages, which, under the law and circumstances, Plaintiffs are entitled to recover.

SECOND COUNT

PRIVATE NUISANCE

113. Plaintiffs and the other class members incorporate herein the allegations contained in Paragraphs 1 through 108 of this Complaint as if fully restated herein.

114. 3M's acts and omissions with respect to the releases of PFOS, PFOA, and/or other PFCs caused and continue to cause a material, substantial, and unreasonable interference with Plaintiffs' and the other class members' use and enjoyment of their properties, and has materially diminished and continues to diminish the value of such properties.

115. 3M's material, substantial, and unreasonable interference with the use and enjoyment of Plaintiffs' and the other class members' properties and continuing substantial and unreasonable interference with such use and enjoyment constitutes a continuing private nuisance.

116. 3M's creation and continuing creation of a continuing private nuisance proximately caused and continues to proximately cause damage to Plaintiffs and the other class members in the form of bodily injury, emotional distress, and property damage all of a type special and common to members of the class but not common to the general public, for which 3M is liable, including liability for all appropriate medical monitoring relief/reasonably necessary future medical care of Plaintiffs and the other class members.

THIRD COUNT

PAST AND CONTINUING TRESPASS

117. Plaintiff and the other class members incorporate herein the allegations contained in Paragraphs 1 through 112 of this Complaint as if fully restated herein.

118 3M's intentional acts and omissions have resulted and continue to result in the unlawful release and threatened release of PFOS, PFOA, and/or other PFCs at, under, onto, and into Plaintiffs' and the other class members' bodies and lawfully possessed properties.

119. PFOS, PFOA, and/or other PFCs present on Plaintiffs' and the other class members' properties and in their bodies originating from the 3M Plant were at all relevant times hereto, and continue to be, the property of 3M.

120. The invasion and presence of PFOS, PFOA, and/or other PFCs at, under, onto, and into Plaintiffs' and the other class members' properties and bodies were and continue to be without permission or authority from Plaintiffs or any of the other class members or anyone who could grant such permission or authority.

121. The presence and continuing presence of PFOS, PFOA, and/or other PFCs in Plaintiffs' and the other class members' properties and bodies constitute a continuing trespass.

122. 3M's past and continuing trespass upon Plaintiffs' and the other class members' properties and bodies proximately caused and continue to proximately cause damage to Plaintiffs and the other class members in the form of bodily injury, emotional distress and property damage, for which 3M is liable, including liability for all appropriate medical monitoring relief/reasonably necessary future medical care of Plaintiffs and the other class members.

FOURTH COUNT

PAST AND CONTINUING BATTERY

123 Plaintiff and the other class members incorporate herein the allegations contained in Paragraphs 1 through 118 of this Complaint as if fully restated herein.

124. 3M's intentional acts and omissions have resulted and continue to result in the unlawful invasion, contact, and/or presence of PFOS, PFOA, and/or other PFCs with, onto, and/or into Plaintiffs' and the other class members' bodies.

125. 3M's intentional acts and omissions were done with the knowledge and/or belief that the invasion, contact, and/or presence of PFOS, PFOA, and/or other PFCs with, onto, and/or into Plaintiffs' and/or other class members' bodies were substantially certain to result from those acts and omissions.

126. PFOS, PFOA, and/or other PFCs that Plaintiffs and other class members have ingested or otherwise been exposed to, or that are present in the bodies of Plaintiffs and the other class members, originating from the 3M Plant were at all relevant times hereto, and continue to be, the property of 3M.

127. The invasion, contact, and/or presence of PFOS, PFOA, and/or other PFCs with, onto, and/or into Plaintiffs' and the other class members' bodies were and continue to be without permission or authority from Plaintiffs or any of the other class members or anyone who could grant such permission or authority.

128. The presence and continuing invasion, contact, and/or presence of PFOS, PFOA, and/or other PFCs with, onto, and/or into Plaintiffs' and the other class members' bodies constitute a continuing battery.

129. 3M's past and continuing battery upon Plaintiffs' and the other class members' bodies proximately caused and continue to proximately cause damage to Plaintiffs and the other

class members in the form of bodily injury, emotional distress and other damage, for which 3M is liable, including liability for all appropriate medical monitoring relief/reasonably necessary future medical care of Plaintiffs and the other class members.

FIFTH COUNT

MINNESOTA ENVIRONMENTAL RESPONSE AND LIABILITY ACT (MERLA)

130. Plaintiffs and the other class members incorporate herein the allegations contained in Paragraphs 1 through 125 of this Complaint as if fully restate herein.

131. The 3M Plant and its associated waste disposal facilities, including but not limited to those landfills in which 3M disposed of PFOS, PFOA, and/or other PFCs (which Plant and associated facilities are collectively referred to hereinafter as the "Facilities"), are "facilities" within the meaning of the Minnesota Environmental Response and Liability Act ("the Act"), Minn. Stat. § 115B.01 *et seq*.

132. 3M owns and/or operates the Facilities and/or owned or operated the Facilities during the times of the release or threatened release of PFOA, PFOS, and other PFCs from the Facilities; and/or arranged for the disposal, treatment or transport for disposal or treatment of waste containing PFOA, PFOS, and/or other PFCs; and/or accepted for transport to a disposal or treatment facility waste containing PFCs that it knew or should have known contained hazardous substances, and selected the facility to which it was to be transported.

133. EPA considers PFOA, PFOS and/or other PFCs to be hazardous wastes within the meaning of the federal Resource Conservation and Recovery Act ("RCRA"), Title 42 of the United States Code, section 6903. EPA's authority under § 3004(6) of RCRA extends to releases of wastes that meet the statutory definitions of "hazardous waste," defined as "a solid

waste. . .which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5). PFOA, PFOS, and/or other PFCs constitute "hazardous waste" and thus "hazardous substances" within the meaning of the Act.

134. At times material to this Complaint, 3M owned and/or possessed the PFOA, PFOS, and/or other PFCs and arranged for the disposal, treatment, and/or transport for disposal and/or treatment of the PFOA, PFOS and PFCs.

135. At times material to this Complaint, there have been releases and/or threatened releases of PFOA, PFOS, and other PFCs from the 3M Plant and/or releases otherwise attributable to 3M and/or under 3M's control related to 3M's operation of such 3M Plant, including discharges into the Mississippi River, releases related to incineration and/or other on-site disposal, and releases related to off-site disposal at area landfills, including but not necessarily limited to the Abresch site, the Washington County landfill and the Woodbury landfill.

136. At times material to this Complaint, 3M is and has been responsible for the releases and/or threatened releases of PFOA, PFOS and/or other PFCs described in paragraphs 127-131 above.

137. The releases and/or threatened releases of PFOA, PFOS and/or other PFCs have caused and will cause Plaintiffs and the other class members to suffer some or all of the following damages:

a. Medical and hospital bills for diagnostic and preventative treatment and

for treatment of injuries, including medical monitoring/reasonably necessary future medical care expenses;

c. Physical injury, both temporary and permanent;

d. Property damage, both temporary and permanent;

e. Severe and significant emotional distress and mental pain and suffering;

f. Humiliation, embarrassment and fear;

g. Loss of enjoyment of life;

h. Annoyance and inconvenience; and

i. Other damages, which, under the law and circumstances, Plaintiffs are entitled to recover.

138. 3M is strictly liable to Plaintiffs and the other class members for those damages that Plaintiffs and the other class members have incurred and will incur.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and each member of the Class have been damaged, and are entitled to damages in an amount to be proven at trial, in an amount in excess of $50,000 per plaintiff and per class member, including compensatory damages, attorneys' fees and costs, and therefore request the following relief:

1. An order from this Court ordering that this is an appropriate action to be prosecuted as a class action pursuant to Rule 23 of the Minnesota Rules of Civil Procedure and finding that Plaintiffs and their counsel are appropriate representatives and appropriate counsel for the class, and that this action shall proceed as a class action on all common issues of law and fact;

2. A judgment against 3M that 3M is liable to Plaintiffs and the other class members for all appropriate medical monitoring relief/reasonably necessary future medical care, in an amount to be determined at trial;

3. Compensatory damages in an amount to be determined at trial;

4. Declaratory judgment that PFOA, PFOS and other PFCs are hazardous substances within the meaning of MERLA and other appropriate declaratory relief;

5. The costs, disbursements and attorneys' fees of this action as provided by law;

6. Pre-judgment and post-judgment interest;

7. Equitable and injunctive relief for providing notice and medical monitoring relief/reasonably necessary future medical care to the Plaintiffs and the class and to abate and/or prevent the release and/or threatened release of PFOS, PFOA, and/or related PFCs; and

8. For all other further and general relief, whether compensatory, equitable, or injunctive relief, as this Court may deem just and appropriate.

JURY DEMAND

Plaintiff and the other class members hereby demand trial by jury on all issues so triable.

Dated: May 18, 2005

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ACKNOWLEDGMENT

(Minn. Stat. §§549.211 Sanctions in Civil Actions)

The underlying signatory hereby certifies that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that the pleading (1) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief. The parties acknowledge that sanctions may be imposed under Minn. Stat. § 549.211.

Dated: 5/18/05

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Appendix C

Proposed Fee Agreement

SAAG Contract
State of Michigan Department of Attorney General
PFAS Environmental Tort Litigation

Dana Nessel, Attorney General of the State of Michigan (Attorney General), and the Department of Attorney General (the Department) retain and appoint the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. (Beasley Allen or Firm) to provide legal services through the appointment of the following individuals as Special Assistant Attorneys General (SAAGs):

Rhon E. Jones

The legal services provided to the State of Michigan will be pursuant to the following terms and conditions in this Contract:

1. PARTIES/PURPOSE

1.1 Parties. The parties to this Contract are the Department of Attorney General and the law firm of Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. No other attorney may engage in the practice of law on behalf of the State of Michigan under this Contract without the Department's prior approval, a Contract amendment, and a SAAG appointment from the Attorney General.

1.2 Purpose. The Department and Beasley Allen agree that the Firm will provide legal services relative to the PFAS environmental tort litigation. All case resolutions are to be approved in advance by the Department

1.3 Work Product. Beasley Allen understands that all work product is subject to review by the Department. The Department reserves the right to deny payment for any work product deemed unacceptable. Delivery of such a deficient work product may also result in Contract termination under paragraph 9 of this Contract.

2. TERM OF CONTRACT

The duration of this Contract is indefinite.

3. COMPENSATION AND COST REIMBURSEMENT

3.1 Compensation and the repayment of costs and disbursements shall be contingent upon a successful recovery of funds being obtained from Defendant(s) in the litigation pursued under the terms of this Contract (whether through settlement or final non-appealable judgment).

3.2 If no recovery is made, the State owes nothing for costs incurred by Beasley Allen and is not obligated to reimburse the Firm for any costs.

3.3 If a recovery is obtained, the costs incurred by Beasley Allen will be deducted prior to the calculation of the fee set forth in the Fee Agreement. Beasley Allen will be required to submit a monthly statement to the Department of Attorney General setting forth in detail any potentially reimbursable costs incurred with respect to this appointment, together with a running total of costs

accumulated since the execution of the Fee Agreement.

3.4 If Beasley Allen obtains settlement or judgment for the State, the State will pay the Firm the following fee:

a. 22% of any recovery of up to $10,000,000; plus

b. 22% of any portion of such recovery between $10,000,000 and $50,000,000; plus

c. 16% of any portion of such recovery between $50,000,000 and $100,000,000; plus

d. 12% of any portion of such recovery between $100,000,000 and $150,000,000; plus

e. 8% of any portion of such recovery exceeding $150,000,000.

f. The aggregate contingency fee paid shall not exceed $75,000,000.

3.5 If this agreement is terminated before the case is resolved, the Department gives Beasley Allen a lien against any subsequent recovery in this case in an amount sufficient to reasonably compensate Beasley Allen for its time and expenses. Under no circumstance can the award under this paragraph exceed the fee limitations imposed by section 3.4 of this Fee Agreement.

3.6 If a settlement amount has been negotiated by Beasley Allen on behalf of the Department at the time that this agreement is terminated, Beasley Allen will have a lien upon any subsequent recovery equal to the applicable percentage in the fee schedule contained in section 3.4 of this Fee Agreement, plus expenses incurred or an amount sufficient to reasonably compensate Beasley Allen for its time spent on the case and expenses. Under no circumstance can the award under this paragraph exceed the fee limitations imposed by section 3.4 of this Fee Agreement.

3.7 If possible, Beasley Allen shall seek payment of the fees and expenses described herein directly from Defendant(s) separate from and/or in addition to Department's recovery via agreement or court order. If Defendants do not pay the entirety of Beasley Allen's fees and expenses via agreement or court order, any remaining fees or expenses due to Beasley Allen pursuant to this agreement shall be reimbursed by the Department in accordance with section 3.3 of this agreement.

4. REPRESENTATIONS

4.1 Qualifications. The SAAG, by signing this Fee Agreement, attests that he is qualified to perform the services specified in this Contract and agrees to faithfully and diligently perform the services consistent with the standard of legal practice in the community.

4.2 Conflict of Interest. Beasley Allen represents that it has conducted a conflict check prior to entering into this Contract and no conflicts exist with the proposed legal services. Beasley Allen agrees to not undertake representation of a client if the representation of that client is related to the subject matter of this Contract or will be adverse to the State of Michigan, unless the firm obtains prior written approval to do so from both the [name of department or agency] and the Department.

With respect to potential conflicts of interest, other lawyers at Beasley Allen must be advised of the SAAG's representation of the Department of the Attorney General, and that the firm has agreed not to accept, without prior written approval from [name of department or agency] and the Department, any employment from other interests related to the subject matter of this Contract or adverse to the State of Michigan. Beasley Allen shall carefully monitor any significant change in the assignments or clients of the firm in order to avoid any situation which might affect its ability to effectively render legal services to the Department of the Attorney General.

4.3 Services to be Confidential. Beasley Allen must keep confidential all services and information, including records, reports, and estimates. Beasley Allen must not divulge any information to any person other than to authorized representatives of the Department and [name of department or agency], except as required by testimony under oath in judicial proceedings, or as otherwise required by law. Beasley Allen must take all necessary steps to ensure that no member of the firm divulges any information concerning these services. This includes, but is not limited, to information maintained on the firm's computer system.

All files and documents containing confidential information must be filed in separate files maintained in the office of Beasley Allen with access restricted to each SAAG and needed clerical personnel. All documents prepared on the Beasley Allen computer system must be maintained in a separate library with access permitted only to each SAAG and needed clerical personnel.

4.4 Assignments and Subcontracting. The SAAG must not assign or subcontract any of the work or services to be performed under this Contract, including work assigned to other members or employees of Beasley Allen, without the prior written approval of the Department. Any member or employee of Beasley Allen who received prior approval from the Department to perform services under this Contract is bound by the terms and conditions of this Contract.

4.5 Facilities and Personnel. Beasley Allen has and will continue to have proper facilities and personnel to perform the services and work agreed to be performed.

4.6 Advertisement. The SAAG, during the term of appointment and thereafter, must not advertise his position as a SAAG to the public. The SAAG designation may be listed on the SAAG's resume or other professional biographical summary, including resumes or summaries that are furnished to professional societies, associations, or organizations. Any such designation by the SAAG must first be submitted to and approved by the Department, after consultation with [name of department or agency].

4.7 Media Contacts. The SAAG may not engage in any on or off the record communication (written or spoken) with any member of the media without advance approval and appropriate vetting by the Director of Communications of the Department of Attorney General.

4.8 Records. As set forth in Paragraph 3.3 of this Contract, Beasley Allen must submit a monthly statement to the designated representative(s) of the Attorney General, setting forth in detail any potentially reimbursable costs incurred with respect to this appointment, together with a running total of costs accumulated since the execution of the Fee Agreement. These invoices shall be considered confidential and not be subject to discovery in the litigation brought under the Scope of Work. The records must be kept in accordance with generally accepted accounting practices and sound business practices. The Department and [name of department or agency], or their designees,

reserve the right to inspect all records of the SAAG related to this Contract.

4.9 Non-Discrimination. The SAAG, in the performance of this Contract, and Beasley Allen agree(s) not to discriminate against any employee or applicant for employment, with respect to their hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital status, physical or mental disability unrelated to the individual's ability to perform the duties of the particular job or position. This covenant is required by the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, and the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, and any breach of the Act may be regarded as a material breach of the Contract. The SAAG agrees to comply with the provisions of the Federal Civil Rights Act of 1964, 42USC §2000d, in performing the services under this Contract.

4.10 Unfair Labor Practices. The State will not award a contract or subcontract to any employer, or any subcontractor, manufacturer, or supplier of the employer, whose name appears in the current register compiled pursuant to 1980 PA 278, MCL 423.321 *et seq*. The State may void this Contract if after the award of the Contract, the name of the SAAG or his law firm appears in the register.

4.11 Compliance. Beasley Allen's activities under this Contract are subject to applicable State and Federal laws and to the Rules of Professional Conduct applicable to members of the Michigan Bar Association. In accordance with MCL 18.1470, DTMB or its designee may audit Contractor to verify compliance with this Contract.

4.12 Independent Contractor. The relationship between Beasley Allen [name of department or agency] in this Contract is that of an independent contractor. No liability or benefits, such as workers compensation rights or liabilities, insurance rights or liabilities, or any other provisions or liabilities, arising out of or related to a contract for hire or employer/employee relationship, must arise, accrue or be implied to either party or either party's agent, subcontractor or employee as a result of the performance of this Contract. The SAAG and Beasley Allen will be solely and entirely responsible for his acts and the acts of Beasley Allen's agents and employees during the performance of this Contract. Notwithstanding the above, the relationship is subject to the requirements of the attorney-client privilege.

5. MANAGEMENT OF CASES

5.1 Notifications. The SAAG must direct all notices, correspondence, inquiries, billing statements, pleadings, and documents mentioned in this Contract to the attention of the Department's Environment, Natural Resources, and Agriculture (ENRA) Division. The Division Chief of the ENRA Division is the Contract Manager, unless notice of another designation is received from the Attorney General. The Division Chief may designate an Assistant Attorney General in the Division to oversee the day to day administration of the Contract.

For the Department:

[Division Chief's name],
Division Chief Michigan Department of Attorney General
[Division name]

P.O. Box [Number] [City], MI [Zip Code]
[Office telephone number] [Office fax number]

For the SAAG:

Rhon E. Jones
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
218 Commerce Street, Montgomery, AL 36104
(334) 269-2343 (phone)
(334) 954-7555 (fax)
Rhon.Jones@BeasleyAllen.com

5.2 Beasley Allen must promptly inform the Contract Manager of the following developments as soon as they become known:

A. Favorable actions or events that enable meeting time schedules and/or goals sooner than anticipated.

B. Delays or adverse conditions that materially prevent, or may materially prevent, the meeting of the objectives of the services provided. A statement of any remedial action taken or contemplated by the SAAG must accompany this disclosure.

For every case accepted, Beasley Allen must:

A. Promptly undertake all efforts, including legal proceedings, as directed by the [insert division name], and must prosecute any case to its conclusion unless directed to the contrary by the [insert divisionname].

B. Provide copies of all pleadings filed in any court by the SAAG, or by the opposing party, to the [insert division name].

5.3 Motions. Before any dispositive motion is filed, the supporting brief must be submitted to the [insert division name] for review and approval for filing with the court.

5.4 Investigative Support. All claims will be vigorously pursued and prepared for filing. If authorized by the Contract Manager, use of investigative subpoenas must be thorough and aggressive. The [insert division name] may request investigative subpoenas in addition to what the SAAG has filed.

5.5 Discovery Requests. The SAAG must consult with Contract Manager and assist in the preparation of answers to requests for discovery. The SAAG must indicate those requests to which he intends to object.

5.6 Witness and Exhibit Lists. At least ten (10) calendar days before the day a witness list or an exhibit list is due, the Contract Manager must receive a preliminary witness list or exhibit list for review and recommendation of additional names of witnesses or additional exhibits.

5.7 Mediation. Fifteen (15) calendar days before any mediation, the mediation summary

must be submitted to the Contract Manager for review and recommendation. Immediately following mediation, the SAAG must submit a status memorandum indicating the amount of the mediation and a recommendation to accept or reject the mediation.

5.8 Trial Dates. The SAAG must advise the Contract Manager immediately upon receipt of a trial date.

5.9 Settlements. All settlements are subject to approval by the Department. The SAAG must immediately communicate any plea/settlement proposal received along with a recommendation to accept, reject, or offer a counterproposal to any offer received to the Department's Contract Manager. "Settlement" includes, but is not limited to, the voluntary remand of a case to the trial court or by way of stipulation or motion.

5.10 Experts. The SAAG must provide advance notice to the Contract Manager prior to the selection of experts or consultants, and the Attorney General shall have the right to reject proposed experts or consultants. The SAAG shall cooperate with the Department and make all records and documents relevant to the tasks as described in the Scope of Work available to the Department through the Contract manager or his or her designee in a timely fashion.

5.11 Money. A SAAG must only accept payment by an opposing party under the following terms:

A. The SAAG must immediately inform the Contract Manager upon receipt of any funds by the SAAG as payment on a case, whether pursuant to court order, settlement agreement, or other terms. Following the deduction of reimbursable costs, calculation of the fee under the Fee Agreement, and approval of the calculated fee by the Department, Beasley Allen shall deduct the Department-approved eligible costs, the Department- approved fee, and shall make payment of the remainder of the recovery to the State of Michigan as follows:

i. payment must be made by check, certified check, cashier's check, or money order;

ii. payable to the "State of Michigan" or as otherwise specified by the Contract Manager;

iii. include the tax identification number/social security number of the payer; and

iv. include the account to which the remittance is to be applied.

5.12 File Closing. The SAAG must advise the Contract Manager, in writing, of the reason for closing a file (e.g., whereabouts unknown, no assets, bankruptcy, payment in full, or settlement).

6. INDEMNIFICATION

The SAAG agrees to hold harmless the State of Michigan, its elected officials, officers, agencies, boards, and employees against and from any and all liabilities, damages, penalties, claims,

costs, charges, and expenses (including, without limitation, fees and expenses of attorneys, expert witnesses and other consultants) which may be imposed upon, incurred by, or asserted against the State of Michigan for either of the following reasons:

A. Any malpractice, negligent or tortious act or omission attributable, in whole or in part, to the SAAG or any of [his/her/its] employees, consultants, subcontractors, assigns, agents, or any entities associated, affiliated, or subsidiary to the SAAG now existing, or later created, their agents and employees for whose acts any of them might be liable.

B. The SAAG's failure to perform his obligation either expressed or implied by this Contract.

7. INSURANCE

7.1 Errors and Omissions. Beasley Allen must maintain professional liability insurance sufficient in amount to provide coverage for any errors or omissions arising out of the performance of any of the professional services rendered pursuant to this Contract.

7.2 Certificates of Insurance. Certificates evidencing the purchase of insurance must be furnished to the Department's [insert division name], upon request. All certificates are to be prepared and submitted by the insurance provider and must contain a provision indicating that the coverage(s) afforded under the policies will not be cancelled, materially changed, or not renewed without thirty (30) calendar days prior written notice, except for ten (10) calendar days for non- payment of premium, and any such notice of cancellation, material change, or non- renewal must be promptly forwarded to the Department upon receipt.

7.3 Additional Insurance. If, during the term of this Contract changed conditions should, in the judgment of the Department, render inadequate the insurance limits Beasley Allen will furnish, on demand, proof of additional coverage as may be required. All insurance required under this Contract must be acquired at the expense of Beasley Allen, under valid and enforceable policies, issued by insurers of recognized responsibility. The Department reserves the right to reject as unacceptable any insurer.

8. APPEALS

Beasley Allen agrees that no appeal of any order(s) of the Michigan Court of Claims, any Michigan Circuit Court, the Michigan Court of Appeals, or any United States District Court will be taken to the Michigan Court of Appeals, the Michigan Supreme Court, or any United States Circuit Court of Appeals, without prior written approval of the Michigan Solicitor General, Department of Attorney General. Further, Beasley Allen agrees that no petition for certiorari will be filed in the United States Supreme Court without prior written permission of the Michigan Solicitor General, Department of Attorney General.

9. TERMINATION OF CONTRACT AND APPOINTMENT

9.1 SAAG Termination. The SAAG may terminate this Contract upon sixty (60) calendar day's prior written notice (Notice of Termination). Upon delivery of such notice, the SAAG must

continue all work and services until otherwise directed by the [insert division name]. The SAAG will be paid only as set forth in the contingency fee arrangement specified under the Fee Agreement.

9.2 Attorney General Termination. The Department may terminate this Contract and SAAG appointment, at any time and without cause, by issuing a Notice of Termination to the SAAG. Any compensation owed to the SAAG at the time of termination is governed by sections 3.5 – 3.6.

9.3 Termination Process and Work Product. Upon receipt of a Notice of Termination, and except as otherwise directed by the Attorney General or her designee, the SAAG must:

A. stop work under the Contract on the date and to the extent specified in the Notice of Termination;

B. incur no costs beyond the date specified by the Department;

C. on the date the termination is effective, submit to the Contract Manager all records, reports, documents, and pleadings as the Department specifies and carry out such directives as the Department may issue concerning the safeguarding and disposition of files and property; and

D. submit within thirty (30) calendar days a closing memorandum and final billing.

Upon termination of this Contract, all finished or unfinished original (or copies when originals are unavailable) documents, briefs, files, notes, or other materials (the "Work Product") prepared by the SAAG under this Contract, must become the exclusive property of the Department, free from any claims on the part of the SAAG except as herein specifically provided. The Work Product must promptly be delivered to the [insert division name]. Beasley Allen acknowledges that any intentional failure or delay on its part to deliver the Work Product to the Department will cause irreparable injury to the State of Michigan not adequately compensable in damages and for which the State of Michigan has no adequate remedy at law. The SAAG accordingly agrees that the Department may, in such event, seek injunctive relief in a court of competent jurisdiction. The Department must have full and unrestricted use of the Work Product for the purpose of completing the services. In addition, each party will assist the other party in the orderly termination of the Contract.

The rights and remedies of either party provided by the Contract are in addition to any other rights and remedies provided by law or equity.

10. GENERAL PROVISIONS

10.1 Governing Law and Jurisdiction. This Contract is subject to and will be constructed according to the laws of the State of Michigan, and no action must be commenced against the Department or the Attorney General, his designee, agents or employees [add client agency, if applicable] for any matter whatsoever arising out of the Contract, in any courts other than the Michigan Court of Claims.

10.2 No Waiver. A party's failure to insist on the strict performance of this Contract does not constitute waiver of any breach of the Contract.

10.3 Additional SAAGs. It is understood that during the term of this Contract, the Department may contract with other SAAGs providing the same or similar services.

10.4 Other Debts. Beasley Allen agrees that it is not, and will not become, in arrears on any contract, debt, or other obligation to the State of Michigan, including taxes.

10.5 Invalidity. If any provision of this Contract or its application to any persons or circumstances to any extent is judicially determined to be invalid or unenforceable, the remainder of this Contract will not be affected, and each provision of the Contract will be valid and enforceable to the fullest extent permitted by law.

10.6 Headings. Contract section headings are for convenience only and must not be used to interpret the scope or intent of this Contract.

10.7 Entire Agreement. This Contract represents the entire agreement between the parties and supersedes all proposals or other prior agreements, oral or written, and all other communications between the parties.

10.8 Amendment. No Contract amendment will be effective and binding upon the parties unless it expressly makes reference to this Contract, is in writing, and is signed by duly authorized representatives of all parties and all the requisite State approvals are obtained.

10.9 Issuing Office. This Contract is issued by the Department and is the only state office authorized to change the terms and conditions of this Contract.

10.10 Counterparts. This Contract may be signed in counterparts, each of which has the force of an original, and all of which constitute one document.

Dated: ______________________________ ______________________________
[Attorney's Name]

Dated: ______________________________ ______________________________
Dana Nessel, Attorney General or her Designee
Michigan Department of Attorney General