From:	Hailey VanKeuren
To:	AG-PFASProposal
Cc:	Roe Frazer; bburke@rpwb.com; Greg Cade; Christiaan Marcum; Frederick Kuykendall; Trey Frazer
Subject:	PFAS Proposal
Date:	Wednesday, June 5, 2019 4:45:11 PM
Attachments:	Michigan PFAS Proposal.pdf
Importance:	Low

Please see attached PFAS Manufacturers Tort Litigation Proposal Attached.

Hailey VanKeuren
Legal Assistant
Hailey@frazer.law
Frazer PLC
30 Burton Hills Blvd. Suite 450
Nashville, TN 37215
Frazer.Law
(615) 647-6464

FRAZER
ATTORNEYS AT LAW

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30 BURTON HILLS BOULEVARD
SUITE 450
NASHVILLE, TN 37215

June 5, 2019

VIA EMAIL

AAG Polly Synk
Assistant Attorney General
State of Michigan
Department of Attorney General
synkp@michigan.gov
PFASProposal@michigan.gov

Re: State of Michigan Department of Attorney General
Request for Proposals for PFAS Manufacturer Tort Litigation

Dear AAG Synk:

Thank you for the opportunity to respond to the above-referenced Request for Proposal ("RFP"). Before making specific responses to the RFP, we would like to make the following brief introduction.

Richardson Patrick Westbrook & Brickman, LLC, The Environmental Litigation Group, P.C., Frazer PLC, and The Kuykendall Group, LLC (collectively, "PFAS Legal Team") are joining forces to submit this proposal to serve as Special Assistant Attorney Generals ("SAAGs") to the State of Michigan in the PFAS Litigation. The PFAS Legal Team would be honored to represent the State of Michigan in the PFAS Litigation, and we welcome the opportunity to make an in-person presentation in the near future.

We know that Michigan has been hard hit by PFAS pollution of drinking water. We believe that Michigan can be the leading state in the fight against the PFAS pollution of the State's water supplies, aquifers, groundwater, rivers, tributaries, and lakes using the PFAS Legal Team's expertise and extensive work to date. From our experience representing water providers, we have generated a preliminary damages analyses for effective remediation of PFAS.

We believe our PFAS Legal Team is uniquely qualified to serve as SAAGs for the State of Michigan for five key reasons:

(1) Our PFAS Legal Team has been involved in PFAS litigation for several years, and we currently represent several drinking water providers in pending cases against PFAS manufacturers, distributors, and polluters in many states. We understand the legal and factual issues, and we have been in active discovery with certain PFAS defendants for more than a year. We

have access to multiple discovery databases, and we have developed our own database of discovery, research, data analysis, and information.

(2) Lawyers on our PFAS Legal Team serve on the Plaintiff's Executive Committee ("PEC") in the only PFAS-related Multi-District Litigation ("MDL") in the United States, MDL No. 2873, *In re Aqueous Film Forming Foams* ("AFFF") *Products Liability Litigation*, U.S. District Court for the District of South Carolina. T. Roe Frazer II of Frazer PLC serves on the PEC, is the co-chair of the Private Water Provider Subcommittee, and is a member of the Legislative Subcommittee. Gregory A. Cade of Environmental Litigation Group, P.C. serves on the PEC and is on the Science and Legislative Subcommittees. Christiaan Marcum of Richardson, Patrick, Westbrook & Brickman, LLC serves on the PEC and is on the Private Water Subcommittee.

(3) We have already assembled a team of experts from around the United States who are working with the PFAS Legal Team. Our experts have already completed significant work in analyzing the PFAS issues nationwide.

(4) The PFAS Legal Team includes attorneys with a wealth of diverse experience in complex litigation and settlements. While the PFAS Legal Team is actively involved in clean drinking water litigation, we do not represent any plaintiffs bringing personal injury or medical monitoring claims. Instead, the PFAS Legal Team is working exclusively on the side of water providers to obtain compensation for remediation of PFAS in drinking water – making our drinking water safe for the people prospectively. We view the subject RFP in the same light.

(5) We would conduct a Michigan-specific investigation and strategy. Our litigation plan would include: (a) assertion of claims against the PFAS chemical compounds manufacturers; (b) assertion of claims against certain manufacturers using PFAS compounds in their products; and (c) priority filing of a Michigan statewide AFFF complaint.

1. Bidder Contact Information (1.1, 1.2)

Elizabeth Burke of Richardson, Patrick, Westbrook & Brickman, LLC will be the Bidder Contact. Ms. Burke's contact information is: 1037 Chuck Dawley Blvd. – Building A, P.O. Box 1007, Mount Pleasant, SC 29465, (843) 7272-6500, bburke@rpwb.com. Ms. Burke is authorized to sign any contract resulting from this Request for Proposal.

Company Background Information

2.1, 2.2

This bidding team is composed of four law firms: Richardson, Patrick, Westbrook & Brickman, LLC, Frazer PLC, Environmental Litigation Group, P.C., and The Kuykendall Group LLC.

Richardson, Patrick, Westbrook & Brickman LLC ("RPWB") is a limited liability company organized under the laws of South Carolina, with the following office locations: 174 East Bay, P.O. Box 879, Charleston, SC 29402, (843) 727-6500; 1037 Chuck Dawley Blvd. – Building A, P.O. Box 1007, Mount Pleasant, SC 29465, (843) 7272-6500; 1730 Jackson Street, P.O. Box 1368, Barnwell, SC 29812, (803) 541-7850; 1513 Hampton Street, 1st Floor, Columbia, SC 29201, (803) 541-7850; 623 Richland Ave. W, P.O. Box 3088, Aiken, SC 29802, (803) 541-7850; and Mark Twain Plaza II, 103 West Vandalia Street, Ste. 212, Edwardsville, IL 62025, (618) 307-5077. RPWB maintains a website at www.rpwb.com. **Elizabeth Burke** and **Christiaan Marcum** will be the lead attorneys for this matter for RPWB and both work out of the firm's Mount Pleasant, SC office, with their emails respectively bburke@rpwb.com and cmarcum@rpwb.com.

Environmental Litigation Group, P.C. is a professional corporation organized under the laws of Alabama. ELG has offices at 2160 Highland Ave., Birmingham, AL 35205, and 2101 L. St. NW, Ste. 800, Washington, DC 20037. ELG's main phone is (205) 328-9200, with a website domain at www.elglaw.com. ELG is also a certified General Services Administration ("GSA") business by the U.S. federal government. This allows ELG to provide services for federal government operations while facilitating the business operations of the government in the legal, collections, and industrial hygiene fields. ELG thus is intimately familiar working with governmental entities and assisting in reaching governmental objectives. **Gregory A. Cade** will be the lead attorney for this matter at ELG and his email address is gregc@elg.com.

Frazer PLC is a professional limited liability company organized under the laws of Tennessee. Frazer PLC maintains its offices at 30 Burton Hills Blvd., Suite 450, Nashville, TN 37215; (615) 647-6464, with a website domain of www.frazer.law. The lead attorney for this matter at Frazer PLC will be **T. Roe Frazer II**, (615) 647-0990 (direct dial) and email address of roe@frazer.law.

The Kuykendall Group LLC ("TKG") is a limited liability company organized under the laws of Alabama. TKG maintains offices at 356 B Murphy Avenue, Fairhope, AL 36532, (205) 252-6127, ftk@thekuykendallgroup.com. **Frederick ("Rick") T. Kuykendall, III** will be the lead attorney for this matter at TKG; his email is ftk@thekuykendallgroup.com.

2.3

If awarded this contract, the primary work would occur in Nashville, TN, Birmingham, AL, and Charleston, SC. The PFAS Legal Group also would associate local Michigan counsel in consultation with and consent of the State of Michigan Department of Attorney General.

2.4

All of the firms of the PFAS Legal Team are civil litigation law firms.

2.5

The PFAS Legal Team is already a collaborative working group of lawyers focused on environmental issues and litigation, as well as complex tort litigation. The PFAS Legal Team was established to bring together different and complementary skill sets, experience, and expertise to provide for a more formidable working group aligned against the PFAS defendants in an overall, nationwide effort to clean up the U.S.'s drinking water.

2.6

Although undecided at this time, the PFAS Legal Time may use an e-discovery services contractor.

2.7

The lead attorneys on the PFAS Legal team are:

Elizabeth Burke and Christiaan Marcum of RPWB.

T. Roe Frazer II of Frazer PLC.

Gregory A. Cade of ELG.

Frederick T. Kuykendall, III of TKG.

The resumes of these attorneys are attached hereto as Appendix 1.

3. Experience

3.1

Following is a description of a few, among many, relevant experiences supporting our ability to successfully perform the work set forth in the RFP's SOW.

Roe Frazer, Gregory Cade, and Christiaan Marcum are members of the Plaintiffs' Executive Committee in the *In re: Aqueous Film-Forming Foams Products Liability Litigation* ("AFFF"), MDL No. 2873, U.S. District Court for the District of South Carolina. The AFFF MDL is the only federal multi-district litigation involving PFAS chemicals. Our leadership participation in this MDL is in addition to other PFAS litigation on behalf of water providers, including *New Jersey American Water v. E.I. duPont de Nemours & Co., et al.*, District of New Jersey and *New York American Water v. Dow Chemical Co., et al.*, Eastern District of New York. Rick Kuykendall is co-counsel in those cases, and together, these attorneys and law firms are collaborating on numerous PFAS cases and matters for water providers throughout the United States involving

drinking water contamination from, including, PFAS, PFOS, PFOA, other C-8s, 1,4-dioxane, petrochemicals, benzene, pharmaceuticals, dioxins, and furans.

The attorneys of RPWB have extensive experience investigating and litigating instances of water contamination and environmental degradation on behalf of governmental entities. RPWB has served lead roles in successfully litigating dozens of natural resource damage cases on behalf of the State of New Jersey, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The majority of these cases involved groundwater and/or surface water contamination from industrial facilities, plants, factories, oil refineries, and gas stations. RPWB lawyers worked extensively with experts in the fields of hydrogeology, chemistry, resource valuation, and economics to fully evaluate the extent and damage caused by contamination of valuable water resources. RPWB's representation resulted in the recoveries of millions of dollars to compensate the various governmental agencies and to assist in cleanup and preservation efforts. In 2014, RPWB successfully completed a decade-long fight to bring justice to the residents and government of the U.S. Virgin Islands for contamination of the primary aquifer on St. Croix and surface pollution surrounding an oil refinery and alumina refinery. In total, the Territory recovered financial compensation and environmental remediation efforts valued at between $160 million and $180 million. Notably, Elizabeth Burke is Co-Chair of the Plaintiffs' Steering Committee, *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19mdl 2885 (N.D. Fla.).

Roe Frazer and Rick Kuykendall were lead attorneys in water pollution, class action litigation against paper mills in the southern United States. The claims centered on the production of dioxins and furans in the effluent of paper mills due to the use of chlorine in the pulp bleaching process. The litigation successfully changed the process of bleaching to eliminate the use of chlorine nationwide, as well as obtained compensation for riparian land owners. The lead case was *Branch, et al. v. Weyerhaueser Corp., et al.*, Greene County, Alabama Circuit Court.

Rick Kuykendall successfully litigated against BP in *MDL 2179 Oil Spill Litigation,* Eastern District of Louisiana on behalf of many cities and counties. Mr. Kuykendall also served as co-lead counsel in several successful water pollution cases including *Queen v. Constellation Energy* (MD) and *In Re: Conoco, Inc. Class Action*, No. 2001 CA 000631 (FL). Roe Frazer was lead counsel in a successful PCB soil and water contamination case against Monsanto in federal court in Mississippi. Mr. Frazer is presently in litigation as lead counsel against a secondary copper smelter (Cerro Flow Products) in Illinois for toxic dioxin air emissions and soil and water pollution.

3.2

Please see Appendix 2 that includes publicly available motions, briefs, and other documents relevant to our experience in this matter.

4. Conflict of Interest

4.1, 4.2, 4.3

These sections inquire about potential conflicts of interest with the State of Michigan or regarding any prior, current, or anticipated future relationship with any manufacturer of PFAS or PFAS-containing products. There are no such conflicts. The PFAS Legal Team has no conflicts with the State of Michigan. The PFAS Legal Team does not and has never represented any of the potential PFAS manufacturers, industries, or potential defendants. Moreover, the PFAS Legal Team has limited its representation in all PFAS litigation to water providers in order to align ourselves with the goal of remediation of water supplies, aquifers, rivers, reservoirs, lakes, and tributaries. Accordingly, we do not represent any personal injury plaintiffs, any medical monitoring plaintiffs or class actions, or any private well owners in the PFAS litigation. Finally, we do not represent any municipalities or counties in the State of Michigan in any litigation, including but not limited to the opiates prescription drug litigation. Finally, we do not represent any other state governments in PFAS or any other litigation such as the opiates prescription drug.

5. SAAG Contract

Pursuant to Section 5.1, this bidding team affirms our agreement with the SAAG Contract, with no proposed edits or redlines.

6. Fee Agreement

6.1

The PFAS Legal Team's Proposed Fee Agreement is attached, entirely consistent with the SAAG Contract.

Again, we are honored and privileged to be considered for SAAGs for the State of Michigan PFAS Manufacturer Tort Litigation. We stand ready to answer any questions by phone, email, or in person. There are many unique and helpful insights we have that we would like to share with you under the cover of attorney-client privilege and/or attorney work-product privilege. We look forward to the next steps.

Sincerely,

THE PFAS LEGAL TEAM

By: T. Roe Frazer II

CCS: Elizabeth Burke, Christaan Marcum, Gregory A. Cade, Frederick T. Kuykendall, III

2.7 CVs
Attachments

Christiaan A. Marcum
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Boulevard, Building A
Mount Pleasant, SC 29464
(843) 727-6522

Education: College of Charleston, B.A., History, 1995
Member of Phi Alpha Theta National History Honor Society

University of South Carolina, J.D., *cum laude* 1999
Order of Wig and Robe
Research Editor, South Carolina Environmental Law Journal
Recipient of Outstanding Senior Research Paper Award

Admissions: South Carolina Bar, 1999
United States District Court for the District of South Carolina, 2000
United States District Court for the Northern District of Illinois 2013
United States District Court for the Central District of Illinois 2013
United States Court of Appeals for the Fourth Circuit 2017

Member: South Carolina Bar
Charleston County Bar
South Carolina Association for Justice (SCAJ)
American Association of Justice (AAJ)

Employment: Richardson, Patrick, Westbrook & Brickman, LLC, *Member*
Mt. Pleasant, SC, 2004 to Present.

Mark C. Tanenbaum, PA, *Attorney*
Charleston, SC, 2000-2004.

The Honorable Kaye G. Hearn, *Law Clerk*
South Carolina Court of Appeals, 1999-2000.

Litigation: Complex civil litigation involving personal injury, products liability, medical malpractice, medical device and pharmaceutical cases; mass torts; multi-district litigation

Frederick T. Kuykendall, III

AV Preeminent Rated, Martindale Hubbell

PRINCIPAL AREAS OF PRACTICE:

Product Liability/Mass Tort Litigation with concentration on Industrial and Pharmaceutical Litigation

Class Actions with concentration in Consumer and Environmental Actions

Labor and Employment Litigation including Fair Labor Standards Act violations, Employment and Sexual Discrimination.

Select Defense Representation

Dispute Resolution/Negotiation

EDUCATION:

Cumberland School of Law at Samford University
Juris Doctor, 1981
Director Basic Skills and Trial Advocacy (Scholarship Position)
Justice, Honor Court

University of Alabama
Bachelor of Arts, 1976
Member, Student Court
Member, Honorary, Literary and Debate Society

PRIMARY EMPLOYMENT:

May 2017 –Present

THE KUYKENDALL GROUP, LLC
Founding Member & President
356 B Murphy Avenue
Fairhope, Alabama 36532

December 1998-Present	KUYKENDALL & ASSOCIATES, L.LC. Founding Member & President PO Box 2129 Fairhope, Alabama 36533
October 2014- November 2017	HAUSFELD, L.L.P. *Of Counsel* 1700 K Street N.W. Suite 650 Washington, D.C. 20006
1981 to 1998	COOPER, MITCH, CRAWFORD, KUYKENDALL & WHATLEY, L.L.C. Birmingham, Alabama Managing Partner and Attorney
1976-1977	Assistant Legislative Assistant to United States Representative (R) Jack Edwards U.S. House of Representatives, Washington, D.C.
1976	Lyndon Baines Johnson Intern U.S. House of Representatives, Washington, D.C.

BAR ADMISSIONS:

MDL 2179 Oil Spill Litigation in Eastern District of Louisiana, Admitted Pro Hac Vice, 2010

ALABAMA BAR ASSOCIATION, 1981
U.S. District Court, Northern and Southern Districts of Alabama; U.S. Court of Appeals, First, Third, Fifth and Eleven Circuits

United States Supreme Court, 1986

SELECTED DIRECTORSHIPS, OFFICES and APPOINTMENTS:

ALABAMA STATE BAR

Chair of Judicial Liaison Committee, 2006-2007.

Elected Bar Commissioner, Tenth Judicial Circuit, Place No. 5, 1994-1997

Served on Executive Counsel of Young Lawyers and Member of Judicial Liaison Committee

Bench and Bar Committee, 2005

AMERICAN BAR ASSOCIATION

BIRMINGHAM BAR ASSOCIATION

BALDWIN COUNTY BAR ASSOCIATION

Lawyers Committee for Civil Rights Under Law, 1995-Present;
Board of Directors, 1997-Present

Advisory Panel, National Labor Relations Board, 1994-2000; Appointed by Chairman of the NLRB

Alabama Trial Lawyers Association; Board of Directors, Sustaining Member, Board of Governors, Member of Elections Committee 2005 to Present
Association of Trial Lawyers of America/American Association of Justice
- ATLA-PAC Task Force
- ATLA PPA Litigation Group Co-Chair
- ATLA PAC Public Affairs Committee
- ATLA Labor Liaison Committee
- AAJ Leaders Forum Member
- AAJ Public Affairs Committee
- AAJ List Committee

Trial Lawyers for Public Justice, 1995-present; Member, Board of Directors, 1995-2003

Pensacola Gulf Coast/River Keepers, Inc., Founding Member; Director, 2001-2005

Mobile Baykeeper; Board Member 2005 – Present

Board of Directors, Surfrider Foundation- 2012- Present

CERTIFIED MEDIATOR:
Mediator Training through Mediation Media, December 2012.
The Mediation Process and the Skills of Conflict Resolution, a comprehensive CLE-approved basic mediation training approved by the Alabama Center for Dispute Resolution that meets the training requirements for inclusion on the state court mediator roster.

Special Master by Appointment of the Honorable Joel Laird in *Abernathy v. Solutia* in Calhoun County, Alabama

Dean's Advisory Board, Cumberland School of Law at Samford University, 2004-Present

Maryland Association of Justice, Governor

General Counsel, Local 1657, United Food & Commercial Workers, Birmingham, Alabama (1998-2002)

Outside General Counsel, Lulu's Landing, Inc. (1998-Present)

Included in multiple editions of *Best Lawyers in America*

SELECTED EXAMPLES OF PROFESSIONAL SPEAKING ENGAGEMENTS, LECTURES AND APPEARANCES:

July 2018	Opioid Crisis Summit presented by Mass Tort Nexus, Fort. Lauderdale, FL Topic: *Tribal Claims*
April 2014	Earth Week Key Note Speaker at Georgia State University. Topic: *The State of Environmental Law Through the Lens of BP*
	GreenLaw Breakfast with Rick Kuykendall CLE at State Bar of Georgia Building, Atlanta, GA. Topic: *Environmental Litigation*
November 2013	Surfrider Foundation Florida Chapter Conference. Topic: *Deepwater Horizon Updates*
October 2013	Relevant- The Un-Conference: Five Year Road Map for Future Focused Lawyers. Topic: *The Future of Plaintiffs' Steering Committees*
March 2013	Class Action Seminar- Recent Developments in Quebec, in Canada and in the United States. Topic: *The Importance of Meaningful Opt-Out Rights in Class Actions in the United States and Developing Legal Systems*
2010	Warhorse Seminar, Maryland Association of Justice
October 2009	Mass Torts Made Perfect Seminar, "Carbon Monoxide-Silent Killer"
April 14, 2005	American Bar Association Section of Dispute Resolution Conference In Los Angeles, "The Golden State of ADR" Topic: *When Can Mass Torts Have Mass Settlements?*
October 22, 2004	Louisiana Bar Association Class Action Symposium in New Orleans

Topic: *Settlement Negotiation as Art and Science*

October 15, 2004 — Effective Representation of Clients in Mass Tort and Class Action Mediation; Kissimmee, Florida "Meet the Masters" Symposium

November 6, 2003 — Mass Torts Made Perfect Seminar in New Orleans
Topic: *The Art of Negotiation*

December 9, 2002 — Mealey's Emerging Litigation in Drugs & Medical Devices in Naples, FL
Topic: *PPA Litigation Update*

July 22, 2002 — ATLA Annual Convention in Atlanta, GA
Topic: *Update on the Current State of PPA and Ephedra Litigation*

December, 1998 — Alabama Trial Lawyers Association 1998 Ski Seminar in Beaver Creek, CO
Topic: *The Crime-Fraud Exception to the Attorney-Client Privilege*

January 1997 — Alabama State Bar-Joint Meeting of the Bench and Bar
Topic: *Alabama Judge's Class Action Deskbook*

October 1996 — Cumberland School of Law CLE Seminar
Topic: *Litigating the Class Action: Dispositive Motions, Settlement And Notice from the Plaintiffs' Perspective*

October 1994 — UFCW Attorneys Conference
Topic: *The Law Relating to Traditional Organizing: Post-Election Litigation and Remedies*

SELECTED PUBLICATIONS:

Contributing Editor: The Developing Labor Law, 2001 to 2005

Co-Author: Winegard & Wright's The Labor Lawyer, 2001

Co-Author: *Epilepsy Foundation of Northeast Ohio and the Recognition of Weingarten in the Non-Organized Workplace: A Manifestly Correct Decision, and a Seed for Further Progress.* Published in The Labor Lawyer, Volume 17, Number 1.

SELECTED REPORTED CASES:

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158 (11th Cir. 1988)

Shopman's Local 539 of the International Association of Bridge Workers v. Mosher Steel Co., 796 F.2d 1361 (11th Cir. 1986)

Snowden v. United Steelworkers of America, 435 So.2d 62 (Ala. 1983)

Todd v. United Steelworkers of America, 441 So.2d 889 (Ala. 1983)

Acevedo Cordero v. Cordero Santiago,764 F. Supp. 702 (D.P.R. 1991)

Cunningham v. Warner Lambert, 21 PLLR 88 (June 2002)

SELECTED LEAD OR CO-LEAD COUNSEL IN COMPLEX LITIGATION/CLASS ACTION LITIGATION:

Co-Lead Counsel, *Baldwin County, Alabama v BP et al*

Co-Lead Counsel, *Mobile County, Alabama v. BP et al*

Co-Lead Counsel, *Town of Dauphin Island, Alabama v. BP et al*

Co-Lead Counsel, *Jackson County, Mississippi v. BP et al*

Co-Lead Counsel, *City of Pascagoula, Mississippi v. BP et al*

Co-Lead Counsel, *City of Moss Point, Mississippi v. BP et al*

Co-Lead Counsel, *City of Gautier, Mississippi v. BP et al*

Co-Lead Counsel, *City of Ocean Springs, Mississippi v. BP et al*

Co-Lead Counsel in $50 million settlement in environmental damage case *Queen v. Constellation Energy,* MD 2009

In Re: CISCO SYSTEMS INC., Northern District of California

In Re: Rezulin Products Liability Litigation, MDL 1348 (S.D. New York)

In Re: Conoco, Inc. Class Action, Case 2001 CA 000631 (Escambia County, FL)

Cox v. Shell, Polybutylene Plumbing Class Action

Moye v. Exxon/Mobile Corp., Class Action

CURRENTLY SERVING AS CO-LEAD COUNSEL FOR THE FOLLOWING ENTITIES IN NATIONAL OPIOID LITIGATION:

St. Croix Chippewa Indians of Wisconsin
Lac Courte Oreilles Band of Lake Superior Chippewa Indians
Red Cliff Band of Lake Superior Chippewa
Lac du Flambeau Band of Lake Superior Chippewa Indians

Fond du Lac Band of Lake Superior Chippewa
Shinnecock Nation
Coyote Valley Band of Pomo Indians
Washoe Tribe of Nevada and California
Round Valley Tribe and Round Valley Tribal Health Clinic
Narragansett Indian Tribe of Rhode Island
Walker River Paiute Tribe and Walker River Tribal Health Clinic
Fallon Paiute Shoshone Tribe and Fallon Tribal Health
Potter Valley Tribe
Big Valley Band of Pomo Indians
Guidiville Band of Pomo Indians
Redwood Valley Little River Band of Pomo
Scotts Valley Band of Pomo Indians
Hopland Band of Pomo Indians
Koi Nation
Big Sandy Rancheria
Robinson Rancheria
Resighini Rancheria
Cahto Tribe of the Laytonville Rancheria
Pyramid Lake Paiute Tribe and the Pyramid Lake Tribal Health Clinic.

NMMC Hospitals
Baptist Hospital, Inc. (Florida)
Rush Health Systems, Inc. (Mississippi)
ApolloMD (Georgia)
Center Point, Inc. (California)
El Campo Hospital (Texas)
Odyssey House (Louisiana)
Consolidated Tribal Health Project, Inc.

Elizabeth Middleton Burke
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Boulevard, Building A
Mount Pleasant, SC 29464
(843) 727-6659
bburke@rpwb.com

Education: **University of South Carolina**, J.D., 1997
Alumni Association Gold Compleat Lawyer Award, 2016
College of Charleston, B.A., English, with Departmental Honors; Honors College, 1994
Honor's College Distinguished Alumni Award, 2011
Honor's College Commencement Speaker, 2011

Admissions: South Carolina Bar, 1997
United States District Court for the District of South Carolina, 1998
United States Court of Appeals for the Third Circuit, 2012
United States Court of Appeals for the Fourth Circuit, 2009

Professional Associations: South Carolina Bar
South Carolina Association for Justice, *Sustaining Member*
Southern Trial Lawyers Association, *President*, 2019-2020
American Association of Justice (AAJ)
*Lipitor Litigation Group, Co-Chair
*Convention Planning Committee, 2008 to Present
*National Collage of Advocacy Board of Trustees, 2005-2008
*New Lawyers' Division
- Secretary, 2000-2001
- Treasurer, 2001 -2002
- Communications Committee, 2003-2005

Community Involvement: ***Trustee,* College of Charleston,**
Elected by the South Carolina General Assembly
Term, July 1, 2018 - June 30, 2022
Committees:
*Audit and Governance
*Facilities
*Governmental Affairs and External Relations
*Budget and Finance
College of Charleston Alumni Association Board of Directors, 2003-2012
*Immediate Past President, 2011-2012
*President, 2010 - 2011
*President Elect, 2008- 2009; 2009-2010
*Vice President, 2007-2008

Employment: Richardson, Patrick, Westbrook & Brickman, LLC, *Attorney*
Mt. Pleasant, SC, 2003 to Present

Ninth Circuit Solicitor's Office, *Assistant Solicitor*
Conway, SC, 2002-2003

Suggs & Kelly, P.A., *Attorney*, Columbia, SC, 1998–2002

The Honorable Paula H. Thomas, *Law Clerk*
South Carolina Circuit Court, 1997-1998
(Now serving on the Court of Appeals)

Litigation: Personal injury, products liability, and medical device and pharmaceutical cases including Yaz, Chantix, Lipitor, Xarelto, Abilify, Ortho Evra, Vioxx, Rezulin, Baycol, Sulzer Hip Implants, Phenylpropanolamine (PPA), Silicone Gel Breast Implants, Fen-Phen, Arava, Lamasil, Larium, and others.

Presentations/CLE:

Harris Martin's 3M Combat Earplugs Litigation Conference: Military Discovery, Science and Other MDL 2885 Hurdles, New Orleans, Louisiana, May 2019, *Presenter,* "Spotlight Focus on Legal Briefing & Plan of Attack for Experts".

South Carolina Association for Justice Auto-Torts Seminar, Atlanta Georgia, November 2014, *Presenter,* "Lipitor Litigation Update".

AAJ Pharmaceuticals and Medical Device Litigation Update Seminar, Philadelphia, Pennsylvania, September 24-25, 2013, *Presenter,* "Lipitor: A Nationwide Litigation Update".

AAJ Rapid Response Teleseminar, *Presenter*, Lipitor Litigation, July 16, 2013.

Southern Trial Lawyers Winter Conference, New Orleans, Louisiana, February 2014, *Presenter,* "Opening Statements".

Southern Trial Lawyers Winter Conference, New Orleans, Louisiana, February 2010, *Presenter,* "ESI and the New Rules: Preparing for your Meet and Confer".

AAJ's Pharmaceutical Litigation Seminar, Las Vegas, Nevada, September 12-13, 2008, *Course Advisor.*

RPWB Litigation Seminar, Charleston, SC, May 2008, *Presenter, "Wyeth v. Levine".*

AAJ Winter Convention, San Juan, Puerto Rico, January 26-30, 2008, *Course Advisor.*

ATLA Trial Advocacy College: Depositions, Cleveland Ohio, October 13-15, 2006, *Course Advisor, Instructor and Presenter:*

*Developing a Discovery Plan
*Dealing with the Difficult Situation and Attorney (Ethics)
*Workshop Instructor

RPWB Co-Counsel Seminar, Charleston, SC, April 2006, *Presenter.*

ATLA Winter Convention, Honolulu, Hawaii, January 2006, Advocacy Track: Effective Depositions and Protecting Attorney Work Product, *Moderator.*

ATLA's Litigating Medical Negligence Cases Seminar, Washington, D.C., October 7-8, 2005, *Course Advisor and Moderator.*

RPWB Co-Counsel Seminar, Charleston, SC, April 2005, *Presenter.*

ATLA Annual Convention, Chicago, Illinois, July 1999, Workplace Injury Litigation Group (WILG), *Presenter.*

Personal:

Married:	Richard Cobb Burke, August 26, 2006
	Daughter, Katherine
Hometown:	Lake City, South Carolina
Born:	Hartsville, South Carolina, January 8, 1972

Gregory Andrews Cade, J.D., M.P.H.
Environmental Litigation Group, P.C
2160 Highland Avenue South
Birmingham, Alabama 35205
Email: gregc@elglaw.com

Biography:

Greg joined Environmental Litigation Group, P.C. (ELG) in 1993, as an investigator/litigation paralegal before being admitted to the bar. As an investigator and litigation paralegal, he was recognized as pivotal in case development and trial support resulting in verdicts and settlements for clients that exceeded the $1 billion mark. After being admitted to the bar, Greg started his own environmental and toxic tort litigation practice, that later merged into ELG. Greg is now the principal attorney of ELG a national environmental and asbestos practice. Greg has expanded ELG's focus into governmental representation, natural resource and groundwater litigation, Superfund litigation and Disaster relief litigation. Greg recently expanded the firm's abilities into federal contracting through the General Services Administration ("GSA"), allowing the firm to provide services to the federal government through its Washington, D.C. office.

Pending Cases:

- Co-counsel for American Water Company, including all its subsidiaries in clean water cases filed and to be filed against third-party industrial polluters.
- Lead counsel in several dioxin actions in St. Clair County, Illinois against Cerro Flow Products, a secondary copper smelter, on behalf of 12,0000 plaintiffs.
- Lead counsel for individual plaintiffs in the following MDLs: *In RE: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation,* MDL No. 2738; *In RE: Testosterone Replacement Therapy Products Liability Litigation,* MDL No. 2545;
- Lead counsel for individual asbestos cases filed in Jefferson County, Alabama.
- Co-counsel in a number of actions in St. Louis County, Missouri against Mallinckrodt LLC and Cotter Corporation related to the processing, transport, storage, handling, and disposal of hazardous, toxic and radioactive materials.
- Counsel to the Government of Puerto Rico in actions against Equifax, Inc.

Education:

- Miles Law School, J.D., 2001
- University of Alabama Birmingham, master's in public health-Occupational Health, Safety/Industrial Hygiene, 1996
- University of Alabama Birmingham, B.S. in Natural Science and Mathematics, Biology/Chemistry, 1991

Memberships and Awards:

- Alabama Association for Justice
- Alabama State Bar
- Alabama's 2011 and 2012 "*Top 100 Trial Lawyers*"
- American Bar Association
- America's Top 100 Attorneys
- America's Top 100 High Stakes Litigators
- Birmingham, Alabama's 2005 "*Top 40 Under 40*"
- Birmingham Bar Association
- Birmingham Magazine 2011 "*Top Attorneys*"
- District of Columbia Bar Association

- Fellow of the American Bar Foundation
- Lifetime Charter Member-Rue Ratings' as Best Attorneys of America
- Magic City Bar Association
- Martindale Hubbell's AV Preeminent Rating for Legal Ability and Ethical Standards
- Miles College Board of Trustee
- National Association of Distinguished Counsel, Nation's Top One Percent
- National Association of Environmental Professionals
- National Registry of Environmental Professionals
- Plaintiff's Executive Committee ("PEC") In re Aqueous Film-Forming Foams (AFFF) Products Liability Litigation MDL2873, U.S. District court for the District of South Carolina
- Super Lawyers 2012 "*Rising Stars*"
- The American Association for Justice
- The American Society of Legal Advocates
- The National Trial Lawyers' National Asbestos Mesothelioma Trial Lawyers
- The National Trial Lawyers, Top 100
- Vermont Bar Association
- Who's Who in American Law

Admitted:

- 2002, Alabama and U.S. District Court, Northern, Middle and Southern Districts of Alabama
- 2008, District of Columbia
- 2012, United State Court of Federal Claims
- 2017, Vermont Supreme Court

Experience:

Air Ops, LLC, Bessemer, Alabama — July 1, 2011 to Present
Owner/Manager
- Successful owner of executive aviation charter service FAA part 135 certified

Environmental Litigation Group, PC, Birmingham, Alabama — March 1, 2005 to Present
Principal/Attorney
- Environmental litigator responsible for the prosecution of claims made on behalf of those who have suffered injury and property damage due to toxic exposures throughout the United States.

Cade Law Firm, LLC, Birmingham, Alabama — March 1, 2004 to March 1, 2005
Attorney/Sole Practitioner
- Practice focused primarily on the representation of railroad workers and workers exposed to chemicals such as asbestos, benzene, and other workplace toxicants.

Environmental Attorneys Group, LLC, Birmingham, Alabama — October 2001 to July 2004
Paralegal/Attorney
- Practice focused primarily on the representation of workers exposed to chemicals such as asbestos, benzene, and other workplace toxicants.

Environmental Litigation Group, PC, Birmingham, Alabama — February 1993 to October 1, 2001
Paralegal/Investigator
- Responsible for case development and client relations including trial preparation.
- Instrumental in all phases of trial development which resulted in verdicts and settlements for clients that exceeded the $1 billion mark.

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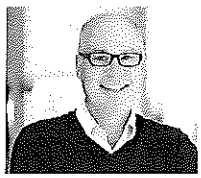

ROE FRAZER is a trial lawyer with 34 years of experience in complex litigation, with over two billion dollars in trial verdicts and settlements on behalf of plaintiffs. He is a principal in Frazer PLC, a boutique litigation law firm centered on representing organizations, companies, health care providers, Indian tribes, and individuals in complex litigation matters. Frazer PLC collaborates with many law firms in almost every case in order to meet the needs and demands of the particular clients and their cases. Roe is usually lead trial counsel in every case, having tried more than 75 cases to verdict in his career.

With a *Martindale* AV+ rating, Roe is a speaker and writer on a variety of legal and technology topics, serving on the Evolving Legal Market Committee of the Tennessee Bar Association and the CLE Committee of the Nashville Bar Association. Roe is one of the leading attorneys in the United States on the strategic use of legal technology and artificial intelligence in litigation, as well as smart ESI protocol, having started two e-discovery software companies, CaseLogistix and Cicayda.

Pending Cases

- Plaintiffs' Executive Committee and Co-Chair of the Private Water Providers Committee, *In Re: Aqueous Film-Forming Foam Litigation*, MDL No. 2873, U.S. District Court for the District of South Carolina (appointed by Honorable Richard Gergel, U.S. District Judge).

- National Lead Counsel for American Water Company in its drinking water litigation against industrial polluters of drinking water for broad range of contaminants – PFAS, PFOA, PFOS, PFNA, PFCs, 1,4-dioxane, pharmaceuticals, and other pollutants.

- Lead Counsel for approximately 40 federally recognized Indian Tribal governments in Wisconsin, Minnesota, New York, Louisiana, Nevada, California, Oregon, and Oklahoma, *In re Prescription Opiates Litigation*, MDL No. 2804, U.S.

District Court for the Northern District of Ohio, as well as various state court actions.

- Member, Indian Tribe Leadership Committee, Indian Tribe Track, MDL No. 2804, *In re Prescription Opiates Litigation.*

- Lead counsel for Harrison County, Mississippi, *In re Prescription Opiates Litigation*, MDL No. 2804, U.S. District Court for the Northern District of Ohio.

- Lead trial counsel in a number of PCB and dioxin actions in Illinois state court on behalf of individual plaintiffs.

- Co-Lead class counsel for debenture holders in a securities class action in state court in Pittsburgh, PA.

- Co-Lead counsel for plaintiffs in individual and class action air pollution cases pending in U.S. District Court for the Southern District of Texas.

- Lead Counsel for three Indian Tribes and a putative class of federally recognized Indian Tribes, *In Re: Equifax Customer Data Security Breach Litigation*, MDL No. 2800, U.S. District Court for the Northern District of Georgia.

Representative Cases, Historically

- Multi-million-dollar plaintiff's verdicts in complex litigation cases, including a $144 million verdict against Pfizer in an individual products liability case involving the pharmaceutical drug, Rezulin, a $30.26 million verdict in an individual insurance fraud case against Southern Farm Bureau Insurance, and a $5.5 million verdict against General Motors Corporation in products liability, fuel systems case.

- Counsel for individual plaintiffs in various product liability MDLs.

- Lead counsel in numerous state court actions involving thousands of plaintiffs and claims against the manufacturers of the pharmaceutical drug Rezulin resulting in settlements for over 2,700 persons.

- Lead trial plaintiffs' counsel in hundreds of cases against Monsanto for airborne and water borne PCB contamination (S.D. Miss.) resulting in settlements in all cases.

- Lead Counsel in *Branch v. Weyerhaueser*, resulting in a multi-million dollar Alabama class action settlement in case involving paper mill water pollution and the claims of riparian property owners.

- Co-Lead Class Counsel in *In Re Polybutylene Pipe Litigation* (*Spencer vs. Shell Oil Co. et al.*), a consumer fraud, nationwide litigation resulting in $970 million

nationwide class action settlement against E.I. duPont de Nemours & Co. Shell oil Co., Hoechst-Celanese, and Eljer Industries in multiple courts.

- Lead trial counsel in hundreds of individual pharmaceutical drug and medical devices cases against many pharmaceutical drug and medical device manufacturers in the United States.

- Lead trial counsel in numerous individual plaintiffs in various automotive products liability actions against many automobile manufacturers.

- Co-Lead Class Counsel in *Pigford v. Glickman and U.S. Department of Agriculture ("The Black Farmers Case")* (D.D.C).

- Plaintiffs' counsel in *In Re Sunset Limited Train Crash Litigation*, MDL No. 1003 (S.D. Ala.).

- Lead trial counsel in a number of individual asbestos lawsuits against every asbestos manufacturer, distributor, installer, etc.

Education

- J.D., Cumberland School of Law (1985), Samford University, Birmingham, Alabama; Editor-in-Chief, *Cumberland Law Review*; Co-Captain, National Moot Court Team; Member, Order of Barristers.

- B.A., Politics, Wake Forest University (1982), Winston-Salem, North Carolina.

Other Law-Related Items of Interest

- U.S. Circuit Court of Appeals Judge Delegate, Honorable John K. Bush, Sixth Circuit Annual Judicial Conference, 2018.

- Author: four law review articles and numerous periodicals.

- Speaker: numerous CLEs and legal conferences.

- Member, Dean's Advisory Board, Cumberland School of Law, Samford University, Birmingham, Alabama.

- Member, American Bar Association, Tennessee Bar Association, Nashville Bar Association, Mississippi Bar Association, and Alabama Bar Association.

- Admitted to practice before the U.S. Supreme Court, Mississippi Supreme Court, Alabama Supreme Court, Tennessee Supreme Court, Fourth, Fifth, and Sixth U.S. Circuit Courts of Appeals, and U.S. District Courts for the Northern District of Wisconsin, Southern and

Northern Districts of Mississippi, Northern, Middle, and Southern Districts of Alabama, Western, Middle and Eastern Districts of Tennessee, Northern District of Florida, District of New Jersey, and Southern District of Texas.

- "Top 100 Technology Thought Leaders in the World", named by *City Tech Magazine*, London, U.K. (2006-07)
- Co-Founder, CaseLogistix e-discovery software, now owned by Thomson Reuters.
- Co-Founder, Cicayda, an e-discovery software and services company located in the Nashville, Tennessee metropolitan area.
- Outstanding Trial Lawyer of the Year, Mississippi Trial Lawyers Association (1993).

3.2 Experience Attachments

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS EASTERN DIVISION

HARRY STEPHENS FARMS, INC.; and HARRY STEPHENS, individually and as managing partner of STEPHENS PARTNERSHIP,	)	
Plaintiffs,	)	
v.	)	**CASE NO. 2-06CV-00166 Lead**
	)	**4-07CV-00278 Consolidated**
WORMALD AMERICAS, INC., successor to ANSUL, INC.; HELENA CHEMICAL COMPANY; and EXXON MOBIL CORPORATION, Successor to Mobil Chemical Co.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS EXXONMOBIL CORPORATION AND HELENA CHEMICAL COMPANY'S MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS OF HARRY STEPHENS, INDIVIDUALLY AND AS MANAGING PARTNER OF STEPHENS PARTNERSHIP

The plaintiffs hereby provide the following in response to Defendants Exxon Mobil ("Exxon") and Helena Chemical Company's ("Helena") Motion for Summary Judgment on the Claims of Harry Stephens, Individually and as Managing Partner of Stephens Partnership ("the Motion"). Since genuine issues of material facts exists in regards to Stephens Partnership and Harry Stephens III, individually and as managing partner of Stephens Partnership Defendants' Motion for Summary Judgment should be denied.

While the defendants are correct that Stephens Farms, Inc. ("Stephens Inc.") owns the land at issue in this lawsuit, the damages suffered by Stephens Partnership ("the Partnership") and Harry Stephens III ("Harry Stephens or Mr. Stephens") individually and as managing partner

of Stephens Partnership are equally extensive. By virtue of Defendants' contaminating the Stephens Farmland, the Partnership inevitably faces serious economic damages in the future. The Stephens family – in particular Harry Stephens III – is well respected in the Helena, Arkansas community, and to the public at large, Harry Stephens III, Stephens Farms, Inc. and Stephens Partnership are indistinguishable and viewed as one in the same. Therefore, if one entity is perceived to be contaminated, the whole family farming operation[1] will be "guilty by association" and inherently branded with the same stigma.

The Partnership has a claim for damages and it has evidence to support that claim. A lessee has an implied right for quiet enjoyment that runs with the land. *Pickett v. Ferguson*, 45 Ark. 177, 199 (Ark. 1885). If while exercising his enjoyment of the land, a party's wrongful acts deprive him of this right that party is liable to the extent of his injury. *Crane v. Patton*, 21 S.W. 466, 467 (Ark. 1893). An action accrues for a lessee when a trespass interferes with a lessee's enjoyment of land. *Fletcher v. John Pfeifer Clothing Co.*, 146 S.W. 864, 866 (Ark. 1912). The well settled law in Arkansas establishes a right to quiet use and enjoyment of land for a lessee, such as the Stephens Partnership, and it imposes liability on those who prevent exercising that use and enjoyment. Exxon and Helena (collectively "the Defendants") have infringed upon the Partnership's ability conduct future business operations by their failure to maintain the release of chemicals in a way that does not interfere with others. The Partnership faces extensive future damages to its reputation and its ability to conduct its business operations due to the contamination on the land. *See also Kemmerer v. Midland Oil & Drilling Co.,* 229 F. 872, 889 (8th Cir. 1915) (a lessee's exclusive possession of real estate entitles one to an adequate remedy for infringement or disturbance of that right).

[1] Notably, all Three (3) – Stephens Farms, Inc., Stephens Partnership and Harry Stephens III - share the "Stephens" sir name

As plead in the Plaintiffs' First Amended Complaint ("the Complaint"), the Partnership claims damages to its business operations and its business expectancies. Compl. ¶ 49. The Partnership also claims past and future economic damages to its agricultural business. *Id*. at ¶ 62. At the time of his deposition, Harry Stephens III articulated certain worries and concerns about the future of his family's farming operations in relation to future damages; however, this does not mean that other future damages are not present, including economic damages. *See* June 8 – 9, 2010 Deposition of Harry Stephens III ("Stephens III Depo") at p. 174, ln. 8 – p. 175, ln. 13; p. 177, ln. 11 – 19, attached as Exhibit 1 to Exxon Mobil Corporation and Helena Chemical Company's Motion for Summary Judgment on the Claims of Harry Stephens, Individually and as Managing Partner of Stephens Partnership ("the Motion"). Jeanie Stephens ("Jeanie"), Harry Stephens' wife and long time bookkeeper for the Stephens' business operations, will testify to the future economic impact that the contamination will have on the business. John Robbins, the President of Helena National Bank, will testify to the contamination's affect on Harry Stephens, Stephens Inc. and the Partnership's future potential inability to acquire loans with the land as collateral due to contamination. *See* Affidavits of Jeanie Stephens and John Robbins, attached to Plaintiffs Response to Exxon Mobil Corporation and Helena Chemical Company's Motion for Summary Judgment on the Claims of Harry Stephens, Individually and as Managing Partner of Stephens Partnership ("the Response") as **Exhibits A & C**, respectively.

The stigma attached to contaminated land will greatly impact the businesses associated with that land. There can be a decline in market value for a contaminated property that is beyond, or in addition to, the cost to cure; this additional decline is the stigma effect. Peter J. Patchin, *Valuation of Contaminated Property*, The Appraisal Journal, 56:1, 7-16 (January 1988), attached as **Exhibit D** to the Response; Peter J. Patchin, *Valuation of Contaminated Properties*-

Stigma Revisited, The Appraisal Journal, 167 – 162 (April 1992), attached at **Exhibit E** to the Response. Peter J. Patchin, *Valuation of Contaminated Property*, The Appraisal Journal, 56:1, 7-16 (January 1988).[2] Other risk factors are the "fear of public liability" and the "lack of mortgageability." *Id.* Public liability fears are related to the possibility of third party litigation against a future owner. The lack of mortgageability, is "the inability to obtain financing, either for the sale of a property or its future financing, is one of the most frequent causes of stigma related value loss." *Id*. The contamination has caused the Stephens' farmland to be clouded with stigma. In addition, the current and future condition of the land has been impaired due to the contamination. As a result, there is no doubt that the highest and best use of the land, as it has been used by the Stephens family for the last 150 years, has been destroyed, and any other possible use is only of nominal worth. [3]

The entire Stephens' family farming operations will be greatly impacted by the stigma associated with contaminated farmland. The stigma will attach to all people and business associated with the Stephens family. The farm will not be able to continue to operate as it does today with land that is contaminated. The overall value of the Stephens' family farming operations will be diminished if it has to operate and produce crops on contaminated land, and it will suffer future damages, including economic, if the contamination is not remedied. *See* Jeanie Stephens' Affidavit, **Exhibit A**. The Stephens family is very concerned about not being able to continue their farming operations as they have done in the Helena community for many years. They are worried about selling contaminated crops. They do not want to hurt anyone and they

[2] *See e.g.* B. Mundy, *Stigma and Value*, The Appraisal Journal, 60:1, 7-13 (1992a); J. A. Chalmers and T. O. Jackson, *Risk Factors in the Appraisal of Contaminated Property*, The Appraisal Journal, 64:1, 44-58 (1996); T. O. Jackson, *Mortgage-Equity Analysis in Contaminated Property Valuation*, The Appraisal Journal, 66:1, 46-55 (1998).
[3] For further discussion and incorporated herein by reference, please see the section regarding Ronda Weaver's appraisal and Appraisal Standards Board, Advisory Opinion 9 on cost, use and risk effects in Plaintiffs Response to Defendants' Motion For Summary Judgment on the of Damages to Real Property.

do not want anyone thinking they sell contaminated crops. *See* Stephens III Depo. at p. 174, ln. 8 – p. 175, ln. 13; p. 177, ln. 11 – 19; Jeanie Stephens' Affidavit, **Exhibit A**.

Harry Stephens III is the leader and public face of the Stephens' family businesses. Like any good business, Mr. Stephens depends on the knowledge and input of others to provide him with the necessary information to make the decisions required to run and evaluate his business. Mr. Stephens, upon consultation with Jeanie Stephens and John Robbins, as president of Stephens, Inc. and managing partner of the Partnership will present testimony as to what he now sees will be the future economic impact on business operations.

As noted in Plaintiffs' Response to Defendants Statement of Material Facts, the real property made the subject of this lawsuit is owned by Stephens, Inc. Harry Stephens III is the president of Stephens, Inc. and owns 78% share of the corporation. *See* Stephens III Depo. at p. 12, ln. 22 – 23; p. 13, ln. 10 – 13. In the community, Harry Stephens III is the ambassador for all Stephens' family businesses. Harry Stephens III is also the managing partner of the Partnership. *See* Stephens III Depo. at p. 8, ln. 21 – 23. Therefore, harm caused to the Partnership, the land, Stephens, Inc. and/or any combination of his family farm businesses is necessarily reflective on Harry Stephens individually and as managing partner of the Partnership. Given that the stigma associated with a contaminated farm attaches not only to the land itself, and Stephens, Inc. as the owner of the land, but also to Harry Stephens III as the President of the corporation and managing partner of the Partnership, the Partnership itself and Harry Stephens III as an individual; the harm caused by the contamination cannot be limited to the corporation that owns the land, when the actual impact of the harm will be shouldered by each of the current Plaintiffs. All people, businesses and land associated with Harry Stephens' family farm businesses will be affected by the stigma associated with contaminated land.

The plaintiffs suffered damages to their land and business. Appropriate measures of damages are designed to fully compensate the plaintiff. Even after Plaintiffs' land is remediated, the damage caused to Plaintiffs' farming business will nevertheless persist, by virtue of the land being forever stigmatized as contaminated. The plaintiffs must be compensated for their remaining loss. *In re Paoli*, 35 F. 3d 717, 797 – 798 (3rd Cir. 1994). Plaintiffs can recover for damages to their business caused by pollution from an off-site source, even though they experienced no physical harm. *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 – 568 (9th Cir. 1974). The plaintiffs, including Stephens Partnership and Harry Stephens III, individually and as managing partnership are entitled to recover damages.

Harry Stephens III and his family rely upon their land to finance and operate their business and support their families. As with many American farmers, Harry Stephens III depends upon bank loans and government subsidies to operate his farm from year to year. While the Stephens family businesses have not been denied financing to this point due to the contamination on the land, the possibility is certainly very likely in the future. In addition, their ability to sell the land is greatly diminished because a bank will not finance land that is contaminated. *See* John Robbins' Affidavit, **Exhibit C.** The magnitude of the problems associated with the contamination was not apparent to Harry Stephens and his family until after the experts published their reports. Subsequent to Dr. Paul Rosenfeld's report[4] identifying the amount of contamination present in the land, the likelihood that a loaning organization may deny future loans is greatly increased. *Id*. If Harry Stephens III, the Partnership and Stephens, Inc. are unable to obtain loans because their main source of collateral – the land – is contaminated, their

[4] *See* p. 18 -24 in Exhibit 2 to Plaintiffs Reply to: Helena Chemical Company's Response and Incorporated Brief in Opposition to Plaintiffs' Request to Take Judicial Notice and Motion for Summary Judgment (Doc. 183), The Expert Report of Dr. Paul Rosenfeld ("Rosenfeld Report"), showing the unsafe levels of 1,2-dicholorthane ("DCA") present in AGI-1.

entire business operation would be ruined. Harry Stephens could not borrow the money he needs to run his family farming operations without his land.

The stigma associated with Stephens, Inc.'s contaminated land will reflect negatively on Harry Stephens III. In a defamation context, a statement about a plaintiff's business – its character or existence, for example – would harm the interest of the owner. As the owner of the business he would have a cause of action for injurious falsehood. David D. Willoughby, *The Taxation of Defamation Recoveries: Toward Establishing Its Reputation*, 37 Vand. L. Rev. 621, 644 fn.153 (1984). While Harry Stephens III is not aware of any defaming statement made by Helena or Exxon, and the plaintiffs are not implying that one was made, the parallels to the current situation are evident. The stigma that is attached to contaminated farmland land is similar to a defamatory statement made about the character or existence of a business, in that it attaches to the business, inflicts future economic damages and reflects negatively on the business' good will, reputation and public perception, which in turn harms its owner that in this case is the public figure of all Stephens' family business – Harry Stephens III.

Plaintiffs have a property interest in the farming business itself, and continued operation of its enterprise. *Hawkeye Commodity Promotions, Inc. v. Miller, 432 F. Supp. 2d 822, 852 (N.D. Iowa 2006) citing Kimball Laundry Co., v. United States*, 338 U.S. 1, 5 (1949). Market value should be defined the same way in takings' case as in nuisance cases. *Nashua Corp. v. Norton Co.,* 1997 U.S. Dist. LEXIS 5173, *16 - *17 (N.D. N.Y. April, 15 1997). Therefore, like takings' cases, it is appropriate for this Court to consider the Plaintiffs' "intangible" business assets like the goodwill, and earning power of the farm. *Kimball Laundry Co.,* 338 U.S. at 5. The land has value to the Partnership and Harry Stephens III, individually and as managing partner of the Partnership above and beyond the value of the land.

The requirement to keep Plaintiff Harry Stephens in this case goes beyond public perception and personal connection to the land. If the situation presented itself, under an insider reverse veil-piercing theory, Harry Stephens III, the majority shareholder, could disregard the corporate structure to avail himself of corporate claims against a third party[5]. *See* Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. Corp. L. 33, 37 (1990). *See also U.S. v. Scherping*, 187 F. 3d 796, 803 – 804 (8th Cir. 1999)(recognizing reverse veil-piercing in the 8th Circuit); *In re Western World Funding*, 52 Bankr. 743, 784 (D. Nev. 1985)(acknowledging a corporation is not limited to piercing its own veil in bankruptcy situations only) and *State Bank in Eden Valley v. Euerle Farms*, 441 N.W.2d 121 (Minn. Ct. App. 1989)(reverse veil-piercing in a family farm corporation). *Arguendo*, Stephens, Inc. could face future liabilities related to contaminated crops. Given the inherently intertwined nature of the shared identities and interests with the Stephens' family farming operations, those Plaintiffs may seek to pierce the corporate veil of Stephens, Inc. in order to reach the assets of Stephens' Partnership and/or Harry Stephens III, individually. [6] Therefore, by analogy, if Harry Stephens III may be personally liable, by bypassing the corporate form for the harm caused by his company, it follows that he should be able to purposefully pierce his own corporate veil when the harmful results are already attributed to him as the public leader of all the Stephens' businesses and the corporation's controlling shareholder. This is further support demonstrating that Harry Stephens III, individually and as managing partner of the Partnership must remain in the suit.

[5] The plaintiffs present this argument not to show that any action has or has not taken place that would put Harry Stephens in a position where reverse insider veil-piecing would be appropriate, but instead to show that the possibility exists and that as a result Harry Stephens must remain in the suit to protect his own interest and that of the corporation.

[6] The plaintiffs make no assertion that Harry Stephens III, Stephens Partnership, Stephens Farms, Inc. or any person or entity associated with Stephens, Inc. and/or Stephens Partnership has done anything that would justify piercing the Stephens Farms, Inc. corporate veil. This argument was presented as a hypothetical only, and is not an admission of any liability or wrongdoing.

Finally, This Court should recognize the bad faith exercised by the Defendants, in the multitude of motions submitted to this Court. The Defendants have repeatedly prayed for relief based on diametrically opposed legal and factual arguments; thus over-burdening this Court, further delaying resolution of this case, and wasting valuable resources. For example, Defendants' Motion to Dismiss based on primary jurisdiction concedes the existence of questions of fact that "require both expert consideration and uniformity of resolution." (Doc. 233 pg. 14) However, the Defendants then filed six (6) separate motions for summary judgment claiming that there were no "issues of material fact."[7] Additionally, all six (6) of the Defendants' motions for summary judgment rely heavily on facts and opinions articulated by Plaintiffs Stephens' experts. (Defendants' collectively refer to the reports of Dr. Rosenfeld and Dr. Chermisonoff nearly two hundred (200) times throughout their summary judgment motions) However, audaciously, Defendants have at the same time, filed motions to exclude these same experts, claiming that their reports are not qualified as such, for various reasons. (Doc. 255, 263, 265, 267, 272) The Defendants have yet to articulate valid defenses that do not inherently contradict other pending motions that they have filed. Defendants' "talking out of both sides of their mouths," to support whatever motion is convenient to them at that time, should not be entertained or condoned by this Court.

The foregoing clearly demonstrates that Stephens Partnership and Harry Stephens III, individually and as managing partner of the Partnership have valid claims with ample legal and factual supporting evidence. It is clear that a genuine issue of material fact exists with regards to the Partnership and Harry Stephens III, individually and as managing partner of the Partnership.

[7] Helena's MSJ Doc. 252 pg. 8, Defendants' joint MSJ on the issue of damages Doc. 257 pg. 1, Defendants' joint MSJ of claims of Harry Stephens Doc. 259 pg. 1, ExxonMobil's MSJ on the issue of ownership and control Doc. 269 pg 1, ExxonMobil's MPSJ for punitive damages or in the alternative, to bifurcate trial Doc. 284 pg. 1, Helena's MPSJ for punitive damages or in the alternative, to bifurcate trial Doc. 274 pg. 1

The defendants failed to produce any evidence to support their claim that these parties should be dismissed from this suit, except for selected and sometimes unqualified excerpts from deposition testimony, which do not amount to a showing of no claim, let alone the showing of a lack of a genuine issue of material fact. Upon consultation with some of his trusted business advisors, Harry Stephens has realized the full multitude of future damages that his businesses face, which along with the affidavits of Jeanie Stephens and John Robbins support the claims for damages for the Partnership and in turn Harry Stephens III, individually and as managing partner of the Partnership.

The stigma associated with contaminated farm land will attach itself to all aspects of the Stephens family farming operations and individual family members, in particular Harry Stephens III. This will have drastic impacts on the ability of everyone and every entity associated with the Partnership and Stephens, Inc. to run a successful and profitable business in the future. This case involves more than just a piece of multi-generational family farm land. It reaches the family, the land and the businesses associated with the land.

Plaintiffs respectfully request that the court deny Defendants' Motion.

Submitted this 7th day of September, 2010.

/s/ Kevin B. McKie

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

/s/ Kevin B. McKie
Kevin B. McKie

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

NEW JERSEY-AMERICAN WATER COMPANY, INC., **Plaintiff,** **v.** **THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); ANGUS FIRE; THE ANSUL COMPANY; BUCKEYE FIRE EQUIPMENT CO.; BUCKEYE FIRE PROTECTION COMPANY; CHEMGUARD; NATIONAL FOAM, INC.; TYCO FIRE PRODUCTS LP; JOHN DOE DEFENDANTS 1-50,** **Defendants.**	**Civil No.: 1:18-cv-15960** **COMPLAINT** **JURY DEMAND**

New Jersey-American Water Company, Inc. ("NJAW" or "Plaintiff") files this Complaint against the Defendants named herein and in support thereof alleges as follows:

SUMMARY OF THE CASE

1. NJAW brings this action for damages, contribution and reimbursement of costs incurred, and which continue to be incurred, to address the presence of Polyfluoroalkyl substances or "PFAS" chemicals—including but not limited to Perfluorooctanoic acid ("PFOA"), Perfluorooctanesulfonic acid ("PFOS"), Perfluorohexanoic acid ("PFHxA"), Perfluoropentanoic acid ("PFPA"), Perfluoroheptanoic acid ("PFHpA"), Pentafluorobenzoic acid ("PFBA"), Perfluorobutanesulfonic acid ("PFBS"), Perfluorononanoic acid ("PFNA") , Perfluorodecacanoic acid ("PFDA"), and Perfluorohexane Sulfonic Acid ("PFHS"), as well as any and all hazardous

chemicals produced by Defendants (collectively referred to herein as "PFAS"), — found in the public water supply systems owned and operated by NJAW throughout the State of New Jersey and in the ground and surface waters that serve as supply sources for those systems. As the manufacturers and sellers of products that contain PFAS compounds, Defendants The 3M Company (f/k/a Minnesota Mining and Manufacturing Co.), Angus Fire, The Ansul Company, Buckeye Fire Equipment Co., Buckeye Fire Protection Company, Chemguard, National Foam, Inc., Tyco Fire Products, LP, and John Doe Defendants 1-50 (collectively "Defendants"), have discharged PFAS into, or are otherwise responsible for PFAS released into, the groundwater and surface waters that serve as the supply sources for NJAW's public water supply systems.

2. For years, Defendants manufactured, sold, and distributed PFAS compounds and products containing PFAS chemicals. These products include the firefighting suppressant agent, Aqueous Film Forming Foam ("AFFF") that contains those compounds, for use at airports and military facilities throughout the State of New Jersey.

3. Defendants knew, or should have known, that PFAS and related constituents present unreasonable risks to human health, water quality, and the environment and of the dangers associated with these compounds. Yet, Defendants handled, discharged and were otherwise responsible for the release of PFAS into the environment without sufficient containment or caution. Defendants' acts and omissions resulted in the presence of these compounds in the water sources of NJAW's public supply well systems. As a result of the occurrence of PFAS in the environment from Defendants' discharges, NJAW has been and will be required to fund and implement capital improvements, and has and will in the future incur ongoing operation and maintenance costs, in order to remove and treat for the presence of PFAS in its public water supply systems, and has and will incur in the future damages.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction under federal diversity, pursuant to 28 U.S.C. § 1332, as the parties are completely diverse and the amount-in-controversy exceeds $75,000.

5. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events giving rise to this Complaint occurred in this District.

PLAINTIFF

6. Plaintiff NJAW is a New Jersey corporation with its principal place of business at 1025 Laurel Oak Road, Voorhees, New Jersey, 08043. NJAW, which provides services to an estimated 2.7 million New Jersey customers, is a direct, wholly owned subsidiary of American Water Works Company, Inc., the largest publicly traded water and wastewater utility company in the United States.

7. NJAW owns and operates the following thirty-two public supply well systems in the State of New Jersey:

- Washington System, in Warren County (Public Water Supply Identification ("PWSID") Number 2121001;
- Belvedere System, in Warren County (PWSID Number 2103001);
- ITC System, in Morris County (PWSID Number 1427017);
- West Jersey System, in Morris County (PSWID Number 1427009);
- Country Oaks System, in Morris County (PWSID Number 1427016);
- Mansfield System, in Warren County (PWSID Number 2116003);
- Passaic Basin System, in Morris, Essex, Somerset and Union Counties (PWSID Number 0712001);

- Four Seasons System, in Morris County (PWSID Number 1407001);
- Little Falls System, in Passaic County (PWSID Number 1605001);
- Twin Lakes System, in Somerset County (PWSID Number 1803002);
- Frenchtown System, in Hunterdon County (PWSID Number 1011001);
- Raritan System, in Hunterdon, Middlesex, Mercer, Somerset and Union Counties (PWSID Number 2004002);
- Crossroads System, in Hunterdon County (PWSID Number 1024001);
- Costal North System, in Ocean and Monmouth Counties (PWSID Number 1345001);
- Union Beach System, in Monmouth County (PWSID Number 1350001);
- Ortley Beach System, in Ocean County (PWSID Number 1507007);
- Pelican Island System, in Ocean County (PWSID Number 1507008);
- New Egypt System, in Ocean County (PWSID Number 1523003);
- Deep Run System, in Ocean County (PWSID Number 1523002);
- Atlantic County System, in Atlantic County (PWSID Number 0119002);
- Ocean City System, in Cape May County (PWSID Number 0508001);
- Strathmere System, in Cape May County (PWSID Number 0511001);
- Cape May CH System, in Cape May County (PWSID Number 0506010);
- Western System, in Camden and Burlington Counties (PWSID Number 0327001);
- Sunbury System, in Burlington County (PWSID Number 0329006);
- Logan System, in Gloucester County (PWSID Number 0809002);
- Mt. Holly System, in Burlington County (PWSID Number 0323001);

- Homestead System, in Burlington County (PWSID Number 0318002);
- Vincentown System, in Burlington County (PWSID Number 0333004);
- Harrison Township System, in Gloucester County (PWSID Number 0808001);
- Bridgeport System, in Gloucester County (PWSID Number 0809001);
- Pennsgrove System, in Salem County (PWSID Number 1707001).

8. These public community water systems serve an estimated 2.7 million customers of NJAW in communities throughout the State of New Jersey.

9. NJAW relies on groundwater aquifers and surface waters, including surface water from the Delaware River, to supply water for its public water systems. The systems include over 300 active wells, which feed into 181 points of entry.

DEFENDANTS

10. Defendant The 3M Company (f/k/a Minnesota Mining and Manufacturing Company) ("3M") is a Delaware corporation, with its principal place of business located at 3M Center, St. Paul, Minnesota 55133.

11. Through at least 2002, 3M manufactured PFOS for use in AFFF and other products, and it manufactured AFFF that contained PFAS compounds.

12. Defendant Angus Fire ("Angus") is part of Angus International, and has corporate headquarters in Bentham, United Kingdom. Angus Fire maintains a place of business in the United States at 141 Junny Road, Angier, North Carolina 27501.

13. At all times relevant, Angus manufactured fire suppression products, including AFFF that contained PFAS compounds.

14. Defendant The Ansul Company (hereinafter "Ansul") is a Wisconsin corporation, with its principal place of business at One Stanton Street, Marinette, Wisconsin 54143.

15. At all times relevant, Ansul manufactured fire suppression products, including AFFF that contained PFAS compounds.

16. Defendant Buckeye Fire Equipment Company ("Buckeye") is a North Carolina corporation, with its principal place of business at 110 Kings Road, Kings Mountain, North Carolina 28086.

17. At all times relevant, Buckeye manufactured fire suppression products, including AFFF that contained PFAS compounds.

18. Chemguard is a Wisconsin corporation, having a principal place of business at One Stanton Street, Marinette, Wisconsin 54143.

19. At all times relevant, Chemguard manufactured fire suppression products, including AFFF that contained PFAS compounds.

20. National Foam, Inc. (a/k/a Chubb National Foam) (National Foam, Inc. and Chubb National Foam are collectively referred to as "National Foam") is a Pennsylvania corporation, with its principal place of business at 350 East Union Street, West Chester, Pennsylvania 19382.

21. At all times relevant, National Foam manufactured fire suppression products, including AFFF that contained PFAS compounds.

22. Upon information and belief, Defendants John Does 1-50 also manufactured and sold products that contain PFAS compounds. Plaintiff NJAW presently lacks information sufficient to specifically identify the names of Defendants sued herein under the fictitious names DOES 1 through 50. NJAW will amend this Complaint to show their true names if and when they are ascertained.

POLYFLUOROALKYL SUBSTANCES

23. PFAS compounds are a family of manmade chemicals, also known as

perfluorochemicals ("PFCs"), that have been used for decades to make products that resist heat, oil, stains, grease and water.

24. In the 1940s and 1950s, 3M began creating PFAS chemicals and incorporating them into their products after recognizing their surfactant properties. Over the years, PFAS chemicals were sold to other companies for use in AFFF and a variety of other products, including stain resistant carpeting and upholstery, clothing, paper packaging for food, water and grease resistant cookware.

25. AFFF was introduced commercially in the mid-1960s and rapidly became the primary fire-fighting foam in the United States and other parts of the world. AFFF is a Class-B firefighting foam, which is water-based and used to extinguish fires that are difficult to fight, particularly those that involve petroleum or other flammable liquids.

26. AFFF's are synthetically formed by combining fluorine free hydrocarbon foaming agents with highly fluorinated surfactants. When mixed with water, the resulting solution has the characteristics needed to produce an aqueous film that spreads across the surface of a hydrocarbon fuel. It is this film formation feature that provides fire extinguishment and is the source of the designation, aqueous film forming foam.

27. PFASs are extremely persistent in the environment and resistant to typical environmental degradation processes. In addition, they are thermally stable synthetic organic contaminants, are likely carcinogenic, and have been shown to correlate with thyroid disease and immune deficiencies. PFASs also have high water solubility (mobility) and low biodegradation (persistence).

28. PFASs, in particular PFOS and PFOA, have been identified as "emerging contaminants" by the EPA. This term describes contaminants about which the scientific

community, regulatory agencies and the general public have a new and increasing awareness or understanding about how they move in the environment or affect public health.

29. PFASs, like other emerging contaminants, have become the focus of active research and study, which means that new information is released periodically regarding the effects on the environment and human health as a result of exposure to the chemicals.

30. Certain PFAS compounds, such as perfluorooctane sulfonate ("PFOS") and PFOA (which is also known as "C8" because it contains eight carbon compounds), have been the focus of the New Jersey Department of Environmental Protection ("NJDEP") and EPA's investigations.

31. United States Environmental Protection Agency ("EPA") studies have indicated that exposure to PFOA and PFOS over certain levels can result in adverse health effects, including but not limited to developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).

32. In January of 2009, the EPA established a drinking water Provisional Health Advisory Level ("HAL") for PFOA and PFOS, the two PFAS compounds about which it had the most toxicological data. EPA set the Provisional HAL at 0.4 parts per billion (ppb) for PFOA and 0.2 ppb for PFOS.

33. In May 2016, EPA issued new HALs for PFOA and PFOS, identifying 0.07 ppb (or 70 parts per trillion (ppt)) as the concentration of PFOA or PFOS in drinking water at or below which health effects are not anticipated to occur over a lifetime of exposure.

34. In 2006, the NJDEP began a statewide study of New Jersey water systems to determine the occurrence of PFOA and PFOS in groundwater wells and surface waters that are

sources of drinking water.

35. Several of NJAW's public water supply systems were part of NJDEP's sampling and analysis.

36. As a result of additional testing and study, in 2016 the NJDEP proposed a Health Based Maximum Contaminant Level ("MCL") of 14 ppt for PFOA, which was adopted on November 1, 2017. Additionally, NJDEP adopted an MCL of 13 ppt for PFNA in September of 2018. The New Jersey Drinking Water Quality Institute has also recommended that the NJDEP adopt an MCL of 13 ppt for PFOS.

37. The NJDEP has further concluded and directed that the detection values of PFOAs and PFOSs where found together should be combined given that their adverse effects are additive. Likewise, in issuing its 2016 HALs, EPA directed that when both PFOA and PFOS are found in drinking water, the *combined* concentrations of PFOA and PFOS should be compared with 70 ppt health advisory level.

38. In connection with its emerging contaminant studies, EPA implemented an Unregulated Contaminant Monitoring Rule Number 3 in 2012 ("UCMR 3"), which was designed to collect nationwide information regarding the occurrence of PFAS contamination in the public's water supply.

39. UCMR 3 required sampling of Public Water Systems ("PWSs") serving more than 10,000 people (i.e., large systems) and 800 representative PWSs serving 10,000 or fewer people (i.e., small systems) for 21 chemicals, including a number of PFASs, during one consecutive twelve month period in the timeframe between 2013 through 2015.

40. In 2015, NJAW participated in the UCMR 3 sampling for its facilities that serve more than 10,000 people.

41. The results of the UCMR 3 sampling revealed the presence of PFAS compounds in groundwater at various locations throughout New Jersey.

42. Sampling under UCMR 3 used higher reporting limits than would be applicable in light of scientific information and guidance levels developed since that time, which are much lower than those employed in 2008 and 2009.

43. In addition, the UCMR 3 sampling effort did not combine PFAS levels thus not taking into account added effects from the presence of more than one PFAS compound as NJDEP has recognized.

44. While more studies have been conducted, and thus, more is known regarding PFOS and PFOA, all PFAS compounds have generally demonstrated similar characteristics to PFOS and PFOA.

45. Although some PFAS compounds have been shown to break down, the resulting products typically end at non-biodegradable PFOA and PFOS.

46. The EPA acknowledges that the studies associated with PFAS compounds are ongoing, and as such, the HALs may be adjusted based upon new information.

47. As manufacturers, sellers, handlers and dischargers of PFAS compounds, and products containing PFAS, Defendants knew or should have known that the inclusion of PFAS chemicals in any products presented an unreasonable risk to human health and the environment.

48. Defendants knew or should have known that PFAS compounds are highly soluble in water, highly mobile, extremely persistent, and highly likely to contaminate water supplies if released to the environment.

49. Defendants' prior knowledge of the adverse impacts from PFAS compounds to human health and the environment amounts to reckless disregard to human health and

environmental safety. Nonetheless, Defendants negligently and recklessly manufactured and sold PFAS and products containing PFAS with no warnings or instructions on use or disposal to avoid contamination.

50. Defendants' actions have directly resulted in contamination of a portion of the wells that make up NJAW's water supply system. Because Defendants' PFAS has infiltrated the waters that serve as the source for NJAW's public water supply system, contamination of NJAW's wells is recurring and continuing.

NJAW WATER SYSTEM IMPROVEMENTS

51. NJAW is committed to the supply of potable drinking water consistent with federal and state guidelines and requirements. NJAW must therefore implement remedies to assure that the water it supplies to its customers meets these standards.

52. As a direct result of Defendants' action, NJAW has had to address PFAS contamination. In doing so, NJAW has conducted and continues to conduct sampling, studies and investigations related to PFAS, which requires funding by NJAW, including costs for its personnel to supervise the assessments, and costs to develop PFAS treatment scenarios, and costs to analyze available alternatives.

53. NJAW has incurred, and will continue to incur, significant costs, for capital improvements such as the installation of Granular Activated Carbon ("GAC") adsorption to reduce and/or remove PFAS contamination, and other adjustments such as installing new connections between well fields to assure sufficient non-PFAS impacted water supplies. Operation and maintenance measures for these improvements are ongoing and add further to the costs that NJAW has incurred and will incur in the future to address Defendants' PFAS contamination.

54. NJAW has obtained NJDEP approval for the actions it has taken to address PFAS

removal, resulting in additional regulatory costs.

CAUSES OF ACTION

COUNT ONE – STRICT LIABILITY (ABNORMALLY DANGEROUS ACTIVITY)

55. Plaintiff NJAW hereby incorporates by reference the allegations set forth in paragraphs 1-54 of this Complaint as if they were set forth fully herein.

56. Defendants engaged in the design, manufacturing, marketing, and sales of PFAS chemicals and products containing PFAS, which Defendants knew or should have known, would result in contamination of the environment, including the surface waters and groundwater that serve as the water source for Plaintiff's public water supply system, thereby causing damage to Plaintiff.

57. Defendants knew or should have known of the adverse impacts the exposure to its PFAS compounds would have on the environment and the activities and rights of others.

58. Defendants knew or should have known of the persistence and high mobility of PFAS in the environment, and the foreseeable risk that their PFAS and PFAS-containing products would be discharged, released, or disposed of in the environment.

59. By causing PFAS contamination and the resulting impact to Plaintiff's public water supply systems, Defendants engaged in abnormally dangerous activity for which they are strictly liable.

60. As a result of Defendants' abnormally dangerous activity, plaintiff has incurred, and will continue to incur, investigation, cleanup, remediation, and removal costs and damages related to PFAS contamination.

COUNT TWO – STRICT LIABILITY (FAILURE TO WARN)

61. Plaintiff NJAW hereby incorporates by reference the allegations set forth in

paragraphs 1-54 of this Complaint as if they were set forth fully herein.

62. Defendants engaged in the design, manufacturing, marketing, and sales of PFAS chemicals and products containing PFAS, which Defendants knew or should have known, would result in contamination of the environment, including the surface waters and groundwater that serve as the water source for Plaintiff's public water supply systems, thereby causing damage to Plaintiff.

63. Defendants knew or should have known of the adverse impacts the exposure to its PFAS compounds would have on the environment and the activities and rights of others.

64. Defendants knew or should have known of the persistence and high mobility of PFAS in the environment, and the foreseeable risk that their PFAS and PFAS-containing products would be discharged, released, or disposed of in the environment.

65. Defendants failed to provide warnings or instructions sufficient to notify the users of the dangers inherent in their products.

66. Defendants' failure to provide notice or instruction regarding the dangers to human health and the environment rendered Defendants' PFAS and PFAS-containing products unreasonably dangerous for the purposes intended and promoted by Defendants.

67. This failure to warn or adequately instruct regarding the dangers associated with use of these products directly and proximately caused harm to Plaintiff.

COUNT THREE – STRICT LIABILITY (DESIGN DEFECT)

68. Plaintiff NJAW hereby incorporates by reference the allegations set forth in paragraphs 1-54 of this Complaint as if they were set forth fully herein.

69. Defendants herein, at all times relevant, were in the business of the design, manufacture, sale and distribution of PFAS and PFAS-containing products.

70. Defendants designed, manufactured, marketed, and sold defective products that were unreasonably dangerous for their intended use.

71. When Defendants placed PFAS and their PFAS-containing products into the stream of commerce, the products were defective, unreasonably dangerous, and not fit, suitable or safe for the intended, foreseeable and ordinary uses.

72. The products designed, manufactured, sold and distributed by Defendants reached consumers and users without substantial change to the condition and nature of the products.

73. Defendants, with knowledge of the risks associated with the use of PFAS compounds, failed to use reasonable care in the design of PFASs.

74. The defects in Defendants' products existed at the time the product left Defendants' control and were known to Defendants.

75. Reasonable safer alternatives exist and were available to Defendants at all relevant times.

76. The defects in Defendants' products proximately caused and have directly resulted in the damages of which Plaintiff complains.

COUNT FOUR – NEGLIGENCE

77. Plaintiff NJAW hereby incorporates by reference the allegations set forth in paragraphs 1-54 of this Complaint as if they were set forth fully herein.

78. Defendants had a duty to exercise due or reasonable care in the manufacture, distribution, and use of its PFAS chemicals and PFAS-containing products so as to avoid harm to those who would be foreseeably injured by PFAS environmental contamination.

79. Defendants knew or should have known that their PFAS products would result in the release, discharge, or disposal of PFAS compounds into the environment that would lead to

contamination of drinking water supplies and hazards to human health if not treated.

80. By failing to exercise due care in the design, manufacturing, marketing, and sale of PFAS and their PFAS-containing products, Defendants breached their duty to avoid harm to Plaintiff.

81. As a result of Defendants' negligence, Plaintiff has incurred, and will continue to incur, investigation, cleanup, remediation, and removal costs and damages related to PFAS contamination.

82. Defendants' acts were willful, wanton or reckless and conducted with a reckless indifference to the rights of Plaintiff.

83. As a direct and proximate result of Defendants' actions and omissions, Plaintiff has suffered and continues to suffer damages.

COUNT FIVE – PRIVATE NUISANCE

84. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1-54 of this Complaint as if they were set forth fully herein.

85. Through Defendants' acts and omissions, Defendants' PFAS and PFAS-containing products have directly and proximately caused environmental contamination that has unreasonably interfered with, and continues to interfere with, Plaintiff's use and enjoyment of its public water supply systems and the surface and groundwater sources that supply those systems.

86. The private nuisance created by Defendants is continuing.

87. Defendants have failed, and continue to fail, to abate the private nuisance.

88. As a result of the private nuisance, Plaintiff has suffered and continues to suffer, significant harm and damages, including investigation, cleanup, remediation, and removal costs and damages related to the detection, treatment and removal of PFAS constituents that have and

will continue to migrate into Plaintiff's wells.

COUNT SIX – PUBLIC NUISANCE

89. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1-54 of this Complaint as if they were set forth fully herein.

90. Through Defendants' acts and omissions, Defendants' PFAS and PFAS-containing products have directly and proximately caused environmental contamination that has unreasonably interfered with, and continues to interfere with, Plaintiff's right to a clean environment, which right Plaintiff holds in common with members of the public, and which right is specifically permitted.

91. Through Defendants' acts and omissions, Defendants' PFAS and PFAS-containing products have directly and proximately caused environmental contamination that has unreasonably interfered with, and continues to interfere with, Plaintiff's right to the use of groundwater and surface waters as a source of potable water, which right Plaintiff holds in common with members of the public, and which right is specifically permitted.

92. The public nuisance created by Defendants is continuing.

93. Defendants have failed, and continue to fail, to abate the public nuisance.

94. As a result of the public nuisance, Plaintiff has suffered and continues to suffer, significant harm and damages special to Plaintiff and different in kind from those the general public may have suffered, including investigation, cleanup, remediation, and removal costs and damages related to the detection, treatment and removal of PFAS constituents that have and will continue to migrate into Plaintiff's wells, such that Defendants should be required by injunction to abate the nuisances they have created.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff New Jersey American Water ("NJAW") respectfully requests that

this Court:

a. Enter judgment finding Defendants jointly and severally liable for all costs and damages incurred by Plaintiff, including but not limited to prior, interim and future capital as well as operation and maintenance costs related to PFAS contamination; including the reasonable costs of sampling, investigations, and assessment of injury, and destruction or loss resulting from PFAS contamination;

b. Enter judgment finding Defendants liable for punitive damages;

c. Enter judgment finding Defendants liable for consequential damages;

d. Enter judgment requiring, via injunction, Defendants to abate the nuisance they have created;

e. Award Plaintiff NJAW costs and reasonable attorney fees incurred in prosecuting this action, together with prejudgment interest, to the full extent permitted by law; and

f. Award NJAW such other relief as this Court deems appropriate.

DEMAND FOR JURY TRIAL

Demand is hereby made for a trial by jury.

Attorneys for the Plaintiff

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Dated: November 8, 2018

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

New Jersey-American Water Company, Inc.

(b) County of Residence of First Listed Plaintiff Camden County, NJ
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
T. Roe Frazer II, Frazer PLC, 1 Burton Hills Blvd, Ste 215, Nashville, TN 37215 615.647.6464 / John E. Keefe and Stephen T. Sullivan, Keefe Law Firm, 125 Half Mile Rd, Ste 100, Red Bank, NJ 07701 732.224.9400

DEFENDANTS The 3M Company (F/k/a Minnesota Mining and Manufacturing, Co,); et al.

County of Residence of First Listed Defendant Ramsey County, MN
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☒ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☒ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☒ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. § 1332

Brief description of cause:
Property damage and nuisance for PFAS contamination

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE _____ DOCKET NUMBER _____

DATE
11/08/2018

SIGNATURE OF ATTORNEY OF RECORD
/s/ T. Roe Frazer II

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The 3M Company (f/k/a Minnesota Mining and Manufacturing, Co)
Attn: Inge Thylin, Registered Agent
3M Center
St. Paul, MN 55144-1000

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Tyco Fire Products LP
1400 Pennbrook Parkway
Landsdale, PA 19446

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* National Foam, Inc.
350 East Union Street
West Chester, Pennsylvania 19382

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify)*:

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Chemguard
One Stanton Street
Marinette, Wisconsin 54143

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Buckeye Fire Protection Company
110 Kings Road
Kings Mountain, North Carolina 28086

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Buckeye Fire Equipment Co.
110 Kings Road
Kings Mountain, North Carolina 28086

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Ansul Company
One Stanton Street
Marinette, Wisconsin 54143

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of New Jersey

NEW JERSEY-AMERICAN WATER COMPANY, INC.

Plaintiff

v.

THE 3M COMPANY (f/k/a Minnesota Mining and Manufacturing, Co.); et al.

Defendant

Civil Action No. 1:18-cv-15960

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Angus Fire
141 Junny Road
Angier, North Carolina 27501

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

T. Roe Frazer II
FRAZER PLC
1 Burton Hills Blvd, Ste 215
Nashville, TN 37215
615.647.6464 (p)
roe@frazer.law

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-15960

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

MELISSA JOHNS, *et al.*,	)	
	)	
Plaintiffs,	)	No. 11-L-188 (Consolidated with Nos.
	)	11-L-189; 11-L-190; 11-L-191)
v.	)	
	)	
SOLUTIA, INC., *et al.*,	)	Judge Christopher Kolker
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CERRO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COME NOW Plaintiffs, by and through their undersigned counsel, and file this Response in opposition to Defendant Cerro Flow Products, Inc.'s ("Cerro") Motion for Partial Summary Judgment. Cerro's Motion should be denied in its entirety. In support of this Response, Plaintiffs would respectfully show the Court the following:

INTRODUCTION

The Defendant Cerro Flow Products, Inc. ("Cerro") for up to 70 years has owned and operated a copper recycling plant in St. Clair County, Illinois near the Village of Sauget (the "Cerro Facility"). As part of the copper recycling process, Cerro has produced enormous quantities of dioxins, furans, and other toxins at this location. Due to poor disposal practices, Cerro has released enormous quantities of dioxins, furans, and other toxins ("Released Substances") into the air, water, and soil in this area.

These releases have created, and continue to create, serious health risks for past and present residents living near the sites (the "Affected Area") including Trial Plaintiffs Robert Kofron (through Ann Kofron), Katina Whittington, and Lester Smith (though Celeste Gamache). These

Plaintiffs and others were exposed to the Released Substances by inhalation, incidental ingestion, dermal absorption, and ingestion of homegrown produce.

Plaintiffs in this litigation currently reside, or have resided, in the Affected Area near Cerro. As a result of their exposure to the Released Substances, they have developed a variety of cancers and other serious health conditions. For example, from age two to age forty-three, Robert Kofron resided within four miles of the Cerro facility. He lived in this area from 1944 to 1985. During this period, Mr. Kofron was exposed to dioxins and furans emitted from the Cerro facility. Doctors diagnosed Mr. Kofron with soft tissue sarcoma in February of 2002. Despite surgery and other treatment, Mr. Kofron died on March 22, 2002, as a result of his soft tissue sarcoma.

Katina Whittington was born within four miles of the Cerro facility. She lived within four miles of the Cerro facility for 44 years of her life including 14 years of her childhood. During this 44-year period, Ms. Whittington was exposed to dioxins and furans emitted from the Cerro facility. Doctors diagnosed Ms. Whittington with soft tissue sarcoma in February of 2001. She has undergone multiple surgeries and painful radiation treatment. The treatment, however, has been successful, and Ms. Whittington is currently cancer-free.

Lester Smith resided within four miles of the Cerro facility from 1949 until his death in 1997. During this period, Mr. Smith was exposed to dioxins and furans emitted from the Cerro facility. During those years, Mr. Smith drank well water and grew vegetables some of which he consumed. He also raised chickens in the area for two years that he consumed. Doctors diagnosed Mr. Smith with non-Hodgkin Lymphoma in May of 1997. Despite surgery and other treatment, Mr. Smith died of the disease in September of 1997.

The Plaintiffs have filed lawsuits against Cerro to recover for the injuries caused by Cerro's tortious conduct. Included in those lawsuits are causes of action alleging negligence, strict liability,

battery, negligence per se, nuisance, and willful and wanton misconduct. Furthermore, this Court has allowed the Plaintiffs to proceed with their claims for punitive damages. Mr. Kofron, Ms. Whittington, and Mr. Smith have been selected as the initial Trial Plaintiffs. The claims asserted by Ms. Whittington and the personal representatives of Mr. Kofron and Mr. Smith will be tried in advance of the other Plaintiffs.

SUMMARY JUDGMENT STANDARD

Summary judgment is not proper when genuine issues of material fact exist and when the movant is not entitled to judgment as a matter of law. *Stewart v. Jones*, 742 N.E.2d 896, 900 (Ill. App. Ct. 2001). When determining whether a genuine issue of material fact exists, the record must be liberally construed in favor of the non-movant and strictly against the movant. *Largosa v. Ford Motor Co.*, 708 N.E.2d 1219, 1221 (Ill. App. Ct. 1999). All pleadings and attachments must be viewed in the light most favorable to the non-movant. *Keating v. 68th & Paxton, L.L.C.*, 936 N.E.2d 1050, 1063 (Ill. App. Ct. 2010). A triable issue precluding summary judgment exists where the material facts are disputed or where the material facts are undisputed but reasonable persons might draw different inferences from those facts. *Morris v. Union Pacific R.R. Co.*, 39 N.E.3d 1156, 1163 (Ill. App. Ct. 2015). Therefore, summary judgment is a drastic means of disposing of litigation and should be granted only where the movant's right to judgment is clear and free from any doubt. *Lutz v. Goodlife Entertainment, Inc.*, 567 N.E.2d 477, 479 (Ill. App. Ct. 1990). The Defendant has no right to summary judgment in this case due to the many material facts in dispute, and Defendant's requested relief is wholly improper in the case at hand.

ARGUMENT

A. CERRO OWED PLAINTIFFS A DUTY OF CARE

1. Genuine issues of fact exist as to whether Cerro knew or should have known of the harmful effects that its secondary copper smelting activities had on the surrounding community.

Cerro conflates the summary judgment standard with an undefined and heightened judgment on the pleadings standard when it accuses plaintiffs of failing to plead specific facts indicating Cerro's knowledge of dioxins. *Defendant's Motion for Summary Judgment,* pg. 6-7. For purposes of summary judgment, the Court does not merely examine the sufficiency of the allegations in the Complaint. Instead, the Court is to consider all evidence in the light most favorable to the nonmoving party. *Perez v. Sunbelt Rentals, Inc.*, 968 N.E.2d 1082, 1084 (Ill. App. Ct. 2012). Viewed in this light, the evidence unequivocally establishes a genuine issue of material fact as to whether Cerro knew or should have known that its secondary copper smelting activities could harm the plaintiffs.

Under Illinois law, the following four factors are relevant in determining whether a duty of care exists: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant. *Dunning v. Dynegy Midwest Generation, Inc.*, 33 N.E.3d 179, 191 (Ill. App. Ct. 2015). Cerro, ostensibly recognizing that a majority of these factors tilt in favor of finding a duty of care, only argues against the first factor, foreseeability of the injury. Although the other three factors weigh heavily in favor of finding that Cerro owed plaintiffs a duty of care, plaintiffs will not address these factors because, under Illinois law, an "argument not raised in the initial brief is deemed waived . . . even if discussed in the reply brief." *Resudek v. Sberna*, 477 N.E.2d 789, 791 (Ill. App. Ct. 1985). Cerro's failure to address three out of the four factors, alone, provides this Court with ample grounds to deny Cerro's motion for summary judgment as to

plaintiffs' negligence claims, and an application of the foreseeability factor lends even further support for concluding that Cerro owed plaintiffs a duty of care.

Cerro's historical practices indicate widespread and uncontrolled dioxin emissions into the community. When pollution control devices were finally implemented, they were ineffective and continually out of service, resulting in persistent dioxin releases into the ambient air surrounding its plant. *See* Exh. 1 *Chermisinoff Expert Report*, pg. 22-34. Cerro polluted the environment with dioxins and other harmful contaminants when smelting copper scrap materials in its open pit incinerators, ore incinerators, and blast furnaces. Cerro consciously turned a blind eye to the harm it was causing – harm that was reasonably foreseeable and likely to occur.

Dioxins are formed during combustion and other thermal processes as a by-product with the presence of chlorine molecules, oxygen, and organic matter. Dioxin congeners are known to be amongst the most toxic chemicals known to man. *Dioxins, Volume I. Sources, Exposure, Transport, and Control*, US EPA, June 1980, EPA-600/2-80-156. The industry and the scientific community has known about the toxicity of dioxin for decades. In 1968, the National Cancer Institute reported negative health effects in animals due to dioxin exposure. *Evaluation of Carcinogenic, Teratogenic, and Mutagenic Activities of Selected Pesticides and Industrial Chemicals, Volume II*., National Cancer Institute, August 1968. A 1971 report from the National Institute of Environmental Health Sciences determined that fetal exposure to dioxins causes developmental abnormalities. *Teratology Studies with 2, 3, 5 – Trichlorophenoxyacetic Acid and 2, 3, 7, 8 – Tetrachlorodibenzo-P-dioxin*, National Institute of Environmental Health Sciences, Toxicology and Applied Pharmacology 20, 396-403 (1971). By 1977, the International Association for Research on Cancer thoroughly documented the carcinogenic risks of dioxin exposure in humans. IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals

to Man, World Health Organization, International Agency for Research on Cancer, August 1977, Volume 15, pgs. 82-84. By the early 1980s, the U.S. EPA and other regulatory bodies confirmed the toxic nature of dioxin exposure. *Dioxins,* US EPA, November 1980, EPA-600/2-80-197; *Carcinogenesis Bioassay of 2,3,7,8-Tetrachlorodibenzo-p-Dioxin,* National Toxicology Program, February 1982.

The scientific community has also long understood that dioxins are produced from the combustion of chlorine, oxygen, and organic matter. Such actions have long been the practice of Cerro in its secondary copper smelting operations. In 1980, the US EPA conducted an extensive literature review of dioxin formation in all combustion processes. *Dioxins, Volume I. Sources, Exposure, Transport, and Control,* US EPA, June 1980, EPA-600/2-80-156. This study reviewed "an extensive amount of literature published during the past 25 years . . ." information which all industry participants had a duty to understand. *Id.* The literature confirmed dioxin production in secondary copper smelter combustion while stating "dioxins [have] been a concern of both scientific researches and the public for many years" because dioxins are "one of the most toxic substances known to science." *Id.*

Given the widespread acceptance of dioxin production in combustion, and specifically secondary smelting, the federal government spent significant resources in the early 1980s creating a national dioxin plan in efforts to protect human health. Based upon information collected since the 1950s, these studies show that dioxin production from secondary copper smelting is larger than any other source tested in comparable industries. *See* Exh. 2 *Source Category Survey: Secondary Copper Smelting and Refining Industry.* The data collected by the US EPA, released in the mid-1980s, shows what the secondary copper smelting industry knew for decades - dioxin production from its secondary recycling processes created a risk to human health magnitudes above any other

industry. The fact that Cerro operated as a secondary copper smelter is crucial to the question of whether Cerro knew or should have known that it produced harmful contaminants such as dioxin for decades. The scientific and industrialized sector has known about the inherently dangerous and toxic nature of the combustion of materials containing plastics, such as chlorinated materials, and the dire health effects this has on humans. *See* Exh. 3 *America Burning: The Report of the National Commission of Fire Prevention and Control*. National Commission on Fire Prevention and Control, 61-69 (1973).

Cerro's persistent dioxin releases caused immeasurable harm to the people and families living near its facility. It is a harm foreseeable to Cerro, yet Cerro refuses to accept responsibility, or show any contrition, and continues to deny the obvious by claiming that it neither operated as a secondary copper smelting facility, nor emitted dioxins into the atmosphere. *See* Exh. 4, Blair deposition, pgs. 15-16, 27. Abundant evidence belies these false and unsubstantiated claims. The defendant makes such claims to justify its deliberate decision during decades of secondary copper recycling to forego any testing for dioxin releases, unlike others in the industry. Ironically, Cerro's own expert admits that it operated as a secondary copper smelter. *See* Exh. 5, deposition of Dr. David Garabrant as representative example, pg. 36 ("Q: Do you understand that the [Cerro] plant is a secondary copper smelter? A: I believe I have seen that, yes.").

Cerro's own documentation invalidates its corporate representative's deposition testimony. A 1986 internal Baseline Operating Report signed by Cerro's Manager of Energy and Environmental Affairs lists the East St. Louis facility as "a completely integrated secondary copper complex which performs smelting, refining, casting, and fabrication." *See* Exh. 6 CCU 089520-089523. A 1986 letter from the defendant to an outside contractor (Patterson Associates) asserts the fact that Cerro's East St. Louis plant is the only one in the nation where "smelting, refining,

casting, and fabrication of copper takes place in a single location...." *Id*. A 1989 report from Hunter Environmental Services to the defendant states "Cerro Copper Products Company operates a secondary copper smelter at its plant in Sauget, Illinois located at Illinois Route 3 and the Alton and Southern tracks." *See* Exh. 7 CCU 137893-137947, at 137897. This report was authored by an outside contractor specifically hired by the defendant to conduct stack testing. This company considered the defendant to be a secondary copper smelter in 1989. Finally, a 1992 internal memorandum classifies the defendant as part of the secondary copper smelting industry in efforts to curtail EPA actions against the industry. *See* Exh. 8 CCU 193594. These documents directly rebut the corporate testimony denying operations as a secondary copper smelter that needed to test its stacks for dioxin emissions.

Likewise, all outside regulatory agencies agree that the defendant operated as a secondary copper smelter and, therefore, released huge amounts of dioxins. In 1974, the Illinois EPA noted that the defendant was using an incinerator for removing insulation from copper wire while having significant issues with plant maintenance. *See* Exh. 9 IEPA 01185-01189. Burning insulation off of copper wire causes extremely high dioxin formation and is a hallmark of the secondary copper smelting industry. The US EPA in 1980 listed Cerro Copper as part of the secondary copper smelting industry. *Source Category Survey: Secondary Copper Smelting and Refining Industry,* US EPA, May 1980, EPA-450/3/80/011, pg. 16. Again in 1995, the US EPA classified Cerro within the secondary copper smelting industry. "Domestically, the secondary copper smelting industry is led by four producers: Franklin, Southwire Co., Chemetco, and Cerro Copper Co." *Profile of The Nonferrous Metals Industry,* US EPA, September 1995, EPA-310-R- 95-010, pg. 32. In 2002, Copper Development Association, Inc., an industry trade group, set forth in its newsletter that Cerro operated as a secondary copper smelter until April 1998 when it "suspended

operations at its 40,000 ton-per year electrolytic refinery and associated secondary smelter . . ." *Technical Report, The U.S. Copper-base Scrap Industry and its By-products – 2002,* Copper Development Association, Inc. Technical Report, July 2002, pg. 21. Lastly, in 2006 the Federal Register listed the defendant as a historical participant in the secondary copper smelting industry. FED. REG. Vol. 71, No. 194, 40 C.F.R. Part 63 (Oct. 6, 2006).

Documents and court records show that Cerro was a member of the secondary copper smelter industry well into the 1990s. *See* Exh. 10 Stipulation of Liability, *U.S. v. Pharmacia Corp., et al.*, Case No. 3:99-cv-GM. This time period was well after the copper recycling industry, and the scientific community understood that: (1) dioxins are harmful to humans and (2) every secondary copper smelting operation releases dioxins. Despite this, the defendant deliberately failed to test for dioxins, implement adequate environmental controls, or warn the surrounding community.

Additional circumstantial evidence of Cerro's actual knowledge of dioxin production is found in a 1966 memo Cerro issued to build a new wire incinerator designed to process 30,000 pounds per day of plastic insulated wire. *See* Exh. 11, CCU 070919-070954, at 070941. The contract included the installation of an after-burner "in effort to comply with anticipated air pollution regulations." *Id.* An after burner is designed to assure heat levels remain high enough to limit the production of dioxins. In summary, the record is abundantly clear that Cerro knew or, at a minimum, should have known that its copper smelting operations generated harmful dioxin production.

2. **Cerro owed Plaintiffs a duty of care even if it lacked scientific knowledge sufficient to understand that its operations produced specific dioxin congeners.**

Assuming, *arguendo*, that Cerro did not have knowledge that it, for decades, polluted the community with harmful levels of dioxin, a wholly separate reason exists for finding that Cerro

owed a duty to plaintiffs. In the 1960s, Cerro routinely conducted open pit burning and the incineration of insulated wire. By the late 1960s and 1970s, Cerro was burning million pounds of insulated wire per year. This consisted of literally burning insulated wire in a pit behind its plant facility. Efforts were made to conduct the burning as far away from the facility (and thereby closer to the surrounding neighborhoods) in order to prevent interference with operations inside the plant. Whether Cerro knew of the harms of dioxins, it certainly had knowledge of the harmful nature of this reckless practice. Cerro's own documents prove this.

A 1965 internal memorandum shows complaints that the "smoke and fumes are objectionable" while the practice of burning materials containing chlorine created a "noxious smoke upon burning" which "interferes with operations in other areas of our plant and evokes complaints from other plants in the vicinity." *See* Exh. 12 CCU 016107-016110. A 1968 internal memorandum indicates an "old, inefficient burner" (creating more dioxins) contributing to "air pollution problems" which has an "impact of air pollution as a national menace." *See* Exh. 13 CCU . When pollution controls were finally employed, they were incorrectly employed, highly inefficient, and suffered from frequent malfunctions. *See* Exh. 14 IEPA 03350-03362, at 3351; IEPA00754-00757.

Cerro employed the bare minimum pollution controls - air pollution control devices that did little, if anything, to protect the surrounding community. Despite exceptional advances in pollution control technology that were available to it, Cerro recycled copper scrap with significant operational problems well into the 1990s. *See* Exh. 1 *Chermisinoff Expert Report*, pg. 22-34. This led to considerable emissions into the community well after Cerro knew the harms that those emissions imposed. A 1994 internal memorandum shows stack testing results were "very disappointing at best". *See* Exh. 15 CCU 145484. Cerro contributed this to "an unexplainable

anomaly." *Id.* Thus, as late as 1994, Cerro was still unsure how to employ its own pollution controls in a manner to reduce harmful emissions to the community. Similarly, a 1995 inspection report of Cerro by an independent third party, Advanced Air Technology, shows extremely poor maintenance practices causing the anode furnace scrubber system to routinely fail. *See* Exh. 16 CCU 145495-145512.

Cerro's pollution controls, even when installed, were inadequate, inefficient, and poorly maintained resulting in excessive harmful emissions to the community. These poor historical practices led to widespread contamination of the surrounding community.

Cerro was designated a potentially responsible party ("PRP") by the US EPA under the federal CERCLA statute. This designation made Cerro responsible for remediation and clean-up of the contaminated area in order to protect health and human safety. The same poor environmental practices which led to the PRP designation are directly relevant to the duty of care arguments to the jury. Therefore, based on the foregoing, plaintiffs have shown that material issues of facts exist for a jury to determine the issue of duty of care.

3. **Cerro owed Plaintiffs a duty to restore the environmental health it destroyed and remediate the toxic pollutants.**

Even assuming, *arguendo*, that Cerro somehow had no knowledge that its copper smelting activities could release toxic substances into the environment, it, at a minimum, knew or should have gained historical knowledge by 1980 that it had contaminated the surrounding community. Despite this knowledge, Cerro consciously and intentionally chose not to warn the community, chose not to rid the community of contaminants, concealed the contamination risks from the public, and allowed plaintiffs and the surrounding community to remain exposed to dioxin and other toxic substances for decades. Cerro, even faced with looming CERCLA litigation, purposefully refused to clean up the toxic wastes it had dumped on the community, including plaintiffs, for decades. It

was not until 1990 that Cerro finally agreed to contribute to clean up efforts when it reached a deal to clean up portions of Dead Creek in Sauget, Illinois. CCU 001293.

Paul Tandler, former vice president of Cerro, admitted culpability, stating "[w]e recognized that there was a problem with Dead Creek, and that over the years we may have been one of many companies that contributed to that problem." CCU 001293. The portion of Dead Creek subject to the cleanup efforts became part of Cerro's property in the 1950s and 1960s, yet Cerro waited decades to accept responsibly and to contribute to the removal of the toxic substances that it had produced. As a result, plaintiffs were further exposed to dioxins and other toxic substances. The Complaint clearly alleges that Defendants were negligent "[b]y failing to take appropriate measures to halt the migration or release of pollutants and failing to clean up the pollutants discharged." Compl. ¶ 17(e).

B. POLLLUTING THE ENVIRONNMENT WITH DIOXIN, THE MOST TOXIC SUBSTANCE KNOWN TO MAN, CONSTITUTES ULTRAHAZARDOUS ACTIVITY.

Cerro, again, conflates the summary judgment standard with an undefined and heightened judgment on the pleadings standard when it accuses plaintiffs of failing to plead specific facts "showing how copper processing is abnormally dangerous." *Defendant's Motion for Summary Judgment*, pg. 7. Cerro's argument exclusively focuses on the wording of the Complaint's allegations – an analysis that is not appropriate at this stage. For purposes of summary judgment, the Court does not merely examine the sufficiency of the allegations in the Complaint. Instead, the Court is to consider all evidence in the light most favorable to the nonmoving party. *Perez v. Sunbelt Rentals, Inc.*, 968 N.E.2d 1082, 1084 (Ill. App. Ct. 2012). Viewed in this light, the evidence unequivocally establishes a genuine issue of material fact as to whether the pollution of the environment and surrounding community with the most toxic substance on earth constitutes ultrahazardous activity.

No Illinois case has directly dealt with the issue on point in this case. However, at the outset, it is imperative to note that activities involving toxic substances have been recognized as inherently dangerous or ultrahazardous around the country. *See State, Dept. of Environmental Protection v. Ventron Corp*., 94 N.J. 473, 493 (1983). In the *Ventron* case, the Supreme Court of New Jersey applied the Restatement (Second) of Torts § 520 factors that have since been formally adopted by Illinois courts. *Miller v. Civil Constructors, Inc.*, 651 N.E.2d 239, 269 (Ill. App. Ct. 1995). These factors are as follows:

> (1) the existence of a high degree or risk of some harm to person, land, or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes.

In considering these factors, the *Ventron* court held that mercury and other toxic materials produced by mercury processing are abnormally dangerous, and the disposal or storage of them, past or present, is an abnormally dangerous activity. *Id.* at 493. Here, as in *Ventron* where toxic materials were allowed to be released into the surrounding environment, Cerro perpetually polluted the surrounding community with dioxin, a chemical far more toxic than mercury, in quantities sufficient enough to pose a high risk of harm to plaintiffs. Therefore, an application of these factors makes clear that Cerro's conduct qualifies as ultrahazardous activity.

Factors 1 and 2: Cerro's conduct resulted in a high risk of great harm.

First, defendant's combustion of material that produced dioxin in the operation of its plant posed a high degree of risk of some harm to others due to the nature of the emissions. Polychlorinated dibenzodioxins (PCDDs, "dioxins") and polychlorinated dibenzofurans (PCDFs, "furans") have been historically created as unwanted byproducts during the manufacture of chlorinated phenols and chlorophenoxy herbicides. *See* Exh. 17 *Garabrant Expert Report*, pg. 4.

They are commonly associated with the combustion of material containing chlorinated compounds. *Id.* The toxicity of dioxins has been known for decades. A 1968 report authored by the National Cancer Institute discussed the negative health effects in animals due to exposure to the most common dioxin congers. *Evaluation of Carcinogenic, Teratogenic, and Mutagenic Activities of Selected Pesticides and Industrial Chemicals, Volume II.*, National Cancer Institute, August 1968. By 1977, the International Association for Research on Cancer thoroughly documented the carcinogenic risks of dioxin exposure in humans. *IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Man*, World Health Organization, International Agency for Research on Cancer, August 1977, Vol. 15, pg. 82-84. By the 1980s, the U.S. EPA and other regulatory bodies confirmed the toxic nature of dioxin exposure. *Dioxins*, US EPA, Nov. 1980, EPA-600/2-80-197. Cerro was involved in activities, such as open pit burning of material and inappropriate maintenance of furnaces, that released the highly toxic substance of dioxin into the surrounding environment. *See* Ex. 18 *Cheremisinoff Expert Report*, pg. 19.

Second, the harm that resulted from Defendant's activity is great. The secondary copper smelting industry was, and still is, one of the largest sources of emissions of dioxins/furans into the environment due to the burning/incineration of scrap copper materials containing impurities. *See* Exh. 1 *Chermisinoff Expert Report*, pg. 22-23. Certain procedures, such as emission controls, must be continuously used in order to reduce – but not eliminate – the emission of these toxic substances. *Id.* Evidence shows that Cerro's emission controls perpetually failed to manage the emissions from the plant. *Id*. Specifically, as a direct result of Cerro's activities, dioxin – the most harmful chemical known to man – was released into the air, surface water, and ground water of a populated community. These factors heavily weigh in favor of strict liability.

Factor 3: Cerro's conduct could not eliminate the risk.

With respect to the ability to eliminate the risks involved in Cerro's conduct, secondary copper smelting has inherent risks that can only be mitigated, but not eliminated through proper emission control devices, and copper smelting produces some of the highest emissions of dioxins. *See* Exh. 18 *Cheremisinoff Expert Report*, pg. 9. Further, Illinois courts have recognized that while all the factors must be considered, not every factor needs to be present, especially where other factors weigh heavily. *In re Chicago Flood Litigation*, 680 N.E.2d 265, 280 (Ill. 1997). This factor weighs in favor of strict liability.

Factor 4: Open Pit Burning and secondary copper smelting is not a common activity.

In efforts to marginalize its conduct, Cerro once again misrepresents the true nature of the plaintiffs' claims. Cerro's litany of statistics to copper processing is irrelevant to the common usage factor, and even the subject matter of this action. Production statistics aside, as to common usage, an activity is only a matter of common usage "if it is customarily carried on by the great mass of mankind or by many people in the community." *In re Chicago Flood Litigation*, 680 N.E.2d 265, 281 (Ill. 1997) (*quoting* Restatement (Second) of Torts § 520, cmt. I (1977)). The deciding characteristic of this factor is "that few person[s] engage in [this] activity[]." *Id.* Despite Cerro's claims, the evidence shows that Cerro's East St. Louis plant, the plant in question in this action, was the *only* plant in the nation where "smelting, refining, casting, and fabrication of copper [took] place in a single location." *See* Exh. 19 CCU 091573-091574. Because Cerro's activities were not carried on by the "great mass of mankind," Cerro's conduct at this plant is clearly not common usage, and this factor heavily weighs in favor of strict liability.

Factor 5: Cerro's conduct was inappropriate to the place where it was carried on.

Cerro's conduct that resulted in the release of dioxins is particularly inappropriate in the area surrounding Cerro's plant due to the fact that the Cerro plant is in close proximity to

neighborhoods, streams, and other businesses. Cerro's conduct in processing copper produced a noxious smoke that filled the surrounding area. *See* Exh. 12 CCU 016107-016110. This smoke was so objectionable that the open pits used to burn material were strategically placed as far away from the facility as possible so as to not interfere with operations inside the plant. *Id.* Not only did this conduct elicit complaints from Cerro's own staff, but surrounding plants within the vicinity complained about the noxious smoke produced by Cerro. *Id.* Cerro's conduct, even within the local industrial community, was seen as objectionable, therefore, this factor heavily weighs in favor of strict liability.

Factor 6: The dangerous harms of Cerro's conduct does not outweigh its value to the community.

Cerro cites that its smelting process has provided jobs to the community, however this is of limited value considering the price these jobs extolled. By operating this ultrahazardous activity within a populated city, Cerro inflicted mass environmental damage and health issues upon thousands of plaintiffs in this litigation. Further, the area surrounding Cerro was part of a CERCLA cleanup and a Superfund site. The city of Sauget, Illinois was not a city that depended on Cerro's operation at the time of the conduct in question. Rather, it was a highly industrialized area that enjoyed a diversified working environment. Cerro's conduct simply only brought value to it and its bottom line while costing the surrounding community irreparable harm. This factor heavily weighs in favor of strict liability.

C. CERRO'S ACTS CONSTITUTE BATTERY.

As set out in Plaintiffs' Complaint, this Response, and the Motion to Amend granted by this Court on February 21, 2019, Cerro has intentionally dumped, discharged, and otherwise allowed enormous quantities of dioxin to escape from its facility and into the air, ground, surface water and groundwater. Complaint at ¶ 27. These intentional acts caused Plaintiffs to be exposed

to dioxins and to be injured as a result of that exposure. These actions were sufficient under applicable law to constitute the tort of battery.

In attempting to avoid responsibility under this cause of action as well, Cerro selectively cites applicable case law in such a way as to seemingly apply only the most extreme acts. That is simply not the case. The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm, but rather an intent to bring about a result which will invade the interests of another in a way that the law will not sanction. Prosser on Torts, § 8, p. 31. Accordingly, the gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff. Prosser on Torts, § 9, p. 36.; *see, e.g., Cowan v. Insurance Co. of North America*, 318 N.e.2d 315, 323 (Ill. App. Ct. 1974).

Although citing *Pechan v. Dynapro, Inc*., 622 N.E.2d 108 (Ill. App. Ct. 1993) for certain examples of conduct constituting battery, Cerro fails to note that the contact may be a substance or force put in motion by the defendant, and that an action for battery does not depend on the hostile intent of the defendant, but on the absence of the plaintiff's consent to the contact. *Id*. at 1084 (citations omitted). Defendant also cites *Torf v. Chicago Transit Authority*, but the Court in that case denied Defendant's motion for summary judgment finding that genuine issues of material fact existed as to the state of mind of the actor. 938 N.e.2d 1143, 1147-49. As discussed above, Cerro's knowledge and intent, as properly pled, with regard to the discharge of dioxins, the selection of sites for burning, and other acts raise sufficient genuine issues of material fact so as to deny Defendant's motion.

Cerro next cites *Glowacki v. Moldtronics, Inc*., but again chooses a case which is inapplicable to the present facts. 636 N.E.2d 1138 (Ill. App. Ct. 1994). In that decision, the Court noted that the Complaint did not allege that the defendants were aware of the specific risks faced

by the plaintiff or that they fraudulently misrepresented the risks. *Id.* at 1140. The Complaint in this case, however, and the evidence obtained through discovery, is more than sufficient with regard to those allegations. Finally, Cerro's reliance on *Hennessey v. Commonwealth Edison Co*. is misplaced for the same reason. 764 F. Supp. 495 (N.D. Ill. 1978). Summary judgment was granted since the record was "bereft of any facts or explanation regarding what event led to … contamination." *Id*. at 507. The Court went on to note that based upon the evidence before it that it would be "pure speculation to suppose that ComEd either engineered a radiation release or knew that a radiation release was substantially likely to occur … in an amount and manner that would case the internal contamination." *Id*. In the present case, however, sufficient evidence exists as to Cerro's knowledge and acts so as to deny its motion for summary judgment.

D. CERRO'S ARGUMENT AGAINST NEGLIGENCE PER SE CLAIM IS SUSPECT .

Defendants argue in their motion that Plaintiffs' negligence per se claim fails as a matter of law, and in support cite a federal case from the Central District of Illinois for that proposition. *See Test Drilling Servc. Co. v. Hanor Co.*, 322 F.Supp.2d 957, 963 (C.D. Ill. 2003). A contrary decision of equal weight is *Krempel v. Martin Oil Marketing, Ltd.*. 1995 WL 733439 (N.D. Ill. 1995), holding that a private cause of action is available under 415 ILL. COMP. STAT. 5/31(b). However, the Illinois Court of Appeals, in 1997, held that the 415 ILL. COMP. STAT. 5/31(b) does not provide litigants a private cause of action for violations of the statute. *NBD Bank v. Krueger Ringier, Inc.*, 686 N.E.2d 704 (Ill. App. Ct. 1997).

E. CERRO CREATED BOTH A PRIVATE AND PUBLIC NUISANCE.

Plaintiffs have presented sufficient evidence that Cerro has created both a public and private nuisance. Defendants once again base their motion for summary judgment wholly on some undefined and heightened judgment on the pleadings that attacks the sufficiency of Plaintiffs'

pleadings for nuisance; however, for purposes of summary judgment, the Court does not merely examine the sufficiency of the allegations in the Complaint. Instead, the Court is to consider all evidence in the light most favorable to the nonmoving party. *Perez v. Sunbelt Rentals, Inc.*, 968 N.E.2d 1082, 1084 (Ill. App. CT. 2012)

1. Plaintiffs have alleged and shown evidence for a triable cause of action for private nuisance.

In Illinois, a "private nuisance is a substantial invasion of another's interest in the use and enjoyment of his or her land." *Willmschen v. Trinity Lakes Improvements Ass'n*, 840 N.E.2d 1275, 1281-82 (Ill. 2005). "The invasion must either be intentional or negligent, and unreasonable." *Id.* at 1282. In determining whether particular conduct constitutes a nuisance, the standard is the conduct's effect on a reasonable person. *In re Chicago Flood Litigation*, 680 N.E.2d 265, 277 (Ill. 1997). An invasion constituting a nuisance can include noise, smoke, vibration, dust, fumes, and odors produced on the defendant's land and impairing the use and enjoyment of neighboring land. *Id.* In the case at hand, Plaintiffs have presented ample evidence that Cerro's conduct in secondary copper smelting produced a private nuisance. Cerro engaged in open pit burning of material. A 1965 internal Cerro memorandum shows complaints that the "smoke and fumes are objectionable" while the practice of burning materials containing chlorine created a "noxious smoke upon burning" which "interferes with operations in other areas of our plant and evokes complaints from other plants in the vicinity." *See* Exh. 12 CCU 016107-016110.

The production of smoke alone shows that the invasion unto the plaintiffs' lands was substantial, intentional or negligent, and unreasonable. This smoke was so objectionable that this material was burned in an open pit strategically placed as far away from the facility (and therefore closer to the plaintiffs) as possible so as to not interfere with operations inside the plant. *Id.* Not only did this conduct elicit complaints from Cerro's own staff, but surrounding plants within the

vicinity complained about the noxious smoke produced by Cerro. *Id.* Further, in addition to the smoke, toxic fumes wafted onto plaintiffs' lands and deposited highly toxic dioxins onto the properties thereby affecting the use and enjoyment of their land. Lastly, and most importantly, whether the complained of activity constitutes a nuisance is generally a question of fact. *Pasulka v. Koob*, 524 N.E.2d 1227, 1239 (Ill. Ct. App. 1988). Because the plaintiffs have produced more than enough evidence of a triable issue of fact, disposition of this issue at summary judgment is wholly inappropriate.

2. Plaintiffs have alleged and shown evidence for a triable cause of action for public nuisance.

Defendants attack the sufficiency of plaintiffs' pleadings for public nuisance, however the Illinois Supreme Court has held that "[w]hen the plaintiff's theory of liability is public nuisance, the pleading requirements are not exacting because the 'concept of common law public nuisance does elude precise definition.'" *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004) (*quoting City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (Ill. 1982)). What is required has been plead by the plaintiffs: the existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury. *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113 (Ill. 2004).

First, plaintiffs have properly alleged and shown evidence to support a public right because Cerro's nuisance has affected indivisible resources – air, surface water, and groundwater – shared by the public at large. Cerro attempts to draw parallels between the case at hand and the Restatement (Second) of Torts' example of a polluted stream. *See Defendants Motion for Summary Judgment*, pg. 14. Specifically, Cerro argues that the harm suffered by the plaintiffs has been too individualized in nature to be considered a public right. However, in the case at hand, the pollution caused by Cerro affected the surface water, groundwater, and air to such a degree that the US EPA

declared that a public health hazard existed within the area. CCU 001293-95. Further, whether or not the nuisance occurred on private property is immaterial because Illinois courts have held that a public nuisance is actionable even where the nuisance is present on private property. *City of Chicago v. Latronica Asphalt and Grading, Inc.*, 805 N.E.2d 281, 287 (Ill. Ct. App. 2004). Illinois courts have also acknowledged that a public right for public nuisance purposes exists in the traditional sense such as the obstruction of highways and waterways; the pollution of air or navigable streams; and the presence of airborne toxins. *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 132-33 (Ill. Ct. App. 2005) (*referencing* D. GIFFORD, *Public Nuisance as a Mass Products Liability Tort*, 71. U. Cin. L. Rev. 741, 818 (20030)); *City of Chicago v. Latronica Asphalt and Grading, Inc.*, 805 N.E.2d 281, 289 (Ill. Ct. App. 2004). Plaintiffs have produced evidence that identifies that Cerro produced airborne toxins in the form of dioxins, and that Cerro has polluted the area to such a degree that the area was a public health hazard. This evidence shows far more than an individualized claim of harm, rather it shows that a public right exists, and that right has been violated by Cerro, therefore summary judgment is inappropriate.

Second, the Plaintiffs have alleged an unreasonable interference with a public right by the defendant. *Beretta U.S.A.*, 821 N.E.2d at 1124. If an enterprise is highly regulated by state or federal law, the plaintiff must allege only that "(1) the defendant violated the applicable statutes or regulations, (2) the defendant was otherwise negligent in carrying out the enterprise, or (3) the law regulating the defendant's enterprise is invalid." *Gilmore v. Stanmar, Inc.*, 633 N.E.2d 985, 994 (Ill. Ct. App. 2004). Assuming *arguendo* if Cerro is a commercial enterprise that is highly regulated by state or federal law, the defendant is still liable for public nuisance because it was negligent in carrying out its copper smelting process. Plaintiffs have alleged through their Complaint and established through discovery that Cerro had a duty to use reasonable care in the

handling, production, and use of PCBs, dioxins, furans, and other pollutants at their facilities. Discussed earlier in more detail, Plaintiffs have presented enough evidence to create a triable issue of whether Cerro has breached this duty. *See supra* Section A. Therefore, Plaintiffs have presented a triable cause of action for public nuisance. Lastly, in Cerro's Motion, only the first two elements for public nuisance are addressed; plaintiffs will not address the other factors that Cerro failed to address because, under Illinois law, an "argument not raised in the initial brief is deemed waived . . . even if discussed in the reply brief." *Resudek v. Sberna*, 477 N.E.2d 789, 791 (Ill. Ct. App. 1985). Cerro's failure to address two out of the four factors, alone, provides this Court with ample grounds to deny Cerro's motion for summary judgment.

F. WILLFUL AND WANTON CONDUCT BY CERRO HAS BEEN ESTABLISHED.

Count VI of Plaintiffs' Complaint sets out allegations of Cerro's conduct so as to justify the imposition of punitive damages. Cerro's response to this in its motion for summary judgment is only to argue that the limited wording of the title of the count does not constitute a separate cause of action under Illinois law. Cerro's arguments are misplaced and are further moot pursuant to this Court's Order of February 21, 2019 regarding the right of Plaintiffs to seek punitive damages in the trial of this cause. Plaintiffs adopt the motion to amend in its entirety as well as the pleadings and arguments in Custer on this same issue. Plaintiffs' claims for punitive damages have been allowed to proceed in this matter and Cerro's motion as to Count VI is therefore not well taken.

CONCLUSION

The court should DENY summary judgment for the counts discussed for the foregoing reasons. Plaintiffs have provided triable issues for each count discussed above.

WHEREFORE, Plaintiffs Melissa Johns, et. al., prays that this honorable Court denies Defendant Cerro Flow Products' Motion for Partial Summary Judgment.

Dated this 1st day of March, 2019.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 1, 2019, the foregoing was filed with the Clerk of the Court via electronic filing system Odyssey eFileIL.

The undersigned further certifies that on March 1, 2019 a true and correct copy of the foregoing document has been served upon the following via email addressed as follows:

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

NEW JERSEY-AMERICAN WATER COMPANY, INC., **Plaintiff,** **v.** **E. I. DUPONT DE NEMOURS & CO. and THE CHEMOURS COMPANY,** **Defendants**	**Civil No.:** **COMPLAINT**

New Jersey-American Water Company, Inc. ("NJAW" or "Plaintiff") files this Complaint against the Defendants named herein and in support thereof alleges as follows:

SUMMARY OF THE CASE

1. NJAW, which operates a public water supply system in Salem County, New Jersey, brings this action for contribution and reimbursement of costs incurred and which continue to be incurred to address the presence of perfluorochemicals ("PFCs")[1] that Defendants E.I. DuPont de Nemours & Co. ("DuPont") and its subsidiary, The Chemours Company ("Chemours") (collectively "Defendants"), have discharged or are otherwise responsible for, from the Chambers Works facility, also located in Salem County. Defendants knew that PFCs present unreasonable risks to human health and the environment and of the dangers associated with these compounds. Yet, Defendants handled, discharged and were otherwise responsible for the release of PFCs into the environment without sufficient containment or caution. Defendants'

[1] As a class of chemicals, PFCs may also be referred to as: Perfluorochemicals, Perfluoroalkyls, Perfluorinated alkyl acids, Polyfluorinated chemicals, Polyfluorinated compounds, and Polyfluoroalkyl substances ("PFAS"). Nat'l Institute of Health (2016).

acts and omissions resulted in the presence of these compounds in the groundwater that is the source of the Penns Grove public supply well system in Salem County. As a result of the occurrence of PFCs in groundwater from Defendants' discharges, NJAW was required to fund and implement capital improvements as well as incur ongoing operation and maintenance costs in order to remove and treat for the presence of these hazardous substances where they are present above state and federal guidelines.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under federal diversity, pursuant to 28 U.S.C. § 1332, as the parties are completely diverse and the amount-in-controversy exceeds $75,000.

2. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events giving rise to this Complaint occurred in this District.

PLAINTIFF

3. Plaintiff NJAW is a New Jersey corporation with its principal place of business at 1025 Laurel Oak Road, Voorhees, New Jersey, 08043. NJAW, which provides services to an estimated 2.7 million New Jersey customers, is a direct, wholly owned subsidiary of American Water Works Company, Inc., the largest publicly traded water and wastewater utility company in the United States.

4. NJAW owns and operates the Penns Grove public supply well system located in Salem County ("Penns Grove System") with Public Water Supply Identification ("PWSID") Number NJ1707001.

5. The Penns Grove System serves the Borough of Penns Grove, Carney's Point Township, Pedricktown, and a portion of Oldmans Township.

6. The Penns Grove System is a public community water system consisting of seven wells that draw from the Potomac-Raritan-Magothy ("PRM") Aquifer. This System may receive additional supply through an interconnection with NJAW's Logan System, which consists primarily of PRM groundwater, but may also include treated surface water from the Delaware River.

7. NJAW closed on its purchase of the Penns Grove System from Pennsgrove Water Supply Company, through its parent company SJ Services, Inc., on November 1, 2007.

DEFENDANTS

8. Defendant DuPont is a Delaware corporation authorized to conduct business in New Jersey and maintains a principal place of business at 1007 Market Street, Wilmington, Delaware, 19898.

9. DuPont is the owner and operator of the approximately 1,445 acre Chambers Works facility located in Salem County, New Jersey that began operations in 1917 and continues operations to this day.

10. Defendant Chemours is a Delaware corporation authorized to conduct business in New Jersey with its principal place of business at 1007 Market Street, Wilmington, Delaware. Chemours was a subsidiary of DuPont until July 1, 2015, when Chemours began operating independently from DuPont.

11. The property upon which the Chambers Works facility is sited was transferred to Chemours in 2014.

12. Chemours currently manages the remedial obligations at the Chambers Works facility.

PERFLUOROCHEMICALS

13. PFCs are a family of manmade chemicals that have been used for decades to make products that resist heat, oil, stains, grease and water.

14. In the 1940s and 1950s, The 3M Co. ("3M") began creating PFCs and incorporating them in their products after recognizing their surfactant properties.

15. In the 1950s, DuPont purchased one of the PFC chemicals produced by 3M: perfluorooctanoic acid ("PFOA"). At that time, Dupont was instructed that the chemical should be incinerated or disposed of at a proper chemical waste facility.

16. Rather than disposing of PFOA at a proper chemical waste facility, DuPont instead disposed of the chemical into the Delaware River and unlined landfills and digestion ponds throughout the Chamber Works facility.

17. DuPont had known since as early as the 1960s that PFOA was likely dangerous to human health. During this period, DuPont was also aware that PFOA had adverse effects on rat and dog livers.

18. By the 1970s, 3M shared additional information about toxicity among rats and monkeys.

19. In the 1970s, DuPont tested for and found high concentrations of PFOA in its workers' bloodstreams.

20. In 1981, DuPont obtained information that PFOA could cross the placenta in humans.

21. DuPont was also aware in the 1980s that it was contaminating the local groundwater at levels higher than what its own scientists claimed was safe.

22. In 1991, DuPont set an internal safety limit for PFOA concentration in drinking water at 1 parts per billion ("ppb"), which is well below the levels currently recommended by the federal and various state governments.

23. The acts and omissions of DuPont at the Chambers Works facility have resulted in discharges of PFOA and other hazardous substances that have contaminated the drinking water source for Plaintiff's Penns Grove water supply system.

24. PFCs have been used in a wide range of industrial applications and consumer products including oil-, stain- heat-, and water-resistant materials such as clothing (*i.e.*, GORE-TEX®), carpeting (*i.e.*, Scotchguard™), lubricants, furniture, food packaging (*i.e.*, popcorn bags), flooring (*i.e.*, Stainmaster™), non-stick cookware (*i.e.*, Teflon®), stain/water resistant paint, and roofing materials. U.S. Environmental Protection Agency ("EPA") (2013).

25. PFCs are also used in products to help them flow freely; these products include paints, cleaning products, and certain firefighting foams called aqueous film-forming foams ("AFFFs") that are used to fight fuel-based fires.

26. Due to their strength of multiple carbon-fluorine bonds, PFC compounds break down slowly, if at all, in industrial use and the environment.

27. Certain PFCs, such as perfluorooctane sulfonate ("PFOS") and PFOA (which is also known as "C8"[2]), have been the focus of the New Jersey Department of Environmental Protection ("NJDEP") and EPA's investigations to date.

28. According to the EPA, "[t]he toxicity, mobility and bioaccumulation potential of PFOS and PFOA pose potential adverse effects for the environment and human health." U.S. EPA, (2013).

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[2] PFOA is sometimes referred to as C8 because it contains eight carbon atoms.

29. PFCs are extremely persistent in the environment and resistant to typical environmental degradation processes. In addition, they are thermally stable synthetic organic contaminants, are likely carcinogenic, and have been shown to correlate with thyroid disease and immune deficiencies. PFCs also have high water solubility (mobility) and low biodegradation (persistence).

30. PFCs have been identified as "emerging contaminants" by the EPA. This term describes contaminants about which the scientific community, regulatory agencies and the general public have a new and increasing awareness or understanding about how they move in the environment or affect public health.

31. PFCs, like other emerging contaminants, have become the focus of active research and study, which means that new information is released periodically regarding the effects on the environment and human health as a result of exposure to the chemicals.

32. In 2006, the NJDEP began its own statewide study of New Jersey water systems to determine the occurrence of PFOA and PFOS in wells and surface waters that are sources of drinking water.

33. Several of NJAW's public water supply systems, including the Penns Grove System, were part of NJDEP's sampling and analysis.

34. In February of 2007, NJDEP recommended that .04 ppb be used as the preliminary health-based guidance level for PFOA in drinking water.

35. In order to develop the guidance level, the NJDEP used a risk assessment approach to evaluate the health effects associated with exposure.

36. NJDEP concluded that, based upon information available at that time, the .04 ppb drinking water concentration was expected to be protective for both non-cancer effects and

cancer at the one-in-one-million risk level. The NJDEP also noted that it would continue to re-evaluate the guidance level of .04 ppb as further study and understanding of the impacts from PFOA were developed.

37. As a result of its additional testing and study, in 2016 the NJDEP proposed a Health Based Maximum Contaminant Level ("MCL") of .014 ppb for PFOA.

38. The .014 ppb level proposed by the NJDEP was subjected to public notice and comment and was adopted on November 1, 2017.

39. The NJDEP also concluded that the detection values of PFOAs and PFOSs where found together should be combined given that their adverse effects are additive.

40. In connection with its emerging contaminant studies, EPA implemented an Unregulated Contaminant Monitoring Rule Number 3 in 2012 ("UCMR 3"), which was designed to collect nationwide information regarding the occurrence of PFC contamination in the public's water supply.

41. UCMR 3 required sampling of Public Water Systems ("PWSs") serving more than 10,000 people (i.e., large systems) and 800 representative PWSs serving 10,000 or fewer people (i.e., small systems) for 21 chemicals, including a number of PFCs, during a twelve month period from 2013 through 2015.

42. In 2015, NJAW participated in the UCMR 3 sampling for its facilities that serve more than 10,000 people. The Penns Grove System is one of those facilities.

43. The results of UCMR 3 demonstrate the presence of PFCs in groundwater at various locations throughout New Jersey, revealing in particular, high levels of PFOA in proximity to the Chambers Works facility.

44. Sampling under UCMR 3 utilized higher reporting limits than would be applicable in light of scientific information and guidance levels developed since that time, which are much lower than those employed in 2008 and 2009. As such, the results of the sampling conducted pursuant to USMR 3 present a more conservative picture of the presence of PFCs under more recent guidelines.

45. In addition, the UCMR 3 sampling effort did not combine PFC levels, thus not taking into account added effects from the presence of more than one PFC.

46. EPA studies have indicated that exposure to PFOA and PFOS over certain levels can result in adverse health effects, including but not limited to developmental effects to fetuses during pregnancy or to breastfed infants (e.g., low birth weight, accelerated puberty, skeletal variations), cancer (e.g., testicular, kidney), liver effects (e.g., tissue damage), immune effects (e.g., antibody production and immunity), thyroid effects and other effects (e.g., cholesterol changes).

47. In January of 2009, the EPA established a drinking water Provisional Health Advisory Level ("HAL") for PFOA and PFOS, the two PFC compounds about which it had the most toxicological data. EPA set the Provisional HAL at 0.4 parts per billion (ppb) for PFOA and 0.2 ppb for PFOS.

48. In 2016, following additional study, the EPA lowered the HAL for PFOS and PFOA. EPA established the HAL of .07 ppb.

49. In addition, EPA, in issuing its 2016 HALs, like the guidance levels in New Jersey, directs that when both PFOA and PFOS are found in drinking water, the *combined* concentrations of PFOA and PFOS should be compared with the .07 parts per billion health advisory level.

50. Additional PFCs for which there is currently less scientific information include:

a. PFHxS Perfluorohexane sulfonate

b. PFOSA Perfluorooctane sulfonamide

c. PFNA Perfluorononanoate

d. PFDeA Perfluorodecanoate

e. Et-PFOSA-AcOH 2-(N-ethyl-perfluorooctane sulfonamido) acetate

f. Me-PFOSA-AcOH 2-(N-methyl-perfluorooctane sulfonamido) acetate.

51. While more studies have been conducted, and thus, more is known regarding PFOS and PFOA, all PFCs have generally demonstrated similar characteristics to PFOS and PFOA.

52. Although some PFCs have been shown to break down, the resulting products typically end at non-biodegradable PFOA and PFOS.

53. The EPA acknowledges that the studies associated with PFCs are ongoing, and as such, the HALs may be adjusted based upon new information.

54. At least two states, Vermont and New Jersey, have already adopted limits on PFCs that are lower than the current EPA HALs.

55. As manufacturers, handlers and dischargers of PFCs, Defendants knew or should have known that the inclusion of PFCs in any products presented an unreasonable risk to human health and the environment.

56. Defendants knew or should have known that PFCs are highly soluble in water, highly mobile, extremely persistent, and highly likely to contaminate water supplies if released to the environment.

57. Defendants' prior knowledge of the adverse impacts from PFCs to human health and the environment amounts to reckless disregard to human health and environmental safety.

58. Some of the severe health risks associated with exposure to PFCs (particularly PFOA) were documented as a result of scientific studies following a settlement in 2005 of litigation related to PFC exposure. *Leach et al. v. E. I. du Pont de Nemours & Co. & Lubeck Public Service District,* Case No. 01-C-608 (Wood County W. Va. Cir. Ct.).

59. The class action settlement agreement reached between DuPont and the plaintiffs in the *Leach* matter was approved by the West Virginia court on February 28, 2005 (hereinafter the *Leach* Agreement).

60. The *Leach* Agreement required DuPont to fund a panel of scientists that was directed to study the impact of PFC exposure in relation to certain potential diseases (hereinafter the Science Panel). DuPont and the class action plaintiffs jointly selected "three completely independent, mutually-agreeable, appropriately credentialed epidemiologists" to perform the studies. The Science Panel considered toxicological data in animals, outside epidemiology studies, and four epidemiologic studies conducted by them.

61. In 2011, after seven years, the Science Panel released their findings. The Science Panel studies concluded that exposure to PFOA is a probable cause of six illnesses: high cholesterol, kidney cancer, testicular cancer, thyroid disease, pregnancy-induced hypertension/preeclampsia, and ulcerative colitis.

PENNS GROVE WATER SUPPLY IMPROVEMENTS

62. NJAW is committed to the supply of potable drinking water consistent with federal and state guidelines and requirements.

63. NJDEP confirmed to NJAW in 2008 that the .04 ppb was to be used as preliminary health-based guidance for PFOA in drinking water for the Penns Grove System.

64. The Penns Grove System included two wellfields and initially included two associated treatment plants: Ranney Station and Layton Station.

65. In connection with the PFOA treatment, these wellfields would both be treated at one point (the Ranney treatment plant), as opposed to the two treatments plants that were used formerly.

66. The first phase of this improvement work required construction of an approximately 7,000 foot twelve- inch diameter pipeline that was installed between the two well fields to assist in the reliable provision of potable water. Initially, the main line carried system water from Layton Station to Ranney Station and was later converted to a raw water delivery line when a centralized treatment process was added to the Ranney Station.

67. The Ranney well station has a capacity of approximately 2.4 million gallons per day ("gpd").

68. In connection with the sampling of groundwater entering the Penns Grove System treatment plants at the point of entry ("POE"), PFOA was found to be present at levels as high as .10 ppb.

69. NJAW has conducted and continues to conduct sampling, studies and investigations related to PFOA contamination from Chambers Works, which requires funding by

NJAW, including costs for its personnel to supervise the assessments and costs to develop PFOA treatment scenarios and analyze available alternatives.

70. In or around 2009, NJAW began implementing treatment of PFOA at the Penns Grove System which included capital improvement and operation and maintenance measures that continue to this day.

71. NJAW installed Granular Activated Carbon ("GAC") adsorption to reduce and/or remove PFOA contamination at the Penns Grove System's Ranney treatment plant (which now treats source water from both the Ranney and Layton wellfields).

72. NJAW obtained NJDEP approval for the GAC treatment system in connection with PFOA removal.

73. GAC filtration is considered one of the most effective treatment options for the removal of PFOA from water, typically removing more than 90% of PFOA.

74. Based upon sampling following the installation and operation of the GAC filtration system, the occurrence of PFOA in NJAW's Penns Grove System is beneath the .04 ppb guidance level set by NJDEP in 2007.

75. The capital costs associated with installation of the filtration system amounted to more than $4 million, as of July 2017, and included costs for the following: permitting, construction of an operations building for GAC adsorbers as well as the instillation of the adsorbers, installation of a chemical storage and feed facilities, installation of wastewater equalization tanks, upgrade of existing well pumps, installation of additional piping and accessories to connect raw water to treatment system, installation of electrical installations associated with the new treatment facility, and demolition of obsolete equipment/buildings.

76. Replacement of GAC in the filtration system is typically made on a biannual basis and is considered part of the capital cost for the treatment system.

77. The GAC filtration system requires routine operation and maintenance expenditures that include but are not limited to:

a. Potassium hydroxide,

b. Corrosion inhibitors,

c. On site hypochlorite generation power,

d. Salt,

e. Labor, and

f. Filter waste disposal.

78. Annual operating expenses associated with the GAC filtration system to remove PFCs have and will continue to, indefinitely, exceed $240,000 per year.

CAUSE OF ACTION

New Jersey Spill Compensation and Control Act

79. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1-80 of this Complaint as if they were set forth fully herein.

80. Pursuant to the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.* (the "Spill Act"), Defendants are responsible for the discharge of hazardous substances into the groundwater that serves as the source for Plaintiff's Penns Grove public water supply system.

81. As a result of discharges at the Defendants' Chambers Works facility, Plaintiff has incurred, and will continue to incur, investigation, cleanup, remediation, and removal costs and damages related to the PFCs discharged by the Defendants.

82. The costs and damages Plaintiff has incurred, and will continue to incur are "cleanup and removal costs" within the meaning of *N.J.S.A.* 58:10-23.11b.

83. Plaintiff is a "person" within the meaning of *N.J.S.A.* 58:10-23.11b who has and is remediating the PFCs discharged by the Defendants.

84. The Defendants, as the dischargers of PFCs that Plaintiff has had to remediate are liable to Plaintiff, under *N.J.S.A.* 58:10-23.11f, without regard to fault, for all investigation, cleanup, remediation, and removal costs and damages that Plaintiff has incurred, and will continue to incur.

PRAYER FOR RELIEF

WHEREFORE, NJAW respectfully requests that this Court:

a. Enter judgment against Defendants determining that their discharges of PFCs are in violation of the Spill Act, thus rendering them liable for contribution and reimbursement to NJAW for cleanup and removal costs and damages incurred and to be incurred to address and remove PFC contamination from the groundwater utilized in the NJAW Penns Grove System;

b. Enter judgment finding Defendants jointly and severally liable for cleanup and removal costs and damages, including but not limited to prior, interim and future capital as well as operation and maintenance costs, including the reasonable costs of assessing injury, destruction or loss resulting from the discharges, and threatened discharges;

c. Award Plaintiff NJAW costs and reasonable attorney fees incurred in prosecuting this action, together with prejudgment interest, to the full extent permitted by law; and,

d. Award Plaintiff NJAW such other relief as this Court deems appropriate.

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Dated: February 27, 2018

No. 13-31299
(aligned with Nos. 13-30843, 13-31296, and 13-31302)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED, ET AL.,
Plaintiffs,

PLAINTIFFS' STEERING COMMITTEE,
Appellee,

v.

BP EXPLORATION & PRODUCTION, INCORPORATED;
BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,
Defendants-Appellants,

v.

SEALED APPELLEE,
Claimant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Louisiana
MDL No. 2179, Civ. A. Nos. 12-970 & 13-492

AMICUS CURIAE UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF SURFRIDER FOUNDATION IN SUPPORT OF APPELLEES

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May it Please the Court:

Pursuant to FED. R. APP. PROC. 29, Amicus Curiae, Surfrider Foundation ("hereinafter "Surfrider"), located in San Clemente, California, respectfully requests the leave of this Honorable Court to file the attached proposed Amicus Curiae Brief in support of the principal appellee briefs filed by Plaintiffs-appellees in this matter. Surfrider is a grassroots, non-profit environmental organization dedicated to the protection and enjoyment of the world's oceans, waves, and beaches for all people, through a powerful activist network. Organized as a 501(c)(3) non-profit corporation, Surfrider has more than 250,000 supporters, activists, and members who live in the United States, with over 84 local chapters nationwide, and has a particular interest in protecting beaches and waterways throughout the United States. ***As stated, Surfrider brings this amicus brief in its capacity as a nation-wide entity, and not on behalf of any specific local chapter, including any local chapters which might be eligible to submit BEL claims under the Amended Settlement Agreement.***

Surfrider's mission is "the protection and enjoyment of oceans, waves and beaches through a powerful activist network."[1] To that end, Surfrider has successfully filed and argued amicus curiae briefs in other litigation, including an amicus curiae brief which received considerable compliments from the Rhode

[1] http://www.surfrider.org/pages/mission (last visited June 16, 2014).

Island Supreme Court. In *Rose Nulman Park Foundation, et al. vs. Four Twenty Corp., et al.*, Rhode Island Supreme Court Case No. SU-2013-0068, the Court specifically made reference that "[t]his Court is indebted to amicus curiae the Surfrider Foundation for its eloquent and helpful brief." [2]

Surfrider respectfully submits that the proposed brief is desirable because it will assist the Court in evaluating whether the Claims Administrator correctly applied the business economic loss compensation framework to non-profit claimants. Specifically, BP argues in their briefing that the claims administrator should not consider grants or contribution as revenue when applying the BEL framework to claims of non-profits. Even though it is likely a non-profit would have other sources of revenue, such as membership dues, grants and contributions are vital to their survival. Accordingly, BP's rather fanciful arguments, if not debunked, could result in the denial of just compensation to non-profit entities, based on the plain and unambiguous terms of the Amended Settlement Agreement to which BP agreed — compensation needed by those entities, and to which they are entitled, in order to effectuate their missions and goals.

Moreover, Surfrider respectfully submits that the proposed brief is relevant, as Surfrider is a non-profit entity whose members care deeply about the safety and health of the Gulf of Mexico and surrounding bodies of water and work tirelessly

[2] http://www.surfrider.org/campaigns/entry/6101 (last visited June 13, 2014).

to preserve them. The proposed brief will help the Court in addressing BP's attempt to avoid full payment to non-profit business economic loss claimants which is relevant to the proper interpretation of the Amended Settlement Agreement's compensation framework at issue.

Moreover, Global Headquarters is not an eligible class member due to its geographical location outside the applicable Zones, as set forth in the Amended Settlement Agreement. Therefore, the PSC does not and cannot adequately protect its interests. Nevertheless, Surfrider has an acute interest in the outcome of BP's appeals, despite Surfrider's lack of class membership.

Specifically, BP's appeals substantially relate to the calculation of financial losses for all non-profit entities, including those akin to Amicus. BP generally asserts that the claims administrator misapplied the Amended Settlement Agreement's compensation framework resulting in falsely inflated Eligibility Awards. The proposed brief will further help demonstrate the grassroots level impact of what BP is trying to do—avoid compensating non-profit class-members whose claims for damages qualified for compensation.

The first principal animating the Surfrider's Foundation is recognition of "the biodiversity and ecological integrity of the planet's coasts are necessary and irreplaceable. SURFRIDER is committed to preserving natural living and non-

living diversity and ecological integrity of the coastal environment."[3] Of Surfrider's approximately 250,000 supporters, activists, and members, about 6,700 live in impacted Gulf Coast communities.

Accordingly, if BP prevails in the instant appeals, they risk having worked at cross purposes to their commitment to clean up the Gulf by denying ecological and environmental minded non-profit claimants the compensation they deserve—compensation those entities might use to further their efforts at preserving the diversity and ecological integrity of the Gulf of Mexico.

All of the foregoing is takes place in the backdrop of BP's recent announcement it has ended active shoreline cleanup operations from the Deepwater Horizon oil spill.[4] BP's own actions highlight the movant's interest and the desirability and relevance of the proposed brief.

Pursuant to this Court's Rule 27.4, Surfrider, through counsel, contacted counsel to the parties to this appeal. Plaintiffs-appellees indicated their consent to the filing of the attached Amicus Curiae Brief. Counsel for Appellant, BP, indicated that it had no objection at this time, but it reserved its rights to file a response after reviewing the attached brief.

[3] http://www.surfrider.org/pages/environmental-policies (last visited June 16, 2014).
[4] http://www.bp.com/en/global/corporate/press/press-releases/active-shoreline-cleanup-operations-dwh-accident-end.html (last visited May 19, 2014).

For the foregoing reasons, Surfrider requests that this Court grant its motion and order that the attached Amicus Curiae be filed into the record and considered by this Court.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE SURFRIDER FOUNDATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record, on this, the 16th day of June 2014.

/s/ James M. Garner
JAMES M. GARNER

No. 13-31299
(aligned with Nos. 13-30843, 13-31296, and 13-31302)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED, ET AL.,
Plaintiffs,
PLAINTIFFS' STEERING COMMITTEE,
Appellee,
v.
BP EXPLORATION & PRODUCTION, INCORPORATED;
BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,
Defendants-Appellants,
v.
SEALED APPELLEE,
Claimant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Louisiana
MDL No. 2179, Civ. A. Nos. 12-970 & 13-492

AMICUS CURIAE BRIEF ON BEHALF OF SURFRIDER FOUNDATION IN SUPPORT OF APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

No. 13-31299
(aligned with Nos. 13-30843, 13-31296, and 13-31302)

IN RE: DEEPWATER HORIZON

LAKE EUGENIE LAND & DEVELOPMENT, INCORPORATED, ET AL.,
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v.
BP EXPLORATION & PRODUCTION, INCORPORATED;
BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,
Defendants-Appellants,
v.
SEALED APPELLEE,
Claimant-Appellee.

Pursuant to this Court's Rule 29.2 and Rule 28.2.1, the undersigned counsel of record for Amicus Curiae certifies that the following listed persons and entities have an interest of the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae Filing This Brief:

- Surfrider Foundation, which has no parent corporation and no publically held corporation owns 10% or more of its stock

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Dated: June 16, 2014

/s/ James M. Garner
JAMES M. GARNER

ATTORNEYS FOR AMICUS CURIAE SURFRIDER FOUNDATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, Surfrider Foundation, (hereinafter "Surfrider"), located in San Clemente, California, brings this amicus brief solely on its own behalf, and not on behalf of any specific local chapter, including any local chapters which might be eligible to submit BEL claims under the Amended Settlement Agreement. Surfrider is a nonprofit environmental organization with 84 local chapters and 30 youth clubs throughout the United States. Of Surfrider's approximately 250,000 supporters, activists and members, around 6,700 live in areas of the Gulf Coast impacted by the BP oil spill.

Surfrider has an acute interest in the outcome of BP's appeals. Specifically, BP's appeals substantially relate to the calculation of financial losses of non-profit entities such as Amicus. BP generally asserts that the claims administrator misapplied the Settlement Agreement's compensation framework resulting in falsely inflated Eligibility Awards. The proposed brief will further help demonstrate the grassroots level impact of what BP is trying to do—avoid compensating non-profit class-members whose claims for damages qualified for compensation. The first principal animating Surfrider is "SURFRIDER recognizes the biodiversity and ecological integrity of the planet's coasts are necessary and irreplaceable. SURFRIDER is committed to preserving natural living and non-living diversity and ecological integrity of the coastal environment."

Accordingly, if BP prevails in the instant appeals, it risks having worked at cross purposes to its commitment to clean up the Gulf by denying ecological and environmental minded non-profit claimants the compensation they deserve—compensation those entities might use to further their efforts at preserving the diversity and ecological integrity of the Gulf of Mexico.

STATEMENT OF AUTHORITY AND CONSENT TO FILE

Pursuant to this Court's Rule 27.4, Surfrider, through counsel, contacted counsel to the parties to this appeal. Plaintiffs-appellees indicated their consent to the filing of the attached Amicus Curiae Brief. Counsel for Appellant, BP, indicated that it had no objection at this time, but it reserved its rights to file a response after reviewing the attached brief.

DISCLOSURE OF AUTHORSHIP AND CONTRIBUTIONS

Pursuant to Fed. R. App. Proc. 29(c)(5), the undersigned aver that the instant Amicus Curiae Brief was not authored, in whole or in part, by counsel for any party to this litigation identified by Plaintiffs-appellees in their brief, in support of which Amicus Curiae file the instant brief. Amicus Curiae, who is not a claimant in the class action settlement, retained undersigned counsel to prepare and submit the Amicus Curiae Brief. No party identified by Plaintiffs-appellees in their brief, no such party's counsel, nor any person—other than Amicus Curiae, their members, or their counsel—have contributed any money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Surfrider respectfully submits this amicus brief in support of the appellees and respectfully requests that this Honorable Court affirm the District Court. As a non-profit organization, Sufrider is familiar with the manner in which such organizations account for donations and grants. The receipt of such funds is clearly revenue to Surfrider and non-profit organizations. Absent the receipt of such funds, Surfrider and other non-profit organizations cannot continue to exist. The suggestion by BP that such funds do not fall within the plain meaning of the term "revenue" is without merit and contrary to law and generally accepted accounting principles.

As discussed below, contrary to the clear and unambiguous terms of the Amended Settlement Agreement (sometimes hereinafter referred to as "ASA"), BP erroneously claims that the Claims Administrator ("CA") has contravened the terms of the Amended Settlement Agreement by treating gratuitous grants and contributions to non-profit entities as if they were "revenue" for purpose of the BEL framework. BP Brief 13-31296, p. 1; BP's Brief 13-31299, p.1.[1] In further contravention of the clear and unambiguous terms of the Amended Settlement Agreement, BP also mistakenly claims that "gratuitous donations" are not revenue,

[1] Because BP incorporates its brief in appeal 13-31299 by reference into its brief in 13-31296, and because those appeals are aligned with 13-30843 and 13-31302, this brief addresses issues germane to all briefs.

and that the underlying Claimants received a *cy pres* contribution or a trust grant, as the aligned appeals argue, that should have been disregarded under the BEL framework. BP Brief 13-31296, p. 2.

ARGUMENT

I. BP's Statement Of the Case is Deeply Flawed

BP's entire premise, that grants and contributions to non-profit class members should not be considered as revenue, as that term is used in the Amended Settlement Agreement (sometimes hereinafter referred to as "ASA"), is deeply flawed and contrary to the ASA. As set forth below, grants and contributions to non-profits are "revenue" within the ordinary and understood meaning of the term.

A. The Parties Did Not Exclude Non-Profit Businesses From the Class

BP incorporates its brief in appeal 13-31299 by reference into its brief in 13-31296. That brief essentially argues that "gratuitous grants and contributions to non-profit entities" should not be "treated . . . as if they were 'revenue' under the [ASA] for purposes of the [BEL] framework". BP brief, 13-31299, p.1. In response, one is left: 1) wondering if BP is obliquely trying to now claim, in revisionist fashion, that non-profits are not proper BEL claimants, and if so, then why didn't BP exclude non-profits from the class and/or the settlement?; [2] 2) with

[2] *See e.g., In re Deepwater Horizon*, 744 F.3d 370, 377 (5th Cir. 2014) (affirming the validity of the Business Economic Loss Settlement Agreement, reasoning: "There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not.")

the sense that BP's unilateral use of the word "gratuitous" seems both out of place and self-serving, as there is no indication that the ASA, the BEL framework, or any of the Claims Administrator's (sometimes hereinafter referred to as "CA") policy decisions make reference to "gratuitous" grants or contributions, as opposed to any other type of grant, contribution, donation, gift, etc., and 3) noting that, in a silence of deafening proportions, BP fails to cite to any language in the ASA or CA policy decisions that specifically defines what constitutes "revenue," or that specifically excludes grants, contributions or donations to non-profits from revenue within the BEL rubric.

BP's position is even more perplexing when one considers that in the ASA, BP specifically agreed to a class definition that expressly includes non-profit entities. The class, as defined, is comprised of "entities," and "entities" by express definition, include "an organization or entity, other than a GOVERNMENTAL ORGANIZATION, operating or having operated for profit or not-for-profit . . . ." ROA. 13-31302.4578, 4674. There is no restriction in the ASA which would limit recovery under the ASA's BEL framework, based upon the scope or nature of a non-profits' operations.

B. Grants and Contributions Are Not "Gratuitous"

The word "gratuitous," as used as an adjective by BP, is defined generally as: 1) "uncalled for; lacking good reason; unwarranted; unmerited"; or 2) "given or

done free of charge or not involving a return benefit." *See* http://www.merriam-webster.com/dictionary/gratuitous (last visited June 16, 2014); http://www.oxforddictionaries.com/us/definition/american_english/gratuitous?q=gratuitous (last visited June 16, 2014). Neither definition has any genuine application in this context. There should not be any legitimate dispute that many, if not all, donors, contributors or grantors (collectively and/or individually "benefactors"), would hardly consider their beneficence, as manifested tangibly in pecuniary largesse, to be "uncalled for, unwarranted, unmerited or lacking good reason."

To the contrary, it is no secret that numerous grants have eligibility requirements, which, by definition, nullifies any legitimacy regarding BP's attempt to ascribe *de facto*, *carte blanche* "gratuitous" status across the board to all grants and contributions bestowed upon non-profits. Further, it defies common-sense to believe that benefactors do not select the recipients of their largesse based on intrinsic factors and qualities, such as a non-profit's mission, track record, or other intangible qualities, such as "good will" and other intrinsic types of value benefactors identify with any particular non-profit.

Thus, the institutional reputation or "good-will" of a non-profit entity is undoubtedly a factor, and most likely a significant factor, for any benefactor when deciding which recipient(s) will receive a grant, contribution or donation. For

example, in *Samaritan Inns, Inc. v. District of Columbia, et al*, 114 F.3d 1227 (D.C. Cir. 1997), the court reasoned:

> It cannot be gainsaid that just as the success of a for-profit business may depend on the good will of its customers, *see, e.g., Newark Morning Ledger Co., v. United States*, 507 U.S. 546, 555–56, 113 S.Ct. 1670, 1675–76, 123 L.Ed.2d 288 (1993), many charitable enterprises such as Samaritan Inns depend largely on donations from the public for their continued success. *See, e.g.*, Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 840–41 (1980). Furthermore, because such enterprises cannot sell equity shares, they often depend heavily on outside contributions for capital financing. *Id.* at 877. By issuing a stop-work order because Samaritan Inns had purportedly misrepresented its intentions in its permit applications, and by otherwise obstructing the completion of Tabitha's House, the (defendant) District could reasonably have foreseen that its actions might, at least temporarily, **adversely affect Samaritan Inns' image as an efficient and reputable provider of charitable services, and thereby impair its ability to raise funds**").

Id. at 1234 (emphasis added).

Thus, there should be no dispute that a non-profit's receipt of contributions is both contingent upon, and affected by, each respective benefactor's perception of the intended non-profit recipient's reputation and image; BP's argument regarding "gratuitous" contributions abuts absurdity.

C. Grant and Contributions are Considered "Revenue" by Various Federal Courts, the IRS, GAAP, and the Financial Accounting Standards Board

Not only do non-profits generate revenue, but grants and contributions are properly classified as part of such revenue, in addition to a non-profit's multitude of other revenue/income sources. Just as there is a similarity between for-profit

and non-profits businesses, insofar as each of them having a certain amount of "good will" or "reputational value" which, in turn, has an impact, at least to some appreciable degree, on the revenue each type of entity generates (obviating the "gratuitous" nature of that revenue), the lines of demarcation between for-profit and non-profit entities are becoming increasingly blurred, if not becoming outright non-existent, as economic enterprises.

As discussed in *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of America, Inc.*, 646 F.3d 983, 987-88 (7th Cir. 2011) (emphasis added below):

> No gulf separates the profit from the nonprofit sectors of the American economy. There are nonprofit hospitals and for-profit hospitals, nonprofit colleges and for-profit colleges, and, as we have just noted, nonprofit sellers of food and for-profit sellers of food. When profit and nonprofit entities compete, they are driven by competition to become similar to each other. **The commercial activity of nonprofits has grown substantially in recent decades, fueled by an increasing focus on revenue maximizing by the boards of these organizations, and this growth has stimulated increased competition both among nonprofit enterprises and with for-profit ones.** Howard P. Tuckman & Cyril F. Chang, "Commercial Activity, Technological Change, and Nonprofit Mission," in *The Nonprofit Sector: A Research Handbook* 629, 630 (Walter W. Powell & Richard Steinberg eds., 2d ed.2006); Dennis R. Young & Lester M. Salamon, "Commercialization, Social Ventures, and For–Profit Competition," in *The State of Nonprofit America* 423, 436–37 (Salamon ed.2002); Burton A. Weisbrod, "The Nonprofit Mission and Its Financing," in *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector* 1, 16–17 (Weisbrod ed.1998); Michael S. Knoll, "The UBIT: Leveling an Uneven Playing Field or Tilting a Level One?," 76 *Fordham L.Rev.* 857, 858–59 (2007); Evelyn Brody, "Agents Without Principals: The Economic

> Convergence of the Nonprofit and For–Profit Organizational Forms," 40 *N.Y. Law School L.Rev.* 457, 489–90 (1996).
>
> **The principal difference between the two types of firm is not that nonprofits eschew typical commercial activities such as the sale of services—they do not—but that a nonprofit enterprise is forbidden to distribute any surplus of revenues over expenses as dividends or other income to owners of the enterprise, but must apply the surplus to the enterprise's mission.** That does not seem to alter the incentives of the people who run such organizations much, if one may judge from the many scandals involving nonprofit colleges and universities, which seem to compete for students, faculties, research grants, and alumni gifts with a zeal comparable to that of their for-profit counterparts. "In response to the challenges they are facing from the market, nonprofits are internalizing the culture and techniques of market organizations and making them their own." Young & Salamon, *supra,* at 436. We have noted that the original stated purpose of the national Girl Scout organization in cutting its local councils by two-thirds was to effectuate a cost- and revenue-driven "business strategy," which is a worthy objective but no different from the objectives of profit-making firms." John A. Byrne, "Profiting From the Nonprofits," *Business Week*, March 16, 1990, pp. 66, 72.

As such, BP should be hard-pressed to contend convincingly that non-profits do not generate revenue, as any such assertion is belied by the modern-day, current economic realities, and appears particularly specious when viewed through the prism of U.S. I.R.S. tax forms and publications, as shown below.

Specifically, IRS Form 990, attached as Exhibit "A," which is the primary non-profit entity annual tax reporting form, specifically states, on Line 8, Part I, within the category entitled "REVENUE," "**Contributions and grants (Part VIII, line 1h)**", with the parenthetical referencing a related section of Form 990; namely,

Part VIII and the corresponding lines on which to reflect the required information. The Form 990 "REVENUE" section in Part I also lists other forms of revenue and income, such as "Program service revenue (Part VIII, line 2g)," "Investment income (Part VIII, column (A), lines 3, 4, and 7d), "Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)", and then "Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)." Moreover, Form 990's Part VIII, which is specifically entitled "Statement of Revenue," reflects line-item entries for more than a dozen types of revenue/income, including seven (7) distinctly different types of revenue in the first subsection, entitled **"Contributions, Gifts, Grants and Other Similar Amounts."** IRS Form 990.

Based on IRS Forms and Publications alone, there should be no legitimate dispute that contributions and grants constitute revenue to non-profit entities, as clearly demonstrated by the above-referenced particulars of IRS Form 990; grants and contributions are viewed by the federal government as one of a non-profit's principal sources of revenue. Likewise, IRS Form 990T also solidifies the fallacy of BP's rather tenuous contention that contributions and grants are not revenue.[3] That Form indicates that non-profits may have a multitude of differing types of income streams, in addition to the forms of income to non-profits reflected in the

[3] Nowhere in BP's brief (nor in any of BP's "aligned" briefs) does BP cite to any specific language in the Settlement Agreement, nor in any subsequent Claims Administrator-issued policy determinations, that defines "revenue," let alone any language the excludes, exempts, restricts or otherwise precludes grants and contributions from constituting revenue.

"REVENUE" section of IRS Form 990, discussed above. Form 990T is attached as Exhibit "B" and illustrates there various types of income non-profits must report.

General accounting principles and authorities also demonstrate the lack of efficacy of BP's position. On July 1, 2009, the "*FASB Accounting Standards Codification,*" issued by the Financial Accounting Standards Board (sometimes hereinafter referred to as "FASB"), became the single official source of authoritative, nongovernmental generally accepted accounting principles (GAAP) in the United States,[4] and, prior to the 2009 codification, the FASB issued numerous Statements of Accounting Standards, as discussed below.

Statement of Financial Account Standards 116 (FAS 116) provides guidance **relating to the recording of contribution revenue by not-for-profit organizations** (NFPs). Issued in 1993, FAS 116 created new standards relating to the recording and presentation of contribution revenue and introduced the terms restricted revenue and net assets. The main effect of FAS 116 was to require that NFPs record all unconditional contributions as revenue when notification of the contribution is received. In pertinent part, FAS 116, as currently amended, clearly indicates that contributions, by definition, include voluntary, non-reciprocal

[4] http://www.fasb.org/jsp/FASB/Page/LandingPage&cid=1175805317350 (last visited June 16, 2014).

transfers of cash, and that such contributions shall be recognized as revenue, as seen below, and particularly in paragraphs 5 and 8:

FAS116 *FASB Statement of Standards*

Statement of Financial Accounting Standards No. 116
Accounting for Contributions Received and Contributions Made

Definitions

5. A contribution is an unconditional transfer of cash or other assets to an entity or a settlement or cancellation of its liabilities in a voluntary nonreciprocal transfer by another entity acting other than as an owner. Other assets include securities, land, buildings, use of facilities or utilities, materials and supplies, intangible assets, services, and unconditional promises to give those items in the future.

6. A promise to give is a written or oral agreement to contribute cash or other assets to another entity; however, to be recognized in financial statements there must be sufficient evidence in the form of verifiable documentation that a promise was made and received. A communication that does not indicate clearly whether it is a promise is considered an unconditional promise to give if it indicates an unconditional intention to give that is legally enforceable.

7. A donor-imposed condition on a transfer of assets or a promise to give specifies a future and uncertain event whose occurrence or failure to occur gives the promisor a right of return of the assets transferred or releases the promisor from its obligation to transfer assets promised. In contrast, a donor-imposed restriction limits the use of contributed assets; it specifies a use that is more specific than broad limits resulting from the nature of the organization, the environment in which it operates, and the purposes specified in its articles of incorporation or bylaws or comparable documents for an unincorporated association.

Contributions Received

8. **Except as provided in paragraphs 9 and 11, contributions received shall be recognized as revenues or gains in the period received and as assets, decreases of liabilities, or expenses**

> **depending on the form of the benefits received.** Contributions received shall be measured at their fair values. Contributions received by not-for-profit organizations shall be reported as restricted support or unrestricted support as provided in paragraphs 14-16.
>
> ***Contributed Services***
>
> 9. Contributions of services shall be recognized if the services received (a) create or enhance nonfinancial assets or (b) require specialized skills, are provided by individuals possessing those skills, and would typically need to be purchased if not provided by donation. Services requiring specialized skills are provided by accountants, architects, carpenters, doctors, electricians, lawyers, nurses, plumbers, teachers, and other professionals and craftsmen. Contributed services and promises to give services that do not meet the above criteria shall not be recognized.
>
> 10. An entity that receives contributed services shall describe the programs or activities for which those services were used, including the nature and extent of contributed services received for the period and the amount recognized as revenues for the period. Entities are encouraged to disclose the fair value of contributed services received but not recognized as revenues if that is practicable.[5]

Similarly, FAS 117, which pertains to financial statements for non-profits, again in its current, amended form, also clearly demonstrates that contributions are reported as revenue, and revenue is reported as an increase in net assets, as seen below, and particularly in paragraphs 20 and 21;

FAS117 *FASB Statement of Standards*

Statement of Financial Accounting Standards No. 117
Financial Statements of Not-for-Profit Organizations

[5] http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175820918884&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=235414&blobheadervalue1=filename%3Daop_FAS116.pdf&blobcol=urldata&blobtable=MungoBlobs (last visited June 16, 2014) (emphasis added).

Classification of Revenues, Expenses, Gains, and Losses

20. A statement of activities shall report revenues as increases in unrestricted net assets unless the use of the assets received is limited by donor-imposed restrictions. For example, fees from rendering services and income from investments generally are unrestricted; however, income from donor-restricted permanent or term endowments may be donor restricted and increase either temporarily restricted net assets or permanently restricted net assets. A statement of activities shall report expenses as decreases in unrestricted net assets.

21. Pursuant to FASB Statement No. 116, *Accounting for Contributions Received and Contributions Made,* in the absence of a donor's explicit stipulation or circumstances surrounding the receipt of the contribution that make clear the donor's implicit restriction on use, contributions are reported as unrestricted revenues or gains (unrestricted support), which increase unrestricted net assets. Donor-restricted contributions are reported as restricted revenues or gains (restricted support), which increase temporarily restricted net assets or permanently restricted net assets depending on the type of restriction. However, donor-restricted contributions whose restrictions are met in the same reporting period may be reported as unrestricted support provided that an organization reports consistently from period to period and discloses its accounting policy.

22. A statement of activities shall report gains and losses recognized on investments and other assets (or liabilities) as increases or decreases in unrestricted net assets unless their use is temporarily or permanently restricted by explicit donor stipulations or by law. For example, net gains on investment assets, to the extent recognized in financial statements, are reported as increases in unrestricted net assets unless their use is restricted to a specified purpose or future period. If the governing board determines that the relevant law requires the organization to retain permanently some portion of gains on investment assets of endowment funds, that amount shall be reported as an increase in permanently restricted net assets.

23. Classifying revenues, expenses, gains, and losses within classes of net assets does not preclude incorporating additional classifications within a statement of activities. For example, within a class or classes

> of changes in net assets, an organization may classify items as *operating* and nonoperating, expendable and nonexpendable, earned and unearned, recurring and nonrecurring, or in other ways. This Statement neither encourages nor discourages those further classifications. However, because terms such as *operating income*, *operating profit*, *operating surplus*, *operating deficit*, and *results of operations* are used with different meanings, if an intermediate measure of *operations* (for example, excess or deficit of *operating* revenues over expenses) is reported, it shall be in a financial statement that, at a minimum, reports the change in unrestricted net assets for the period. If an organization's use of the term *operations* is not apparent from the details provided on the face of the statement, a note to financial statements shall describe the nature of the reported measure of operations or the items excluded from operations.
>
> ***Information about Gross Amounts of Revenues and Expenses***
>
> 24. To help explain the relationships of a not-for profit organization's ongoing major or central operations and activities, a statement of activities shall report the gross amounts of revenues and expenses. However, investment revenues may be reported net of related expenses, such as custodial fees and investment advisory fees, provided that the amount of the expenses is disclosed either on the face of the statement of activities or in notes to financial statements.[6]

Again, there can be no legitimate dispute that cash contributions, such as the specific contribution BP laments in its brief, constitute revenue to non-profits. Indeed, without such contributions, as discussed above, the non-profit likely will not survive. The only key distinctions between a non-profit and a for-profit are that the former does not pay income taxes and does not distribute its profits to

[6] http://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175823287301&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=258598&blobheadervalue1=filename%3Daop_fas117.pdf&blobcol=urldata&blobtable=MungoBlobs (last visited June 16, 2014).

equity holders. BP's argument lacks any appreciable degree of efficacy and should not be countenanced by this Court. Both must earn revenue to remain in business and, for a non-profit like Surfrider and many others, the principal form of that revenue is donations from outside sources.

D. BP Attempts to Rewrite the ASA by Imposing its Own Self-Serving Definition of "*Cy pres*"

Despite BP's attempts to inject unwarranted, qualifying verbiage, such as "gratuitous" contribution, "earned" revenue, or "*cy pres*" contribution, terms not found anywhere in the ASA or CA policies with regard to non-profit eligibility requirements, or in the definition of "revenue," in addition to abundant legal, accounting, and governmental authority establishing that grants and contributions to a non-profit constitute revenue, so, too, is there ample support that lost contributions (and, ergo, lost grants) are equivalent to lost profits (or surplus, in non-profit entity accounting nomenclature), further eroding any persuasive effect of BP's argument.

In *Samaritan Inns, supra*, the plaintiff, a non-profit agency, sought to recover monetary damages for lost contributions to the agency. *Samaritan Inns*, 114 F.3d at 1232. The *Samaritan Inns* court began its analysis by explaining that there is **"no principled basis on which to conclude that a nonprofit corporation ... may not recover contributions lost or delayed as a result of the [defendant's] unlawful interference with its activities if such interference was**

the proximate cause of the loss." 114 F.3d at 1234 (emphasis added). The court also equated the standard of proof for recovering such damages with the principles applicable to the recovery of damages for lost profits. *Id.* "Thus, while a plaintiff seeking to recover lost profits must ordinarily prove the fact of injury with reasonable certainty, proof of the amount of damages may be based on a reasonable estimate." *Id.* at 1235.

In this case, BP agreed and consented to the ASA which established various economic formulas which, if met, established causation. BP's argument again lacks sufficient efficacy. *See, e.g., Armenian Assembly of America, Inc., et al v. Cafesjian, et al*, 746 F.Supp.2d 55 (D.D.C. 2010) (wherein plaintiffs asserted a legal claim for damages, including damages for lost or delayed donations and for the potential loss of a donation). Therefore, regardless of BP's attempts at vernacular deflection, there simply is no credible support for the misguided assertion that contributions are not revenue, especially given that courts recognize that lost and delayed contributions to non-profits can constitute damages due to lost revenue, akin to damages due to lost profits in a for-profit business context.

BP's use of the term *cy pres* is grossly misplaced. Obviously, there is no relevance to the term as it is traditionally used regarding trusts and estate matters. Thus, the only possible relevance would be if a *cy pres* contribution to a non-profit was somehow excluded from the definition of revenue by the ASA, and BP's brief

contains no such specific citation.[7] It is of no moment that the Claimant, as recipient of the contribution at issue, was not a party to the underlying class-action from whence the contribution issued or that the contribution was not predicated upon a legal obligation, or even that the contribution was purportedly the largest donation in the Claimant's history in 2009 or 2010.

The fact is that many non-profits, such as Surfrider, rely on the receipt of such *cy pres* awards or trust grants when planning their budget and funding their activities. Even if the receipt of a *cy pres* award, or a trust grant, is relatively rare—in comparison to other forms of revenue, such as member dues, donations from members, corporate sponsorship and grants—those types of awards are still considered in budgeting, and Surfrider classifies *cy pres* donations as "other revenue" on its financial statements. Thus, there can be no doubt that such awards constitute revenue.

First, if the contributions at issue were the result of being a party to a lawsuit, then it would not properly be a "contribution" for IRS Form 990 or general accounting purposes. Rather, it would more correctly be classified as some other type of revenue or income on Form 990, Part VII. The same rationale holds true for any revenue or income derived from BP's unspecified, potential "legal obligation." BP Brief, p. 5. Lastly, simply because a donation is the largest

[7] The same holds true with regard to trust grants, or any type of grant for that matter.

received by any given non-profit to date, and bears little or no relation to donations, grants or contributions received in any prior periods, does not mean that a non-profit cannot legitimately expect to receive a similar or even greater amount of contributions in future years. Surfrider plans its annual budget with the expectation of receiving such contributions, and it is likely that many other non-profit organizations do likewise. It is precisely the unknown, amorphous, unpredictable nature of the source(s) and amount(s) of non-profit revenues, as related to donations/contributions, and to a lesser degree, grants, that negates BP's argument.

A non-profit would be at least equally justified in expecting an increase in contribution/donation revenue (and likely, all revenues from fundraising as well), as it would expect a decrease. If BP had wanted to address the reality of this obvious component of non-profit entity revenue generation/receipt, it could have easily bargained for a different framework, an exclusion from the class definition, or a different framework specifically tailored to non-profits. It chose not to do so, and should not be heard to complain at this juncture.

Also, BP admits that it "appealed the Claimant's award to the Appeals Panel, arguing that the *cy pres* contribution could not be considered revenue because it was not 'earned' . . . ." BP Brief, 13-31296, p. 6; BP Brief, 13-31299, p. 14. Again, BP conflates irrelevant terms, as there is no citation to any authority

limiting the definition of revenue for a non-profit to "earned revenue", and again, as shown above, non-profit revenue clearly is not limited to "earned" revenue.

E. BP'S Arguments Are Not Supported By Law, Are Logically Flawed, Or Both

BP first claims that the CA erred in determining the award at issue based on the premise that under the ASA, grants and contributions are proper components of the non-profit Claimants' revenue. BP Brief, 13-31296, p. 10; BP Brief, 13-31299, pp. 18-25. Curiously, there is not a single supporting citation in this part of BP's brief, other than to refer to "Part II" of said brief. Again, as set forth above, the use of "gratuitous" is misplaced, and grants and contributions clearly are considered components of revenue in the context of non-profit accounting and tax reporting. BP's lack of support, whether in the case law, jurisprudence, or the Amended Settlement Agreement itself, for this argument is glaring.

BP's second claim is conceptually hard to define, and appears to be a bit nonsensical, as is seems BP is trying to mix concepts by conflating the definition of revenue under the ASA with the select phrase, "might have been expected to generate," contained in the definition of "Claimant-Specific Factor," to argue that by definition, a grant or contribution to a non-profit can never be considered when processing BEL claims for non-profits, because a non-profit, according to BP, ostensibly has no reasonable expectation of receiving any specific grant or

contribution. Putting aside the lack of record evidence (or any empirical evidence at all) to support that novel concept, BP's "logic" is flawed.

Non-profits clearly are "businesses," by any stretch of the imagination, and BP makes no argument to the contrary. Further, non-profits are not excluded from, but rather, expressly referenced in, the class definition, and thus, are eligible to submit BEL claims, by the very terms of the ASA, which references non-profits in the definition of eligible "entities". See ROA, 2:10-md-02179, Rec. Doc. # 6430, §38.65; ROA.13-31302.4578, 4674. Any Claimant in Zone A is automatically eligible, from a causation standpoint, due to geographical proximity to the Gulf and the "BP spill area". Thus, all Zone A Claimants need only satisfy one of the compensation formulas set forth in Exhibit 4C.

BP also seeks to confuse the issue by claiming that the ASA equates revenue with sales, and that, by definition, non-profits do not have "sales" nor "profits." BP thus claims that, because grants and contributions to non-profits should not be deemed "sales," those revenues can never be the "earned profit of a business." The resulting implication seems to be that, according to BP, a loss of revenue which otherwise satisfies one of the causation tests in Exhibit 4C can never be a proper basis for a BEL award to a non-profit when that revenue is derived from grants, contributions, or donations. BP Brief, 13-31296, pp. 11-12; BP Brief, 13-31299, pp. 18-25.

BP's professed logic appears a trifle facile, does not comport with the ASA's intention of maximizing recoverable awards, and seeks to re-write the clearly established and previously-agreed upon rules, but only for non-profits. However, a common-sense review and interpretation of the ASA yields the inescapable conclusion that in the non-profit context, revenue is normally, systemically, and continually derived from grants, contributions and donations, be they repeating, one-time, large, small, from known sources, from anonymous sources, or otherwise somewhat random and unpredictable. Conversely, and contrary to BP's assertion, it is **not** clear at all that "[i]n context, it is clear that the [ASA] uses the term 'revenue' to refer to financial assets received by a business as the earned proceeds of its commercial activities." BP Brief, 13-31296, p.11-12; BP Brief, 13-31299, pp. 18-25. If that were true, the ASA would have so defined revenue; it did not, and, in the absence of such limitation, a broad interpretation of "revenue" should be given in the ASA given its inclusion of non-profit organizations.

Also, simply because a non-profit uses an accounting terminology that refers to "profits" as "surplus," and obtains revenue by "selling" its mission and institutional reputation, among other intangibles, to benefactors in order to generate grants, contributions and donations, this does not negate the undeniable fact that non-profits seek to increase their net assets, just as for-profit businesses do, and also experience gains and losses which are directly correlated to

revenue/income minus expenses. Surely, non-profits, like any corporation, that have sustained losses cannot continue in business. Non-profits cannot expect to continue operations if they do not seek to earn a profit (surplus), and their principal manner for earning profits (surpluses) is generating revenue from the receipt of charitable contributions, grants and donations.

A non-profit in Zone A, that, in conformity with any of the compensation formulas in Exhibit 4C, establishes that it: 1) "earned a profit", i.e., realized a net gain in assets as a result of revenues exceeding expenses prior to the spill; but 2) did not realize the same or higher net gain in assets in the corresponding time frame after the spill; 3) satisfies Exhibit 4C's formula, and is thus entitled to an award under the plain language of the ASA.

After conceding, *arguendo*, that the CA's decision to deem grants and contributions as components of revenue for non-profits could be "somehow correct," BP persists with the canard that the awards at issue were improper because trust garnt and/or a so-called *cy pres* contribution were deemed revenue, despite the alleged absence of anything "to suggest that it [the Claimant] suffered a loss of an unexpected additional *cy pres* contribution," or a loss of another trust grant. BP Brief, 13-31296, pp. 11-17; BP Brief, 13-31299, pp. 40-43. In so arguing, BP rehashes the same skewed, hackneyed lamentations addressed above; namely, that non-profits should not be allowed to use grants and contributions as

components of revenue merely because, according to BP, non-profits should never expect to receive a "second [such] contribution in the post-spill period." *Id.*, p. 13.

However, one glaring fallacy of BP's argument is that it ignores the very nature of grants and contributions, which by definition are difficult, if not impossible, to predict as to the timing, source, size, or reason for any given contribution. If BP's "logic" was applied across the board, no business could legitimately expect to receive exactly what they do receive; unexpected contributions of indeterminable and varying size, source, purpose, and/or at varying times. Regardless of the rather imprecise nature of a non-profit's receipt of grants and contributions, it is precisely the unpredictability of, and fluctuations in, the particular attributes of each grant or contribution that is the normal, ordinary mode of a non-profit's business. Contrary to BP's assertion, there is every reason to believe that a non-profit "might have expected to earn (receive)" a future, albeit as-of-yet undefined, sizeable contribution, just like it received the one now BP seeks to exclude.

Lastly, BP seeks to parse the word "typically," as it is used in the CA's November 30, 2012 policy decision. BP Brief, 13-31296, pp. 16-17; BP Brief, 13-31299, pp. 40-43. BP seeks to invert what it claims is the CA's policy that "grants and contributions shall typically be treated as revenue for [non-profit] entit[ies] for purposes of the various required calculations" found in Exhibit 4C, by claiming

that the allegedly offending *cy pres* contribution and/or trust grant BP complains of should be deemed *de facto* "atypical." *Id.*, p. 16. Curiously, BP fails to state how the contribution is atypical. Rhetorically speaking, were they atypical: 1) in that they were the only contribution or trust grant received by the non-profit during the relevant time frame; 2) because the Claimant does not usually receive contributions or trust grants; 3) due to the source of the contribution or trust grant; 4) due to the manner in which the contribution or trust grant was made or funded; or 5) due to the size of the contribution or trust grant? In other words, there are many facets to all contributions, and thus, a contribution may still be typical in many aspects, while being atypical in one or more other aspects. BP has not shown why the CA's policy of typically treating grants and contributions as revenue to non-profits is unreasonable, an unwarranted deviation from the terms and spirit of the ASA, or is otherwise in need of revision or reversal.

Finally, it is curious that BP would not have the CA exclude expenses incurred in seeking contributions or donations (e.g., postage costs for soliciting donations, advertising expenses, etc.) when determining the ultimate net loss to a non-profit. Throughout BP's repeated appeals of the CA's interpretation of the ASA, BP has consistently argued for a matching of revenues and expenses in determining the ultimate loss. Yet, in this instance, BP makes no such argument that expenses incurred in obtaining such donations or grants should not be

included. Such a contradiction must be fatal to BP's arguments. For these reasons, this Court should affirm the District Court's interpretation of the ASA regarding the definition of "revenue" as applied to non-profits.

CONCLUSION

If successful, BP's misguided attempt to re-write the BEL compensation framework with respect to non-profit class members will directly impact those business and impair their missions. The first principal animating the Surfrider's Foundation is "SURFRIDER recognizes the biodiversity and ecological integrity of the planet's coasts are necessary and irreplaceable. SURFRIDER is committed to preserving natural living and non-living diversity and ecological integrity of the coastal environment." Accordingly, if BP gets their way in the instant appeals, they risk having worked at cross purposes to their commitment to clean up the Gulf by denying ecological and environmental minded non-profit claimants the compensation they deserve—compensation those entities might use to further their efforts at preserving the diversity and ecological integrity of the Gulf of Mexico.

All of the foregoing has taken place against the backdrop of BP's recent pronouncement that it has unilaterally elected to end active shoreline cleanup operations from the Deepwater Horizon oil spill.[8] BP ought not be allowed to avoid its responsibility to make the Gulf of Mexico, and those who live in the region

[8] http://www.bp.com/en/global/corporate/press/press-releases/active-shoreline-cleanup-operations-dwh-accident-end.html (last visited May 19, 2014).

around it, whole. Non-profits deserve fair and just compensation under the ASA's BEL framework, based on previously-agreed upon formulas that include grants and contributions as revenue for non-profits, when calculating their respective awards.

Respectfully submitted,

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ATTORNEYS FOR AMICUS CURIAE SURFRIDER FOUNDATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record, on this, the 16th day of June 2014.

/s/ James M. Garner
JAMES M. GARNER

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(a)(7)(C), I hereby certify:

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) and Fed. R. App. Proc. 29(d) because this brief contains 6149 words, excluding the parts of the brief exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. Proc. 32(a)(5) and the type style requirements of Fed. R. App. Proc. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman.

Dated: June 16, 2014

/s/ James M. Garner
JAMES M. GARNER

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

► **Do not enter Social Security numbers on this form as it may be made public.**

► **Information about Form 990 and its instructions is at *www.irs.gov/form990*.**

OMB No. 1545-0047

2013

Open to Public Inspection

A For the 2013 calendar year, or tax year beginning , 2013, and ending , 20

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Terminated
- ☐ Amended return
- ☐ Application pending

C Name of organization

Doing Business As

Number and street (or P.O. box if mail is not delivered to street address) | Room/suite

City or town, state or province, country, and ZIP or foreign postal code

D Employer identification number

E Telephone number

G Gross receipts $

F Name and address of principal officer:

H(a) Is this a group return for subordinates? ☐ Yes ☐ No

H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list. (see instructions)

I Tax-exempt status: ☐ 501(c)(3) ☐ 501(c) ( ) ◄ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ►

H(c) Group exemption number ►

K Form of organization: ☐ Corporation ☐ Trust ☐ Association ☐ Other ► | **L** Year of formation: | **M** State of legal domicile:

Part I Summary

Activities & Governance	1	Briefly describe the organization's mission or most significant activities:		
	2	Check this box ► ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.		
	3	Number of voting members of the governing body (Part VI, line 1a)	3	
	4	Number of independent voting members of the governing body (Part VI, line 1b)	4	
	5	Total number of individuals employed in calendar year 2013 (Part V, line 2a)	5	
	6	Total number of volunteers (estimate if necessary)	6	
	7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	
	b	Net unrelated business taxable income from Form 990-T, line 34	7b	

			Prior Year	Current Year
Revenue	8	Contributions and grants (Part VIII, line 1h)		
	9	Program service revenue (Part VIII, line 2g)		
	10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)		
	11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)		
	12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)		
Expenses	13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)		
	14	Benefits paid to or for members (Part IX, column (A), line 4)		
	15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)		
	16a	Professional fundraising fees (Part IX, column (A), line 11e)		
	b	Total fundraising expenses (Part IX, column (D), line 25) ►		
	17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)		
	18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)		
	19	Revenue less expenses. Subtract line 18 from line 12		

			Beginning of Current Year	End of Year
Net Assets or Fund Balances	20	Total assets (Part X, line 16)		
	21	Total liabilities (Part X, line 26)		
	22	Net assets or fund balances. Subtract line 21 from line 20		

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

► Signature of officer | Date

► Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ►			Firm's EIN ►	
Firm's address ►			Phone no.	

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☐ No

Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . . ☐

1 Briefly describe the organization's mission:

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ **Yes** ☐ **No**

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ **Yes** ☐ **No**

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ including grants of $) (Revenue $)

4b (Code:) (Expenses $ including grants of $) (Revenue $)

4c (Code:) (Expenses $ including grants of $) (Revenue $)

4d Other program services (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e Total program service expenses ▶

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1		
2	Is the organization required to complete *Schedule B, Schedule of Contributors* (see instructions)?	2		
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		
9	Did the organization report an amount in Part X, line 21, for escrow or custodial account liability; serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		
12 a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a		
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b		
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		
14 a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I (see instructions)*	17		
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		
20 a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		

Part IV Checklist of Required Schedules *(continued)*

			Yes	No
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		
22	Did the organization report more than $5,000 of grants or other assistance to individuals in the United States on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No," go to line 25a*	24a		
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3) and 501(c)(4) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		
26	Did the organization report any amount on Part X, line 5, 6, or 22 for receivables from or payables to any current or former officers, directors, trustees, key employees, highest compensated employees, or disqualified persons? If so, complete Schedule L, Part II	26		
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part III*	27		
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34		
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a		
b	If "Yes" to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b		
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O	38		

Part V Statements Regarding Other IRS Filings and Tax Compliance

Check if Schedule O contains a response or note to any line in this Part V . . . . . ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a			
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b			
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?		1c		
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	2a			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?		2b		
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to *e-file* (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?		3a		
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*		3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?		4a		
b	If "Yes," enter the name of the foreign country: ► ---------- See instructions for filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?		5a		
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?		5b		
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?		5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?		6a		
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?		6b		
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?		7a		
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?		7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?		7c		
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?		7e		
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?		7f		
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?		7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?		7h		
8	**Sponsoring organizations maintaining donor advised funds and section 509(a)(3) supporting organizations.** Did the supporting organization, or a donor advised fund maintained by a sponsoring organization, have excess business holdings at any time during the year?		8		
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the organization make any taxable distributions under section 4966?		9a		
b	Did the organization make a distribution to a donor, donor advisor, or related person?		9b		
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	10b			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?		12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state?		13a		
	Note. See the instructions for additional information the organization must report on Schedule O.				
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?		14a		
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*		14b		

Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response or note to any line in this Part VI . . . . . ☐

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . . 1a If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.			
b	Enter the number of voting members included in line 1a, above, who are independent . 1b			
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2	☐	☐
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors, or trustees, or key employees to a management company or other person? .	3	☐	☐
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4	☐	☐
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5	☐	☐
6	Did the organization have members or stockholders?	6	☐	☐
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?	7a	☐	☐
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?	7b	☐	☐
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a	☐	☐
b	Each committee with authority to act on behalf of the governing body?	8b	☐	☐
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	9	☐	☐

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	10a	☐	☐
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	10b	☐	☐
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	11a	☐	☐
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	12a	☐	☐
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b	☐	☐
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this was done*	12c	☐	☐
13	Did the organization have a written whistleblower policy?	13	☐	☐
14	Did the organization have a written document retention and destruction policy?	14	☐	☐
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a	☐	☐
b	Other officers or key employees of the organization	15b	☐	☐
	If "Yes" to line 15a or 15b, describe the process in Schedule O (see instructions).			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a	☐	☐
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	16b	☐	☐

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (Section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

☐ Own website ☐ Another's website ☐ Upon request ☐ Other *(explain in Schedule O)*

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ▶

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

• List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.

• List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."

• List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.

• List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.

• List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors; institutional trustees; officers; key employees; highest compensated employees; and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1)		☐	☐	☐	☐	☐	☐			
(2)		☐	☐	☐	☐	☐	☐			
(3)		☐	☐	☐	☐	☐	☐			
(4)		☐	☐	☐	☐	☐	☐			
(5)		☐	☐	☐	☐	☐	☐			
(6)		☐	☐	☐	☐	☐	☐			
(7)		☐	☐	☐	☐	☐	☐			
(8)		☐	☐	☐	☐	☐	☐			
(9)		☐	☐	☐	☐	☐	☐			
(10)		☐	☐	☐	☐	☐	☐			
(11)		☐	☐	☐	☐	☐	☐			
(12)		☐	☐	☐	☐	☐	☐			
(13)		☐	☐	☐	☐	☐	☐			
(14)		☐	☐	☐	☐	☐	☐			

Part VII **Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees** *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(15)		☐	☐	☐	☐	☐	☐			
(16)		☐	☐	☐	☐	☐	☐			
(17)		☐	☐	☐	☐	☐	☐			
(18)		☐	☐	☐	☐	☐	☐			
(19)		☐	☐	☐	☐	☐	☐			
(20)		☐	☐	☐	☐	☐	☐			
(21)		☐	☐	☐	☐	☐	☐			
(22)		☐	☐	☐	☐	☐	☐			
(23)		☐	☐	☐	☐	☐	☐			
(24)		☐	☐	☐	☐	☐	☐			
(25)		☐	☐	☐	☐	☐	☐			
1b Sub-total ▶										
c Total from continuation sheets to Part VII, Section A ▶										
d Total (add lines 1b and 1c) ▶										

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization ▶

		Yes	No
3	Did the organization list any **former** officer, director, or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual* **3**	☐	☐
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual* **4**	☐	☐
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person* **5**	☐	☐

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization ▶

Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII . . . . . ☐

				(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512-514
Contributions, Gifts, Grants and Other Similar Amounts	1a	Federated campaigns . . .	1a				
	b	Membership dues	1b				
	c	Fundraising events	1c				
	d	Related organizations . . .	1d				
	e	Government grants (contributions)	1e				
	f	All other contributions, gifts, grants, and similar amounts not included above	1f				
	g	Noncash contributions included in lines 1a-1f: $					
	h	**Total.** Add lines 1a–1f . . . . . ▶					
Program Service Revenue			**Business Code**				
	2a						
	b						
	c						
	d						
	e						
	f	All other program service revenue .					
	g	**Total.** Add lines 2a–2f . . . . . ▶					
Other Revenue	3	Investment income (including dividends, interest, and other similar amounts) . . . . . ▶					
	4	Income from investment of tax-exempt bond proceeds ▶					
	5	Royalties . . . . . ▶					
			(i) Real / (ii) Personal				
	6a	Gross rents . .					
	b	Less: rental expenses					
	c	Rental income or (loss)					
	d	Net rental income or (loss) . . . . . ▶					
			(i) Securities / (ii) Other				
	7a	Gross amount from sales of assets other than inventory					
	b	Less: cost or other basis and sales expenses .					
	c	Gain or (loss) . .					
	d	Net gain or (loss) . . . . . ▶					
	8a	Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 . . . . . a					
	b	Less: direct expenses . . . . b					
	c	Net income or (loss) from fundraising events . ▶					
	9a	Gross income from gaming activities. See Part IV, line 19 . . . . . a					
	b	Less: direct expenses . . . . b					
	c	Net income or (loss) from gaming activities . . ▶					
	10a	Gross sales of inventory, less returns and allowances . . . a					
	b	Less: cost of goods sold . . . b					
	c	Net income or (loss) from sales of inventory . . ▶					
		Miscellaneous Revenue	**Business Code**				
	11a						
	b						
	c						
	d	All other revenue					
	e	**Total.** Add lines 11a–11d . . . . . ▶					
	12	**Total revenue.** See instructions. . . . . ▶					

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns. All other organizations must complete column (A).

Check if Schedule O contains a response or note to any line in this Part IX . . . . . ☐

Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.		(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to governments and organizations in the United States. See Part IV, line 21				
2	Grants and other assistance to individuals in the United States. See Part IV, line 22 . . .				
3	Grants and other assistance to governments, organizations, and individuals outside the United States. See Part IV, lines 15 and 16 . .				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees				
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B) . .				
7	Other salaries and wages				
8	Pension plan accruals and contributions (include section 401(k) and 403(b) employer contributions)				
9	Other employee benefits				
10	Payroll taxes				
11	Fees for services (non-employees):				
a	Management				
b	Legal				
c	Accounting				
d	Lobbying				
e	Professional fundraising services. See Part IV, line 17				
f	Investment management fees				
g	Other. (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O.) . .				
12	Advertising and promotion				
13	Office expenses				
14	Information technology				
15	Royalties				
16	Occupancy				
17	Travel				
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings .				
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization .				
23	Insurance				
24	Other expenses. Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a	_____				
b	_____				
c	_____				
d	_____				
e	All other expenses _____				
25	**Total functional expenses.** Add lines 1 through 24e				
26	**Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ▶ ☐ if following SOP 98-2 (ASC 958-720)				

Part X Balance Sheet

Check if Schedule O contains a response or note to any line in this Part X . . . . . ☐

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing		1	
	2	Savings and temporary cash investments		2	
	3	Pledges and grants receivable, net		3	
	4	Accounts receivable, net		4	
	5	Loans and other receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L		5	
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions). Complete Part II of Schedule L.		6	
	7	Notes and loans receivable, net		7	
	8	Inventories for sale or use		8	
	9	Prepaid expenses and deferred charges		9	
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D — 10a			
	b	Less: accumulated depreciation — 10b		10c	
	11	Investments—publicly traded securities		11	
	12	Investments—other securities. See Part IV, line 11		12	
	13	Investments—program-related. See Part IV, line 11		13	
	14	Intangible assets		14	
	15	Other assets. See Part IV, line 11		15	
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)		16	
Liabilities	17	Accounts payable and accrued expenses		17	
	18	Grants payable		18	
	19	Deferred revenue		19	
	20	Tax-exempt bond liabilities		20	
	21	Escrow or custodial account liability. Complete Part IV of Schedule D		21	
	22	Loans and other payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L		22	
	23	Secured mortgages and notes payable to unrelated third parties		23	
	24	Unsecured notes and loans payable to unrelated third parties		24	
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17-24). Complete Part X of Schedule D		25	
	26	**Total liabilities.** Add lines 17 through 25		26	
Net Assets or Fund Balances		**Organizations that follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets		27	
	28	Temporarily restricted net assets		28	
	29	Permanently restricted net assets		29	
		Organizations that do not follow SFAS 117 (ASC 958), check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds		30	
	31	Paid-in or capital surplus, or land, building, or equipment fund		31	
	32	Retained earnings, endowment, accumulated income, or other funds		32	
	33	Total net assets or fund balances		33	
	34	Total liabilities and net assets/fund balances		34	

Part XI Reconciliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	
2	Total expenses (must equal Part IX, column (A), line 25)	2	
3	Revenue less expenses. Subtract line 2 from line 1	3	
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	
5	Net unrealized gains (losses) on investments	5	
6	Donated services and use of facilities	6	
7	Investment expenses	7	
8	Prior period adjustments	8	
9	Other changes in net assets or fund balances (explain in Schedule O)	9	
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 33, column (B))	10	

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990: ☐ Cash ☐ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a	☐	☐
	If "Yes," check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both:			
	☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	☐	☐
	If "Yes," check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both:			
	☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c	☐	☐
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a	☐	☐
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b	☐	☐

6.1 Fee Agreement Attachment

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL

REPRESENTATION AGREEMENT

The law firms of Richardson Patrick Westbrook & Brickman, LLC, The Environmental Litigation Group, P.C., Frazer PLC, and The Kuykendall Group, LLC (collectively the "Firms"), are herein retained as Special Assistant Attorneys General ("SAAGs") to represent the State of Michigan, through the Department of Attorney General (the "Client," or "You"), in connection with potential litigation regarding the presence of PFAS, PFOS, C-8 chemicals, Aqueous Film Forming Foam, and/or other identifiable contaminants (collectively, "PFAS Chemicals") in Client's natural resources, including, but not limited to, the State's rivers, lakes, streams, drinking water supplies, groundwater, aquifers and/or water treatment facilities, titled as the PFAS Manufacturers Tort Litigation, as follows:

1. The Firms and their lawyers will be deputized as SAAGS for the State of Michigan for purposes of the PFAS Manufacturers Tort Litigation.

2. The SAAGs are engaged to represent the Client in potential civil litigation in connection with legally tenable claims to be brought against manufacturers and others regarding the presence at unacceptable detection limits of PFAS Chemicals (the "case" or "matter"). Subject to favorable results of our investigation into your potential claims, we will file and prosecute a lawsuit on your behalf against responsible parties that we deem necessary to a successful outcome of the litigation. If nothing is recovered, you will not be indebted to the Firms for any attorney's fees or expenses.

3. The SAAGs shall represent the Client on a contingency fee basis, such that our attorney's fees and expenses shall be paid only if we obtain a favorable result in this case. We will advance the costs of this litigation including filing fees, transcript costs, notices, e-discovery, data hosting and collection, travel expenses, expert fees, and copy and delivery charges. Clients agree to pay the Firms a total contingency fee of twenty percent (20%) of the total amount of money or other items of value obtained in connection with the settlement, trial, or appeal of the claim. In the event of a settlement, the attorney's fees shall be computed on the basis of the present value of the settlement, with the contingency fee calculated on the gross amount of the settlement amount, if any. Litigation and other expenses will be deducted from any recovery with such expenses deducted out of the Client's share of any recovery. Furthermore, any expenses that benefitted multiple clients will be spread evenly, pro rata, among them. Client shall remain responsible for the payment of any statutory or contractual liens, such as subrogation claims, and said liens shall be paid out of the Client's share of any recovery. To the extent that a separate or additional attorneys' fee is awarded by a court, the Client agrees that such fee shall be in addition to the foregoing contingency fee. Under no circumstances shall Client share in any attorney's fees. Client acknowledges that the Firms have made no promises and will make no promises or guarantees as to the probabilities of outcome(s) or the amounts recoverable in connection with Clients' claim(s).

4. The SAAGs are splitting responsibilities and any contingency fees in a manner and amount that we deem appropriate. You agree to this division of responsibilities and fees, and further approve the association of other firms or attorneys which the Firms reasonably believe will assist in the prosecution of this litigation. The attorneys' fees set forth in this Agreement will include fees

due other associated counsel, if any. As to any other proposed associated counsel, you will be provided their names in advance of our association, with the right to approve said associated attorneys and/or withhold approval.

5. Qualifications. The SAAGs, by signing this Contract, attests that they are 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.

6. Conflict of Interest. The SAAGs and Firms represents that they have conducted a conflicts check prior to entering into this Contract and no conflicts exist with the proposed legal services. The SAAGs agree 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 SAAG obtains prior written approval to do so from both the Client. With respect to potential conflicts of interest, other lawyers in the SAAGs' firms must be advised of the SAAG's representation of the State of Michigan, and that the firm has agreed not to accept, without prior written approval from Client, any employment from other interests related to the subject matter of this Contract or adverse to the State of Michigan. The SAAGs and Firms must 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 Client.

7. Services to be Confidential. The SAAGs will keep confidential all services and information, including records, reports, and estimates. The Firms will not divulge any information to any person other than to authorized representatives of the or unless disclosure is authorized by you or required by law or the applicable codes of professional responsibility. All files and documents containing confidential information will be filed in separate files maintained in the offices of the Firms with access restricted to each Firm and needed clerical personnel. All documents prepared in the Firms' computer systems will be maintained in a separate library with access permitted only to each Firm and needed clerical personnel.

8. Assignments and Subcontracting. The SAAGs will 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 the Firms, without the prior written approval of the Client. Any member or employee of the SAAG firm who received prior approval from the Department to perform services under this Contract is bound by the terms and conditions of this Contract.

9. Facilities and Personnel. The SAAGs have and will continue to have proper facilities and personnel to perform the services and work agreed to be performed.

10. Advertisement. The SAAGs, during the term of appointment and thereafter, will not advertise their position as 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 Client, after consultation with the Client.

11. Media Contacts. The SAAGs 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 Communications of the Department of Attorney General.

12. Records. The SAAGs must submit monthly statements to the designated representatives 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. The records will be kept in accordance with generally accepted accounting practices and sound business practices. The Client reserves the right to inspect all records of the SAAGs related to this contract.

13. SAAG Termination. You will have the right at any time to terminate our representation, with or without cause, upon written notice to us. In the event that Client and the Firms should disagree with respect to litigation tactics or should disagree over advice given to Client with respect to settlement of the Client's claims, the Firms shall have the right to withdraw as counsel with respect to Client upon sixty (60) calendar day prior written notice. Client has the right to substitute attorneys at any time and the Firms reserve the right to withdraw or apply to the Court for permission to withdraw at any time after giving reasonable notice, in which case the Firms shall be entitled to, and Client agrees to pay, reasonable attorney's fees based upon *quantum meruit* for legal services rendered upon settlement of the case and/or issuance of a judgment.

14. Client agrees to fully cooperate with the Firms and their representatives at all times and to speedily comply with all reasonable requests of the Firms in the prosecution of this matter. Client agrees to be truthful at all times with the Firms, to provide whatever information is necessary (in the Firms' estimation) in a timely and competent manner; to quickly provide the Firms with any change of address, email address, phone number or business affiliation; to provide immediate information as to any change in Client's status which may have any impact on the prosecution of this claim.

15. The use of email is an expedient and effective method of communicating and in transmitting documents. While it is possible for such communications to be intercepted and read, there is a sufficient likelihood of confidentiality in this means of transmission to justify its use with Client on a regular basis. Accordingly, email may be used communicate and to transmit documents from time to time.

16. This Agreement does not include any contract or agreement for any other legal representation not herein expressly referenced. Client understands that the Firms will not provide any tax, accounting, or financial advice or services regarding this matter. If additional legal services are necessary in connection with or beyond the scope of the engagement reflected herein and you request attorney to perform such services, separate and additional fee arrangements must be made between you and the Firms. Any request by Client for legal services unrelated to this engagement must be set forth in a separate written agreement signed by Client and one or more of the Firms.

17. Non-Discrimination. The SAAGs, in the performance of this Contract, agree 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 SAAGs agree to comply with the provisions of the Federal Civil Rights Act of 1964, 42USC §2000d, in performing the services under this Contract.

18. 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 law firm appears in the register.

19. Compliance. The SAAGs' 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.

20. Independent Contractor. The relationship of the SAAGs to the Department of Attorney General 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 SAAGs will be solely and entirely responsible for their acts and the acts of their firms, agents and employees during the performance of this Contract. Notwithstanding the above, the relationship is subject to the requirements of the attorney-client privilege.

21. Notifications. The SAAGs must direct all notices, correspondence, inquiries, billing statements, pleadings, and documents mentioned in this Contract to the attention of the Client'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 SAAGs:

Elizabeth Burke
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Blvd. – Building A, P.O. Box 1007
Mount Pleasant, SC 29465
(843) 7272-6500

The SAAGs 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, the SAAG 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 division name].

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

22. Motions. Before any dispositive motion is filed, the supporting brief must be submitted to the Client for review and approval for filing with the court.

23. 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 Client may request investigative subpoenas in addition to what the SAAGs have filed.

24. Discovery Requests. The SAAGs must consult with Contract Manager and assist in the preparation of answers to requests for discovery. The SAAGs must indicate those requests to which they intend to object.

25. 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.

26. 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 SAAGs must submit a status memorandum indicating the amount of the mediation and a recommendation to accept or reject the mediation.

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

28. Settlements. All settlements are subject to approval by the Department. The SAAGs 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.

29. Experts. The SAAGs 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 SAAGs shall cooperate with the Department of Attorney General 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.

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

SAAGs 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, the SAAG 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.

31. 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).

32. Indemnification. The SAAGs agree 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: (1) Any malpractice, negligent or tortious act or omission attributable, in whole or in part, to the SAAGs or any of its employees, consultants, subcontractors, assigns, agents, or any entities associated, affiliated, or subsidiary to the SAAGs now existing, or later created, their agents and employees for whose acts any of them might be liable; (2) The SAAGs' failure to perform its obligation either expressed or implied by this Contract.

33. Insurance. Errors and Omissions. The SAAGs 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. Certificates evidencing the purchase of insurance must be furnished to the Client, 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 nonpayment of premium, and any such notice of cancellation, material change, or nonrenewal must be promptly forwarded to the Department upon receipt.

If, during the term of this Contract changed conditions should, in the judgment of the Department, render inadequate the insurance limits the SAAGs 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 the SAAGs, under valid and enforceable policies, issued by insurers of recognized responsibility. The Client reserves the right to reject as unacceptable any insurer.

34. The SAAGs agree 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, the SAAGs agree 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.

35. In the event SAAGs recover any compensation for you, all payments first will be deposited and/or paid into our trust account first, or trust account designated by us, from where they will be distributed, pursuant to an itemized accounting, to you consistent with the terms of the settlement minus the agreed-upon attorney's fees and costs as set forth in this agreement. Funds may be held in our IOLTA trust account and the interest, if any, will be sent to the appropriate bar foundation(s).

36. 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.

37. 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.

38. 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.

39. Other Debts. The SAAGs agree that they are not, and will not become, in arrears on any contract, debt, or other obligation to the State of Michigan, including taxes.

40. 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.

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

42. 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.

43. 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.

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

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

ACCEPTED BY CLIENT:

Dana Nessel, Attorney General or her Designee
Michigan Department of Attorney General

_____
Signature

Date: _____

By: _____
FRAZER P.L.C.

By: _____
RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC

By: _____
ENVIRONMENTAL LITIGATION GROUP, P.C.

By: _____
THE KUYKENDALL GROUP, LLC