**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))	Master Docket No.: 2:18-mn-2873-RMG
CITY OF CAMDEN, et al., *Plaintiffs,* -*vs*- E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), et al., *Defendants.*	)))))))))))	Civil Action No.: 2:23-cv-03230-RMG

CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, FOR FINAL CERTIFICATION OF THE SETTLEMENT CLASS, AND IN RESPONSE TO OBJECTIONS

Class Counsel, on behalf of the Preliminarily Approved Settlement Class and the Preliminarily Approved Class Representatives, City of Camden, City of Brockton, City of Sioux Falls, California Water Service Company, City of Del Ray Beach, Coraopolis Water & Sewer Authority, Township of Verona, Dutchess County Water & Wastewater Authority and Dalton Farms Water System, City of South Shore, City of Freeport, Martinsburg Municipal Authority, Seaman Cottages, Village of Bridgeport, City of Benwood, Niagara County, City of Pineville, and City of Iuka, respectfully submit this Motion for Final Approval of Class Settlement, for Final Certification of the Settlement Class, and in Response to Objections.

For the reasons set forth in the accompanying memorandum of law, Class Counsel's request that the Court:

- Grant their Motion for Final Approval;
- Find the Settlement Agreement is fair, reasonable and adequate;
- Find that, for settlement purposes only, the Settlement Class satisfies the requirements of Fed. R. Civ. P. 23;
- Grant their Motion for Attorneys' Fees and Costs;
- Enter judgment dismissing Claims in the Litigation asserted by Settlement Class Members against Released Persons; and
- Enter a permanent injunction prohibiting any Settlement Class Member from asserting or pursuing any Released Claim against any Released Person in any forum.

Dated: November 21, 2023

Respectfully submitted,

/s/ Michael A. London
Michael A. London
Douglas and London P.C.
59 Maiden Lane, 6th Floor
New York, NY 10038
212-566-7500
212-566-7501 (fax)
mlondon@douglasandlondon.com

Paul J. Napoli
Napoli Shkolnik
1302 Avenida Ponce de León
San Juan, Puerto Rico 00907
Tel: (833) 271-4502
Fax: (646) 843-7603
pnapoli@nsprlaw.com

Scott Summy
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
214-521-3605
ssummy@baronbudd.com

Elizabeth A. Fegan
Fegan Scott LLC
150 S. Wacker Dr., 24th Floor
Chicago, IL 60606
312-741-1019
beth@feganscott.com

Joseph Rice
Motley Rice LLC
28 Bridgeside Blvd.,
Mt. Pleasant, SC 29464
jrice@motleyrice.com

Class Counsel

-and-

Robert Klonoff*
Lewis & Clark School of Law
Jordan D. Schnitzer Professor of Law
10101 S. Terwilliger Boulevard
Portland, Oregon 97219
503-768-6600
klonoff@usa.net

*On the Brief (*pro hac forthcoming)*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 21st day of November, 2023 and was thus served electronically upon counsel of record.

/s/ Michael A. London
Michael A. London
Douglas and London PC
59 Maiden Lane, 6th Floor
New York, NY 10038
212-566-7500
212-566-7501 (fax)
mlondon@douglasandlondon.com

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MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, FOR FINAL CERTIFICATION OF THE SETTLEMENT CLASS, AND IN RESPONSE TO OBJECTIONS

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I. INTRODUCTION

This Class Action Settlement Agreement ("Settlement Agreement" or "SA") [ECF No. 3393-2], along with the related 3M Settlement, resolves what is likely the most important environmental litigation in U.S. history. It is without question the largest drinking water settlement ever. If approved, it will help Public Water Systems ("PWS") protect the health and safety of millions of individuals throughout the United States for generations. Given the significant value of the Settlement Agreement ($1,185,000,000) ("Settlement Amount"), the vigorous litigation by skilled counsel, years of contentious mediation and ultimate resolution for PWS, final approval of the settlement is appropriate. Indeed, the tiny number of Objections to the settlement (about 0.16% of the class)— more than three quarters of which consist of mainly copy-and-paste documents filed by a single law firm—confirms that the Settlement Class Members overwhelmingly support this settlement. Accordingly, Plaintiffs and Defendants[1] urge the Court to grant final approval. As demonstrated below, the Settlement Agreement satisfies the class certification requirements of Rule 23(a) and (b) and the fairness requirements of Rule 23(e) and *Jiffy Lube.* Moreover, the few Objections lodged either misconstrue the Settlement Agreement or are legally flawed.

The Settlement Agreement was reached only after approximately 4½ years of sustained, hard-fought litigation, including the production of over 4.6 million documents totaling over 37 million pages, 82 depositions of corporate witnesses, 7 government witness depositions, 12 defense expert witness depositions, 14 Plaintiffs' expert depositions, service of over 20 expert

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[1] The Chemours Company, the Chemours Company, FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E. I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively, "Defendants").The term "Defendants" is used throughout this brief for purposes of drafting convenience only and is not intended to imply that all Defendants were involved with the manufacture or sale of products alleged to have contributed to PFAS contamination.

reports, extensive legal briefing including defeating multiple summary judgment and *Daubert* motions, preparation of the *Stuart* bellwether case for trial, and approximately three years of contentious and vigorous arms-length settlement negotiations by highly-skilled counsel, overseen by a skilled mediator. As set forth below, following any deductions for any forthcoming Court-approved attorneys' fees and costs (as to which no objection has been lodged), the Settlement Amount will be allocated equitably among the Settlement Class Members pursuant to the Allocation Procedures.[2] There is no valid reason to delay the implementation of this settlement.

II. FACTUAL BACKGROUND

A. Defendants' Role in the AFFF MDL

Although Defendants never manufactured AFFF concentrates, Defendants were nonetheless dually situated within the AFFF marketplace.[3] Specifically, at various times, Defendants manufactured and sold raw materials, called telomer iodides, that were incorporated into fluorosurfactants used in various AFFF concentrates.[4] Subsequently, beginning in 2002, as a result of its acquisition of the Forafac line of fluorosurfactants from Atochem f/k/a Atofina, Defendants likewise began to manufacture fluorosurfactants themselves and did so until 2015.[5] Certain of Defendants' fluorosurfactants that were incorporated into AFFF concentrates contained C8 telomer iodides (PFOA precursors), which degrade to PFOA in the environment, including

[2] Settlement Agreement, at Ex. C [ECF No. 3393-2]("Allocation Procedures").
[3] Motion for Summary Judgment of Defendants E. I. du Pont de Nemours and Co., the Chemours Company, and the Chemours Company FC, LLC, at 1 [ECF No. 2693]("DuPont MSJ").
[4] *Id.*; *see also*, Declaration of Scott Summy, Esq., in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and For Permission to Disseminate Class Notice [ECF No. 3393-3] ("Summy Prelim. App. Decl."), at ¶ 19; Declaration of Michael A. London, Esq. in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice [ECF No. 3393-4] ("London Prelim. App. Decl."), at ¶¶ 27-29 (noting sales of raw materials from 1974-2015).
[5] DuPont MSJ at 1; *see also* Summy Prelim. App. Decl., at ¶ 19.

most notably Forafac 1157N, which was incorporated into AFFF concentrates manufactured by various AFFF concentrate manufacturers.[6]

B. History of the Proceedings

As the Court is aware, litigation involving per- and polyfluoroalkyl substances ("PFAS") has been ongoing for nearly 25 years. Over the course of the last two-plus decades, public awareness and concern over PFAS contamination nationwide has greatly increased. In 2016, the first AFFF-specific PFAS cases were filed in federal courts across the country, and in the following years the number of these pending lawsuits ballooned. This resulted in the need for coordination and consolidation of these cases to serve "the convenience of the parties and witnesses and [to] promote the just and efficient conduct" of these cases.[7] On December 7, 2018, the Judicial Panel on Multidistrict Litigation ("JPML") transferred the AFFF MDL to the District of South Carolina.[8]

Following the creation of the MDL, pursuant to Case Management Orders ("CMO") 2 and 3, the Court appointed Plaintiffs' Co-Lead Counsel, the first slate of Plaintiffs' Executive Committee ("PEC") members, and Advisory Counsel to the PEC.[9] As the MDL progressed, certain lawyers were added to leadership while others resigned, bringing the total number of PEC firms for the 2022-2023 Term to twenty-eight (28) firms.[10] On August 22, 2023, the Court added one additional Co-Lead Counsel and appointed the now four Co-Lead Counsel—Michael A. London of Douglas & London, Scott Summy of Baron and Budd, Paul J. Napoli of Napoli Shkolnik and

[6] *See* London Prelim. App. Decl., at ¶¶ 27-29.
[7] 28 U.S.C. § 1407.
[8] MDL Transfer Order No. 2873 [ECF No. 1].
[9] CMO 2 and 3 [ECF Nos. 28 & 72]. CMO 3 added four (4) additional firms to the initial slate of PEC firms.
[10] CMO 24 [ECF No. 2259].

Joseph F. Rice of Motley Rice—as Class Counsel.[11] In addition, Elizabeth Fegan of Fegan Scott LLC was appointed as a fifth Class Counsel.[12]

The enormous amount of work conducted throughout the course of this MDL since its inception is thoroughly detailed in Class Counsel's Memorandum in Support of their Motion for Attorneys' Fees and Costs ("Mot. for Attorneys' Fees").[13] Nonetheless, Class Counsel will briefly reiterate some of the efforts undertaken over the course of the last 4 ½ plus years. These efforts, which required approximately 414,000 hours of work conducted by approximately 40 law firms and 650 timekeepers,[14] included, *inter alia*, MDL oversight and administration,[15] bellwether efforts,[16] general liability efforts, significant legal briefing efforts including successfully overcoming the government contractor defense,[17] service of nine (9) general expert reports and twelve (12) case-specific expert reports, and one (1) expert report with a general sub-part and three (3) case-specific sub-parts, as well as multiple supplemental reports.[18]

In addition, master sets of document demands were served on the many predominant defendants, including the United States, and significant third-party discovery was likewise

[11] Order Regarding Appointment of Joseph Rice of Motley Rice ("Rice Appointment Order") [ECF No. 3602] and Preliminary Approval Order ("Preliminary Approval Order" or "PAO")[ECF 3603 as amended by ECF No. 3684].
[12] PAO, at 4-5.
[13] Mot. for Attorneys' Fees [ECF No. 3795-1].
[14] Declaration of John W. Perry, Jr. in Support of Mot. for Attorneys' Fees ("Perry Fee. Decl."), at ¶¶ 10, 20 [ECF No. 3795-4].
[15] Declaration of Michael A. London in Support of Mot. for Attorneys' Fees ("London Fee Decl."), at ¶ 12, 20-44 [ECF No. 3795-6].
[16] London Fee Decl., at ¶ 54-63, 74-83; Declaration of Gary J. Douglas in Support of Mot. for Attorneys' Fees ("Douglas Fee Decl."), at ¶ 31-36 [ECF No. 3795-8].
[17] Declaration of Rebecca G. Newman in Support of Mot. for Attorneys' Fees ("Newman Fee Decl."), at ¶ 14-17 [ECF No. 3795-13]; Douglas Fee Decl., at ¶ 22-30.
[18] Douglas Fee Decl., at ¶ 21; *see also*, Declaration of Wesley Bowden in Support of Mot. for Attorneys' Fees ("Bowden Fee Decl."), at ¶ 15 [ECF No. 3795-12].

undertaken, including service of over one hundred-seventy (170) subpoenas.[19] In total, Plaintiffs coded over 4.65 million documents (totaling over 37 million pages),[20] conducted 82 depositions of corporate witnesses, seven (7) depositions of United States' witnesses, twelve (12) defense expert witness depositions, defended fourteen (14) Plaintiff expert witnesses in their depositions and defended fifty-six (56) depositions of bellwether Plaintiff witnesses.[21] Finally, Plaintiffs prepared the *City of Stuart* bellwether case for trial, including through dispositive and *Daubert* briefing, preparation of exhibit lists, deposition designations, witness lists, arguing of evidentiary motions, preparing direct examinations, opening statements and other pretrial briefings.[22]

Ultimately, the City of Stuart's claims against Defendants were severed from the *City of Stuart* trial when Defendant Kidde filed for Chapter 11 bankruptcy, given that the liability as between these two entities was so intertwined.[23] Thereafter, on June 5, 2023, the *City of Stuart* trial was stayed for 21 days to allow Plaintiffs and Defendant 3M, the sole remaining Defendant in the *City of Stuart* case following Defendants' severance, to work towards a global resolution.[24]

C. History of the Settlement Negotiations and Mediation

As set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement and for Permission to Disseminate Class Notice ("Prelim. App. Mot.")[ECF No. 3393], the parties began preliminary settlement discussions with Defendants in the Summer of 2020.[25] From the outset, it was readily

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[19] London Fee Decl., at ¶ 117.
[20] Declaration of Staci J. Olsen in Support of Mot. for Attorneys' Fees ("Olsen Fee Decl."), at ¶ 18 [ECF No. 3795-11].
[21] Douglas Fee Decl., at ¶¶ 16, 21.
[22] *Id.* at ¶¶ 38-50.
[23] Severance Order [ECF No. 3183].
[24] Continuance Order [ECF No. 3256].
[25] Summy Prelim. App. Decl., at ¶¶ 9-10.

apparent that Defendants would only settle PWS claims on a nationwide basis in order to maximize finality.[26] Further, right from the start, these settlement negotiations were extremely complicated,[27] which resulted in the discussions continuing throughout 2020, into 2021 and then into 2022.[28] These discussions took place both remotely and in-person, and included various document exchanges, multiple presentations, and formal mediation sessions.[29] In addition, numerous experts were retained to assist in the exploration of a proposed global settlement.[30]

On October 26, 2022, this Court appointed Judge Layn Phillips (ret.) as the Court-appointed Mediator.[31] Following Judge Phillips's appointment, the parties routinely met in-person and by both Zoom and telephone.[32] There can be little doubt that Judge Phillips's appointment was instrumental to the furtherance of the settlement negotiations.[33] Further, and in tandem with the intensive negotiation sessions, the *City of Stuart* trial team was preparing that bellwether case for trial, which added significant pressure and urgency to the resolution of these claims.[34] After approximately eight months of difficult, all-consuming arms-length mediations[35] with the assistance and oversight of Judge Phillips, on June 1, 2023, the parties signed a memorandum of understanding ("MOU"),[36] four days before the *City of Stuart* trial was scheduled to begin.[37]

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[26] *Id*. at ¶ 21.
[27] London Prelim. App. Decl., at ¶ 17.
[28] Summy Prelim. App. Decl., at ¶ 9-10.
[29] *Id*. at ¶ 10; *see also*, London Prelim. App. Decl., at ¶ 18.
[30] Summy Prelim. App. Decl., at ¶ 12.
[31] CMO 2.B [ECF No. 2658].
[32] Summy Prelim. App. Decl., at ¶ 17; *see also*, London Prelim. App. Decl., at ¶ 22.
[33] London Prelim. App. Decl., at ¶ 22.
[34] *Id*. at ¶¶ 19-20.
[35] *See* PAO, at ¶ 9 (noting that the "proposed Settlement Agreement is the product of intensive, arm's-length, non-collusive negotiations overseen by the Court-appointed mediator, Honorable Layn Phillips; has no obvious deficiencies; does not improperly grant preferential treatment to the Class Representatives; and is fair, reasonable and adequate.").
[36] Summy Prelim. App. Decl., at ¶ 23.
[37] London Prelim. App. Decl., at ¶ 21 (noting trial to start on June 5, 2023).

D. The Class Action Complaint

On July 12, 2023, Plaintiffs filed a Class Action Complaint ("Complaint") against Defendants on behalf of themselves and all other similarly-situated PWS claiming one or more of the following types of damages: (1) the costs of testing and monitoring of the ongoing contamination of their Drinking Water wells and supplies; (2) the costs of designing, constructing, installing and maintaining a filtration system to remove or reduce levels of PFAS detected in Drinking Water; (3) the costs of operating that filtration system; and (4) the costs of complying with any applicable regulations requiring additional measures.[38]

This Complaint, which was designed to be used as the mechanism for a class-wide settlement, identifies each Class Representative,[39] defines the Settlement Class, and states the claims intended to become Released Claims and concluded by the Final Judgment. None of the issues identified in the Complaint are new; however, as each has been extensively litigated through this MDL to the eve of trial.

E. Preliminary Approval Order and Motion for Attorneys' Fees and Costs.

As noted above, on August 22, 2023, this Court granted Plaintiffs' Motion for Preliminary Approval. In its PAO, the Court found that "the requirements of Rules 23(a)(1)-(4), 23(b), and 23(e) of the Federal Rules of Civil Procedure have been satisfied for the purposes of preliminary approval of the Settlement Agreement as modified by (C.A. No. 2:23-3230, ECF No. 30), such that notice of the Settlement Agreement should be directed to Settlement Class Members and a

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[38] Complaint, Case No.2:23-cv-03230 [*Camden* ECF No. 7], at ¶¶15-16, 246-252, 265.

[39] The Class Representatives include: (1) City of Camden, (2) City of Brockton, (3) City of Sioux Falls, (4) California Water Service Company, (5) City of Delray Beach, (6) Coraopolis Water & Sewer Authority, (7) Township of Verona, (8) Dutchess County Water and Wastewater Authority and Dalton Farms Water System, (9) City of South Shore, (10) City of Freeport, (11) Martinsburg Municipal Authority, (12) Seaman Cottages, (13) Village of Bridgeport, (14) City of Benwood, (15) Niagara County, (16) City of Pineville and (17) City of Iuka. *Id.* at ¶¶ 6-64.

Final Fairness Hearing should be set."[40] The Court further noted that "it will likely be able to certify the Settlement Class for purposes of judgment of the proposed Settlement Agreement," and that "[t]he Settlement Class is likely to meet the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a)(1)-(4) of the Federal Rules of Civil Procedure."[41]

Likewise pursuant to the PAO, the Court ordered that the last day of the objection period would be November 4, 2023,[42] which was subsequently extended to November 11, 2023.[43] Moreover, the Court set the last day of the opt-out period as December 4, 2023,[44] and Class Counsel was directed to (and did) file its motion for attorneys' fees and costs by October 15, 2023.[45] Class Counsel's papers in support of Final Approval of the Settlement Agreement and any responses to any objections were originally due November 14, 2023;[46] however, these deadlines were later extended to November 21, 2023.[47] Finally, the Final Fairness hearing was set for December 14, 2023.[48]

F. Notice to the Class Complied with this Court's Preliminary Approval Order and Due Process.

In conjunction with preliminary approval of the Settlement, this Court ordered that Notice be disseminated to the Class. As set forth in detail above, the parties complied with the Court's order. Notice was disseminated *via* USPS certified mail, with tracking and signature required, to

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[40] PAO, at ¶ 1.
[41] PAO, at ¶ 5.
[42] PAO, at ¶ 21.
[43] Order Granting Joint Motion to Supplement the Preliminarily Approved Allocation Procedures [ECF No. 3862], at 3-4.
[44] PAO, at ¶ 16.
[45] PAO, at ¶ 27.
[46] PAO, at ¶ 28.
[47] Order on Joint Motion to Extend Time to Respond to Class Action Settlement Objections [ECF No. 3891]; *see also*, Order on Parties' Motion to Extend Time for Plaintiffs' Motion for Final Approval [ECF No. 3935].
[48] PAO, at ¶ 26.

14,019 identified Settlement Class Members.[49] In addition, the Notice administrator established a settlement website, www.PFASWaterSettlement.com, and a toll-free hotline devoted to this case to apprise Settlement Class Members of their rights and options in the Settlement. Further, the Notice Administrator provided email notification of the Settlement to 9,129 identified Settlement Class Members and implemented a media campaign involving both publication notice and digital notice.[50]

The Notices that have been disseminated and published comply with Due Process. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Beyond first-class mailing, an extensive publication Notice Plan was implemented to ensure that every reasonable effort to provide notice to identified class members of the pendency of this class action was made. Conducting this Notice Plan supports approval of the Settlement.

G. The CAFA Notice Requirement Has Been Satisfied by Defendants.

The Class Action Fairness Act, 18 U.S.C § 1711 et seq. ("CAFA"), requires settling defendants to serve notice of a proposed settlement on the "appropriate" state and federal officials after a proposed class action settlement is filed with the court. 28 U.S.C. § 1715(b). Defendants satisfied this CAFA notice requirement.[51]

III. MATERIAL TERMS OF THE SETTLEMENT

A. Consideration

[49] *See* Declaration of Steven Weisbrot, Esq. of Angeion Group, LLC Regarding Notice Plan Implementation, at ¶¶ 8, 11 attached as Ex. A ("Weisbrot Final Approval Decl."), being filed concurrently herewith.
[50] *Id.* ¶¶ 9-10, 20-21, 26-31.
[51] *Id.* at ¶¶ 4-5.

Defendants have agreed to pay or cause to be paid the Settlement Amount of one billion one hundred eighty- five million dollars ($1,185,000.00) in exchange for receiving releases, covenants not to sue, and dismissals from Settlement Class Members as provided for in the Settlement Agreement.[52]

B. Class Definition

The preliminarily approved Settlement Class consists of:

(a) All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before the Settlement Date, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level; and

(b) All Public Water Systems in the United States of America that, as of the Settlement Date, are (i) subject to the monitoring rules set forth in UCMR 5 (*i.e.*, "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.[53]

Subsection (a) Settlement Class members are referred to as "Phase One" Class members and subsection (b) Settlement Class members are referred to as "Phase Two" Class members, discussed further below in Section III.C.

Further, as identified in the PAO, the following are excluded from the Settlement Class:

(a) Any Public Water System that is located in Bladen, Brunswick, Columbus, Cumberland, New Hanover, Pender, or Robeson counties in North Carolina; provided, however, that any such system otherwise falling within clauses (a) or (b) of Paragraph 3 of this Order will be included within the Settlement Class if it so requests.

(b) Any Public Water System that is owned and operated by a State government and cannot sue or be sued in its own name, which systems within clauses (a) and (b)(i) of Paragraph 3 of this Order are listed in Exhibit I to the Settlement Agreement.

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[52] SA, at §§ 2.50, 3.2, 12.1-12.9.

[53] PAO, at ¶ 3(a)-(b).

(c) Any Public Water System that is owned and operated by the federal government and cannot sue or be sued in its own name, which systems within clauses (a) and (b)(i) of Paragraph 3 of this Order are listed in Exhibit J to the Settlement Agreement.

(d) Any privately owned well or surface water system that is not owned by, used by, or otherwise part of, and does not draw water from, a Public Water System within the Settlement Class.[54]

C. Allocation of Settlement Amount between Phase One and Phase Two Qualifying Settlement Class Members

The Allocation Procedures provide that the Settlement Amount, subject to the requisite fees, costs and holdbacks as set forth in the SA, will be divided among Phase One and Phase Two Qualifying Class Members.[55] Subject to final approval by the Court, Phase One Qualifying Class Members will be allocated 55% of the Settlement Amount, and Phase Two Qualifying Class Members will be allocated 45% of the Settlement Amount.[56]

This division of funds between Phase One and Two Class Members was arrived upon based on the analysis of Timothy G. Raab.[57] Mr. Raab is the Managing Director at Alvarez and Marsal, a global professional services firm.[58] He is an expert in the field of liability forecasting, which is a field that requires building statistical and mathematical models to forecast liability and assets for, among other things, settlement negotiations and complex settlement programs.[59]

Mr. Raab was tasked with determining a methodology to be used to estimate the likely ratio between the Phase One and Phase Two members of the Settlement Class.[60] Mr. Raab's analysis was based upon public information provided by Class Counsel and included: (a) state data showing

[54] *Id.* at ¶ 4(a)-(d).
[55] Allocation Procedures, at p.1, p. 3, § 1(a).
[56] *Id.* at p. 3, § 1(a).
[57] *See generally*, Declaration of Timothy G. Raab [ECF No. 3393-12](“Raab Prelim. App. Decl.”)
[58] *Id.* at § I, ¶ 1.
[59] *Id.* at § I, ¶ 4.
[60] *Id.* at § II, ¶ 1.

PFAS detections and non-detections in certain PWS; (b) the EPA's Third Unregulated Contaminant Monitoring Rule (UCMR 3) data showing PFAS detections and non-detections of the PWS that were subject to UCMR 3; (c) information regarding the PWS that are currently subject to UCMR 5 and applicable state or federal laws; and (d) PWS identified in SDWIS.[61] Based on this information, Mr. Raab identified the known Phase One members of the Settlement Class and compared them to the number of PWS that either have not yet tested for PFAS or have not reported a PFAS detection and would also meet the proposed Phase Two Class definition.[62] From this analysis, Mr. Raab determined that based on mathematical principles it is more likely than not that 64% of the members of the Settlement Class would meet the Phase One Class definition and 36% would meet the Phase Two Class definition.[63] To be conservative and account for any discrepancies in data, he then concluded that it would be fair, reasonable and adequate to estimate that 55% of the members of the Settlement Class would fall under the Phase One Class definition and 45% would fall under the Phase Two Class definition.[64] This division of funds between Phase One and Phase Two members of the Settlement Class is fair, reasonable and adequate, and is based upon Mr. Raab's analysis as described herein and the Raab Prelim. App. Decl.[65, 66]

The Phase One and Phase Two Funds will be allocated among Phase One and Phase Two Qualifying Settlement Class Members by the Court-appointed Claims Administrator, under the oversight of the Court-appointed Special Master, in accordance with the Allocation Procedures.[67]

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[61] *Id.* at § III, *generally*.
[62] *Id.*
[63] *Id.* at § III, ¶ 11.
[64] *Id.* at ¶ 12.
[65] *Id., generally*.
[66] It is also worth noting that the data that has been released by EPA to date with respect to UCMR 5 has thus far only identified that approximately 20% of PWS have PFAS detection, which fully supports Mr. Raab's analysis.
[67] Allocation Procedures, at p. 1.

The Allocation Procedures are the culmination of a tremendous effort by Class Counsel, including negotiations between Class Counsel with Phase One clients and Class Counsel with Phase Two clients, to develop a protocol to fairly, reasonably and adequately allocate the Settlement Amount to Qualifying Settlement Class Members. As part of this massive effort, Class Counsel engaged two highly qualified experts – Dr. J. Michael Trapp[68] and Dr. Prithviraj Chavan[69] – to provide their expertise and technical support to develop an objective formula that can score a Qualifying Settlement Class Member's Impacted Water Source(s) using factors considered when calculating the real-world costs for the installation of PFAS treatment systems.[70] After applying the mathematical formula, the Impacted Water Source scores can be used to allocate the Settlement Amount among Qualifying Settlement Class Members (the "Allocated Amount"). Below are some of the most prominent aspects of the Allocation Procedures.

1. Breakdown of Funds and Claims Forms

The Phase One Funds are broken down into five separate payment sources: the Phase One Very Small Public Water System Payments, the Phase One Inactive Impacted Water System Payments, the Phase One Action Fund, the Phase One Supplemental Fund and the Phase One Special Needs Fund.[71] Similarly, the Phase Two Funds will be separated into five separate payment sources: the Phase Two Very Small Public Water System Payments, the Phase Two Baseline Testing Payments, the Phase Two Action Fund, the Phase Two Supplemental Fund, and the Phase Two Special Needs Fund.[72]

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[68] Summy Prelim App. Decl., at ¶¶ 12, 14.
[69] *Id*.
[70] *Id*. at ¶¶ 12, 14-16.
[71] Allocation Procedures, at p. 3, § 1(c)(ii), pp. 7-20.
[72] *Id.* at p. 4, § 1(c)(v), pp. 20-24.

The initial step for establishing membership in the Settlement Class and eligibility for compensation from any of the Settlement Funds is the completion of the appropriate Claims Form(s).[73] Four Claims Forms are available, the completion and submission of which are dependent upon the compensation being sought by the Qualifying Settlement Class Member.[74] These Claims Forms, along with all verified supporting documentation, must be timely submitted by the applicable deadlines set forth in the Allocation Procedures.[75] The Claims Administrator has made these Claims Forms electronically accessible on the Settlement Website, with a paper copy also available upon request.[76]

a) The Very Small Public Water System Payments

The Phase One and Phase Two Action Funds will provide a one-time payment to Qualifying Settlement Class Members with Impacted Water Sources that qualify as Very Small PWS.[77] Very Small PWS are those that are listed in the SDWIS as Transient Non-Community Water Systems and Non-Transient Non-Community Water Systems serving less than 3,300 people.[78] Under the Allocation Procedures, Transient Non-Community Water Systems will

[73] *Id.* at p. 4, § 1(d).
[74] All four Claims Forms are contained in Exhibit D to the SA. The Public Water System Settlement Claims Form is to be completed by those seeking either: (1) a Phase One or Phase Two Very Small Public Water System Payment; (2) a Phase One Inactive Impacted Water System Payment; or (3) compensation from the Phase One or Phase Two Action Funds. Public Water System Settlement Supplemental Claims Form is to be completed by those seeking compensation from either the Phase One or Phase Two Supplemental Fund. The Public Water System Settlement Special Needs Claims Form is to be completed by those seeking compensation from either the Phase One or Phase Two Special Needs Funds as discussed. The Public Water System Settlement Testing Compensation Claims Form is to be completed by those seeking a Phase Two Baseline Testing Payment.
[75] Allocation Procedures, at p. 1, § 4(c)(iv), 4(d)(iv), 4(e)(i), 5(c)(ii), 5(d)(iii), 5(e)(iii), 5(f)(i).
[76] Allocation Procedures, at p. 1; Declaration of Dustin Mire [ECF No. 3393-9], at ¶ 9 ("Mire Prelim. App. Decl.").
[77] Allocation Procedures, at p. 10, § 4(f), p. 23, § 5(g).
[78] *Id.* at p. 10, § (f)(i), p. 23, § 5(g)(i).

receive a one-time payment of $1,250, and Non-Transient Non-Community Water Systems serving less than 3,300 people will receive a one-time payment of $1,750.[79] Recipients of the Very Small Public Water System Payments are not eligible for payment from any other funds, except that a Phase Two Qualifying Settlement Class Member may also receive a Phase Two Baseline Testing Payment.[80]

The Claims Forms submission deadline for the Phase One Very Small Public Water System Payment is sixty (60) days after the Effective Date.[81] The submission deadline for the Phase Two Very Small Public Water System Payment is June 30, 2026, which is six months after the UCMR 5 testing deadline.[82]

b) The Phase One Inactive Impacted Water System Payment

Phase One Qualifying Settlement Class Members that are classified as Inactive in the SDWIS and that own one or more Impacted Water Source(s) tested before June 30, 2023 will receive a one-time payment of $500.00.[83] Recipients of this payment are not eligible for payment from any other funds.[84] Because Inactive PWS should not be required to test under UCMR 5 or other federal or state law, a similar payment is not available from the Phase Two Fund. The Claims Forms submission deadline for the Phase One Inactive Impacted Water System Payment is sixty (60) days after the Effective Date.[85]

c) The Action Funds

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[79] *Id.* at p. 10, § 4(f)(ii), p. 23, § 5(g)(ii).
[80] *Id.* at p. 10, § 4(f)(iii), p. 23, § 5(g)(iii).
[81] *Id.* at p. 9-10, § 4(e)(i).
[82] *Id.* at p. 23, § 5(f)(i).
[83] *Id.* at p. 10, § 4(g)(i).
[84] *Id.* at p. 10, § 4(g)(ii).
[85] *Id.* at p. 9- 10, § 4(e)(i).

The Phase One and Phase Two Action Funds will compensate all other Qualifying Settlement Class Members with Impacted Water Sources that have timely submitted a Claims Form and performed the requisite testing for each of its Impacted Water Source(s).[86] The Claims Administrator will enter the test results and relevant information provided on the Claims Form into the mathematical formula set forth in the Allocation Procedures to score each Impacted Water Source owned and/or operated by a Qualifying Settlement Class Member.[87]

Phase One Qualifying Settlement Class Members (*i.e.*, those that have detected a measurable concentration of PFAS before June 30, 2023) are not required to retest their Impacted Water Source(s), but they are required to perform Baseline Testing of each of their Water Sources that either have never been tested for PFAS or were tested for PFAS before December 7, 2021, and the test did not result in a measurable concentration of PFAS.[88] Failure to test and submit Qualifying Test Results for Water Sources will disqualify Water Sources from consideration for present and future payments.[89] By contrast, all Phase Two Qualifying Settlement Class Members will have to perform Baseline Testing.[90]

Those Qualifying Settlement Class Members with a detection will receive compensation from the appropriate Action Fund for each Impacted Water Source.[91] While a Qualifying Settlement Class Member may use any laboratory, Class Counsel made great efforts to arrange for

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[86] *Id.*, pp. 11-20, § 4(h), pp. 23-24, § 5(h).
[87] *Id.* at pp. 11-16, §§ 4(h)(i)-4(h)(iv), p. 24, § 5(h)(ii).
[88] *Id.* at pp. 7-8, §§ 4(b)(i)- 4(b)(iii).
[89] *Id.* at p. 8, § 4(b)(v).
[90] *Id.* at pp. 20-21, § 5(b).
[91] *Id.* at pp. 11-20, § 4(h), pp. 23-24, § 5(h).

expedited analysis at reduced rates from Eurofins Environmental Testing, which is a network of laboratories that currently has North America's largest capacity dedicated to PFAS analysis.[92]

Both Drs. Trapp and Chavan agree that capital costs and operation and maintenance ("O&M") costs are the most important factors to consider when calculating the cost of treating PFAS-containing Drinking Water.[93] Capital costs are primarily driven by the flow rate of the Impacted Water Source, while O&M costs are primarily driven by the flow rate of the Impacted Water Source *and* PFAS concentrations.[94] Thus, the flow rates and PFAS concentrations of each Impacted Water Source, obtained from the Qualifying Class Settlement Members' Claims Forms and supporting documentation, can and will be used by the Claims Administrator to formulaically calculate a Base Score for each Impacted Water Source based on the Allocation Procedures.[95] These Base Scores will then be adjusted or "bumped," depending on whether the Impacted Water Source's concentration levels exceed the proposed federal or applicable state MCLs, whether the Qualifying Settlement Class Member had Litigation relating to the Impacted Water Source pending at the time of Settlement, and whether the Qualifying Settlement Class Member was one of the Public Water Provider Bellwether Plaintiffs.[96]

The Claims Administrator will then divide an Impacted Water Source's Adjusted Base Score by the sum of all Adjusted Base Scores for the respective Action Fund to arrive at each

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[92] Declaration of Robert Mitzel, President of TestAmerica Laboratories, Inc. d/b/a Eurofins TestAmerica.[ECF No. 3393-15], at ¶¶ 1, 3-4. 7.
[93] Declaration of J. Michael Trapp, PhD in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and For Permission to Disseminate Class Notice [ECF No. 3393-13] ("Mitzel Prelim. App. Decl."), at pp. 3-8; Declaration of Dr. Prithviraj Chavan, PhD in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and For Permission to Disseminate Class Notice [ECF No. 3393-14]("Prithviraj Prelim. App. Decl."), at pp. 5-10.
[94] *Id.*
[95] Allocation Procedures, at pp. 11-16, §§ 4(h)(i)-4(h)(iv), p. 24, § 5(h)(ii).
[96] *Id.* at pp. 16-19, § 4(h)(v), p. 24, § 5(h)(ii).

Impacted Water Source's percentage of the respective Action Fund.[97] This percentage will be multiplied by the total respective Action Fund to provide the Allocated Amount for each Impacted Water Source.[98]

Because the Allocation Procedures require the information solicited in the Claims Forms to calculate Base Scores and all Base Scores are required to calculate individual Allocated Amounts, each Qualifying Settlement Class Member's Allocated Amount will not be determinable until all applicable Claims Forms are submitted, analyzed, and processed by the Claims Administrator. When these Allocated Amounts are determined and notification of the Allocated Amount is provided, each Qualifying Settlement Class Member may submit a request for reconsideration to the Special Master within the applicable deadlines, if an error in calculation can be established.[99]

The Claims Forms submission deadline for the Phase One Action Fund is sixty (60) calendar days after the Effective Date.[100] The deadline for the Phase Two Action Fund is June 30, 2026, which is six months after the UCMR 5 testing deadline.[101]

d) The Supplemental Funds

The Supplemental Funds were created to compensate Qualifying Settlement Class Members that have an Impacted Water Source that did not exceed the proposed federal or an applicable state MCL at the time they submitted their Claims Forms, but because of subsequent testing, obtain a

[97] *Id.* at p. 19, § 4(h)(v)(a), p. 24, § 5(h)(ii).
[98] *Id.*
[99] *Id.* at pp. 19-20, §§ 4(h)(vi)-4(h)(vii).
[100] *Id.* at pp. 9-10, § 4(e)(i).
[101] *Id.* at p. 23, § 5(f)(i).

Qualifying Test Result that either: (1) exceeds the proposed federal PFAS MCLs or an applicable state MCL; or (2) exceeds a future state or federal PFAS MCL.[102]

For each Impacted Water Source, the Claims Administrator will approximate, as closely as is reasonably possible, the Allocated Amount that each Impacted Water Source would have been allocated had it been in the Action Fund with an MDL exceedance, and shall issue funds from the Supplemental Funds in amounts that reflect the difference between the amount the Impacted Water Source would have been allocated had it been in the Phase One Action Fund with an MCL exceedance and what the Qualifying Settlement Class Member has already received, if anything.[103]

Given the nature of the claims being submitted, the deadline for Claims Form submission for both the Phase One and Phase Two Supplemental Funds is December 31, 2030.[104]

e) The Special Needs Fund

The Phase One and Phase Two Special Needs Funds will compensate Qualifying Settlement Class Members who have already spent money to address PFAS detections in their Impacted Water Sources, such as by taking wells offline, reducing flow rates, drilling new wells, pulling water from other sources and/or purchasing supplemental water.[105]

A Phase One Special Needs Fund Claims Form must be submitted no later than 45 days after the deadline for submission of the PWS Phase One Action Fund Claims Form.[106] Once all Phase One Special Needs Fund Claims Forms are timely received, the Claims Administrator will review them and determine which Phase One Qualifying Settlement Class Members shall receive

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[102] *Id.* at p. 8, § 4(c)(ii)-4(c)(iii); p. 21, §§ 5(d)(ii).
[103] *Id.* at pp. 8-9, §§ 4(c)(v)-4(c)(vi), p. 22, §§ 5(d)(v)-5(d)(vi).
[104] *Id.* at p. 8, § 4(c)(iv), p. 21, § 5(d)(iii).
[105] *Id.* at p. 9, §§ 4(d)(ii)-4(d)(iii), p. 22, § 5(e)(ii).
[106] *Id.* at p. 9, § 4(d)(iv).

additional compensation and the amount of compensation.[107] The Claims Administrator will recommend the awards to the Special Master who must review and ultimately approve or reject them.[108] Phase Two Special Needs Funds claims will employ an identical process except that the deadline for submissions is August 1, 2026.[109]

f) The Phase Two Baseline Testing Payments

The Phase Two Baseline Testing Payment system was created to allow PWS with no evidence of PFAS contamination prior to June 30, 2023, to conduct Baseline Testing that could help them establish eligibility for payments from the Phase Two Action Fund.[110] Although UCMR 5 requires a PWS to test for PFAS, the rule requires only that a PWS test once in its *distribution system*. The Phase Two Baseline Testing Payment system allows for more thorough testing: it allows for Phase Two Qualifying Settlement Class Members to receive a payment in the amount of $200 for *each Water Source* identified in the Phase Two Testing Compensation Claims Form.[111] Thus, Phase Two Qualifying Settlement Class Members will be able to gather far more data regarding PFAS and, critically, will be able to seek compensation for those new detections in Phase Two. Again, Eurofins Environmental Testing will provide this testing and analysis at significantly reduced rates.[112] The deadline for submitting Phase Two Testing Compensation Claims Forms is January 1, 2026, which coincides with the UCMR 5 testing deadline of December 31, 2025.[113]

2. Breakdown of Settlement Funds Paid by Defendants

[107] *Id.* at p. 9, § 4(d)(v).
[108] *Id.*
[109] *Id.* at p. 22, § 5(e)(iii).
[110] *Id.* at p. 21, § 5(c)(i).
[111] *Id.* at p. 21, § 5(c)(iii).
[112] Mitzel Prelim. App. Decl., at ¶ 4.
[113] Allocation Procedures, at p. 21, § 5(c)(ii).

As noted above, Defendants made a payment of the Settlement Amount into the Qualified Settlement Fund ("QSF") described below, which is to be divided between Phase One and Phase Two Qualifying Settlement Class Members, after deductions for all appropriate fees and costs, at a 55% /45% ratio.

After the Effective Date, the QSF Escrow Agent shall transfer five percent (5%) of the total Settlement Funds into the Supplemental Funds for the respective phases, and five percent (5%) of the total Settlement Funds into the Special Needs Funds for the respective phases.[114]

The Claims Administrator will calculate the total amount for the Phase One Action Fund after the Escrow Agent has transferred the amounts for the Phase One Special Needs Fund, the Phase One Supplemental Fund, the Inactive Impacted Water System Payments, and the Phase One Very Small Public Water System Payments into those funds.[115] The Claims Administrator will calculate the amount for the Phase Two Action Fund after the Escrow Agent has transferred the amounts for the Phase Two Special Needs Fund, the Phase Two Supplemental Fund, the Phase Two Very Small Public Water System Payments, and the Phase Two Baseline Testing Payments into those funds.[116]

D. Establishment of a Qualified Settlement Fund and Payment by Defendants

In accordance with the SA, in their Mot. for Prelim. App., Class Counsel moved for the establishment of a QSF as defined in the Defendants MSA.[117] Such Motion was granted by the Court and the QSF was established by the Escrow Agent and Special Master who were authorized

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[114] Allocation Procedures, at p. 8, § 4(c)(i), p. 9, § 4(d)(i), p. 21, 5(d)(i), p. 22, 5(e)(i); *see also,* Decl. of Matthew L. Garretson, Esq. in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and For Permission to Disseminate Class Notice [ECF No. 3393-10] ("Garretson Prelim. App. Decl."), at ¶ 7.
[115] Allocation Procedures, at p. 11, § 4(h)(i).
[116] *Id.* at pp. 23-24, § 5(h)(i).
[117] SA, at §§ 2.41, 6.2, 7.

to take all actions required and/or permitted by the SA.[118] Consistent with the SA[119] and the PAO,[120] Defendants tendered the Settlement Amount into the QSF, titled PWS-1 PFAS Water Provider Settlement Trust (hereinafter, "PWS-1 QSF"). These funds are being maintained in the PWS-1 QSF,[121] and assuming final approval, will be administered by the Special Master.[122]

E. Court Appointments

The SA contemplated that the Court would appoint four independent neutral Persons to administer the Settlement: (1) a Notice Administrator;[123] (2) a Claims Administrator;[124] (3) a Special Master;[125] and (4) an Escrow Agent.[126] Consistent with the SA's provisions, as part of the PAO, the Court ordered the following appointments:

1. Notice Administrator

The Court appointed Steven Weisbrot, of Angeion Group, LLC ("Angeion"), 1650 Arch Street, Suite 2210, Philadelphia, PA 19103, to serve as the Notice Administrator.[127] Mr. Weisbrot is the President and Chief Executive Officer of Angeion, which is a class action and claims administration firm.[128]

As set forth in his attached declaration being filed concurrently herewith as Ex. A, Mr. Weisbrot has executed the Notice Plan, which is more particularly described below.

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[118] PAO, at ¶¶ 34, 38
[119] *See* SA, at § 6.1 (noting that within ten (10) Business Days after Preliminary Approval, Settling Defendants shall pay or cause to be paid the Settlement Amount in full).
[120] PAO, at ¶ 34.
[121] *See* Huntington Private Bank Account Statement [ECF No. 3795-14]
[122] SA, at pp. 28-29, §§ 11.3-11.5.
[123] *Id.* at §§ 2.31, 8.1.
[124] *Id.* at §§ 2.7, 8.3.
[125] *Id.* at §§ 2.57, 8.7.
[126] *Id.* at §§ 2.17, 7.1.2.
[127] PAO, at ¶ 33.
[128] Declaration of Steven Weisbrot, Esq. of Angeion Group, LLC ("Weisbrot Prelim. App. Decl.")[ECF No. 3393-8], at ¶ 1.

1. Claims Administrator

Likewise, pursuant to the PAO, the Court appointed Dustin Mire of Eisner Advisory Group, 8550 United Boulevard, Suite #1001, Baton Rouge, LA 70809, to serve as Claims Administrator.[129] As the Court knows, Mr. Mire is a Partner at Eisner Advisory Group ("EisnerAmper") and in that position is responsible for the operations of EisnerAmper's settlement administration program, which includes class action administration services.[130]

Pursuant to the Notice Plan, Mr. Mire was also tasked with creating and maintaining the Settlement Website and toll-free hotline for the Settlement.[131] Consistent with these directives, Mr. Mire has set up the Settlement Website at the following URL: https://www.pfaswatersettlement.com/. Moreover, this website contains a 24-hour toll free hotline available at the following telephone number: **1-855-714-4341**. To date, the website has had over 11,500 unique visitors.

2. Special Master

In addition, the Court appointed Matthew Garretson of Wolf/Garretson LLC, P.O. Box 2806, Park City, UT 84060 to serve as the Special Master and further to be the "administrator" of the Qualified Settlement Fund escrow account within the meaning of Treasury Regulations §1.468B-2(k)(3).[132] Mr. Garretson is the co-founder of Wolf Garretson, LLC, and an attorney licensed to practice law in the State of Ohio.[133]

Generally, Mr. Garretson's role will be to supervise the Settlement, which includes overseeing the work of both the Notice Administrator and the Claims Administrator, and to

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[129] PAO, at ¶ 31.
[130] Mire Prelim. App. Decl., at ¶ 1.
[131] *Id.*, at ¶ 9.
[132] PAO, at ¶ 30.
[133] Garretson Prelim. App. Decl., at ¶ 1.

administer the QSF.[134] Mr. Garretson will also provide quasi-judicial intervention if and/or when necessary, such as for determinations (if any) related to appeals of Allocated Amounts.[135]

3. Escrow Agent

Finally, the Court appointed Robyn Griffin of Huntington National Bank, One Rockefeller Center, 10th Floor, New York, NY 10020 to serve as the Escrow Agent.[136] Ms. Griffin has over 25 years of experience in the financial sector and her Settlement Team at Huntington National Bank has over 20 years of experience acting as escrow agent on various cases, handling more than 4,500 settlements for law firms, claims administrators and regulatory agencies.[137]

In her role as Court-appointed Escrow Agent, Ms. Griffin, consistent with the PAO, has established the QSF and received and deposited the Settlement Funds.[138] Going forward, and consistent with the terms of the SA, Ms. Griffin will be responsible for: (1) maintaining the QSF; (2) ensuring all legal responsibilities are met with respect to the QSF; (3) disbursing funds from the QSF pursuant to the terms of the SA; and (4) investing the funds.[139]

F. Notice of Settlement

1. Identification of Potential Members of the Settlement Class

[134] SA, at §§ 2.57, 7.1.1, 8.8.
[135] *Id*. at § 8.8.
[136] PAO, at ¶ 32; *see also*, SA, at ¶¶ 6.2.1, 7.2.2; SA, at Ex. H, Escrow Agreement [ECF No. 3393-2](“Escrow Agreement”), *generally*.
[137] Declaration of Huntington National Bank in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement with Defendants the Chemours Company, the Chemours Company, FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E. I. DuPont de Nemours and Company m/k/a EIDP Inc. for Conditional Certification of the Proposed Settlement Class, for Approval to Notify the Settlement Class, and for Related Relief. [ECF No. 3393-16], at ¶¶ 1-3.
[138] PAO, at ¶ 34.
[139] *Id.; see also,* Escrow Agreement, § 9.

Class Counsel have endeavored to provide publicly available information identifying potential members of the Settlement Class to the Notice Administrator.[140] To this end, Class Counsel retained Rob Hesse, an environmental consultant, to assist in identifying potential members of the Settlement Class.[141]

As Mr. Hesse attests in his Declaration submitted in support of Plaintiffs' Mot. for Prelim. App., that all PWS in the United States are permitted entities that are regulated by the EPA.[142] The EPA assigns a unique identification number called a "PWSID" to each PWS and maintains a centralized database that contains an inventory of all PWS in America.[143] This database, called the Safe Drinking Water Information System ("SDWIS"), is regularly updated with classifying information about all PWS, such as the population served, activity status, owner type and primary Water Source, and it also maintains administrative contact information for each PWS.[144]

Not every PWS in the SDWIS is a member of the Settlement Class; rather, only a smaller subset of PWS falls within the Settlement Class definition based on either: (1) PFAS detection in their Drinking Water before June 30, 2023; or (2) being subject to the monitoring rules set forth in UCMR 5, or other applicable federal or state laws.[145]

Based on the publicly available information, Class Counsel and Mr. Hesse created a list of 14,165 potential Settlement Class members (the "Class List")[146]

1. The Notice Plan

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[140] Weisbrot Prelim App. Decl., at ¶ 12.
[141] Summy Prelim. App. Decl., at ¶¶ 12-13.
[142] Declaration of Rob Hesse in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and For Permission to Disseminate Class Notice [ECF No. 3393-11] ("Hess Prelim. App. Decl."), at p. 2.
[143] *Id.*
[144] *Id.*
[145] *Id.* at pp. 2-4; *see* also, SA, at § 5.1.1.
[146] Summy Prelim. App. Decl., at ¶ 13; *see also*, SA, at Ex. G, Notice Plan [ECF No. 3393-2]("Notice Plan"), *generally*.

As noted above, Mr. Weisbrot of the firm Angeion was appointed as the Notice Administrator.[147] On August, 2, 2023, as outlined in Mr. Weisbrot's accompanying Declaration, Angeion "received the Class List of 14,165 eligible Settlement Class Members," which included water district's and sewage plant's contact information obtained from U.S. EPA's Safe Drinking Water Information System ("SDWIS").[148] On September 11, 2023, two additional entities were provided to Angeion that were added to the Class List of Eligible Settlement Class Members.[149]

Using the contact information provided, "Angeion analyzed the Class List and processed the mailing addresses through the United States Postal Service's ("USPS") National Change of Address database and Coding Accuracy Support System ("CASS"), which provides updated addresses for entities that have moved in the previous four years and filed a change of address with USPS and standardizes address information to maximize mailed Notice deliverability."[150]

In addition to mail being posted by way of USPS, Angeion likewise employed email notice to 9,129 Settlement Class Members.[151]

Consistent with the Notice Plan, Angeion also employed a media campaign strategy in both print and digital media.[152] In particular, Angeion caused the Summary Notice to be published in key industry-specific titles, such as Journal AWWA, The Municipal, Water Environment & Technology, AWWA Opflow, and the AWWA Source Book,[153] and in national publications such as the Wall Street Journal, USA Today National Edition and the New York Times.[154] The

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[147] PAO, at ¶¶ 33.
[148] Weisbrot Final App. Decl., at ¶ 4.
[149] *Id*. at ¶ 7.
[150] *Id*. at ¶ 8.
[151] *Id*. at ¶¶ 20-21.
[152] *Id*. at ¶ 26.
[153] *Id*. at ¶ 27.
[154] *Id*. at ¶ 28.

Summary Notice was also published digitally via the websites and digital circulars of key industry-specific organizations and publications, such as the American Water Works Association, National Rural Water Association, The Municipal, Water Environment & Technology, and Water Quality Association.[155]

In addition, Angeion worked with the Court-appointed Claims Administrator to establish the Settlement website and a toll-free hotline for Settlement Class members.[156] Angeion also "caused a paid search campaign on Google to help drive Settlement Class Members who are actively searching for information about the Settlement to the dedicated Settlement website."[157] Finally, "[o]n September 5, 2023, Angeion caused a press release to be distributed over PR Newswire's national and public interest circuits to further disseminate information about the Settlement." "A second press release was issued on October 18, 2023, before the Objection and Opt Out deadlines."[158]

In sum, "Angeion analyzed the Notice delivery results and determined that as of October 31, 2023, of the 14,167 Settlement Class Members; 7,966 (56.2%) had Notice successfully delivered by certified mail and email, 4,226 (29.8%) had Notice successfully delivered through certified mail only and, 1,328 (9.4%) had Notice successfully delivered through email only."[159] "Collectively, this represents 95.4% of the 14,167 Settlement Class Members included on the Class List, having Notice successfully delivered."[160] These efforts, combined with the "comprehensive media plan," "reminder postcard and email notice along with 2 nationwide press

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[155] *Id*. at ¶ 29.
[156] *Id*. at ¶¶ 7-8.
[157] *Id*. at ¶ 30.
[158] *Id*. at ¶ 31.
[159] *Id*. at ¶ 32.
[160] *Id*.

releases is the best notice that is practicable under the circumstances and fully comports with due process,"[161] pursuant to FED. R. CIV. P. 23.

G. Objections and Exclusion Rights

1. Objections

Any Settlement Class Member had the right to file an Objection to the Settlement or to an award of fees or expenses to Class Counsel with the Clerk of the Court.[162] The requirements for the written and signed Objection and service obligations are set forth in the Settlement Agreement in the PAO and on the www.pfaswatersettlement.com website, including the requirement that the person objecting be legally authorized to object on behalf of the Settlement Class Member.[163] Any Settlement Class Member who fails to comply with the provisions of SA 9.6, as approved in the PAO, waives and forfeits any and all objections to the Settlement Class Member may have asserted.[164]

Pursuant to the PAO, the original final date for the objection period was November 4, 2023;[165] however, that date was then extended to November 11, 2023.[166] As discussed below, there were only twenty-three (23) filed Objections to the Settlement, which includes seventeen (17) filed by the same law firm.

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[161] *Id*.
[162] SA §§ 2.33, 9.6-9.6.5; *see also*, PAO, at ¶¶ 19-24.
[163] SA § 9.6.1; *see also*, PAO, at ¶ 20.
[164] *Id*. at 9.6.4; *see also*, PAO, at ¶ 23.
[165] PAO, at ¶ 21.
[166] Order Related to Civil Action No. 2:23-cv-3230-RMG, dated Oct. 26, 2023 [ECF No. 3862], p. 3.

Importantly, the filing of an Objection does not "opt out" or exclude a Settlement Class Member from the Settlement Class, which can only be accomplished by filing and serving a "Request for Exclusion" as discussed in the next section.[167]

1. Requests for Exclusion ("Opt-Outs")

Any Settlement Class Member may opt out of the Settlement by serving a written and signed "Request for Exclusion" on the Notice Administrator, Claims Administrator, Defendants' Counsel, and Class Counsel.[168] The requirements for the Request are set forth in the Settlement Agreement and the PAO and included on the Settlement website. "To be effective, the Request for Exclusion must certify, under penalty of perjury in accordance with 28 U.S.C. § 1746, that the filer has been legally authorized to exclude the Person from the Settlement and must: (a) provide an affidavit or other proof of the standing of the Person requesting exclusion and why they would be a Settlement Class Member absent the Request for Exclusion; (b) provide the filer's name, address, telephone and facsimile number and email address (if available); (c) provide the name, address, telephone number, and e-mail address (if available) of the Person whose exclusion is requested; and (d) be received by the Notice Administrator no later than the date specified in Paragraph 15 of the PAO.[169] No "mass," "class," "group," or otherwise combined Request for Exclusion shall be valid, and no Person within the Settlement Class may submit a Request for Exclusion on behalf of any other Settlement Class Member.[170]

Any person that submits a timely and valid Request for Exclusion shall not: (i) be bound by any orders or judgments effecting the Settlement; (ii) be entitled to any of the relief or other benefits provided under the Settlement Agreement; (iii) gain any rights by virtue of the Settlement

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[167] SA § 9.6.5; *see also*, PAO, at ¶ 24.
[168] SA §§ 2.46, 9.7-9.7.5; *see also*, PAO, at ¶¶ 15-17.
[169] PAO, at ¶ 17; *see also*, SA, at § 9.7.1.
[170] SA § 9.7.5; *see also*, PAO, at ¶ 17.

Agreement; or (iv) be entitled to submit an Objection.[171] Any Settlement Class Member that fails to submit a timely and valid Request for Exclusion submits to the jurisdiction of the Court and, unless the Settlement Class Member submits a valid Objection, shall waive and forfeit any and all objections the Settlement Class Member may have asserted.[172]

Pursuant to the PAO, the Court set the deadline for submission of Requests for Exclusion to be ninety (90) calendar days after commencement of dissemination of Notice.[173] "The last day of the opt out period is December 4, 2023."[174]

H. Termination of the Settlement

Defendants have the option to withdraw from the proposed Settlement and terminate the Settlement Agreement if a certain percentage of Settlement Class Members—broken down by PWS category—decide to opt out of the Settlement.[175] Defendants must notify Class Counsel of their intent to exercise this termination right within fourteen (14) business days after the deadline for submitting Requests for Exclusion.[176] If Defendants do not provide notice before this deadline, their right to terminate shall be waived.[177] Any disputes about Defendants' termination right will be submitted to the Court for a final, binding, and non-appealable decision.[178]

I. Release of Claims, Covenants Not to Sue, and Dismissal

After Settlement Class Members are notified and the time period for Opt-Out requests and Objections expires, if the Court grants Final Approval of the Settlement, then all Settlement Class

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[171] SA § 9.7.3.
[172] SA § 9.7.4; *see also*, PAO, at ¶ 17.
[173] PAO, at ¶ 16.
[174] *Id.*
[175] SA §§ 10.1-10.5; *see also*, PAO, at ¶ 18.
[176] SA § 10.3; *see also*, PAO, at ¶ 18.
[177] SA § 10.3.
[178] SA § 10.5.

Members who do not request exclusion from the Settlement Class will be deemed to have released all claims as set forth in the Settlement Agreement against Defendants that fall within the definition of Released Claims in SA 12.1.1, agree not to institute any Released Claims in the future, and, for those Settlement Class Members with pending Litigation, agree to dismiss their Released Claims with prejudice.[179] Notably, the parties have provided a Joint Interpretive Guidance document describing the appropriate interpretation of the release provisions in the Settlement Agreement.

J. Payment of Attorneys' Fees and Litigation Costs and Expenses

On October 15, 2023, Class Counsel filed its Motion for Attorneys' Fees and Costs. Pursuant to that motion, Class Counsel requested 8% of the Settlement Amount, or $94,800,000 in Class Counsel Fees.[180] In addition, Class Counsel requested $2,136,213.21 in Class Costs, which represents approximately 10% of the total Class Costs to date. Moreover, Class Counsel requested that the CMO 3 holdback not apply to the Defendants' PWS Settlement, but rather that the Class Fee and Class Costs be granted.[181] No Objections were filed regarding Class Counsel's request for attorneys' fees and costs.

IV. ARGUMENT

Plaintiffs respectfully submit that the Court should grant certification of the Settlement Class and grant final approval of the Settlement. This section first discusses the policy favoring settlements and the standards for approval of class settlements. It then demonstrates that the

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[179] Should a Settlement Class Member believe it has a claim that is preserved under SA § 12.1.2(a) or 12.1.3(y), it shall execute a stipulation of partial dismissal with prejudice in the form annexed as Exhibit L to the Settlement Agreement within thirty (30) calendar days of the Effective Date of the Settlement. SA § 12.1-12.3. Failure to do so will result in the dismissal of such Litigation by operation of the Order Granting Final Approval with prejudice to the extent it contains a Released Claim and without prejudice to the extent it contains a claim that is preserved under SA § 12.1.2(a) or 12.1.3(y). *Id.*
[180] Mot. for Attorneys' Fees, at 1-3, 7-8, 12-14, 58, 76-78.
[181] *Id*. at 8-9, 78.

requirements for certification of a settlement class have been met. Next, it explains why the proposed Settlement is fair, reasonable, and adequate. Finally, it demonstrates that the small number of Objections supports approval of the Settlement and that, in any event, the Objections are meritless.

A. Settlements of Complex Class Actions Are Favored.

In determining whether to approve the Settlement, the Court should be guided by the strong judicial policy favoring pretrial settlement of claims in complex class action lawsuits. *See, e.g.*, *S.C. Nat. Bank v. Stone,* 749 F. Supp. 1419, 1423 (D.S.C. 1990) ("The voluntary resolution of litigation through settlement is strongly favored by the courts."), citing *Williams v. First National Bank,* 216 U.S. 582 (1910); *Reed v. Big Water Resort, LLC*, 2016 U.S. Dist. LEXIS 187745, at *14 (D.S.C. May 26, 2016) (same); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). The policy favoring settlement exists, in part, because of the complexity and size of class actions:

> In the class action context in particular, "there is an overriding public interest in favor of settlement" [ ] of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources.

S.C. Nat. Bank, 749 F. Supp. at 1424, (quoting*, Armstrong v. Bd. Of School Directors,* 616 F.2d 305, 313 (7th Cir. 1980)); *In re LandAmerica 1031 Exch. Servs. Inc. Internal Revenue Service §1031 Tax Deferred Exch. Litig. (MDL 2054)*, 2012 U.S. Dist. LEXIS 97933 at *13-14 (D.S.C. July 12, 2012) ("'[t]he voluntary resolution of litigation through settlement is strongly favored by the courts and is 'particularly appropriate' in class actions."); *Cotton*, 559 F.2d at 1331 ("In these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources."). *See also Crandell v. U.S.*, 703 F.2d 74, 75 (4th Cir. 1983) ("Public policy, of course, favors private settlement of disputes.").

This preference for settlement also exists, in part, because of the enormous time and resources necessary to resolve complex cases.

> Complex litigation – like the instant case – can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly evasive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements in all types of litigation, not just class actions.... Although class action settlements require court approval, such approval is committed to the sound discretion of the district court.

In re U.S. Oil & Gas Litig., 967 F.2d 489, 493-94 (11th Cir. 1992) (citations omitted). The Eleventh Circuit's analysis is directly applicable here; this complex case has been ongoing for almost 5 years.

B. Standards for Approval of Class Settlements.

Initially, for a class action settlement to be approved, the class settlement must satisfy the requirements of class certification pursuant to Fed. R. Civ. 23(a) and (b). Specifically, Rule 23(a) requires that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As determined by *Amchem*, the issue of class management is not relevant for purposes of certifying the Class in the context of a settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Because the Settlement Class satisfies all the criteria under Rule 23(a) and Rule 23(b)(3), the instant motion should be granted.

In addition, the class action settlement must be fair, reasonable and adequate. *See 1988 Trust for Allen Children Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022). Determining the fairness of class settlements is left to the sound discretion of the district court. *Id*. In the Fourth Circuit, "the court 'act[s] as a fiduciary of the class.'" *Id*., quoting *Sharp Farms v. Speaks*, 917 F.3d 276, 293 (4th Cir. 2019). As a fiduciary, the district court has a "responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *Farms*, 917 F.3d at 294 (quoting *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (cleaned up)). "The fairness analysis is intended primarily to ensure that a 'settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion.'" *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015), quoting, *In re Jiffy Lube Secs. Litig.,* 927 F.2d 155, 159 (4th Cir. 1991). In addition to this procedural consideration of the fairness of the negotiations, the Court also considers the "adequacy of the consideration to the class." *Commissioners of Pub. Works of City of Charleston v. Costco Wholesale Corp. (Commissioners II)*, No. 2:21-cv-42, 2022 WL 214531, at *4 (D.S.C. Jan 24, 2022) (Gergel, J.). *See generally*, Fed. R. Civ. P. 23(e)(2), Advisory Committee Note to 2018 Amendment (noting that each circuit "has developed its own vocabulary for expressing these concerns" which are not "displaced," but should focus on the "core concerns" addressing "primary procedural considerations and substantive qualities").

The proponents of the class settlement bear the burden of demonstrating that the settlement is fair, reasonable, and adequate. *1988 Trust*, 28 F.4th at 521 (recognizing that parties propounding settlement bear "the initial burden to show that the proposed class meets the Rule 23(a) requirements for certification and that a proposed settlement is fair, reasonable, and adequate").

However, in the absence of contrary evidence, there is a "presumption of fairness" after preliminary approval. *Commissioners*, 2022 WL 214531, at *2.

To analyze a class settlement for fairness in the Fourth Circuit, this Court applies the criteria of Rule 23(e)(2) as well as the *Jiffy Lube* factors, which substantially overlap with Rule 23(e). *Commissioners II*, 2022 WL 214531, at *5. "The Fourth Circuit has set forth the factors to be used in analyzing a class settlement for fairness: (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue." *Id*. (citing *Jiffy Lube*, 927 F.2d at 158-59). The *Jiffy Lube* court also provided an additional five factors to evaluate the adequacy of the settlement: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Id*. at 159.[182]

As discussed below, the proposed Settlement satisfies the elements of Rule 23 (a) and (b)(3) and each of the Rule 23(e)(2) *Jiffy Lube* factors.

C. The Requirements of Rule 23(a) and 23(b)(3) Are Satisfied

1. The Requirements of Rule 23(a) Are Met.

The Settlement Class satisfies the requirements for final class certification under Rule 23(a), because it meets the following requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. 23(a). The Fourth Circuit also recognizes that "Rule 23 contains an implicit threshold requirement that the members of a

[182] The Rule 23(e)(2) factors are set forth *infra* at §§ IV.B and D.

proposed class be readily identifiable" or ascertainable. *Peters v. Aetna Inc.*, 2 F.4th 199, 241–42 (4th Cir. 2021) (internal citations omitted); *see also, Commissioners of Pub. Works of City of Charleston v. Costco Wholesale Corp. (Commissioners I)*, 340 F.R.D. 242, 247 (D.S.C. 2021) (Gergel, J.).

a) The Settlement Class Members Are Readily Ascertainable.

The Fourth Circuit has imposed a non-textual condition that "a class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654–55 (4th Cir. 2019). This requirement is often called "ascertainability" where "[t]he goal is not to identify every class member at the time of certification, but to define a class in such a way as to ensure that there will be some administratively feasible [way] for the court to determine whether a particular individual is a member at some point." *Id.* at 658 (internal quotation marks omitted). This requirement will be met so long as the putative class is able to be "identified on a large-scale basis, and notified of the class action accordingly." *Id.*

As detailed above, the proposed Settlement Class meets this requirement because the putative Settlement Class Members are objectively described, and many are readily identifiable, ascertainable by reference to publicly available information and, if necessary, confirmatory testing results.

b) Rule 23(a)'s Numerosity Requirement Is Satisfied.

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While this requirement was "easily satisfied" for a class of 14,000 public sewer system operators, *Commissioners I,* 340 F.R.D. at 247, the Fourth Circuit has also found it satisfied for much smaller classes. *See, e.g., Williams v. Henderson*, 129 Fed.

App'x 806, 811 (4th Cir. 2005) (30 class members). The large number of PWS and their disparate locations alone make joinder an unrealistic option in this case, thereby confirming the impracticality of resolving their claims without use of the class action device.

Thus, the proposed Settlement Class, projected to be over 14,000 PWS, easily satisfies Rule 23(a)'s numerosity requirement, and no objector has argued otherwise. The Court should confirm its preliminary finding of numerosity. *See Commissioners II*, 2022 WL 214531, at *3.

c) Rule 23(a)'s Commonality Requirement Is Satisfied.

Under Rule 23(a)(2), a district court may certify a class only when "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The key inquiry for evaluating commonality is whether a common question can be answered in a class-wide proceeding such that it will "drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "The commonality requirement – at least as it relates to a settlement class – is 'not usually a contentious one: the requirement is generally satisfied by the existence of a single issue of law or fact that is common across all class members and thus is easily met in most cases.'" *Commissioners I*, 340 F.R.D. at 247-248. "What matters to class certification … is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S at 350 (emphasis in original). Thus, even a single common question is sufficient to meet this Rule 23(a) requirement. *Id.* at 359.

This Court found the commonality requirement was met in a class action where public sewer operators alleged that the manufacturers of flushable wipes knew that their wipes were not actually "flushable," failed to warn consumers, and caused harm to sewer systems. *Commissioners I,* 340 F.R.D. at 247. In that case, this Court found that common questions existed "such as whether

'Defendants mislabel their flushable wipes so as to have consumers believe that their flushable wipes will not cause harm to sewer systems in their area' and 'whether Defendants' flushable wipes cause adverse effects on STP Operators' systems.'" *Id.*

The same analysis supports a finding of commonality here. All of Plaintiffs' claims arise from the same allegations that Defendants knew of the environmental and potential human health risks associated with exposure to PFAS, yet continued to develop, manufacture, distribute, and sell PFAS and products containing PFAS.[183] Likewise, Plaintiffs and the preliminarily approved Settlement Class Members have all alleged that Defendants failed to warn users, bystanders, or public agencies of these risks associated with their products that contained PFAS.[184] Plaintiffs and the Settlement Class Members' claims arise out of a common core of salient facts relevant to Defendants, and Defendants' potential liability to Plaintiffs. Moreover, the preliminarily approved Settlement Class is grounded in substantially similar legal theories. For this reason, Rule 23(a)'s commonality requirement is satisfied here. The Court should confirm its preliminary finding of commonality. *See Commissioners II*, 2022 WL 214531, at *3.

d) Rule 23(a)'s Typicality Requirement Is Satisfied.

Typicality requires that the proposed class representatives' claims be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied if a proposed class representative's claim is not "so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp.,* 436 F.3d 461, 466–67 (4th Cir. 2006). Still, courts have emphasized that this "is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical

[183] Compl. at ¶¶ 103-134.
[184] *Id*. at ¶¶ 106, 121, 262, 289, 308, 322-347.

or perfectly aligned." *Id*. at 467. Rather, typicality is satisfied where there is "a sufficient link" between a representative plaintiff's claims and those of absent class members where both allegedly suffered damages caused by the same product, arise out of the same alleged course of conduct by defendant, and are based on identical legal theories. *Commissioners I,* 340 F.R.D. at 247-48. At bottom, the requirement of typicality is not difficult to satisfy. *See, e.g., Soutter v. Equifax Info. Servs., LLC*, 498 F. App'x 260, 264 (4th Cir. 2012) (noting that while a representative's "interest in prosecuting her own case must … tend to advance the interests of the absent class members"); *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 272 n.4 (3d Cir. 2021) (noting that there is "a low threshold for typicality" (quoting *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 428 (3d Cir. 2016)); *Postawko v. Mo. Dep't of Corrs.*, 910 F.3d 1030, 1039 (8th Cir. 2018) (typicality "is fairly easily met so long as other class members have claims similar to the named plaintiff") (quoting *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)); *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (noting that the test for typicality "is not demanding"). As all class members have the same basic interest, a class representative's claims do not need cover every type of claim that the class could bring and "need not be perfectly identical to the claims of the class." *Soutter*, 498 F. App'x at 264 (cleaned up); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006) (same).

In *Soutter*, the Fourth Circuit explained that the typicality analysis involves examining the elements of a class representative's claims, the facts supporting those elements, and "the extent to which those facts would also prove the claims of the absent class members." 498 F. App'x at 264 (cleaned up). Again, the representative's claim "need not be perfectly identical." *Id.* Instead, under Rule 23's "permissive standards," typicality will be satisfied where the representative's claims are

"reasonably coextensive with those of absent class members." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)).

Here, Plaintiffs have asserted claims that are undoubtedly typical of those of the Settlement Class Members they seek to represent. To start, Plaintiffs, like the Settlement Class Members, are PWS that have asserted claims for actual or threatened injuries caused by PFAS contamination.[185] In addition, Plaintiffs and the Settlement Class Members rely on the same common core of facts to allege that Defendants knowingly sold defective PFAS and failed to warn of those defects, leading to the actual or threatened contamination of their respective Water Sources.[186] Plaintiffs and the Settlement Class Members also assert a common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating their Water Sources, either to monitor for PFAS contamination or to remediate existing PFAS contamination from their Drinking Water.[187] Lastly, like the Settlement Class Members, Plaintiffs allege that Defendants engaged in a scheme to fraudulently transfer assets to avoid potential liability for their role in manufacturing and selling PFAS and products containing PFAS.[188]

Because Plaintiffs' and the Settlement Class Members' claims arise out of the same course of conduct by Defendants, are based on identical legal theories, and assert similar damages, Rule 23(a)'s typicality requirement is satisfied. *Commissioners I*, 340 F.R.D. at 247. The Court should confirm its preliminary finding of typicality. *See Commissioners II*, 2022 WL 214531, at *3.

e) Rule 23(a)'s Adequacy of Representation Requirement Is Satisfied.

[185] Compl. at ¶¶ 14-16, 246-252; SA § 5.1.1.
[186] *Id*. at ¶¶ 103-134, 246-252, 262-264, 289, 308, 322-347.
[187] *Id*. at ¶¶ 14-16.
[188] *Id*. at ¶¶ 135-228, 381-407.

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Determining adequacy of representation, therefore, requires the Court to determine: (1) whether the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the entire class." *Parker v. Asbestos Processing, LLC*, No. 0:11-cv-01800-JFA, 2015 U.S. Dist. LEXIS 1765, at *24 (D.S.C. Jan. 8, 2015) (citations omitted). The adequacy-of-representation requirement is satisfied here because the Class Representatives have no interests antagonistic to the interests of the Settlement Class. With respect to counsel, this Circuit has expressed, "in terms of adequacy of representation, there are two requirements, lack of conflicts and class counsel's competency." *1988 Trust for Allen Children v. Banner Life Ins. Co.*, 28 F.4th 513, 524 (4th Cir. 2022). Class Counsel Michael London, Scott Summy, Joseph Rice, and Elizabeth Fegan have no conflicts of interest with the Class, and a single absent class member alleges Class Counsel Paul Napoli might have a conflict of interest.[189] Further, Plaintiffs and Class Counsel have demonstrated a willingness and ability to vigorously prosecute the class claims as set forth in detail above. Lastly, Class Counsel have extensive experience in class actions, have zealously prosecuted the class claims in this litigation, and obtained impressive results in this MDL by way of this Settlement. *See, e.g.*, *Campbell,* 2021 U.S. Dist. LEXIS 16470, at *16. For all these reasons, the proposed Settlement satisfies Rule 23(a)'s adequacy of representation requirement.

2. Rule 23(b)(3) is Satisfied.

[189] Attached as Ex. B is Class Counsel Paul Napoli's declaration addressing the City of Newburgh's objection ("Napoli Newburgh Decl.").

In addition to the requirements of Rule 23(a), the Settlement Class must also satisfy the predominance and superiority requirements of Rule 23(b)(3), other than manageability for trial. "An acceptable type of class provided for by Rule 23(b) is where the class is superior to other methods of adjudication because common questions of law or fact predominate over those of individual class members ('superiority requirement')." *Campbell*, 2021 U.S. Dist. LEXIS 16470, at *5.

Because a chief justification for class actions is efficiency, courts "must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." *Campbell*, 2021 U.S. Dist. LEXIS 16470 at *5-6 (citing 7AA Wright & Miller, Fed. Practice and Procedure § 1779 (3d ed. 2005)). Where common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Stillmock v. Weis Markets, Inc.,* 385 Fed. Appx. 267, 273 (4th Cir. 2010) (cleaned up).

Here, the common questions discussed above clearly predominate over any individual questions that the Settlement Class Members may have. Again, Plaintiffs and the Settlement Class Members are PWS that claim to have been injured by a common course of conduct that resulted in substantially similar damages to Plaintiffs and the putative Settlement Class Members. It would make no sense to decide these identical, overarching issues 14,000+ times. And while certain individual issues, such as damages, may exist for some Settlement Class Members, the nature and scope of the common questions in this case satisfy Rule 23(b)(3)'s predominance requirement.

In addition to efficiency, the Fourth Circuit recognizes other factors that favor class treatment over individual cases. These factors include the absence of a strong interest for the

Settlement Class Members to pursue individual litigation, particularly when considering the expense, burden, risk, and length of trial and appellate proceedings involved. *See Stillmock,* 385 Fed. Appx. at 275. Here, these concerns favor class treatment—and thus satisfy Rule 23(b)(3)'s superiority requirement—because there is a "sufficient desirability to concentrate the litigation in the forum given its familiarity with the relevant issues as the transferee Court." *Campbell*, 2021 U.S. Dist. LEXIS 16470, at *13. Another factor considered by the Fourth Circuit is whether class certification promotes consistency of results, which is not only applicable here but provides Defendants with the finality and repose they desire in pursuing a global resolution of its liability to PWS. *Gunnells v. Healthplan Servs.,* 348 F.3d 417, 429 (4th Cir. 2003) (in contrast to a class action proceeding, individual actions make a defendant vulnerable to the asymmetry of collateral estoppel). Finally, manageability concerns that would arise at trial are irrelevant because this is a settlement. *Amchem,* 521 U.S. at 620. All of these salutary benefits of a class action apply here.

* * *

In sum, the Settlement satisfies all the criteria necessary for class certification under Rules 23(a) and (b)(3).

D. Rule 23(e)(2) and the *Jiffy Lube* Factors Support Granting Final Approval of the Settlement.

Federal Rule of Civil Procedure 23(e)(2) requires that the district court determine a proposed class settlement is fair, reasonable and adequate prior to granting approval of the settlement. To that end, in 1991 the Fourth Circuit in *Jiffy Lube* articulated four factors that a court should consider when making a fairness determination. *Jiffy Lube*, 927 F.2d at 158-59 (quoted above). It also articulated an additional five factors to evaluate the adequacy of the settlement. *Id.* at 159 (quoted above).

In 2018, Rule 23(e)(2) was amended to specify factors (in addition to those articulated by each Circuit) that a court should consider when determining if a proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Specifically, a court should consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement [made in connection with the proposal, which is] required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.[190]

An analysis of these relevant factors overwhelmingly favors final approval of the Settlement before the Court.[191]

1. The Class Representatives and the Undersigned Class Counsel Have Adequately Represented the Class (Rule 23(e)(2)(A)).

[190] Fed. R. Civ. P. 23(e)(2) ; s*ee also, In re: Lumber Liquidators Chinese Manufactured Flooring Prods. Marketing, Sales Pract. and Prods. Liab. Litig*., 952 F.3d 471, 484 n. 8 (4th Cir. 2020) (reaffirming the *Jiffy Lube* factors while noting that the elements listed in the 2018 amendment to Rule 23(e)(2) differ from the Court's considerations but "almost completely overlap").

[191] Because the Rule 23(e)(2) factors overlap to a great extent with the *Jiffy Lube* factors, Plaintiffs have grouped together those factors that overlap or are interrelated.

As discussed above, the Class Representatives and Class Counsel are highly qualified to represent the interests of the Settlement Class. The Class Representatives are familiar with the Claims in this Litigation and they strongly support its approval as fair, reasonable, and adequate. In particular, and as attached hereto, Phase One Class Representatives declared that "the proposed settlement is fair, adequate, and reasonable and recommend[] that the Court approve[s]" the settlement because it "provides appropriate relief for Phase One Class members."[192] Phase Two Class Representatives likewise declare that "the proposed settlement is fair, adequate, and reasonable and recommend[] that the Court approve[s]" the settlement because it "provides appropriate relief for Phase Two class members."[193] The mediator, retired Judge Layn Phillips, has also confirmed the excellent results achieved due to Class Counsel's effective representation.[194]

Further, Class Counsel not only possess the experience with which to conduct the litigation and assess any settlement resolution; having been so intimately involved with the litigation for such a long time, they were fully apprised of all the relevant facts necessary to meaningfully and intelligently negotiate a class resolution of Plaintiffs' Claims. *See generally* Adv. Committee

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[192] *See e.g.*, Phase One Class Representative Declarations in Support of Class Counsel's Motion for Final Approval of Class Action Settlement, including: Declaration of California Water Service Company, at ¶ 8; Declaration of the City of Camden, at ¶ 8; Declaration of City of Freeport, Illinois, at ¶¶ 8-9; Declaration of the City of Sioux Falls, at ¶ 8; Declaration of Coraopolis Water and Sewer Authority, at ¶ 8; Declaration of Dalton Farms Water System Owned and Operated by the Dutchess County Water and Waste Water Authority, at ¶ 8; Declaration of Martinsburg Municipal Authority, at ¶ 8; Declaration of Seaman Cottages, at ¶¶ 8-9; Declaration of the Township of Verona, at ¶ 8; Declaration of Village of Bridgeport, at ¶ 8; Declaration of City of Brockton, Massachusetts; and Declaration of City of Benwood, at ¶ 8, being filed concurrently herewith as Exs. C, D, E, F, G, H, I, J, K, L, M, and N, respectively.

[193] *See e.g.*, Phase Two Class Representative Declarations in Support of Class Counsel's Motion for Final Approval of Class Action Settlement, including: Declaration of Niagara County, at ¶ 8; Declaration of Pineville, at ¶ 7, being filed concurrently herewith as Exs. O and P, respectively.

[194] Declaration of Court-Appointed Mediator Layn Phillips in Support of Prelim. App. Mot. [ECF No. 3393-6] ("Phillips Prelim. App. Mot. Decl."), at ¶¶ 20-23.

Notes, 2018 Amendments to Rule 23(e)(2)(A), (B) (court should consider, in part, "whether counsel negotiating on behalf of the class had an adequate information base"). This is strongly supported by the fact that Plaintiffs were fully prepared to try the first bellwether trial when the Settlement was announced. Given this timing, Plaintiffs had extensive information with respect to the value of the Settlement and the Allocated Amounts and were able to weigh those amounts against any potential recovery at trial[195] while taking into consideration all relevant risks associated with continuing litigation, including the uncertainty of jury verdicts, trials generally, appeals and solvency issues. In addition, continued litigation would likely also include significant scientific and evidentiary hurdles, including challenges in establishing product identification given PFOA's ubiquitous nature, and overcoming the telomer Defendants' general defense that telomer AFFFs do not degrade to PFOA in the environment. As the Court knows, these were among the linchpin defenses of the Telomer Defendants.

For illustrative purposes only, at the *Stuart* trial, Plaintiff's counsel intended to proffer evidence that the compensatory damages associated with Stuart's Drinking Water claims were $76,750,290.00.[196] Assuming Plaintiff was fully successful at trial, then as it pertains to Drinking Water claims only, Plaintiff could have expected $76,750,290.00 in compensatory damages. Of course, this represents the combined total of Plaintiff's compensatory damages across all of the named defendants against whom Plaintiff intended to proceed to trial, which included, DuPont, National Foam, Inc., Kidde-Fenwal, Inc. and the 3M Company.[197] Moreover, testimony at trial would have established that the total Telomer Defendant contribution in *Stuart* was approximately

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[195] Douglas of Gary J. Douglas in Support of Class Counsel's Motion for Final Approval of Class Settlement, for Final Certification of the Settlement Class, and in Response to Objections, at ¶¶ 6-13, being filed concurrently herewith, attached as Ex. Q.
[196] *Id*. at ¶ 9.
[197] *Id*. at ¶ 6.

4.5% ("Telomer Contribution").[198] Even assuming Defendants were held 100% responsible for the Telomer Contribution,[199] this would have resulted in Defendants being responsible for $3,453,763.05 in compensatory damages for Stuart's Drinking Water claims.[200] The allocation of fault attributable to Defendants is information to which Class Counsel was privy when negotiating the Settlement.[201]

Given the foregoing, this consideration weighs in favor of finding that the Settlement is fair, reasonable and adequate.

2. The Proposal Was Negotiated at Arm's Length (Rule 23(e)(2)(B)) and There is No Existence of Fraud or Collusion Behind the Settlement (*Jiffy Lube* Fairness Factor 3).

The Settlement is the product of vigorous arm's-length negotiations between Settlement Class Counsel and Defendants. The Settlement was achieved through court-ordered mediation that was conducted by an experienced mediator.[202] *See generally* Adv. Committee Notes, 2018 Amendments to Rule 23(e)(2)(A), (B) ("[T]he involvement of a neutral or court-affiliated mediator ... may bear on whether [negotiations] were conducted in a manner that would protect and further the class interests").

From the time the parties first began to informally discuss settlement in the Summer of 2020, Class Counsel continued to vigorously prosecute the PWS claims brought against Defendants and the other MDL defendants, which led to negotiations between the parties that were

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[198] *Id*. at ¶ 7.
[199] *Id*. at ¶ 10.
[200] *Id*.
[201] *Id*. at ¶ 11.
[202] *See generally* Phillips Prelim. App. Mot. Decl.; *see also* Summy Prelim. App. Mot. Decl., at ¶¶ 17-23.

difficult, protracted, and often highly contentious.[203] With ups and downs, there was rarely longer than ninety (90) days that went by without some negotiations going forward.[204]

This continued after Judge Phillips was appointed by the Court in October 2022 to mediate the parties' negotiations, and Judge Phillips played a crucial role in supervising the negotiations, assisting in evaluating the strengths and weaknesses of the parties' respective positions and bridging the wide gaps in said positions.[205] And even as Judge Phillips oversaw multiple telephone, video conference and in-person mediation sessions, the negotiations remained difficult and contentious.[206] Indeed, it was the mediator's own proposal that finally resulted in a meeting of the minds after protracted, intensive negotiations. And even after the parties reached the MOU, the negotiations continued as the parties worked to hammer out the details of the final SA.

The adversarial nature of the negotiations and the aid provided by Judge Phillips are factors that weigh in favor of final approval. *S.C. Nat. Bank v. Stone*, 139 F.R.D. 335, 345-46 (D.S.C. 1991) (although supervision "is not mandatory in order to determine a settlement is fair, such participation can insure that the parties will negotiate in good faith without collusion."); *Robinson v. Carolina First Bank NA*, 2019 U.S. Dist. LEXIS 26450, *27 (D.S.C. Feb. 14, 2019) ("supervision by a mediator lends an air of fairness to agreements that are ultimately reached"); Fed. R. Civ. P. 23(e)(2)(B).

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[203] *See generally* Summy Prelim. App. Mot. Decl., London Prelim. App. Mot. Decl., and Phillips Prelim. App. Mot. Decl.
[204] Summy Prelim. App. Mot. Decl., at ¶ 18.
[205] *Id*. at ¶¶ 10, 17, 23; *see also* London Prelim. App. Mot. Decl., at ¶ 22, and Phillips Prelim. App. Mot. Decl., at ¶¶ 9-19.
[206] Phillips Prelim. App. Mot. Decl., at ¶ 19.

In addition, courts have held that where "the amount of the [attorneys'] fee is left entirely to the Court's discretion," as is the case here,[207] "the possibility of collusion among counsel" is "exponentially decrease[d]." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 845 (E.D. La. 2007). As Judge Fallon explained in *Murphy Oil*, "[b]ecause the parties have not agreed to an amount or even a range of attorneys' fees, and have placed the matter entirely into the Court's hands for determination, there is no threat of the issue explicitly tainting the fairness of settlement bargaining." *Id*. (citation omitted.").

For these reasons, this consideration weighs in favor of finding that the Settlement is fair, reasonable and adequate.

3. The Relief Provided is Fair, Reasonable, and Adequate, Taking Into Account the Costs, Risks, and Delays of Trial and Appeals (Rule 23(e)(2)(C)(i)).

Under the terms of the Settlement Agreement and the PAO, Defendants paid $1,185,000,000, which was deposited into a Court-approved QSF to be distributed to Settlement Class Members.[208] Following appropriate deductions for any forthcoming Court-approved fees and costs, those funds will be allocated equitably among the Settlement Class Members under the Allocation Procedures, which rely principally on flow rates and degree of PFAS contamination in each system to calculate the final Allocated Amount.[209] The Settlement Amount will help, in part, to ameliorate the costs faced by PWS in developing and implementing necessary, cost-effective systems to treat the water sources contaminated by Defendants' PFAS. Whether the Settlement Agreement is adequate requires weighing "the cost and risk involved in pursuing a litigated

[207] Mot. for Attorneys' Fees, §§ IV.A and V; *see also* Declaration of Brian T. Fitzpatrick in Support of Mot. for Attorneys' Fees [ECF 3795-5] ("Fitzpatrick Fee Decl."), at ¶ 12, and SA § 11.2.
[208] SA §§ 2.41, 2.50, 3.2, 6.1; Mot. for Attorneys' Fees, Ex. K (providing proof of deposit).
[209] *See generally* Allocation Procedures.

outcome." Adv. Committee Notes, 2018 Amendments to Rule 23(e)(2)(C), (D). In making that assessment, "courts may need to forecast the likely range of classwide recoveries and the likelihood of obtaining such results." *Id*. Several of the *Jiffy Lube* Fairness and Adequacy Factors, discussed herein, address these considerations.

a) The Strength of Plaintiffs' Case on the Merits and Defendants' Defenses Weigh in Favor of Approval of the Settlement (*Jiffy Lube* Adequacy Factors 1&2).

Plaintiffs are confident in the strength of their allegations and supporting evidence, but success is never guaranteed. As is true with any case, "[p]laintiffs' ability to prevail on the merits is uncertain. The Settlement confers relief that might well not be achievable through continued litigation." *Gray v. Talking Phone Book*, 2012 U.S. Dist. LEXIS 200804, at *16 (D.S.C. Aug. 10, 2012). When reviewing the adequacy of a proposed settlement, "the court can assess the relative strengths and weaknesses of the settling parties' positions to evaluate the various risks and costs that accompany continuation of the litigation." *Case v. French Quarter III LLC*, 2015 WL 12851717, at *8 (D.S.C. July 27, 2015).

Before the Settlement was reached, the *Stuart* case was trial ready and Class Counsel believed, and continue to believe, that they have a strong case against Defendants. Class Counsel submit that Defendants were fully cognizant of all this credible evidence and that the strength of Plaintiffs' position is what drove the Settlement Amount agreed to by Defendants.

Of course, the outcome of any case that is tried on the merits is uncertain and, for its part, Defendants have taken the position that it has substantial legal and factual arguments, which also impacted the parties' negotiations. As Judge Phillips attests in his declaration, "[t]o the extent that the settlement negotiations were difficult and contentious, that was because all involved held firm to their convictions that they had the stronger factual and legal arguments on issues relevant to liability,

damages and otherwise, leading to robust debates on virtually every aspect of the settlement, including the ultimate outcome of motions, trials, and appeals, if a negotiated agreement was not achieved."[210]

As in many cases, uncertainty favors settlement because "hurdles to proving liability, such as proving proximate cause would remain and would necessitate expensive expert testimony." *Commissioners I*, 340 F.R.D. at 250 (internal quotation marks omitted); *LandAmerica*, 2012 U.S. Dist. LEXIS 97933, at *11-12 (where defendants "vigorously dispute the Plaintiffs' claims on numerous grounds," "their dispute underscores … the uncertainty of the outcome[.]"); *S.C. Nat. Bank*, 139 F.R.D. at 340 (settlement favored because the legal and factual issues posed a risk to both sides).

Notably, as detailed above, it is estimated that Defendants are responsible for only three to seven percent of the MDL defendants' total alleged PFAS-related liabilities. Correspondingly, notwithstanding Plaintiffs' confidence in the strengths of their proofs against Defendants, this is a factor that could have potentially reduced any favorable jury award. It was therefore a consideration in agreeing to the Settlement Amount. *See e.g. Flinn*, 528 F.2d at 1173-74 (the fact that a cash settlement "'may only amount to a fraction of the potential recovery' will not per se render the settlement inadequate or unfair.").

Accordingly, these factors confirm that the Settlement is reasonable.

b) The Complexity, Expense, and Likely Duration of the Litigation Weigh in Favor of Approval of the Settlement (*Jiffy Lube* Adequacy Factor 3).

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *See* 4 *Newberg on Class Actions* § 11.50 (4th ed.). *Accord, e.g., South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1426 (D.S.C. 1990) (finding that the "likely duration and associated expenses of continued

[210] Phillips Prelim. App. Mot. Decl., at ¶ 19.

litigation likewise favor approval of the settlement") (citing *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988)).

Under the Settlement Agreement, Defendants did not admit liability and expressly declined to waive any affirmative defenses. If the Settlement Agreement is terminated, the parties agree to return to their pre-settlement litigation positions. Only the *Stuart* case has been prepared for trial, so the vast majority of water providers would restart their years-long litigation – after four-and- a-half years have already passed in the MDL. It could easily have taken many additional years for Settlement Class Members to make similar progress in their own cases. And there would have been the risk of recovering nothing or recovering an uncertain amount only after years of trial and appeals. Adding years of litigation for PWS runs counter to having to expend funds in the near term to comply with the pending EPA MCLs for PFAS. This concern about the need for a timely resolution is especially relevant here, because the settlement addresses important public safety concerns. In the context of opt-outs, this Court presciently cautioned about the years of delay that would ensue in the absence of a settlement:

> Let me be honest for folks who are considering opting out. Let me just be honest. We are probably several years away from me returning cases that aren't resolved to my colleagues in the district court. My goal is to get it all resolved, but if I can't do it, I'm going to send it back to my 675 colleagues. *** So, realistically, we're talking about years before it would ever be remanded. And then you know your case of your individual dockets, likely years more before you'd actually get to a trial. *** I would think if there were appeals and so forth, you're probably talking about a decade before it would all be over. So you just need to weigh that.[211]

Indeed, although the claims alleged by the Settlement Class Members involve straightforward tort principles, litigating their cases would involve sophisticated factual, expert,

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[211] *See* Transcript of July 14, 2023 CMC, at 17:10-18:7.

and legal analysis that in many cases will require hiring multiple consulting and testifying experts. A liability determination may turn on resolution of complex fact questions based on sophisticated scientific evidence, including analyses of the PFOA at a particular site to determine whether it is branched or linear or both, and if both, in what proportions. Further complicating the matter is the fact that Defendants did not manufacture AFFF directly, so it could be more difficult for plaintiffs to prove that it is the Defendants' PFOA in their PWS.[212] And looming over all of this is the possibility that a jury could find that the government contractor defense applied in a particular case. All of these uncertainties make settlement especially desirable.

This complexity translates into time-consuming and expensive litigation. Preparing the PWS cases for potential bellwether trials alone required that Plaintiffs engage numerous expert witnesses at a cost totaling hundreds of thousands of dollars, and that is before a single trial has even been conducted. Developing these specific expert opinions for hundreds of PWS presents the real potential for enormously exorbitant costs.

Class Counsel has also expended time and effort in other ways to put the PWS cases into the best position possible for negotiating a potential settlement. For the *Stuart* trial, a core trial team was prepared to present the best evidence against Defendants in a precise, cogent and persuasive manner, as Plaintiffs have done on prior occasions. The firms involved invested extraordinary amounts of time in these efforts without any guarantee of future recovery due to the contingency nature of the litigation. These risks and costs were also part of the parties' calculus in negotiating the proposed Settlement and should be considered by the Court.

Moreover, any judgment would likely be subject to lengthy appeals, whereas the Settlement provides more immediate results and benefits to Settlement Class Members. As one

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[212] Summy Prelim. App. Mot. Decl., at ¶ 19; London Prelim. App. Mot. Decl., at ¶¶ 26-30.

court in this Circuit noted: "[E]ven after three and a half years of litigation, the road to recovery—particularly for the class as a whole—likely would be protracted and costly if the settlement were not approved." *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 480 (D. Md. 2014).

In brokering the proposed Settlement, Class Counsel carefully evaluated all the hurdles involved in establishing Defendants' liability, including getting past *Daubert* and summary judgment in cases beyond *Stuart*, as well as the possibility of a future trial and appeal. Based on these considerations, Class Counsel submit that it is in the best interest of all Settlement Class Members to resolve the claims through the proposed Settlement in order to avoid such risks. *See Gray*, 2012 U.S. Dist. LEXIS 200804, at *5-6, 15 (settlement negotiations involved consideration of avoiding the significant risk and burden of continuing litigation).

For these reasons, this factor weighs heavily in favor of granting final approval to the Settlement.

c) The Posture of the Case at the Time of the Settlement Supports Approval of the Settlement (*Jiffy Lube* Fairness Factor 1).

As set forth in detail above, the parties entered into the MOU on June 1, 2023, only four days before the first PWS bellwether trial – the *Stuart* trial – was set to begin on June 5, 2023. Prior to that, for four-and-a-half years – since this MDL's inception in December 2018 – the parties engaged in extensive, non-stop fact and expert discovery, as well as motion practice in an effort to move this MDL forward efficiently and effectively, and they did not let a global pandemic stop them, with the first of over 150 depositions in this MDL being taken remotely in the earliest days and months of the pandemic. The culmination of their efforts resulted in trial counsel for both parties being ready to present the *Stuart* case to a jury, a process that included, among other things, analyzing and evaluating hundreds of thousands of documents and paring them down to the final core exhibit list, arguing evidentiary objections, securing live witnesses, identifying deposition cuts,

and engaging in motion practice (i.e., summary judgment motions, *Daubert* motions, and motions *in limine*). In this instance "all discovery ha[d] been completed and the cause [was] ready for trial" which is "important" because it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975).[213]

Notably, the PWS cases, in and outside of this MDL, were much further along than those in other settlements that are routinely approved. Indeed, the Fourth Circuit has affirmed approval of a class settlement "reached so early in the litigation that no formal discovery had occurred, [because] the court found that documents filed by plaintiffs and evidence obtained through informal discovery yielded sufficient undisputed facts" to enable a decision regarding the merits of the claims. *Jiffy Lube*, 927 F.2d at 159 (vacated and remanded on other grounds).[214]

This factor supports final approval of the Settlement.

d) The Extent of Discovery Conducted Supports Approval of the Settlement (*Jiffy Lube* Fairness Factor 2).

Preliminary informal exploratory settlement discussions began in the Summer of 2020. By that time, the parties were already well along in the development of their positions and had gathered a substantial cache of relevant evidence on critical elements of the claims at issue. In fact, the PEC had by that point already served voluminous discovery requests on approximately twenty (20) core

[213] Ten (10) days before the *Stuart* trial was set to begin, Defendants were severed from the trial primarily due to the bankruptcy filing of co-Defendant, Kidde-Fenwal, Inc. *See* Order dated May 26, 2023, 2:18-mn-02873-RMG [ECF No. 3183].

[214] *See also Newbanks v. Cellular Sales of Knoxville, Inc.*, No. 12-1420, 2015 U.S. Dist. LEXIS 191550, at *4-5, 14 (D.S.C. Feb. 4, 2015) (discovery was sufficient to allow evaluation of the merits of the case where parties exchanged thousands of pages of documents during the discovery process); *Mullinax v. Parker Sewer & Fire Subdistrict*, No. 12-cv-01405, 2014 U.S. Dist. LEXIS 199340, at *16 (D.S.C. Mar. 11, 2014) (approving settlement "reached after nearly 10 months of litigation that had narrowed and defined the legal and factual issues as clearly as possible").

defendants in the MDL, including Defendants, and Science Day (October 4, 2019) had already convened, at which the parties presented their respective positions regarding some of the key scientific issues at issue in this case. Before reaching settlement, over 4.6 million documents had been produced in discovery, which amount to over 37.4 million pages. The parties also collectively completed 162 depositions of fact and expert witnesses.

Accordingly, as the extensive and highly contentious settlement discussions unfolded between the parties over the next couple of years, general liability discovery as to all of the core MDL defendants, including Defendants, was substantially completed and available for use, including in the *Stuart* trial. To this end, both sides, along with Judge Phillips, were armed with this extensive discovery and primed to make well-informed and intelligent decisions regarding the credibility of liability and its impact on any proposed Settlement. These facts and circumstances support final approval of the proposed Settlement. *See, e.g., Newbanks,* 2015 U.S. Dist. LEXIS 191550, at *4-5, 14; *Mullinax*, 2014 U.S. Dist. LEXIS 199340, at *16.

e) Counsel's Experience in this Type of Case and Opinions Supporting the Settlement Weigh in Favor of Approval of the Settlement (*Jiffy Lube* Fairness Factor 4).

Because Plaintiffs and Defendants are represented by capable counsel who are experienced in complex, large-scale environmental litigation, their opinions supporting the proposed Settlement weigh in favor of granting final approval. *Robinson,* 2019 U.S. Dist. LEXIS 26450, at *13-14, 18-19; *Flinn*, 528 F.2d at 1173 (the opinion and recommendation of experienced counsel "should be given weight in evaluating the proposed settlement."); Fed. R. Civ. P. 23(e)(2)(A).

Indeed, courts have recognized that class counsel's experience in similar litigation allows for a realistic assessment of the merits of a claim and the desirability of a settlement. *Bass v. 817 Corp.,* 2017 U.S. Dist. LEXIS 225380, *5-6 (D.S.C. Sept. 19, 2017). This Court has previously

given consideration to the "parties' history of litigating similar, if not identical issues, combined with Plaintiff's counsel's extensive experience of the same" as "indicat[ing] the settlement was negotiated at arm's length." *Commissioners I*, 340 F.R.D. at 249.

Here, Class Counsel has extensive experience in complex environmental litigation, class actions, and settlements of large, nationwide cases. Indeed, this Court appointed four of them as Co-Lead Counsel to oversee the prosecution of this MDL out of recognition of their experience. Their recommendation of the Settlement is informed by their acquired knowledge.

Scott Summy has litigated and resolved several large-scale cases involving water providers who sought the costs of removing chemicals from their water.[215] As just one example, in 2009, he successfully settled MDL-wide claims brought by water suppliers against the nation's major oil companies for contaminating their drinking water supplies with the gasoline additive, MTBE.[216]

Michael London has devoted his entire legal career to representing consumers and injury victims, primarily in complex litigation settings involving mass torts.[217] As just one example, Mr. London led the seminal PFAS litigation – *In re: E.I. du Pont de Nemours and Company C-8 Pers. Injury Litig.*, MDL No. 2433 (S.D. Ohio).[218] To this precise end, he has previously negotiated two other PFOA settlements with Defendants, the first for $671 million and the second for over $70 million. *Id.* at ¶ 12.

Joseph Rice, who was appointed Class Counsel after Plaintiffs' Mot. for Prelim. App. was filed,[219] has litigated and resolved some of the largest complex cases in history. He is routinely touted as the one of the foremost strategic minds in the country when it comes to settlement

[215] *See generally* Summy Prelim. App. Mot. Decl.
[216] *Id.*
[217] *See generally* London Prelim. App. Mot. Decl.
[218] *Id.*
[219] Rice Appointment Order.

negotiations and end-stage litigation and has been integrally involved in structuring some of the most significant and complex deals in the country.

Elizabeth Fegan, who was appointed Class Counsel, has litigated and resolved complex class actions involving consumers, third party payors, and other victims of fraud, defective products, and environmental contamination.[220] As a result of her track record, two courts have recently *sua sponte* appointed her lead counsel in large class actions, i.e. *In re TikTok, Inc., Consumer Privacy Litigation*, MDL No. 2948 (N.D. Ill.) (second largest biometric privacy class settlement); *In Re: Kia Hyundai Vehicle Theft Marketing, Sales Practices, and Prods. Liab. Litigation*, MDL 3052 (recently announced class settlement valued at more than $750 million).[221]

Considering proposed Class Counsel's broad knowledge of the facts surrounding this litigation, coupled with their extensive experience in class actions and resolving litigations involving similar issues, their endorsement of the Settlement supports final approval.[222]

f) The Insolvency Risk of the Defendants and Likelihood of Recovery on a Litigated Basis Supports Approval of the Settlement (*Jiffy Lube* Adequacy Factor 4).

Although DuPont has not indicated any plans to pursue bankruptcy protection (like its co-defendant in the MDL, Kidde-Fenwal, Inc.), it is always a possibility. The potential inability to pay litigated judgments weighs in favor of the adequacy of finally approving the billion-dollar settlement. *See Lumber Liquidators*, 952 F.3d at 485; *see also In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Prods. Liab. Litig.,* MDL 2672, 2016 WL 6248426, at *11 (N.D.

[220] Declaration of Elizabeth A. Fegan in Support of Prelim. App. Mot. [ECF No. 3393-7] ("Fegan Prelim. App. Decl.").
[221] *Id.*
[222] *See also* Ex. B, Napoli Newburgh Decl.

CA. October 25, 2016) (noting that a settlement class could also receive nothing not only "'because of the risks of litigation *but also because of the solvency risks*…") (emphasis added).

4. The Relief Provided is Adequate, Taking Into Account the Effectiveness of the Proposed Method of Distributing Relief to the Class (Rule 23(e)(2)(C)(ii)).

The parties agreed to the Allocation Procedures which are Exhibit C to the Settlement Agreement.[223] This protocol will be used to calculate Base Scores, which are objectively derived from flow rates of Impacted Water Sources and PFAS concentrations, and was made available to all class members through the Notice Program, including the Court-approved website.[224] Class Counsel employed an expert in the field of liability forecasting (Timothy G. Raab) to analyze public information provided by Class Counsel, which included: (a) state data showing PFAS detections and non-detections in certain PWSs; (b) the EPA's Third Unregulated Contaminant Monitoring Rule (UCMR 3) data showing PFAS detections and non-detections of the PWSs that were subject to UCMR3; (c) information regarding the PWSs that are currently subject to UCMR5 and applicable state or federal laws; and (d) PWS identified in the SDWIS.[225] Mr. Raab's analysis permitted class counsel to divide the fund between Phase One and Phase Two members of the Settlement Class. The Allocation Procedures will then be employed to allocate funds under the guidance of the Court-Appointed Claims Administrator (Dustin Mire), under the oversight of the Court-appointed Special Master (Matt Garretson).

The Allocation Procedures were developed to allocate and distribute the Settlement Funds equitably among Eligible Class Members based on objective criteria under the supervision of a

[223] ECF No. 3393-2, at pp. 76-99.
[224] *See* DuPont-Allocation-Procedures-Updated.pdf (pfaswatersettlement.com).
[225] Raab Prelim. App. Decl., at § III.

neutral master. This method of distribution more than adequately distributes the Settlement Fund and therefore supports final approval of the Settlement.

5. The Relief Provided is Adequate, Taking Into Account the Terms of Any Proposed Award of Attorneys' Fees, Including Timing of Payment (Rule 23(e)(2)(C)(iii)).

As discussed above, Settlement Class Counsel filed a Motion for Attorneys' Fees and Costs [ECF No. 3795] seeking an award of attorneys' fees equal to only 8% of the Settlement in the amount of $94,800,000 (with 5% of that amount, or $4,740,000 held back for future administration), and expense reimbursements totaling $2,136,213.21. The parties did not negotiate a particular fee amount. The award of any attorneys' fees or reimbursement of any cost, including the allocation between and amongst the Attorneys, shall be determined by the Court.

The parties did not negotiate any set attorneys' fee amount or even any range of fees. Rather, the attorneys' fee issue is left entirely to the Court's discretion. This Court will thus determine an appropriate fee award and the timing of any payment of fees. As Class Counsel's fee request is below the median of fee awards in class actions of this magnitude,[226] the relief provided to class members is adequate. *See, e.g., Stayler v. Rohoho, Inc.*, Case No.: 2:16-cv-1235-RMG, 2019 U.S. Dist. LEXIS 58025, at *4 (D.S.C. Apr. 4, 2019) ("The settlement amount, independent of the attorneys' fees and costs, is . . . fair and reasonable[.]") (citing *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009); *Morris v. S. Concrete & Constr., Inc.,* Case No.: 8:16-cv-01440-DCC, 2019 U.S. Dist. LEXIS 80429, at *5 (D.S.C. May 13, 2019) (same); Notably, not a single one of the 14,000+ class members has voiced any objection to the attorneys' fees sought by class counsel.

6. The Relief Provided is Adequate, Taking Into Account Any Agreement Required to be Identified Under Rule 23(e)(3) (Rule 23(e)(2)(C)(iv)).

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[226] Fitzpatrick Fee Decl., at ¶ 16.

Under Rule 23(e)(3), the parties to a proposed class settlement "must file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3). The only agreement entered into by the parties here is the Settlement Agreement. One exhibit thereto was filed under seal and relates to the Walk-Away Right in SA § 10.1. The parties did not enter into any other agreements, and the Settlement contains all terms agreed to by the parties. Therefore, there are no additional agreements for the Court to consider.

7. The Settlement Treats Class Members Equitably Relative to Each Other (Rule 23(e)(2)(D)).

The question raised by this consideration is "whether the apportionment of relief among class members takes appropriate account of difference among their claims . . . ." Adv. Committee Notes, 2018 Amendments to Rule 23(e)(2)(C), (D). As discussed at length above, the parties developed Allocation Procedures to allocate the Settlement Fund among all members of the Settlement Class taking into consideration objective criteria focused on flow rates of Impacted Water Sources and PFAS concentrations. The Court-appointed Claims Administrator is experienced and adept at administering the Allocation Procedures neutrally and fairly. Taking the numerous relevant, objective considerations into account, the Allocation Procedures apportion the relief in an equitable fashion among differently situated members of the Settlement Class.

Moreover, the entire structure of having both Phase One and Phase Two Class Members identified in the Settlement was designed to take into account the difference amongst the claims of the Class Members and thereby ensure equitable treatment for all. In particular, the Settlement allocates 55% of the Settlement Funds for Phase One Class Member while 45% is allocated to Phase Two Class Members. Again, this was specifically fashioned in order to ensure equality as between Class Members with varying types of claims.

E. Given the Small Number of Objections, and Their Lack of Validity, the Overall Reaction of the Class Overwhelmingly Supports Approval (*Jiffy Lube* Adequacy Factor Five).

In a case of this magnitude, involving large individual claims asserted by sophisticated entities, one would expect a large number of objections were there any concerns about the Settlement. In fact, there are only a handful of objections, and most are filed by a single law firm. These facts strongly support the fairness of the Settlement. In any event, the objections themselves are meritless.

1. The Small Number of Objections Supports a Finding of Fairness.

With respect to the fairness of the Settlement, under *Jiffy Lube*, a court is to consider "the degree of opposition to the settlement." Of the over 14,000 PWS identified as Class Members, only twenty-five (25) parties lodged objections,[227] and, of those, two (2) objectors do not even claim to be Class Members.[228] This means that only approximately 0.16% of the known Settlement Class Members lodged objections. Moreover, seventeen (17) of the twenty-three (23) – three quarters of the total - filings were filed as cut-and-paste Objections by a single law firm, Marten Law.[229] As explained in detail below, canned objections by a single law firm (the "Marten Law

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[227] This includes twenty-three (23) filed Objections, however, three (3) plaintiffs are included in the Objection filed by the law firm Rigano, LLC.

[228] These include Brazos River Authority and Lower Colorado River Authority.

[229] *See* the redlines comparing Marten Law Objection on behalf of City of Fort Worth [ECF No. 3954] to their Objection on behalf of North Texas Municipal Water District ("NTMWD") [ECF No. 3960], and to their Objection on behalf of City of Vancouver [ECF No. 3962], attached hereto as Ex. R. These are but two examples illustrating that Marten Law's Objections are near identical copies of each other, with redlines showing changes only to the name of the objecting entity. Some of the Marten Law Objections contain other slight differences as well, but these add to rather than resolve the confusion, because the reason for their inclusion in some but not others is seemingly random. For example, the NTMWD Objection adds a paragraph asserting (incorrectly) that the release might cover claims for air pollution (*see* ECF No. 3960, at p. 6). Presumably all objectors represented by Marten Law are as exposed to air as NTMWD, yet such allegation is not made in all Marten Law Objections. Additionally, some changes are not only random but so devoid of purpose that they invite the question of why they were made at all. For example, the City of

Objectors") should not be separately counted as unique objections. But even taking the number of objectors at face value, 25 out of more than 14,000 is a miniscule fraction. That small percentage is powerful evidence that the settlement is fair, reasonable, and adequate. Notably, there were *zero* objections to Class Counsel's request for attorneys' fees and costs.

The Fourth Circuit has consistently found that the existence of only a small number of objections supports settlement. *See, e.g., McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022) (affirming district court's approval of a settlement where only 0.04% of the class objected); *Herrera v. Charlotte Sch. of Law, LLC*, 818 Fed. Appx. 165 (4th Cir. 2020) (affirming district court's approval of settlement where only 4% of the class objected); *Lumber Liquidators* , 952 F.3d at 485 (finding support for the settlement's adequacy where objecting members equated to about 0.006% of total members); *1988 Tr.*, 28 F.4th at 527 (affirming approval of a class settlement where only one class member objected).

District courts within the Fourth Circuit have likewise held that a small number of objections strongly supports the fairness of a settlement. *See, e.g., Clark v. Experian Information Solutions, Inc.,* No. 8:00-1217-22, 1991 U.S. Dist. LEXIS, at *19 (D.S.C. Jan. 14, 2004) (noting in support of fairness that "only a very small percentage of potential Class Members either opted out of inclusion in the Class or objected" to the settlement); *Haney v. Genworth Life Ins. Co.*, No. 3:22cv55, 2023 U.S. Dist. LEXIS 15589, at *19 (E.D. Va. Jan. 30, 2023) ("The small number of objections teach that the settlement is viewed favorably by the Class. Accordingly, this factor

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Vancouver Objection [ECF No. 3962] and several others switch references from "U.S. Environmental Protection Agency" to "EPA," along with other similarly meaningless edits. Although the motive underlying these differences is unknown, some of the differences—of which there are, generally speaking, very few between the Marten Law Objections—appear to have been made simply to avoid a redline that would show *no* changes (other than to the objecting entity names).

weighs in favor of finding that the award of attorneys' fees is reasonable."); *Krakauer v. Dish Network, L.L.C.*, No. 14-cv-333, L.L.C., 2018 U.S. Dist. LEXIS 203725, at *10 (M.D.N.C. Dec. 3, 2018) ("The absence of a significant number of objections to the settlement indicates that 'counsel have achieved a superior result for the class and weighs in favor of their requested award.'" (citation omitted)); *Scott v. Family Dollar Stores, Inc.*, No. 308CV00540MOCDSC, 2018 WL 1321048, at *2 (W.D.N.C. Mar. 14, 2018) (finding the settlement to be fair where there were only 50 objections); *In re Wachovia Corp. Erisa Litig.*, No. 2-cv-03707, 2011 U.S. Dist. LEXIS 123109, at *20 (W.D.N.C. Oct. 24, 2011) ("The relatively few number of objections demonstrates the satisfaction of Class Members with the settlement result, as well as their implicit approval of its terms" (citation omitted)); *Kay Co. v. Equitable Production Co.*, 749 F. Supp. 2d 455, 465 (S.D.W. Va. 2010) ("[T]he minute number of objections and exclusions among a large class, almost all of whom were individually notified, suggests that the class members are overwhelmingly pleased with the settlement result.").[230]

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[230] Cases from elsewhere in the country are in accord. *See, e.g., Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (low number of objections compared to putative class members supported fairness of settlement); *In re Wireless Tele. Fed. Cost Recovery*, 396 F.3d 922, 933 (8th Cir. 2005) (affirming district court's finding that the small number of objectors in favor of settlement, noting that "[t]he district court has a duty to the silent majority as well as the vocal minority" (citation omitted)); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) ("In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors."); objectors did not "favor derailing settlement" and articulating an assumption that "silence constitutes tacit consent to the agreement"); *Zapeda v. Paypal, Inc.*, No. 10-2500, 2017 WL 1113293, at *15 (N.D. Cal. Mar. 24, 2017) ("Given the relatively small number of objections and opt-outs, the Court finds that the reaction of the class to the settlement is positive, which favors approving the settlement."); *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 389 (E.D. Pa. 2015) (that "only approximately 1% of Class Members filed objections" deemed "impressive" and "weigh[ed] in favor of approving the settlement"), *aff'd*, 821 F.3d 410 (3d Cir. 2016); *Wren v. RGIS Inventory Specialists*, No. 06-05778, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011) (0.020% objection rate "strongly support[ted] approval of the settlement"); *Nat'l Treasury Employees Union* v. U.S., 54 Fed. Cl. 791, 798 (2002) ("[T]here is no question that the small number of objections weighs in favor of the court's approval.").

The paucity of Objections is particularly telling in a case, like this one, in which substantial dollars are at issue for each class member. *See, e.g., Neuberger v. Shapiro*, 110 F. Supp. 2d 373 (E.D. Pa. 2000) (finding that the lack of objection "may be read to favor approval" where the "plaintiff class members [had] strong economic incentives to object"); *Lachance v. Harrington*, 965 F. Supp. 630, 645 (E.D. Pa. 1997) (giving weight to low number of objections from class members, "who certainly had sufficient [financial] incentive to object"); Manual for Complex Litigation, (Fourth), § 21.62 ("The court should interpret the number of objectors in light of the individual monetary stakes involved in the litigation . . . .When the recovery for each class member is high enough to support individual litigation, the percentage of class members who object may be an accurate measure of the class's sentiments toward the settlement.").

Here, of course, each Settlement Class Member has a huge stake in the litigation, and thus has every incentive to object if the Settlement Class Member were to deem the settlement to be inadequate. Again, this infinitesimal number of objectors strongly supports the fairness of the Settlement.

2. The Small Number of Objections is Especially Significant Because Virtually All are Cut-and-Paste Objections.

Out of 23 Objections filed (by 25 objectors) in connection with the Settlement with Defendants, 17 were filed by a single law firm, Marten Law. These filings should be stricken or heavily discounted for multiple reasons.

First, the Marten Law Objectors failed to comply with the 2018 amendment to Rule 23, which states in relevant part that any objection "*must* state whether it applies only to the objector, to a specific subset of the class, or to the entire class . . . ." Fed. R. Civ. P. 23(e)(5)(A) (emphasis added). The italicized language of the Rule makes clear that this requirement is mandatory. Moreover, the mandatory nature of the requirement is confirmed by the Advisory Committee

Notes, which state that "[o]ne feature *required* of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members." (Emphasis added.) Not only do the Marten Law Objectors not comply with the Rule; their multiple filings make it impossible for the Court or the parties to determine if a particular class member's objection applies just to it, to a subset of class members, or to the entire class.

As discussed below, many of the specific objections are verbatim in most (but not all) of the Objections. Do those arguments only apply to the specific objectors who made them? Do they apply to a larger subset of the class? Or do they apply to the whole class? The myriad objections provide no clue. Based on this failure to comply with the Rule 23(e)(5)(A)'s mandatory requirement, all of the Marten Law Objectors' objections should be stricken. *See, e.g.,* Order Granting Final Approval at 13, *In Re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 4:07-cv-05944 (N.D. Cal. Jul 13, 2020), ECF No. 5786 (striking objections for, *inter alia,* failing to comply with Rule 23(e)(5)(A) in that the objections "do not specify whether they apply 'only to the objector, to a specific subset of the class, or to the entire class'"), attached as Ex. S.

Second, the Marten Law Objectors' objections represent an egregious cut-and-paste job, with many but not all arguments appearing verbatim or virtually verbatim.[231] As just one example, nearly all of the objections contain the frivolous argument that the settlement cannot be approved because there was no prior bellwether trial and verdict.[232] As discussed below, no case requires a

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[231] *See also supra*, Section IV.E.1, n.229, and Exhibit R attached hereto, containing redlines comparing three Marten Law Objectors' filings.

[232] *See* Objections from: City of Fort Worth [ECF No. 3954 at 25-26]; Metropolitan Water District [ECF No. 3955 at 26-27]; NTMWD [ECF No. 3960 at 26-27]; City of Vancouver [ECF No. 3962 at 26-27]; Lakewood Water District [ECF No. 3965 at 26-27]; City of DuPont [ECF No. 3968 at 19-20]; City of Airway Heights [ECF No. 3970 at 22-23]; City of Tacoma [ECF No. at 26-27]; Hannah Heights Owners Association [ECF No. 3974 at 17-18]; City of Las Cruces [ECF No. 3978 at 26-27]; City of Dallas [ECF No. 3979 at 25-26]; Lakehaven Water & Sewer [ECF No. 3983 at

bellwether trial prior to settlement, and many thousands of settlements have been approved without bellwether trials. Such specious (and repetitive) objections, especially filed by attorneys (and not *pro se* by objectors), are unacceptable.[233]

Indeed, in many instances, the objections regarding the lack of a bellwether trial even appear on the exact same pages from one filing to another, confirming the cut-and-paste and essentially verbatim nature of the filings.[234] As another example of sloppy cut-and-paste work, Metropolitan included a section in its objection entitled "The Agreement ignores the challenges of PFAS treatment at scale."[235] In its objection, Metropolitan Water District describes the $3 billion water recycling program it is building.[236] But four other Marten Law Objectors (Vancouver, Lakewood Water Dist., Tacoma, and Las Cruces) inexplicably include the identical language about Metropolitan's program. The discussion of *Metropolitan's* water recycling program is irrelevant (indeed, nonsensical) for objectors having no connection with Metropolitan.[237]

22-23]; City of Moses Lake [ECF No. 3986 at 20-21]; Eagle River Water & Sanitation [ECF No. 3987 at 16-17]; and Upper Eagle Regional Water [ECF No. 3989 at 17-19].

[233] *See, e.g., Garber v. Office of the Comm'r of Baseball*, 12-cv-03704 (VEC), 2017 U.S. Dist. LEXIS 27394, at *9 n. 9 (S.D.N.Y. 2017) ("these baseless objections waste judicial time and energy that should be spent on more productive matters"); *In re UnitedHealth Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108–09 & n.1 (D. Minn. 2009) (characterizing position of objector counsel as "disingenuous," "preposterous," and "laughable," among other criticisms); *UFCW Loc. 880-Retail Food Emps. Joint Pension Fund v. Newmont Mining Corp.*, No. CIVA05CV01046-MSKBNB, 2008 WL 4452332, at *4 (D. Colo. Sept. 30, 2008) (noting that an objector had raised same objection as another, was "general in nature, largely unsupported by specific citation to the record or to supporting caselaw," and "lacking in meaningful analysis"), *aff'd*, 352 F. App'x 232 (10th Cir. 2009).

[234] *See* n.229, *supra*.

[235] Metropolitan Water District [ECF No. 3955] ("Met Obj."), at 16-17.

[236] *Id*.

[237] As another example, the Objection of the City of Las Cruces [ECF No. 3978] ("Las Cruces Obj."), at 1, erroneously refers to Las Cruces as being located in Washington rather than in New Mexico.

Third, there is no reason why Marten Law could not have filed a single objection on behalf of all 17 objectors. That is commonly done when a law firm files an objection for multiple class members.[238] Indeed, Rigano LLC filed one objection here on behalf of *three* objectors: the Town of East Hampton, the Town of Islip, and the Town of Harrietstown. The only possible explanation for Marten Law's tactic of generating hundreds of unnecessary pages of duplicative objections is to inflate the total number of objections. Of course, such a tactic is ultimately futile; even with the law firm's approach of filing multiple objections, the combined Class Member objections represent only about 0.16% of the identified Class Members. *See supra.* Indeed, in the entire batch of filed settlement objections, only five were *not* filed by Marten Law.

Fourth, Marten Law undertook an organized campaign to recruit potential objectors by disparaging the settlement, all in a transparent effort to secure fees. Its campaign is decidedly *not* the culmination of a sustained, dedicated effort to protect the nation's water supply. Unlike Class Counsel, who spent many thousands of hours developing and investigating the case—and ultimately bringing Defendants to the settlement table—Marten Law sat on the sidelines and spent a grand total of *twelve* common-benefit hours, all of which occurred in August 2023, working on this litigation. Only after settlement was reached—when Marten Law saw a pathway to recover fees—did it suddenly become active.

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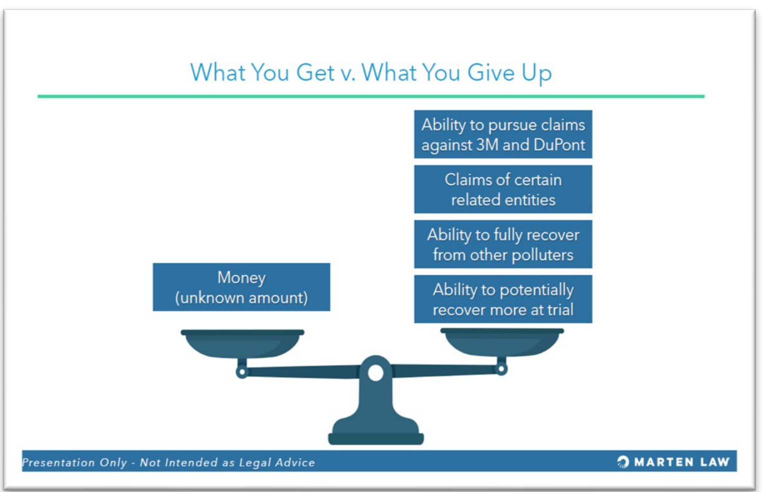
[238] *See, e.g.,* Objections of Class Members Lott, Lutz, Olivant, Slomine, and Woloszyn, *Omar Vargas v. Ford Motor Co.,* No. 2:12-cv-08388 (C.D. Cal. Sep 28, 2012) (No. 151); *Saltzman v. Pella Corp.*, No. 1:06-cv-04481 (N.D. Ill. Aug 18, 2006) (objections for three class representative objectors); *Polyurethane Foam Antitrust Litigation*, Objection of Melissa Holyoak and John Tabin, No. 1:10-md-02196 (N.D. Ohio Dec 02, 2010) (No. 1960). Even pro se objectors have filed one objection listing the names of multiple objecting parties rather than filing carbon copies. *E.g., Bickley v. Schneider National, Inc. et al*, No. 4:08-cv-05806 (N.D. Cal. Dec 31, 2008) (No. 277).

Moreover, its campaign did not involve an objective effort to educate Settlement Class Members. Rather, it was a distorted, one-sided effort to round up dissenters. In one slide show presentation, for example, the firm displayed a scale, with one side representing "what you get" and the other side representing "what you give up." The thrust of the slide, depicted below,[239] is the settlement is essentially all cost and no benefit. It is difficult to imagine a more blatant distortion of the Settlement. This should not be surprising. Never having participated in the litigation in a meaningful way, Marten Law could not possibly have adequately or accurately informed Settlement Class Members of potential objections and/or the risks of opting out. Yet, this was Marten Law's device to recruit objectors.



Moreover, Marten Law also published multiple articles on their website with loaded titles such as, "Water Utilities Must Decide Whether to Give Up PFAS Claims Against 3M, DuPont" and "PFAS Settlements: How Much is Enough?" These articles contain what can only be described as blatant fear-mongering aimed at potential class members, such as the statement: "Few if any know what claims they may face from government regulators, their customers, neighbors, or other

[239] Marten Law PowerPoint presentation, attached hereto as Ex. T.

third parties in the future. Nevertheless, all settlement-eligible water suppliers who do not 'opt out' of the proposed settlement will be bound by the agreements, including the agreements' release of their claims….Water providers will soon receive class settlement notices that they will be forced to act upon…."[240]

Importantly, all of the presentations and articles prominently urged class members to follow up with Marten Law, even providing a fillable form to "Request Marten Law's Preliminary Analysis on 3M and DuPont Settlements," and going so far as to confirm that even PWS with current legal representation are invited to reach out.[241] Not surprisingly, courts have condemned efforts to "try[] to recruit other people to be objectors," *In re Hydroxycut Mktg. & Sales Pracs. Litig.*, No. 09CV1088 BTM KSC, 2013 WL 5275618, at *3 (S.D. Cal. Sept. 17, 2013), and to use the objection process as "an attempt to receive attorneys' fees," *Spark v. MBNA Corp.,* 289 F. Supp. 2d 510, 514 (D. Del. 2003). *Accord, e.g., Shaw v. Toshiba Am. Info Sys., Inc.,* 91 F. Supp 2d 942, 973 (E.D. Tex. 2000) (criticizing use of the objection process and use of "obviously 'canned' objections" to "extract a fee" from the parties); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 754 (S.D. Ohio 2008) (raising concern about "opportunistic objectors" who "contribute[d] nothing to the class"); *In re UnitedHealth Group, Inc. PSLRA Litig.,* 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) ("[Objector counsel's] goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement."); *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, No. 05-cv-01046, 2008 WL 4452332, at *3 (D. Colo. Sept. 30, 2008) (attacking objectors "who challenge fee requests largely in the

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[240] Marten Law article, attached hereto as Ex. U.

[241] *See e.g.,* Ex. T at slide 18 (providing contact information for the Marten Law firm for any questions).

hopes of obtaining their own personal payout"), *aff'd,* 352 F. App'x 232 (10th Cir. 2009). Indeed, the whole purpose of the 2018 amendments to Rule 23 governing objectors was to prevent this sort of abuse. Marten Law's deliberate campaign to undo the settlement for personal gain provides a further reason to view their objections with skepticism.

In short, the Marten Law Objectors have failed to comply with Rule 23(e)(5)(A)'s express requirements for objecting, and offered sloppy, duplicative, and in some places nonsensical objections that have wasted the time of class counsel—and surely will waste the Court's time as well. And there can be no reasonable doubt that Marten Law's objective is to "hijack" as much money as possible to its law firm. Under these circumstances, the Marten Law objections should be stricken in their entirety or, at a minimum, should be given little weight.[242]

3. The Objections Actually Raised are Meritless.

a) Objections Relating to Fairness

i. Amount of Settlement and Relationship to Recovery at Trial[243]

[242] For example, the Brazos River Authority concedes it is not a Settlement Class Member [ECF No. 3981], at 2, 4, 6, 23 ("BRA is not a Class Member"), as does the Lower Colorado River Authority [ECF No. 3991], at 2, 4, 5, 13, 15. Yet both spend a collective 62 pages—36 and 26, respectively—attacking the "[n]onsensical and unjust results" that would occur upon application of the Settlement Agreement's provisions to it. *Id.* Such Objections are meritless on their face.

[243] *See* Objections from: City of Fort Worth [ECF No. 3954], at 23-25; Upper Eagle Regional Water Authority [ECF No. 3989], at 15-19; Eagle River Water & Sanitation District [ECF No. 3987], at 14-17; City of Moses Lake [ECF No. 3986], at 18-21; Lakehaven Water & Sewer District [ECF No. 3983], at 20-23; City of Dallas [ECF No. 3979], at 23-26; City of Las Cruces [ECF No. 3978], at 23-24; Hannah Heights Owners Association [ECF No. 3974], at 18-19; City of Tacoma [ECF No. 3972], at 24-27; City of Airway Heights [ECF No. 3970], at 20-23; City of DuPont [ECF No. 3968], at 17-20; Lakewood Water District [ECF No. 3965], at 25-27; City of Vancouver [ECF No. 3962], at 24-27; City of NTWD [ECF No. 3960], at 24-27; and The Metropolitan Water District of Southern California [ECF No. 3955], at 24-27.

Several objectors complain that the Settlement Agreement must be rejected because it does not compare the value of the settlement to the damages that could have been obtained at trial.[244] Objectors rely almost entirely on case law outside the Fourth Circuit. For several reasons, these objections are flawed.

First, objectors' argument is flatly contrary to controlling Fourth Circuit law, which objectors fail to even acknowledge. For instance, in *McAdams*, the Fourth Circuit considered an objector's contention that a magistrate judge "failed to make a rough estimate of what class members would have received had they prevailed at trial." 26 F.4th at 160 (cleaned up). In upholding the settlement, the court noted that it has "never required such an estimate" and was "not persuaded to impose t[hat] new requirement..." *Id. Accord, e.g., 1988 Tr.*, 28 F.4th at 527 (explaining that, in evaluating a settlement agreement, a court "need not decide the merits of the case nor substitute its judgment of what the case might be worth for that of class counsel;" rather "the court must simply satisfy itself that the class settlement is within the 'ballpark' of reasonableness" (cleaned up)); *Boger v. Citrix Sys., Inc.*, No. 19-CV-01234-LKG, 2023 WL 3763974, at *6, n.5 (D. Md. June 1, 2023) (noting that"[t]he Fourth Circuit has never required an estimate of what the class members would have received had they prevailed at trial") (cleaned up)); *Feinberg v. T. Rowe Price Grp.*, 610 F. Supp. 3d 758, 769 (D. Md. 2022) (to the same effect).

Second, even among Circuits that require some analysis of the potential value of the claims in relation to the settlement, the analysis is far less rigorous than objectors suggest. Objectors assert that nothing short of an actual bellwether trial will do.[245] That assertion is so flatly contrary to precedent that it can only be characterized as frivolous. Class Counsel have conducted a rigorous

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[244] *See, e.g.,* City of Fort Worth Obj. [ECF No. 3954] at 23 ("The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.").
[245] *Id*. at 25 ("The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.").

search of the case law and have found *no* authority in any Circuit for the proposition that a bellwether trial is *required* to demonstrate the reasonableness of a settlement.

Indeed, cases make clear that exactly the opposite is true: no trial on the merits is required prior to settlement. *See, e.g., Flinn*, 528 F.2d at 1174 (noting that there is "no requirement for a trial on the merits as a prerequisite to approval of a settlement"); *Warshawsky v. CBDMD, Inc.*, 20-cv-00562, at *2 (W.D.N.C. Aug. 9, 2022) (in its order granting final approval, the court noted that it was not required "to conduct a trial on the merits of the case or determine with certainty the factual and legal issues in dispute when determining whether to approve a proposed class action settlement"). Not surprisingly, there are countless court-approved settlements (no doubt the overwhelming majority) that involved no bellwether trial, and the Fourth Circuit has affirmed myriad class action settlements where no bellwether trial took place.[246] Any requirement of a bellwether trial prior to settlement would defeat the whole purpose of settlement, which is to provide "an efficient alternative" to the risk and expense of protracted litigation. *In re Allura Fiber Cement Siding Litig.*, Civil Action No.: 2:19-mn-02886-DCN, 2021 U.S. Dist. LEXIS 96931, at *6 (D.S.C. May 21, 2021).

Far from requiring a bellwether trial, even in Circuits that require some showing of the value of the cases at trial, the standard is flexible and easily satisfied here. For instance, in the Seventh Circuit, courts are instructed to evaluate the settlement in relation to the value of class claims. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004). Yet, all that is required is an "estimate" or "reasonable approximation" of the value of the claims. *Id.* at 786. And even in the Seventh Circuit, "evaluation of potential outcomes *need not always be quantified*, particularly

[246] For just a few examples, *see, e.g., 1988 Tr.*, 28 F.4th at 518; *McAdams, supra*; *Lumber Liquidators, supra*; *Sharp Farms, supra*; *Berry, supra*.

where there are other reliable indications that the settlement reasonably reflects the relative merits of the case." *Kaufman v. Am. Express Travel Related Servs. Co.*, 877 F.3d 276, 285 (7th Cir. 2017) (emphasis added) (citing *Wong*, 773 F.3d at 864.). Other reliable indications of a settlement's reasonableness may include the involvement of an "experienced third-party mediator after an arm's-length negotiation where the parties' positions on liability and damages were extensively briefed and debated." *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014). The facts here more than satisfy these criteria.

To begin, Plaintiffs have in fact assessed the value of the claims in a myriad of ways. As discussed at length above, Plaintiffs prepared the *Stuart* case for trial and as part of that preparation, retained an expert to opine on the capital and O&M costs that would be required for the City of Stuart to treat its Drinking Water such that the PFAS levels were nondetectable. As noted above, this resulted in *Stuart* seeking $76,750,290.00 in compensatory damages in relation to its Drinking Water claims. As such, Plaintiffs had a clear understanding of the value of the claims in the *Stuart* bellwether trial, which the parties agreed was a representative case.[247]

Pursuant to the Allocation Procedures, with respect to the Settlement, it is estimated that *Stuart* is entitled to $1,686,581.00[248] This represents a significant portion of the amount expected at trial, and it is well-settled law that even where a cash settlement amounts to only a "fraction of the potential recovery" at trial, that will not render a settlement inadequate or unfair. *Flinn*, 528 F.2d at 1173-1174.

[247] Douglas Final App. Decl. at ¶¶ 9-12.
[248] *See* Estimated Allocation Range Tables, available at https://www.pfaswatersettlement.com/wp-content/uploads/2023/08/DuPont-Estimated-Allocation-Range-Table.pdf.

Moreover, through preparation of the *Stuart* case for trial, Plaintiffs gained a clear appreciation for which defenses Defendants (and the other Telomer Defendants) considered to be their strongest, including resulting from extensive motion practice with respect to both summary judgment and *Daubert*, along with evidentiary rulings that involved letter-briefing, and formal hearings even days before trial. All these trial preparation efforts provided additional insight and were very instructive as to relative merits of each parties' positions and their likelihood of prevailing at trial. Thus, Plaintiffs were able to consider not only the value in numerical terms, but also weigh that value against the defenses raised by Defendants.

In addition, this case was settled only after the involvement of an experienced mediator (retired Judge Layn Phillips), during which time the parties extensively discussed their relative positions on liability and damages. In this regard, and as noted above, Defendants strongly contended that it would be difficult for Plaintiffs to prove that the PFOA found in Stuart's drinking water wells emanated came from Defendants, thereby raising proximate causation concerns. Moreover, as a component part manufacturer rather than an AFFF concentrate manufacturer, Defendants contended that had it little or no duty to warn end-users of risks associated with AFFF use. Finally, Defendants also contended that end-users were contributorily negligent in their use of AFFF, which could have resulted in lesser damages valuations.

Conversely, Plaintiff contended that through methodologically-sound fate and transport analyses coupled with testimony from AFFF end-users in *Stuart*, it would be able to establish that some of the PFOA in Stuart's wells emanated from Defendants and thus prove proximate causation. Similarly, with respect to Defendants' duty to warn, Plaintiff argued that because the component part manufactured by Defendants —that is, the C8 telomer iodide containing fluorosurfactants—was the defective aspect of AFFF, that it did, in fact, have a duty to warn of the

defect, and further, that because it failed to adequately do so, end users were unaware of how and when to properly use, train and/or dispose of AFFF.

In any event, what is ultimately critical is not a theoretical assessment of the claims' maximum value but an analysis of the risks of litigation—an analysis that the Marten Law Objectors essentially ignore. *See, e.g.*, *McAdams*, 26 F.4th at 159 (noting that, in reviewing the adequacy of a settlement, courts "must consider" factors including "the costs, risks, and delay of trial and appeal"); *1988 Tr.*, 28 F.4th at 526 (affirming class certification and settlement approval and noting that "the district court comprehensively addressed the prongs involving the costs and risks of litigation," including "the existence of defenses which raised obstacles to recovery" (cleaned up)); *Sharp Farms*, 917 F.3d at 299 (noting that the "most important factors in this analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses.") (citing *Berry v. Schulman*, 807 F.3d 600, 614-15 (4th Cir. 2015)). Indeed, noticeably lacking from the Marten Law's presentations is any recognition of the serious risks and delay from continuing to litigate. The presentations instead focus entirely on trying to derail the settlement, using inaccurate and misleading arguments.

Here, the risks of this litigation were substantial. As noted above, these risks range from litigation risks such as the uncertainty of jury trials generally and drawn-out appeals to significant scientific hurdles, including the difficulty Plaintiffs may face in tracing PFOA in contaminated Water Sources back to Defendants. In light of these serious risks, objectors cannot plausibly contend that a historic settlement of more than $1 billion against Defendants is deficient.

ii. Settlement Value Versus Defendants' PFAS-Related Damages.[249]

[249] *See* Objections from: Widefield Water & Sanitation [ECF No. 4010], at 6; Upper Eagle Regional Water Authority [ECF No. 3989], at 15; Eagle River Water & Sanitation District [ECF No. 3987], at 13-14; City of Moses Lake [ECF No. 3986], at 17-18; Lakehaven Water & Sewer

The Marten Law Objectors claim that the total Settlement Amount is not adequate because it "pales in comparison to the PFAS-related damages that Defendants have caused across the country while controlling between 3 and 7 percent of the historical PFAS market."[250] As set forth above, "the fact that a cash settlement 'may only amount to a fraction of the potential recovery' will not per se render the settlement inadequate or unfair." *See e.g. Flinn*, 528 F.2d at 1173-74. Similarly, and also discussed above, the five factors[251] to be considered in determining the adequacy of the Settlement Amount have been satisfied here, and the Marten Law Objectors have failed to establish a cogent argument explaining why it believes any of those factors have not been satisfactorily satisfied here.

iii. Allocation of Funds Between Phase One and Phase Two Class Members.[252]

Certain objectors represented by Marten Law argue that the Settlement Agreement does not treat "'class members equitably relative to each other.'" Fed. R. Civ. P. 23(e)(2) .[253] In particular, these objectors identify four circumstances where Settlement Class Members are

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District [ECF No. 3983], at 20; City of Dallas [ECF No. 3979], at 22-23; City of Las Cruces [ECF No. 3978], at 24-27; Hannah Heights Owners Association [ECF No. 3974], at 24; City of Tacoma [ECF No. 3972], at 24; City of Airway Heights [ECF No. 3970], at 20; City of DuPont [ECF No. 3968], at 16-17; Lakewood Water District [ECF No. 3965], at 23-24; City of Vancouver [ECF No. 3962], at 24; City of NTMWD [ECF No. 3960], at 23-24; Metropolitan Water District of Southern California [ECF No. 3955], at 23-24; and City of Fort Worth [ECF No. 3954], at 22-23.

[250] *See e.g.*, Lakewood Water District Objection [ECF No. 3965], at 23-24.

[251] *Jiffy Lube* identifies five factors to adequacy of a settlement: "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *Jiffy Lube*, 927 F.2d at 159.

[252] *See* Objections from: City of Moses Lake [ECF No. 3986], at 21-22; the City of Dallas [ECF No. 3979], at 22-23; and the City of Las Cruces [ECF No. 3978], at 27-28.

[253] *See e.g.*, Lakewood Water District Obj. [ECF No. 3965], at 28-29.

allegedly treated differently, which center around the alleged disparate treatment between Phase One and Phase Two Class Members. Specifically:

(1) When a retail water supplier obtains treated water from a wholesale supplier, it many not obtain funds, even if PFAS enters their system;

(2) When a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination;

(3) The allocation between Phase One and Phase Two Claimants provide more funding for Phase One, even if Phase Two claimants discover greater contamination; and

(4) The methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[254]

As it pertains to number 1 above, the Parties' Joint Interpretative Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"),[255] which the Court approved as a supplement to the Settlement Agreement,[256] is clearly instructive. In particular, the Interrelated Guidance makes clear that there is no categorical bar to a retailer obtaining funds if PFAS enters its system; rather, the amount allocated as between the retailer and the wholesaler will be apportioned by the Claims Administrator "based on relative capital and O&M costs of PFAS treatment borne by the wholesale and the retail customer, respectively."[257] In other words, the Interrelated Guidance clearly contemplates retailers receiving settlement funds, and absent agreement between the wholesaler and the retailer, the retailer will be able to do so based on the extent to which it bears PFAS treatment costs.[258]

[254] *Id*.
[255] The Parties' Joint Interpretative Guidance on Interrelated Drinking-Water Systems [ECF No. 3858-1].
[256] Order Granting Joint Motion to Supplement the Preliminarily Approved Allocation Procedures [ECF No. 3862].
[257] Interrelated Guidance, at 2.
[258] *Id*. at 2-3.

Number two above is essentially the opposite claim as number one; that is, that to the extent that the retailer obtains the full Allocated Amount to treat its PFAS-contaminated water, such claim will extinguish the rights of the wholesaler who may have PFAS-related treatment costs. Again, the same response applies: the Interrelated Guidance provides that the "Claims Administrator will divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment borne by the wholesale and the retail customer, respectively."[259] In short, neither entities' rights usurp those of the other; rather, absent agreement, the Claims Administrator is charged with apportioning the Allocated Amount in a way that is consistent with each entity's treatment costs so as to avoid double recovery for any one Water Source.[260] As such, neither of these issues provide any basis to find the Settlement Agreement unfair.[261]

As it pertains to number 3 above, the Marten Law Objectors provide very little support for this argument other than a bald assertion. However, it goes without saying that simply because a greater proportion of the Settlement Amount is allocated to Phase One than to Phase Two on a 55/45% basis,[262] that does not bear directly on the Allocated Amount that any particular Settlement Class Member may receive. Moreover, as discussed at length above, this determination to allocate on 55/45% basis is actually a conservative estimate as to the proper allocation between Phase One and Phase Two based on the analysis of a highly-esteemed expert in liability forecasting.[263]

[259] *Id*. at 2-3
[260] *Id*. at 2-3.
[261] In fact, the Claims Administrator developed a Joint Claims Form submission process to assist the retailers and wholesalers—as well as any other interrelated Drinking Water partners—to proceed jointly and receive an apportionment of any award that results.
[262] SA, at Ex. E.
[263] Raab Prelim. App. Decl., at ¶ 5 (declaration submitted by Timothy G. Raab explaining that while his analysis called for 36% of the total Settlement amount to be allocated to Phase Two, in "an effort to be conservative," he recommended "adjusting the ratio" to allocate 45% of those funds to Phase Two).

Because this allocation is the result of a sound methodological analysis, this scenario does not provide any basis to support the contention that the Settlement Agreement is unfair.

Finally, as it pertains to number 4 above, the Marten Law Objectors are incorrect in suggesting that the methodologies used by Class Counsel undercounted and undercompensated Phase One claimants, because, they claim, "the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs," whereas UCMR 5 data would allow for more PWS to "qualify under Phase One than previously understood."[264] But again, the differences between UCMR 3 and 5 were already accounted for by Plaintiffs' expert.[265] Clearly, this situation has already been addressed in the Settlement Agreement, and it thus provides no support for the Marten Law Objectors' contention that the settlement is unfair.[266]

iv. The Release is not Overbroad

Marten Law and the few other objectors[267] write at length attacking the scope of the Release. Yet, their arguments are based on a *misreading* in an effort to create dire hypothetical consequences.

As an initial matter, in an effort to eliminate the confusion engendered by these flawed objections, the parties recently promulgated the Joint Interpretative Guidance on Certain Release Issues ("Release Guidance"), which was Court-approved:

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[264] *See e.g.*, Objection of Lakewood Water District, at p. 28.
[265] Raab Decl., at ¶ 4 (stating that "[t]o approximate the impact of the[]differences between UCMR 3 and ECMR 5, I used detections from the state data for large PWS.").
[266] Moreover, as noted above, to date, the EPA has released approximately 7% of the total anticipated UCMR 5 data, and based on the data thus far, only approximately 20% of the PWS had PFAS detections. As such, Mr. Raab's assumption of a 39% detection rate for UCMR5 is supported by the testing data to date which shows only a 20% detection rate.
[267] In total, 25 parties lodged objections related to the issues addressed in the Parties' Joint Interpretive Guidance on Certain Release Issues ("Release Guidance")[ECF No 4064-1].

(1) with respect to certain language in Paragraph 12.1.2, namely, the words "separate from and not related to…," it is the "joint understanding that those words mean "separate from and not *physically* related to;"[268]

(2) with respect to Paragraph 2.6, it is the parties' understanding that "Claims" for "contribution" and "indemnity" are only released to the extent that they fall within the definition of Released Claims, but such "contribution" and "indemnity" is not released for Claims that are not released;[269] and

(3) with respect to Paragraph 2.45 of the Settlement Agreement, that although "Releasing Persons" includes a broad definition, "i[t] is the parties' joint understanding that this language does not mean that such individual persons release personal Claims (i.e., for personal injury").[270]

Within the context of this guidance, it is clear that the Release is only as broad as the relief secured. The scope of the Release does not render the Settlement unfair or unreasonable; instead, it represents the nature of a bargained-for solution.

The purpose of the Settlement is to provide funds to PWS to address PFAS in their Drinking Water. The Agreement opens with a recital that Plaintiffs "have suffered harm resulting from the presence of PFAS in Drinking Water" and allege that "Settling Defendants are liable for damages and other forms of relief to compensate for such harm."[271] The damages compensated by and through participation in the Settlement are treatment costs to Drinking Water within PWS. Keeping this central tenet in mind, the Release is appropriately scoped: it releases *only* those claims of PWS whose Drinking Water was contaminated before the Settlement Date, and *only* those entities with an interest in those claims are Releasing Parties.

Another related tenet of the Settlement is the prohibition against double recovery. Indeed, the underlying theme of the negotiated Release was to avoid double recovery of compensation for

[268] Release Guidance, at p. 1 (emphasis added).
[269] *Id*. at p. 2.
[270] *Id*. at p. 2
[271] SA § 1.2.

treatment of PFAS in PWS' Drinking Water. One of Defendants' primary interests was to reach a resolution that would be final and avoid endless ongoing litigation, so necessarily both the Release and the relief had to be broad. Defendants insisted they would not pay twice (or more) for damages from costs to PWS of treating Drinking Water. Class Counsel was able to leverage this interest to strategically negotiate the carve-outs of claims *unrelated* to treatment costs for Drinking Water; namely, certain stormwater and wastewater claims that relate to facilities or real property that is separate from PWS and does not provide Drinking Water. Such claims are *not* subject to the Release. Objectors completely miss this point.

- **<u>Objection</u>: the Release is overbroad because it includes almost all wastewater and stormwater relating to separate facilities or real property.**[272]

The Settlement Agreement provides for an exception to the Release "where a Settlement Class Member also owns real property or owns or operates a facility that is separate from and not related to a Public Water System and does not provide Drinking Water (*e.g.*, a separate wastewater or stormwater system or airports or fire training facilities that are not related to a Public Water System)." In such instance "Claims relating to the discharge, remediation, testing, monitoring, treatment or processing of stormwater and wastewater at or by such separate real property or facility" are "preserved to the extent such Claims seek damages not arising from or relating to

[272] *See* Objections from Broward County [ECF No. 3997], at 1-5; the City of Newburgh [ECF No. 3995], at 4-6; Lower Colorado River Authority [ECF No. 3991], at 8-9; Upper Eagle Regional Water Authority [ECF No. 3989], at 5; Eagle River Water & Sanitation District [ECF No. 3987], at 4; City of Moses Lake [ECF No. 3986], at 5; Lakehaven Water & Sewer District [ECF No. 3983], at 5; Brazos River Authority [ECF No. 3981], at 10; City of Dallas [ECF No. 3979], at 5; Hannah Heights Owners Association [ECF No. 3974], at 4-5; City of Tacoma [ECF No. 3972], at 5; City of Airway Heights [ECF No. 3970], at 5; City of DuPont [ECF No. 3968], at 5; Lakewood Water District [ECF No. 3965], at 5; City of Vancouver [ECF No. 3962], at 5; City of North Texas Municipal Water District [ECF No. 3960], at 5-6; The Metropolitan Water District of Southern California [ECF No. 3955], at 5; and City of Fort Worth, [ECF No. 3954], at 5.

alleged harm to Drinking Water."[273] When viewed under the two guiding principles described above—purpose of compensation, and prohibition on double recovery—these exceptions make sense. A "separate wastewater or stormwater system or airports or fire training facilities" (§ 12.1.2(a)) contaminated with PFAS will require different treatment than will PWS' Drinking Water. And so long as such Claims "seek damages not arising from or relating to alleged harm to Drinking Water," double recovery is avoided.[274]

Some objectors read these exclusions as meaningless because water, in the global sense, is all hydrologically connected. Rainwater runs off streets as stormwater, which may fill surface water systems or recharge groundwater aquifers to one day emerge as water for drinking; such water, in turn, is consumed and becomes wastewater. Wastewater or stormwater, the objectors argue, can therefore never be "separate from and not related to" Drinking Water. The Release Guidance moots any such argument, explaining that this phrase means "separate from and not physically related to a Public Water System."[275] To the extent that a Settlement Class Member operates a wastewater system that is not physically connected to its PWS, that Settlement Class Member retains its claim for damage to that wastewater system. This grounding in physical connection also moots any concerns that the exclusion would be lost as to a wastewater or stormwater system that is organizationally "related" to a PWS. This logically avoids double recovery and explicitly preserves the excluded claims.

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[273] SA § 12.1.2.
[274] *Id.*
[275] Release Guidance, at p. 1.

Additionally, the Release Guidance makes clear that Settlement Class Members who retain excluded claims under 12.1.2 do not release claims for contribution and indemnity that relate to these excluded claims.[276]

Section 12.1.2(b) then goes on to provide an additional protection for storm- and wastewater claims, stating that "if the EPA or a State establishes additional requirements […] after the Settlement Date with respect to the discharge, remediation, testing, monitoring, treatment or processing of PFAS-containing stormwater or wastewater are preserved to the extent they seek to recover for additional compliance costs imposed on the Settlement Class Member by such new requirements…" This is in the *alternative* to the requirements for exceptions to the Release laid out in § 12.1.2(a), rather than in addition to, meaning that in its totality § 12.1.2 offers multiple potential avenues for preservation of storm- and wastewater as well as real property damage claims.

Finally, the Agreement even preserves claims for PFAS-related damages to Drinking Water where the contamination has yet to occur—a major advantage for Settlement Class Members, and a hard-fought (and heavily contested) term. Section 12.1.3(x) provides that "Released Claims shall not include Claims that arise from or relate to a Test Site as to which PFAS is deemed […] to have entered the water or facilities or real property of the Public Water System after the Settlement Date."

Although the parties believed such language describing the exceptions to the Release to be clear in a plain reading, it should still be read within the full context of all Release provisions. Indeed, applying the same two guiding principles—purpose of compensation and no double recovery—to § 12.1.1 illustrates how the Release maps on to the conceptual framework.

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[276] *Id.*

It is correct that Releasing Parties would be bound by § 12.1.1, which states that Claims "that arise from or relate to PFAS that entered Drinking Water of a Public Water System within the Settlement Class, its Water Sources, its facilities or real property, or any of its Test Sites at any time before the Settlement Date" are released (§ 12.1.1(i)). But there are several limiting factors that must be properly understood.

First, such release applies only to PFAS that *has already entered* a PWS before the Settlement Date.

It is also correct that Releasing Parties would be bound by § 12.1.1(iii) and would thereby release Claims "for any type of relief with respect to the installation, maintenance, or operation of, and cost associated with any kind of treatment, filtration, remediation, testing, or monitoring of PFAS by any Settlement Class Member with respect to PFAS that has entered Drinking Water of a Public Water System within the Settlement Class, its Water Sources, its facilities or real property, or any of its Test Sites at any time before the Settlement Date." Taken within the context of the prohibition on double recovery, this makes perfect sense and is reasonably described. The "installation, maintenance, or operation of, and cost associated with […] PFAS that has entered Drinking Water of a Public Water System" is exactly what the Settlement was designed to compensate, so of course that would be subject to release.

The last clause of the Release provision, § 12.1.1(iv), releases all Claims "that were or could have been asserted in the Litigation." The clause merely acts as a reiteration of what has already been stated: that Released Claims are released, and unreleased Claims are not. The term "Litigation" is defined to mean "collectively the MDL and all other pending litigation brought by or on behalf of a Releasing Person against a Released Person involving Released Claims" (§ 2.26). Critically, "Litigation" is ***not*** as broad as all cases in the MDL, which includes many thousands of

claims that are brought by plaintiffs other than PWS who are not "Releasing Persons." Such cases are thus not within the definition of "Litigation," and § 12.1.1(iv) does not release claims that could not have been asserted by the Releasing Persons here.

The Release is plainly not overbroad, and specifically not with regards to storm- and wastewater claims, which are preserved under § 12.1.2.

- **Objection: the Release is overbroad because Releasing Parties includes parties that never assented to settle.** [277]

The fact that "Releasing Parties" may be broader than the Settlement Class Members alone does not render the Release overbroad. "Class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 109 (2d Cir. 2005) (*see also In re WorldCom, Inc.*, 347 B.R. at 156 (noting that fiber optic cable settlements have released claims against the railroads, which "ensure[s] the final resolution so critical to Defendants' agreeing to settle"). In the *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Prods. Liab. Litig.*, the definition of releasing parties included not only the settlement class member

[277] *See* Objections from: Broward County's [ECF No. 3997], at 6; Lower Colorado River Authority [ECF No. 3991] at 5-6, 17; Upper Eagle Regional Water Authority [ECF No. 3989], at 7-9; Eagle River Water & Sanitation District [ECF No. 3987], at 7-9; City of Moses Lake [ECF No. 3986], at 7-9; 12; Lakehaven Water & Sewer District [ECF No. 3983], at 8-9, 14-15; Brazos River Authority [ECF No. 3981] at 8-9, 22-23; City of Dallas [ECF No. 3979], at 8-9, 17; City of Las Cruces [ECF No. 3978], at 8-9, 18; Hannah Heights Owners Association [ECF No. 3974], at 7-8; City of Tacoma [ECF No. 3972], at 8-9, 18-19; City of Airway Heights [ECF No. 3970], at 7-8; 14-15; City of DuPont [ECF No. 3968], at 7-9, 12-13; Lakewood Water District [ECF No. 3965], at 8-9; City of Vancouver [ECF No. 3962], at 8-9, 18-19; City of North Texas Municipal Water District [ECF No. 3960, at 8-9, 17]; The Metropolitan Water District of Southern California [ECF No. 3955], at 8-9, 18; and City of Fort Worth [ECF No. 3954], at 8, 17.

Volkswagen dealers, but "any other legal or natural persons who may claim by, through, or under them." 2018 WL 1588012, at *8 (N.D. Cal., 2018) (emphasis added). Such scope—arguably much broader than the language here—was permissible, on the logic that "[b]ecause the Intervenor Plaintiffs each assert claims 'by, through, or under [the class members], they are Releasing Parties under the settlement agreement." *Id.* (internal citations omitted).

In the Settlement Agreement, the Releasing Parties definition can be thought of as including, much as in the *In re Volkswagen* case, non-PWS Settlement Class Members whose claims are derivative of PWS Settlement Class Members' claims. Like the Release, the Releasing Parties definition is married exactly to the relief secured, and fits within the framework of the two guiding principles: funds for treatment of PFAS in PWS' Drinking Water, and prohibition on double recovery.

First, section 12.1.3(y) lays out key language limiting the extent of Releasing Parties' release, stating that "any Releasing Person that is not a Public Water System but that is legally responsible for funding (by statute, regulation, other law, or contract) or that has authority to bring a Claim on behalf of, or to seek recovery for harm to, a Public Water System in the Settlement Class […] ***gives the release only to the extent of Claims that seek to recover for alleged harm to such Public Water System***" (emphasis added). This language limits the extent of the release given by Releasing Parties that are legally responsible for funding or that have authority to bring a Claim or seek recovery for harm to a PWS to just those damages for alleged harm to the PWS Settlement Class Member. It is, therefore, plainly for the purpose of ensuring that such Releasing Persons do not release their own claims that are not derivative of the PWS claims.

The Settlement compensates harm to PWS' Drinking Water, and in order to avoid double recovery, the Releasing Parties must necessarily include any who may have a stake in recovery, whether a Settlement Class Member themselves or not.

- **Objection: the Release is overbroad because it releases claims that do not share an "identical factual predicate."[278]**

It is not true, as alleged in certain objections, that the Defendants' Agreement "would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members."[279] As a starting premise, the Agreement does not resolve (and therefore does not release) all claims alleged by Settlement Class Members. Such PWS may have any number of other claims that do not fall within the ambit of the Release—such as storm- and wastewater claims falling within the express exception to the Release—and indeed, those claims are preserved because they do *not* have an identical factual predicate with the Released Claims.

Secondly, the Release is exactly scoped to release only those Claims that *do* have an identical factual predicate: claims relating to PFAS contamination of PWS. *See* §§ 12.1.1, 12.1.2 and 12.1.3 and analysis thereof, *supra*.

Section 12.1.3(x) even goes one step further, exempting *future* PFAS contamination ("the Released Claims shall not include Claims that arise from or relate to a Test Site as to which PFAS

[278] Objections from: Widefield Water and Sanitation District [ECF No. 4010], at 6; the City of Newburgh [ECF No. 3995], at 3; Lower Colorado River Authority [ECF No. 3991], at 8; Upper Eagle Regional Water Authority [ECF No. 3989], at 4-5; Eagle River Water & Sanitation District, [ECF No. 3987], at 4; City of Moses Lake [ECF No. 3986], at 4; Lakehaven Water & Sewer District [ECF No. 3983], at 4-5; Brazos River Authority [ECF No. 3981], at 9-10; the City of Dallas [ECF No. 3979], at 4-5; City of Las Cruces [ECF No. 3978], at 4-5; Hannah Heights Owners Association [ECF No. 3974], at 4; City of Tacoma [ECF No. 3972], at 4-5; City of Airway Heights, [ECF No. 3970], at 4-5; City of DuPont [ECF No. 3968], at 4; City of DuPont [ECF No. 3968], at 4-5; City of North Texas Municipal Water District [ECF No. 3960], at 4-5; The Metropolitan Water District of Southern California [ECF No. 3955], at 4-5; and City of Vancouver [ECF No. 3962], at 4-5.

[279] *Id*.

is deemed under Paragraph 12.6 to have entered the water or facilities or real property of the Public Water System after the Settlement Date"). Section 12.6.4 confirms that such claims are "outside the temporal scope of the release."

Further, the Settlement Agreement, when read in its entirety—including the totality of the documents promulgated in connection therewith, its Exhibits, all Court-approved amendments thereto and the Parties' Joint Interpretive Guidance documents, also Court-approved—confirms that this is a settlement that provides Public Water Systems compensation to treat their Drinking Water. Once a PWS has been compensated to treat their Drinking Water, it will have waived its right to make claims for damages to treat its Drinking Water. Despite the conclusory inclusion in the Marten Law objections that released claims lack an identical factual predicate, no example of this alleged "wide range" of claims is given. Indeed, under a proper read of the Release provisions, no such example can be given because none exists. The Agreement releases claims with identical factual predicates, and exempts those without.

- **<u>Objection</u>: the Release is overbroad because it releases claims for unknown PFAS.[280]**

Again, the only Released Claims are those that relate to PFAS contamination of PWS; the compensation is directly related to the real world costs of installing such treatment.[281] It is therefore

[280] *See* Objections from: Widefield Water and Sanitation District [ECF No. 3995]; City of Newburgh [ECF No. 3995], at 1-2; Lower Colorado River Authority [ECF No. 3991], at 9-10; Upper Eagle Regional Water Authority [ECF No. 3989], at 6-7; Eagle River Water & Sanitation District [ECF No. 3987], at 5-6; City of Moses Lake [ECF No. 3986], at 5-6; Lakehaven Water & Sewer District [ECF No. 3983], at 5-6; Brazos River Authority, ECF No. 3981 at 11-12; City of Dallas [ECF No. 3979 at 6; Objection of City of Las Cruces, ECF No. 3978 at 6; Hannah Heights Owners Association [ECF No. 3974], at 5-6; City of Tacoma [ECF No. 3972], at 6; Lakewood Water District [ECF No. 3965], at 6; City of Vancouver [ECF No. 3962], at 6; City of North Texas Municipal Water District [ECF No. 3960], at 6-7; and City of Fort Worth [ECF No. 3954], at 5-6

[281] SA §§ 1.2, 5.1, 11.3, 11.5 (*see* specifically, § 11.5.2(c), confirming "The payment of the Restitution Amount by Settling Defendants constitutes, and is paid (i) as restitution for alleged PFAS contamination, and/or (ii) for remediation by the Settlement Class Members of alleged

reasonable to address liability from new or unknown PFAS through the Release, because the damages necessary to remediate these new or unknown chemicals in PWS' Drinking Water are being provided through this Settlement. The objections' suggestion that additional damages should be available to remediate these other contaminants would result in double recovery.

While PFAS as a chemical family consists of many different chemicals—including some that have yet to be developed—there are only approximately 200 commercially available, and by virtue of them being within the PFAS family, they are all treatable by the same methods. The Defendants facing this existential threat were simply not willing to release only PFOA/PFOS and face litigation over and over again if a new PFAS chemical was to be found in a PWS's Drinking Water. That interest was part of what allowed Class Counsel to negotiate such a large settlement amount (especially so when taking into account Defendants' liability and market share, discussed *supra)*.

It is further correct that Releasing Parties would be bound by § 12.1.1(ii) and would thereby release Claims "that arise from or relate to the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS alone or in products that PFAS as an active ingredient, byproduct, or degradation product, including AFFF." Again, this offers all parties finality in resolution and, because in real life all PFAS in Drinking Water is subject to the same treatment, the scope of the Release does not prejudice any claimant. By participating in the Settlement they will receive compensation for the costs to install and

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PFAS contamination […], which restitution or remediation has had or will have a direct nexus or connection with the alleged harms described…"), 12. *See also* the Allocation Procedures, generally.

maintain treatment to their PFAS-contaminated Drinking Water, regardless of the PFAS contaminant.

- **<u>Objection</u>: the Release is overbroad because it includes personal injury claims.**[282]

It is not correct that Settlement Class Members' personal injury claims are released. The Settlement Class Members are entirely made up of PWS—*not* natural persons with personal injuries.[283] When read as a whole, in context, that is the only reasonable interpretation. Personal injury claims continue in ongoing litigation. Such cases have been the subject of CMOs and bellwether orders since the filing of the Plaintiffs' Motion for Preliminary Approval and even since the grant of Preliminary Approval.[284]

It is true that recovery under the Settlement would release contribution and indemnity claims the PWS might have against Defendants if *the PWS* is the subject of suits by injured individuals for personal injury claims.[285] "Claims" is defined to include contribution and indemnity claims (§ 2.6), and Released Claims, as defined in § 12.1, incorporates such definition. It is typical for indemnity and contribution to be released in a class settlement. *Caudle v. Sprint/United Management Company*, 2019 WL 2716291, at *4 (N.D. Cal., 2019) (approving

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[282] *See* Objections from City of Newburgh [ECF No. 3995], at 2-3; Lower Colorado River Authority [ECF No. 3991], at 10-11; Upper Eagle Regional Water Authority [ECF No. 3989], at 7-8; Eagle River Water & Sanitation District [ECF No. 3987], at 6-7; Objection of Lakehaven Water & Sewer District, ECF No. 3983 at 6-7; Brazos River Authority [ECF No. 3981], at 12-13; City of Dallas [ECF No. 3979], at 7-8; City of Las Cruces [ECF No. 3978], at 6-7; Hannah Heights Owners Association [ECF No. 3974 at 6-7]; City of Tacoma [ECF No. 3972], at 7-8; City of Airway Heights [ECF No. 3970], at 6-7; City of DuPont [ECF No. 3968], at 6-7; Lakewood Water District [ECF No. 3965], at 6-7; City of Vancouver [ECF No. 3962], at 7-8; City of North Texas Municipal Water District [ECF No. 3960], at 7-8; The Metropolitan Water District of Southern California [ECF No. 3955], at 7-8; and City of Fort Worth [ECF No. 3954], at 6.

[283] The Release Guidance makes clear that individuals who may be Releasing Persons due to their association with a PWS do not release their personal injury claims.

[284] Transcript of July 14, 2023 CMC, 47:24-48:3; 51:18-24.

[285] The Release Guidance makes clear that a PWS does <u>not</u> release contribution and indemnity claims arising from the claims excluded by SA § 12.1.2.

release of indemnity claims arising from claims that are part of settlement); *Rieckborn v. Velti PLC*, 2015 WL 468329, at *10 (N.D. Cal., 2015) (same); *see also*, *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir.2001) ("It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action.")(emphasis added).

Such a release does not render the Settlement unfair or unreasonable. All settlements involve difficult tradeoffs. Here, it is one of many bargained-for terms, and while it must be assessed carefully, it should not be afforded disproportionate weight. When evaluated in the correct context, the risk of consumer suits for personal injury is low (only [2] have been filed in the MDL, which comprises over 15,000 filed cases), and many robust defenses to such claims exist. In short, the risk of personal injury lawsuits should not adversely confront would-be participants.

Arguably, this is not even an Objection for the Court to rule on but rather a choice each Class Member must make. In making that choice, each individual PWS is free to weigh the many risks of opting *out* in order out to preserve those rights. A decision to forgo much needed settlement funds in the face of looming federal regulation in order to simply preserve its rights of indemnification and contribution (for which it is receiving valuable consideration) may likely result in exposing a PWS to even *greater* liability and/or *delay* in obtaining funds. This would include: i) the likelihood of years of litigation before seeing its day in Court; ii) the time and cost of having to prove liability against Defendants with reliable and admissible evidence, when and if they do get that day in court; iii) the risk of losing at trial entirely and thus ending up with zero compensation; iv) the possibility of having no choice but to increase rates in order to pay for the cost of PFAS remediation now; v) the difficulty in justifying future rate increases before an appropriate rate board as a result of having failed to mitigate expenses (by opting out of the

opportunity to obtain settlement funds now); and vi) the potential for a consumer class ratepayer lawsuit against PWS for passing on the costs of PFAS remediation to its ratepayers.

Virtually all class action settlements reflect tradeoffs and difficult choices for class members. Yet, the fact that settlements necessarily require compromise does not render them unfair. An instructive precedent is the *NFL Concussion* litigation. There, the parties reached a settlement that provided, *inter alia,* compensation for players who suffered from specified neurological conditions, such as ALS, Parkinson's Disease, and Alzheimer's Disease. *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2015 U.S. Dist. LEXIS 52565 at *14 (E.D. Pa. Apr. 22, 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016), *cert. denied*, 580 U.S. 1030 (2016). With certain exceptions, class members were required to release claims for Chronic Traumatic Encephalopathy (CTE), a condition that allegedly affects mood and behavior. Although a number of objectors challenged the release of CTE claims, the district court approved the settlement. *Id.* at *78. Importantly, notwithstanding that release, only about 1 percent of the class opted out. *Id.* at *59 (noting that "an opt-out and objection rate of approximately 1% each reflects positively on the Settlement"). On appeal, the Third Circuit rejected objectors' challenge to the release of CTE claims, noting, in language directly applicable here: ***"[Objectors] risk making the perfect the enemy of the good. ... Though not perfect, [the settlement] is fair."*** 821 F.3d at 447 (emphasis added).

Finally, to the extent that Settlement Class Members believe that giving up rights to indemnification and contribution are a deal breaker, they have the option of opting out. "Federal courts routinely hold that the opt-out remedy is sufficient to protect class members who are unhappy with the negotiated class action settlement terms." *Eisen v. Porsche Cars N. Am., Inc.,* No. 2:11-CV-09405-CAS, 2014 WL 439006, at *7 (C.D. Cal. Jan. 30, 2014) (collecting cases).

- **<u>Objection</u>: answers to questions about the effect of the Release on Indian tribes are still pending.[286]**

There have been several Court-approved Parties' Joint Interpretive Guidance documents. The Leech Lake Band of Ojibwe (the "Band") first filed a Motion to Intervene and a Motion for Clarification, seeking responses to questions about the Release's effect on Indian tribes.[287] The parties promulgated the Parties' Joint Interpretive Guidance on Federally Recognized Indian Tribes ("Tribes Guidance"),[288] which was approved as a supplement to the Settlement Agreement.[289] Separately but related, the parties also filed the Release Guidance,[290] which was also approved by the Court and provides additionally responsive answers to the Band's questions.[291]

The Band objects that the Tribes Guidance is "too vague" with regards to natural resource damages, and lists five questions it alleges are still pending.[292] Three of the five questions (#5, 6, and 7) are based on an allegation that the language of certain claims being exempted if they are "unrelated" to a PWS or Drinking Water is unclear. But the Release Guidance is unambiguous: "the parties' joint understanding that the words 'separate from and not related to' [in the Release clauses] mean 'separate from and not physically related to.'"[293] The clarification confirms that Claims exempted from the Release are those that would require treatment of a facility or area that

[286] *See* Objections by Leech Lake Band of Ojibwe [ECF No. 3895].
[287] *See* Motion to Intervene for Limited Purpose to Clarify Settlements by Leech Lake Band of Ojibwe, Nov. 3, 2023 [ECF No. 3893].
[288] Parties' Joint Interpretive Guidance on Federally Recognized Indian Tribes ("Tribes Guidance"), Nov. 10, 2023 [ECF No.'s 3964 and 3967].
[289] Order on Motion to Intervene, Nov. 17, 2023 [ECF No. 4060].
[290] See Release Guidance [ECF No. 4064].
[291] Notwithstanding the more recently promulgated Release Guidance, Class Counsel maintains that the previously promulgated Tribes Guidance sufficiently addressed the Band's questions.
[292] Mem. in Supp. of Mot. for Reconsideration [ECF No. 4063-1].
[293] Consent Mot. to Amend/Correct [ECF No. 4064-1].

is *physically separate from* a PWS. Fish, game, and crops such as wild rice are not located within a PWS, so they are not subject to the Release. This was already confirmed by the Tribes Guidance ("a Release on behalf of a Tribe-owned Settlement Class Member […] would not release a Claim that the Tribe might bring […] for natural-resource damages that are wholly unrelated to Drinking Water or any Public Water System.").[294]

The Band also objects on the basis that its question about whether claims seeking "remediation, monitoring, and/or damages related to costs, such as supplying bottled water […] covered by the Releases and Covenants Not to Sue" is still pending (question #9).[295] This was never a question that needed to be answered by any additional guidance. Rather, a plain reading of the Settlement Agreement, the Allocation Procedures, and their description of the various funds within the QSF confirm that Qualifying Settlement Class Members may be eligible to submit a claim for costs expended in the course of addressing PFAS in Drinking Water through the Special Needs Funds.[296]

The Band further objects on the basis that its question about the Claims-Over provision was not resolved by the Tribes Guidance.[297] In advancing its objection, the Band answers its own question and confirms that previous documents were indeed responsive; namely, there is no difference between the application of the Claims-Over provision to the Band and its application to any other Settlement Class Member. The Band posits that "Tribes are protected from unconsented suits by tribal sovereign immunity" and cite case law in support of such proposition.[298] Nothing in the Settlement Agreement bars the defense of sovereign immunity, let alone tribal sovereign

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[294] Tribes Guidance at p. 6.
[295] Mem. in Supp. of Mot. for Reconsideration [ECF No. 4063-1].
[296] Allocation Procedures at 84.
[297] Mem. in Supp. of Mot. for Reconsideration [ECF No. 4063-1], at p. 7.
[298] *Id*. at p. 8.

immunity. The absence of an affirmative statement to that effect is not a legitimate basis for an Objection to the Settlement's final approval.

Lastly, the Band's assertion that notice of the Tribes Guidance was required is mistaken.[299] The class was objectively defined and ascertainable. To the extent that the Tribes objected to the Class definition,[300] that challenge has been mooted by the Court's approval of the Tribes Guidance.[301] No further notice is necessary. *See In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1111 (10th Cir. 2001) (supplemental notice not required where a modification "expand[s] the rights of class members"); *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2010 U.S. Dist. LEXIS 66879, at *6 (E.D. Pa. July 2, 2010) (a change requires supplemental notice only when it "would have a material ***adverse*** effect on the rights of class members.") (emphasis added). The Objection should be overruled.

v. Class Members Have Sufficient Time to Consider the Terms of the Settlement.[302]

Without citation to any authority, the Marten Law Objectors contend they "were given insufficient time to consider whether to opt-out of the settlement."[303] Believing that only 60 days were afforded the opt-out decision, the Marten Law Objectors contend that because this settlement

[299] Objections by Leech Lake Band of Ojibwe, [ECF No. 3895], at 6.
[300] *Id*.
[301] Order on Motion to Intervene [ECF No. 4060].
[302] *See* Objections from: City of Fort Worth [ECF No. 3954], at 14-15; Metropolitan Water District of Southern California [ECF No. 3955], at 14-15; City of North Texas Municipal Water District, [ECF No. 3960], at 15-16; City of Vancouver [ECF No. 3962], at 15-16; Lakewood Water District [ECF No. 3965], at 15-16; City of DuPont [ECF No. 3968], at 14-15; City of Airway Heights [ECF No. 3970], at 27-28; City of Tacoma [ECF No. 3972], at 31-32; Hannah Heights Owners Association [ECF No. 3974], at 18-19; City of Las Cruces [ECF No. 3978], at 30-32; City of Dallas [ECF No. 3979], at 29-31; Brazos River Authority [ECF No. 3981], at 25-26; Lakehaven Water & Sewer District [ECF No. 3983], at 23-25; City of Moses Lake [ECF No. 3986], at 22-23; Eagle River Water & Sanitation District [ECF No. 3987], at 17-18; and Upper Eagle Regional Water Authority [ECF No. 3989], at 19-20.
[303] Objection of City of Fort Worth [ECF No. 3954], at 29.

is "uniquely complex," more than two months is necessary to allow PWS "to consult with internal authorities and external members."[304] But all class members had from September 5, 2023 until the opt-out deadline of December 4, 2023, to consider whether to exclude themselves from the Settlement. This makes their objection meritless on its face as all class members had **91** days to decide whether to opt out, well over the two-month period the Marten Law Objectors mistakenly contend to be insufficient.

Broadly speaking, the purpose of notice in a class suit is to present a fair recital of the subject matter and proposed terms, and provide an opportunity to be heard to all class members. *See Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950). Consistent with this authority, the Manual for Complex Litigation states that class members need only be given a "reasonable time" to opt out, with courts usually establishing "a period of thirty to sixty days (or longer if appropriate) following mailing or publication of notice." Manual for Complex Litigation § 21.321 (4th ed. 2021). *See also In re Prudential Ins. Co. of Am. Sales Practices Litig*., 177 F.R.D. 216, 240-41 (D.N.J. 1997) (rejecting argument that the opt out period of 46 days was too short, precluding class members of meaningful review of the Proposed Settlement and collecting cases holding that an opt-out period of thirty to sixty days is appropriate); *Ashley v. GAF Materials Corp. (In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig*.), No. 8:11-mn-02000, 2014 U.S. Dist. LEXIS 183679, at *34-35 (D.S.C. Oct. 15, 2014) (stating that "[p]eriods of approximately two (2) months for opting out have been approved in other cases."). Some federal courts have approved opt-out periods of even shorter than 60 days. *Id*. Moreover, the length of a notice period is "almost wholly an exercise in the Court's discretion." *Id.* at *34.

[304] *Id*. at 30.

Here, notwithstanding the complexity, all Settlement Class Members received 91 days to evaluate the settlement and determine whether to exclude themselves from the litigation. By any measure, all were afforded sufficient time to evaluate their opt-out rights. Moreover, many PWS have advocated to get their funds more quickly, which further underscores the meritless nature of this claim. This objection is unfounded and should be overruled.

vi. Challenges to the Adequacy of Notice are Misplaced[305]

The Marten Law Objectors contend that Notice was inadequate because certain wholesalers did not receive individual notice of the Settlement. To support their argument, the Marten Law Objectors assert that the Interrelated Guidance[306] "asserted *for the first time* that the Settlement Agreement applies to wholesale water providers."[307] This hyperbole, however, is contradicted by this Court's Order of October 26, 2023, and the Guidance itself, which was brought about by an earlier Motion for Extension of Time to Seek Settlement Clarification [ECF No. 3830] filed by the Marten Law Firm on behalf of the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") (collectively "Wholesalers").

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[305] *See* Objections from: City of Fort Worth [ECF No. 3954], at 14; Metropolitan Water District of Southern California [ECF No. 3955], at 14; City of North Texas Municipal Water District [ECF No. 3960], at 14-15; City of Vancouver [ECF No. 3962], at 14-15; Lakewood Water District [ECF No. 3965], at 14-15; City of Airway Heights [ECF No. 3970], at 24-26; City of Tacoma [ECF No. 3972], at 28-30; City of Las Cruces [ECF No. 3978], at 28-30; City of Dallas [ECF No. 3979], at 27-29; Brazos River Authority [ECF No. 3981], at 23-25; and Town of East Hampton, Town of Islip and Town of Harrietstown [ECF No. 3998], at 16-17.
[306] *See* Order dated October 26, 2023 [ECF No. 3861].
[307] See Objections from: City of Fort Worth [ECF No. 3954], at 14 ; Metropolitan Water District of Southern California [ECF No. 3955], at 14; City of North Texas Municipal Water District [ECF No. 3960], at 14-15; City of Vancouver [ECF No. 3962], at 14-15; Lakewood Water District [ECF No. 3965], at 14-15; City of Airway Heights [ECF No. 3970], at 24-26; City of Tacoma [ECF No. 3972], at 28-30; City of Las Cruces [ECF No. 3978], at 28-30; City of Dallas [ECF No. 3979], at 27-29; Brazos River Authority [ECF No. 3981], at 23-25; and Town of East Hampton, Town of Islip and Town of Harrietstown [ECF No. 3998], at 16-17.

Now the Marten Law Objectors make the counterfactual argument that Wholesalers never received notice of the Settlement. That factual assertion is belied by Metropolitan and NTMWD's earlier motion to intervene—showing that they were well aware of the Settlement—as well as the record evidence describing the breadth of notice provided by the Notice Administrator. And their legal contentions are equally flawed. For starters, notice of a settlement class is governed by Rule 23 (e)(1)(B), which requires that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Here, Class Counsel employed Mr. Hesse to identify all potential members of the Settlement Class through publicly available information.[308] Mr. Hesse employed the methodology described in his Declaration to identify all PWS in the United States that were Phase One and Phase Two Class Members and included them in the Class List.[309] Although this Court approved the proposed Notice Plan, the Marten Law Objectors now contend that "individual notice should have gone to *every* active PWS in SDWIS."[310] However, not every PWS in the SDWIS is a member of the Settlement Class; rather, only a smaller subset of PWS falls within the Settlement Class definition based on either 1) PFAS detection in their drinking water before June 30, 2023; or 2) being subject to the monitoring rules set forth in UCMR 5, or other applicable federal or state laws. Consequently, Class Counsel candidly acknowledged "the Class List is not definitive."[311] Nevertheless, first class mail was employed to send notice to each reasonably identifiable potential class member on the Class List. That is all that due process requires.[312] Beyond USPS mailed notice, Class Counsel went to great effort to execute the Court-

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[308] Hess Prelim. App. Decl., *generally*.
[309] *Id*. at 1-4.
[310] *See, e.g.,* Objection of City of Fort Worth at 28 (emphasis in original).
[311] Memorandum in Support of Plaintiffs' Mot. for Prelim. App. of Class Settlement [ECF No. 3393], at p. 20.
[312] *See Eisen*, 417 U.S. at 175 ("Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort."). The type of mailed direct notice

approved Notice Plan through Angeion, Inc. to provide emailed notices, email reminders, personalized outreach, print publication notice, digital publication notice, paid search campaigns, press releases, a settlement website and toll-free telephone support.[313] This notice effort itself generated secondary notice through other publications, which garnered national attention.[314] Thus, there is great likelihood that most PWS, including Wholesalers, are aware of the settlement either directly or indirectly.

Indeed, notice of a class action by first class mail is not a prerequisite for due process. *See, e.g., Zimmer Paper Prod., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 92–93 (3d Cir. 1985) (holding that notice procedure of first-class mail and publication satisfied due process); *Wolfert ex rel. Est. of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 176 (2d Cir. 2006) (first class mail and publication notice sufficient). Rule 23 was amended in 2018 to expressly expand the

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Class Counsel employed clearly satisfies these concerns. *See Commissioners I*, 340 F.R.D. at 251 (approving similar notice plan). It certainly surpasses that required for unidentified class members by the Supreme Court in the seminal case of, 339 U.S. at 317 (recognizing that "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.").

[313] *See* SA at Exhibit E; *see also*, Weisbrot Prelim. App. Decl.

[314] *See* Ramishah Maruf, *Three companies agree to pay more than $1 billion to settle 'forever chemical' claims*, CNN Business (Jun. 3, 2023), https://www.cnn.com/2023/06/03/business/pfas-chemours-dupont-corteva-settlement/index.html; Pat Rizzuto, *Water Utilities' Settlement With DuPont, Chemours Passes Hurdle*, Bloomberg Law (Aug. 23, 2023), https://news.bloomberglaw.com/environment-and-energy/water-utilities-settlement-with-dupont-chemours-passes-hurdle; Stephanie Schlea, *Association of State Drinking Water Administrators, Dupont, Chemours, and Corteva Agree to Pay Nearly $1.2 Billion in Water Contamination Settlement*, ASDWA (Jun. 6, 2023), https://www.asdwa.org/2023/06/06/dupont-chemours-and-corteva-agree-to-pay-nearly-1-2-billion-in-water-contamination-settlement/; John Flesher, *Companies reach $1.18 billion deal to resolve claims from 'forever chemicals' water contamination* AP News, (Jun. 2, 2023), https://apnews.com/article/pfas-forever-chemicals-dupont-drinking-water-82516dfef51da45b389e00fa956cf8c5; Ben Casselman et al., *Three 'Forever Chemicals' Makers Settle Public Water Lawsuits*, The New York Times (Jun. 2, 2023) https://www.nytimes.com/2023/06/02/business/pfas-pollution-settlement.html.

methods by which notice is provided beyond first class mail. *See* Fed. R. Civ. P. 23 (C)(2)(B) ("The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means."). Thus, the Rule allows that electronic notice and other forms of media outreach of a class action settlement suffices to meet the constitutional requirements. Here, every effort was made to reach those reasonably identifiable class members by first class mail. To the extent that any were overlooked, the other forms of notice approved by this Court and implemented by the Notice Administrator, including the settlement website (www.PFASWaterSettlement.com) which provides digital versions of the short and long form notice, the Settlement Agreement, and other important documents, amply satisfied every due process concern raised by the MLO. *See Cheng Jiangchen v. Rentech, Inc.,* No. CV 17-1490, 2019 WL 5173771, at *8 (C.D. Cal. Oct. 10, 2019) (approving notice that directed class members to a website); *Russell v. Ray Klein, Inc.,* No. 1:19-CV-00001, 2022 WL 1639560, at *7 (D. Or. May 24, 2022) (approving notice plan that included "a website accessible to all class members and containing extensive information and documents regarding the settlement.").

The objections to the Notice Plan should be overruled.

vii. Notice to Phase Two Class Members Comports with Due Process.[315]

The Marten Law Objectors object that Phase Two Settlement Class Members "will be forced to decide whether to participate or opt out, without understanding whether they have PFAS

[315] Objection from Brazos River Authority [ECF No. 3981], at 25; City of Dallas [ECF No. 3979], at 29; City of Las Cruces [ECF No. 3978], at 32; City of Tacoma [ECF No. 3972], at 30; City of Airway Heights [ECF No. 3970], at 25; Lakewood Water District [ECF No. 3965], at 30-31; City of Vancouver [ECF No. 3962], at 30; The Metropolitan Water District of Southern California [ECF No. 3955], at 30; City of Fort Worth [ECF No. 3954], at 29, and City of North Texas Municipal Water District [ECF No. 3960], at 30.

in their water systems."[316] Contrary to the Marten Law Objectors' categorization of their objection as being about notice, it is fundamentally an attack on whether a Settlement for Phase Two Class members is fair, adequate and reasonable given that they have not yet tested for PFAS.

Phase Two Settlement Class Members are sophisticated entities subject to governmental testing requirements for which they will be required to expend monies in the short term to comply. Neither this Settlement, nor the Notice thereof, is the Phase Two Class members' introduction to an unknown problem. Rather, as sophisticated systems subject to governmental regulation, the PWS are well aware of the PFAS problem through notice and education from federal and state governments[317] and national water associations.[318]

Thus, Phase Two PWS are able to determine—based on the Notice described above—whether to participate in the Settlement and be eligible for costs to cover that testing. Moreover, the Settlement, as explained in the Notice, provides Phase Two Settlement Class Members with access to the same benefits provided in Phase One if the testing reveals certain detections. Thus, this case is not like *Amchem* where "those without current afflictions" could not make intelligent decisions about participating or opting out of the Settlement. *Amchem*, 521 U.S. at 628. Rather,

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[316] *See e.g.,* ECF 3970, at 26.

[317] *See, e.g.*, https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas (last visited November 15, 2023); https://dec.vermont.gov/water/drinking-water/water-quality-monitoring/pfas (last visited November 15, 2023); https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/pfas.html (last visited November 15, 2023); https://www.in.gov/idem/resources/nonrule-policies/per-and-polyfluoroalkyl-substances-pfas/(last visited November 15, 2023); https://doh.wa.gov/community-and-environment/drinking-water/contaminants/pfas-drinking-water (last visited November 15, 2023).

[318] *See, e.g.,* National Water Rural Association, https://nrwa.org/issues/pfas/ (last visited November 15, 2023); American Water Works Association, https://www.awwa.org/Resources-Tools/Resource-Topics/PFAS (last visited November 15, 2023); Water Environment Foundation, https://www.wef.org/pfas (last visited November 15, 2023); Association of Metropolitan Water Agencies, https://www.amwa.net/press-release/amwas-statement-epas-and-polyfluoroalkyl-substances-pfas-action-plan (last visited November 15, 2023).

the government's testing requirements already burden Phase Two Settlement Class Members; the Settlement provides relief to them through reimbursement of costs associated with that testing and provides a known path to address the outcome of that testing without years of litigation risks. The Marten Law Objections should be overruled.

viii. The Agreement Need Not Specify a Set-Off.[319]

Paragraph 12.7 provides for a set off and judgment reductions in subsequent actions against non-settling defendants. This paragraph provides that the set off mechanism will operate "under applicable law." No more is required. In *In re Jiffy Lube Securities Litigation*, the Fourth Circuit approved of similar language that would apply to state-law claims. 927 F.2d at 160. Because different states require different forms for set off credits, it is appropriate to state only that they will be determined by applicable law and not try to describe which method will apply in a particular case:

> State statutes and court decisions differ as to what form the judgment credits should take. Certain states require a proportionate share reduction, others apply a pro tanto judgment credit and some states give a pro rata credit. See Ex. P–20a, 20b and 20c. Regardless of the applicable jurisdiction, under this agreement, non-settling defendants will receive, at a minimum, a set-off or judgment reduction consistent with state law. Allowing non-settling defendants the benefit of whatever judgment reduction that is required under state law is fair and reasonable. The court concludes that the bar order is essential to the settlement and is within the court's powers to approve it,

[319] *See* Objections from: Upper Eagle Regional Water Authority [ECF No. 3989], at 13; Eagle River Water & Sanitation District [ECF No. 3987], at 12; City of Moses Lake [ECF No. 3986], at 11-12; Lakehaven Water & Sewer District [ECF No. 3983], at 12; Brazos River Authority [ECF No. 3981], at 16; City of Dallas [ECF No. 3979], at 12-13; City of Las Cruces [ECF No. 3978], at 12; Hannah Heights Owners Association [ECF No. 3974], at 11-12; City of Tacoma [ECF No. 3972], at 12; City of Airway Heights [ECF No. 3970], at 11; City of DuPont [ECF No. 3968], at 12; Lakewood Water District [ECF No. 3965], at 12; City of Vancouver [ECF No. 3962], at 12; City of North Texas Municipal Water District [ECF No. 3960], at 12-13; The Metropolitan Water District of Southern California [ECF No. 3955], at 12; and City of Fort Worth [ECF No. 3954], at 12.

> and because all parties are adequately protected by its application, the order will be approved.

In re Orthopedic Bone Screw Products Liability Litigation, 176 F.R.D. 158, 182 (E.D. Pa. 1997). *See also Denney v. Deutsche Bank AG*, 443 F.3d 253, 276 (2d Cir. 2006) ("Moreover, there would be no need to specify a judgment credit methodology if the bar on claims for contribution or indemnity was likewise left to "applicable law," instead of being defined under the court-approved settlement agreement.").

ix. The Claims-Over Provision.[320]

The Claim-Over provision of § 12.7 is not an indemnity provision as some objectors claim, rather, the provision merely codifies defendants' rights to contribution under state law; such provisions are standard and non-controversial in class settlements because they merely preserve the rights that non-settling defendants enjoy under state law. *See Denney*, 443 F.3d at 276; *Orthopedic Bone Screw*, 176 F.R.D. at 182. As described in § 12.7.1, a non-settling defendant who is ordered to pay a Settlement Class Member cannot seek to recover that amount from Defendants, who will have *already* paid per this Settlement Agreement. The paragraph preserves a Settlement Class Member's right to sue a non-settling defendant, but recovery is reduced by the amount it has

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[320] *See* Objections from: the Lower Colorado River Authority [ECF No. 3991], at 11-13; City of Airway Heights [ECF No. 3970], at 8-11; Upper Eagle Regional Water Authority [ECF No. 3989], at 10-12; Eagle River Water & Sanitation District [ECF No. 3987], at 9-12; City of Moses Lake [ECF No. 3986], at 9-11; Lakehaven Water & Sewer District [ECF No. 3983], at 9-11; Brazos River Authority [ECF No. 3981], at 13-16; the City of Dallas [ECF No. 3979], at 9-12; City of Las Cruces, [ECF No. 3978], at 9-12; Hannah Heights Owners Association [ECF No. 3974], at 8-11; the City of Tacoma [ECF No. 3972], at 9-12; City of DuPont [ECF No. 3968], at 9-11; Lakewood Water District [ECF No. 3965], at 9-12; City of Vancouver [ECF No. 3962], at 9-12; City of North Texas Municipal Water District [ECF No. 3960], at 10-12; The Metropolitan Water District of Southern California [ECF No. 3955], at 9-11; and City of Fort Worth [ECF No. 3954], at 9-11.

already received from Defendants.[321] This provision is entirely consistent with the Settlement's overall central of tenant of ensuring there is no double recovery. No tortured reading of § 12.7 can "significantly increase the Releasing Persons' potential exposure to *further losses*."[322] The language operates only to limit Defendants' payment under the Settlement.

b) Objections Relating to Class Certification

i. The Class representatives' claims are typical of the Class members.[323]

As discussed above, typicality does *not* require that "the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp*., 436 F.3d 461, 467 (4th Cir. 2006). Here, typicality is satisfied because Class Members' claims arise from a single course of conduct— the contamination of drinking water with PFAS— and each Class Member has suffered contamination or the risk of contamination that differs only by degree.

The Marten Law Objectors make two meritless attacks on typicality. First, they argue that Class Representatives' claims are not typical because only four of 17 Class Representatives "include wholesale water supply as part of their business."[324] Yet just one class representative is required. *Yates v. NewRez LLC*, No. CV TDC-21-3044, 2023 WL 5108803, at *7 (D. Md. Aug. 9, 2023) (certifying class where a single class representative was sufficient to meet the typicality requirement of Rule 23(a)).

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[321] SA, at § 12.7.2.
[322] City of Fort Worth Obj., at 2 (emphasis added).
[323] *See* Objections from: City of Fort Worth [ECF No. 3954], at 18-20; Metropolitan Water District of Southern California [ECF No. 3955], at 19-21; City of North Texas Municipal Water District [ECF No. 3960], at 19-21; City of Vancouver [ECF No. 3962], at 19-22; Lakewood Water District [ECF No. 3965], at 19-21; City of DuPont [ECF No. 3968], at 14-15; City of Airway Heights [ECF No. 3970], at 16-18; City of Tacoma [ECF No. 3972], at 20-22; Hannah Heights Owners Association [ECF No. 3974], at 13-14; City of Las Cruces [ECF No. 3978], at 19-22; City of Dallas [ECF No. 3979], at 18-21; Lakehaven Water & Sewer District [ECF No. 3983], at 16-18; and City of Moses Lake [ECF No. 3986], at 13-16.
[324] *See, e.g.,* City of Fort Worth Obj., at 19.

Second, despite acknowledging that wholesalers are included among the Class Representatives, the Marten Law Objectors cite a vague litany of issues and speculate that the Class Representatives "cannot adequately represent the interests of water providers" that "grapple with these issues."[325] Whether Class representatives are wholesalers or not, their claims are typical of the Class's claims because they stem from a common harm in that their Drinking Water was or is at risk of being contaminated with PFAS through Defendants' conduct. The Marten Law Objectors fail to explain, beyond vague posturing, why wholesaler claims do not arise from the common harm alleged.

Next, without citing a single case in support, the Marten Law Objectors assert that Class Representative claims are "atypical" because Class Representatives "only" represent 13 states and drinking water regulations vary.[326] But national classes are commonly settled without requiring representatives from all 50 states. *See, e.g., In re All-Clad Metalcrafters, Cookware Mktg. & Sales Practices Litig.*, MDL 2988, 2023 WL 2071481 (W.D. Pa. Feb. 17, 2023); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.,* No. 16-MD-02752, 2020 WL 4212811 (N.D. Cal. July 21, 2020)*; In re Anthem, Inc. Data Breach Litig.,* 327 F.R.D. 299 (N.D. Cal. 2018). This is yet another example of the Marten Law Objectors advancing objections that are contrary to settled law.

Moreover, variations in state law do not preclude a finding of typicality. *In re: Mi Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001, 2015 WL 12850547, at *6 (D.S.C. July 22, 2015), *aff'd sub nom*. *In re MI Windows & Doors, Inc., Prod. Liab. Litig.*, 860 F.3d 218 (4th Cir. 2017) ("[D]espite possible state-by-state variations in the elements of these claims, they arise from a single course of conduct by [defendant] and a single set of legal theories."). In fact, "[t]here is

[325] *See, e.g.,* City of Fort Worth Obj., at 19-20.
[326] *See e.g.,* City of Fort Worth Obj., at 20; City of Airway Heights Obj., at 17-18.

no requirement that there be a class representative from each state to certify a national class." *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000, 2020 WL 8256366, at *20 (N.D. Ala. Nov. 30, 2020); *In re Cmty. Bank of N. Virginia*, 622 F.3d 275, 310 (3d Cir. 2010), *as amended* (Oct. 20, 2010) (agreeing with settling parties that there is no requirement to "appoint named class representatives from every state in order to approve a settlement that releases state law claims."). The Marten Law Objectors do nothing more than point out that states regulate drinking water differently – which does not preclude typicality. Regardless of state regulations or contamination levels, the settlement provides relief to remediate the universal harm. Thus, Plaintiffs' claims are typical of the Class members' claims and the objections should be overruled.

ii. Plaintiffs are adequate because the Settlement Agreement was crafted to avoid any appreciable conflict of interests.[327]

Rule 23(a)(4) requires class representatives to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As discussed above, the class representatives' adequacy is plainly established.[328] The Marten Law Objectors' argument to the contrary is based on the erroneous contention that a multitude of subclasses are necessary in addition to the two classes already adopted.

Each of the proposed class representatives is either a Phase One or Phase Two Class Member and each shares the same overriding interests as absent class members in either Phase One or Phase Two respectively.[329]

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[327] *See* Objections from: City of Fort Worth, at 21-22; Metropolitan Water District of Southern California, at 22-23; City of North Texas Municipal Water District, at 22-23; City of Vancouver, at 22-23; Lakewood Water District, at 22-23; City of DuPont, at 15-16; City of Airway Heights, at 18-20; City of Tacoma, at 22-23; City of Las Cruces, at 22-23; City of Dallas, at 21-22; Lakehaven Water & Sewer District, at 18-19; and City of Moses Lake, at 16-17.

[328] The objection raised by the City of Newburgh in its footnote 1 is addressed in the Napoli Newburgh Decl. *See* Ex. B.

[329] *See, generally*, Exs. C-P.

Structure of the negotiations. The structure of the negotiations provides assurance of adequate representation.

The uncontradicted record shows that Class Counsel did in "an exhaustive review" of the proposed settlement terms, conducted "an independent review of the experts' recommendations, and engaged in negotiations and numerous discussions" concerning the proposed allocation of funds to Phase Two class members, all of which led Class Counsel to conclude that "the proposed Settlement Agreement …provides fair, reasonable, and adequate compensation to Phase Two Class [M]embers and treats them equitably in relation to Phase One Class Members."[330] This careful vetting of the proposed settlement is ignored by the Marten Law Objectors.

While the Marten Law Objectors argue that this class action suffers from a conflict of interest between present and future injury plaintiffs, "simply put, this case is not *Amchem*. The most important distinction is that class counsel here took *Amchem* into account by creating the Phase One and Phase Two Class Members status

Terms of the settlement. The terms of the Settlement also reflect substantive fairness: the Settlement was crafted to ensure that all Class Members receive, to the extent practicable, *exactly the same* compensation regardless of when they make claims on the Settlement Fund. The Marten Law Objectors imply that the interests of the Phase Two class members in this litigation, like the interests of the exposure-only class members in *Amchem*, are being slighted, with an inequitable portion of the settlement funds flowing to the Phase One class members who, of course, already

[330] Fegan Prelim. App. Decl., at ¶ 12; *see also,* Prelim. App. Mot. at 12 (discussing Ms. Fegan's "exhaustive review of the proposed Settlement Agreement" and conclusion that the proposed Settlement was "fair, reasonable, and adequate"); London Prelim. App. Decl., at ¶ 24 (same).

know of their injury. This ignores the detailed showing to the contrary set forth in Plaintiffs' memorandum in support of the Motion For Preliminary Approval of the Settlement.[331]

An independent expert in the field of liability forecasting calculated that only 31% of eligible claimants would be Phase Two class members but, in an abundance of caution, and to ensure fairness, on his recommendation, 45% of the settlement funds have been initially reserved for Phase Two class members.[332] Thus, unlike in *Amchem*, it is undisputed that this Settlement Agreement was crafted to ensure that Phase Two class members "receive the same approximate Allocated Amount as a Phase One [class member] with the same Adjusted Base Score, except for an inflation adjustment."[333] By contrast, in the *Amchem* settlement, the exposure-only class members stood to receive only about *one third* the amount received by currently injured class members, with no inflation adjustment.[334]

The Marten Law Objectors posit hypothetical conflicts *between* various Phase Two class members, depending on how much or the type of contamination each class member has.[335] These arguments ignore that *none* of the Phase Two class members (by definition) presently knows whether or not it has *any* contamination. Thus, *ex ante*, during the settlement negotiations, no Phase Two class member could know whether it would be benefitted by more funds allocated

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[331] Prelim. App. Mot., at 21-30.
[332] *Id*. at 21-22.
[333] *See, e.g.,* Allocation Procedures, at p. 24, § 5(h)(ii); *see generally*, SA, at § 11.5, *et seq.*; Allocation Procedures.
[334] *See* Note, Alex Raskolnikov, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor*, 107 Yale L.J. 2545, 2553 (1998). Obviously, a settlement crafted to ensure that both class members who are presently injured, and those whose injuries will manifest (if at all) only in the future, receive *the same* compensation is "intrinsically fair," satisfying even the fiercest critics of mass-tort settlements, *id*. at 2554 & nn. 60-62, and obviously meeting the adequacy-of-representation requirement set out in *Amchem*. *Id*. at 2555.
[335] *See, e.g.,* City of Airway Heights Obj., at 18-19.

toward testing costs, or more funds allocated to remediation costs. In any event, as this Court is aware, the Settlement has been crafted to ensure that *all* reasonable testing costs will be covered for *all* class members, both those in Phase One and those in Phase Two, meaning that the hypothetical conflicts sketched by the Marten Objectors are entirely illusory.

Indeed, illusory conflicts do not require separate representation, nor does the law on adequacy of representation demand perfect symmetry among class members. *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012). As the *Matamoros* court explained:

> But perfect symmetry of interest is not required and not every discrepancy among the interests of class members renders a putative class action untenable. 'Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.' 1 William B. Rubenstein, Newberg on Class Actions § 3:58 (5th ed. 2012). Put another way, to forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole.

Matamoros, 699 F.3d at 138 (additional citations omitted). *See also In re Oil Spill by Oil Rig Deepwater Horizon,* 910 F. Supp. 2d 891, 918 (E.D. La. 2012) ("Subclassing is but one of many available options for limiting the possibility of intraclass conflicts; it is not required as a matter of course. Rather, subclasses might only be needed when there is a 'fundamental' conflict among class members, but no such conflict exists here.")

Nonetheless, not satisfied with this carefully crafted structure, the Marten Law Objectors contend that myriad additional subclasses should have been created. For example, the City of Fort Worth objection lists five subclasses that purportedly are necessary: (1) within Phase Two (those with little or no PFAS detections versus those with high detections); (2) between retailers and wholesalers; (3) between class members with and without regulatory violations; (4) between class members with well-researched or less-researched PFAS; and (5) between class members that have PFAS with or without EPA-approved test methods. According to the Marten Law Objectors, these

subclasses each required separate counsel, and "certification without such safeguards [does] not comply with Rule 23."[336] This argument—which the Marten Law Objectors fail to support with supportive case citations or compelling factual evidence—is meritless, as myriad cases within the Fourth Circuit and elsewhere demonstrate. Those authorities show that subclassing is not required unless there is a critical need.

For instance, in *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003), the Fourth Circuit upheld the district court's conditional certification of a single class that included both employee and employer class members against an insurance claims administrator, rejecting arguments of a conflict of interest. The court held that a conflict "must be fundamental" and "go to the heart of the litigation," which they found to not apply in this case. *Id.* at 430-31 (quoting 6 Alba Conte Herbert B. Newberg, *Newberg on Class Actions* § 18:14 (4th ed. 2002)).

In *Haney v. Genworth Life Ins. Co.*, No. 3:22cv55, 2022 WL 17586016 (E.D. Va. Dec. 12, 2022), the district court rejected objections asserting the need for subclasses. The court reasoned that there was no conflict because there was "no allocation decision necessary to distribute the relief" between the two groups involved. *Id.* at *11. Additionally, the court rejected an argument that subclasses were needed because class members were located in various states, finding nothing "to suggest that [the] questions of law and fact" differed among the relevant states. *Id.* Likewise, in *In re Serzone Products Liab. Litig.*, 231 F.R.D. 221 (S.D.W. Va. 2005), the district court held that there was no conflict of interest among the members to justify subclasses. The court reasoned that the entire class sought to recover damages for immediate injury caused by the product and that the claims were all presently known. *Id.* at 238.

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[336] City of Fort Worth Obj., at 21-22.

Numerous cases outside the Fourth Circuit are in accord. For example, in *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333 (3d Cir. 2010), objectors asserted a conflict of interest between members with only purchase-related claims related to recalled pet food, and members with injured animals caused by consumption of the food. The Third Circuit rejected objector's arguments, upholding the district court's finding that there was no conflict of interest between the members because the claims were all for economic damages and members all had present claims. *Id.* at 344. The court reasoned that "objectors [had] not identified adverse interests that would require the establishment of subclasses." *Id.* Finally, the court rejected the argument that differences in state law would create conflicts, finding that representatives' interests aligned with other class members. *Id.* at 349.

Importantly, far from improving the state of affairs, courts have noted that too many subclasses can be counterproductive, leading to inefficiencies and undue complexities and thereby undermining the class action process. For instance, in *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, 910 F. Supp. 2d 891 (E.D. La. 2012), two class settlements were negotiated: one for economic injuries and one for personal injuries. Rejecting an argument that subclasses should have been created based upon the various types of injury to avoid conflicts of interest, the court reasoned that "[i]f subclasses were entertained, there would be no principled basis for limiting the number of subclasses." *Id.* at 919. The court concluded that creating subclasses for each type of injury, "each with separate class representatives and counsel . . . would have greatly complicated both the settlement negotiations and the overall administration of the litigation." *Id.* at 920.

Other cases have likewise made clear that the creation of multiple subclasses could well undermine any efficiencies from the class action device. *See, e.g., In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005) ("[I]f subclassing is required for each material legal or economic

difference that distinguishes class members, the Balkanization of the class action is threatened.") (internal quotation marks omitted); *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 629 (6th Cir. 2007) ("if every distinction drawn (or not drawn) by a settlement required a new subclass, class counsel would need to confine settlement terms to the simplest imaginable or risk fragmenting the class beyond repair"); *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am, AFL-CIO*, 803 F.2d 878, 880 (6th Cir.1986) ("Subclassing . . . is appropriate only when the court believes it will materially improve the litigation" and is not always necessary because "subclassing often leads to more complex and protracted litigation"). Inexplicably, the Marten Law Objectors ignore all of the case law warning against too many subclasses.

Similarly, the Marten Law Objectors attempt to create conflicts between Class Members who may have incurred or will incur costs with respect to a single Water Source, arguing that the Settlement Funds are not properly allocated among them.[337] However, the Marten Law Objectors ignore that the Settlement provides recovery for each Impacted Water Source. This is consistent with a central tenet of the Settlement Agreement: the prohibition on double recovery.

Thus, the Allocation Procedures[338] provide for payments based on Impacted Water Sources. To the extent multiple entities have claims based on the same Impacted Water Source, their allocated award may be apportioned in the manner explained in the Settlement Agreement,[339] the Allocation Procedures,[340] and the Joint Interpretive Guidance on Entities that Own and/or

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[337] *See, e.g.,* City of Airway Heights Obj., at 18-19. The 2 non-Class Members represented by Marten Law raise the same issue. *See, e.g.,* Brazos River Authority Obj., at 20-22.
[338] *See* Allocation Procedures, *generally*.
[339] SA § 11.5, *et seq*.
[340] *See* Allocation Procedures, *generally*.

Operate Multiple Public Water Systems.[341] Contrary to the Marten Law Objectors' arguments, "[t]he proposed allocation need not meet standards of scientific precision, and given that qualified counsel endorses the proposed allocation, the allocation need only have a reasonable and rational basis." *Feinberg v. T. Rowe Price Grp., Inc.*, 610 F. Supp. 3d 758, 769 (D. Md. 2022) (internal quotations omitted). Here, an award for a single Impacted Water Source to be allocated among those with responsibility to remediate the source is reasonable and rational.

Moreover, the Settlement Administrator has the discretionary authority to consider all documentation submitted by Class members with respect to each Impacted Water Source, and to request additional documentation, analyze any and all relevant information, determine a fair and equitable apportionment of allocated awards amongst interrelated systems, and generally ensure an outcome that comports with the principles and terms of the Settlement Agreement.[342] Because the Allocation Procedures are reasonable and rational, and were "carefully devised to ensure a fair distribution of the settlement fund to the various types of claimants,"[343] the plan should be approved and the objections as to the Plaintiffs' adequacy should be overruled.

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[341] *See* The Parties' Joint Interpretive Guidance on Entities that Own and/or Operate Multiple Public Water Systems [ECF No. 3919-1] ("Mutl. PWS Guidance"), *generally*.

[342] *See, e.g.*, the Parties' Joint Interpretive Guidance on Interrelated Drinking-Water Systems [ECF No. 3858-1], p. 5; SA § 3.3, 8.4.

[343] *See, e.g., In re Ins. Brokerage Antitrust Litig*., 579 F.3d 241, 273 (3rd Cir. 2009) ("…the Plan of Allocation was carefully devised to ensure a fair distribution of the settlement fund to the various types of claimants and was allocated in such a way that policyholders who likely incurred the most damage are entitled to a larger proportion of the recovery than those whose injuries were less severe. Even if some potential benefits may have been realized from utilizing subclasses, it is not at all clear that the advantages would have outweighed the disadvantages, and therefore it is difficult to say that the District Court abused its discretion by not taking this step. Consequently, we conclude that the District Court's decision not to certify separate subclasses or require separate representation did not constitute an abuse of discretion and likewise its approval of the Zurich Settlement Agreement and Plan of Allocation was also within its discretion.")

Under the case law, it was incumbent upon the Marten Law Objectors to demonstrate that the purported conflicts were so fundamental as to warrant separate subclasses. They have not done so. To the contrary, adopting the many subclasses urged by the Marten Law Objectors would lead precisely to the sort of "Balkanization" that courts fear when too many subclasses are created.

iii. Questions of law and fact predominate[344, 345]

As demonstrated above, Rule 23(b)(3) predominance and superiority are satisfied here. In arguing otherwise, the Marten Law Objectors assert that predominance is not met because "individual claims dominate," listing a smattering of considerations that they allege "affect the strength of each class member's claim and thus the potential damages and recovery."[346] "Critically [however], Rule 23(b)(3)'s commonality-predominance test is qualitative rather than quantitative." *Stillmock*, 385 Fed. Appx. at 273 (citing *Gunnells*, 348 F.3d at 429). *Central Wesleyan College v. WR Grace & Co*., 6 F.3d 144 (4th Cir. 1993). Where, as here, "the qualitatively overarching issue by far is the liability issue of the defendant's" conduct, common questions of fact predominate.

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[344] Rule 23(a)(2)'s requirement of commonality is subsumed within Rule 23(b)(3)'s predominance requirement. *Millwood v. State Farm Life Ins. Co.,* No. C/A No. 7:19-cv-01445-DCC, 2022 U.S. Dist. LEXIS 173928, at *11 (D.S.C. Sept. 23, 2022) (granting class certification and explaining "'the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate' over other questions. *Lienhart*, 255 F.3d at 146 n.4 (quoting *Amchem*, 521 U.S. at 609).").

[345] *See* Objections from: City of Fort Worth [ECF No. 3954], at 17-18; Metropolitan Water District of Southern California [ECF No. 3955], at 18-19; City of North Texas Municipal Water District [ECF No. 3960], at 18-19; City of Vancouver [ECF No. 3962], at 19; Lakewood Water District at [ECF No. 3965], at 18-19; City of DuPont [ECF No. 3968], at 13; City of Airway Heights [ECF No. 3970], at 15-16; City of Tacoma [ECF No. 3972], at 19; Hannah Heights Owners Association [ECF No. 3974], at 12-13; City of Las Cruces [ECF No. 3978], at 19; City of Dallas [ECF No. 3979], at 18; Lakehaven Water & Sewer District [ECF No. 3983], at 15-16; City of Moses Lake [ECF No. 3986], at 13; and Upper Eagle Regional Water [ECF No. 3989], at 14-15.

[346] City of Forth Worth Obj., at 18. *See, e.g., id.* (referring to levels of PFAS contamination, application of regulations, the purchase of treated or raw water, viability of claims against the federal government, and the class members' geographic location).

Stillmock, 385 Fed. Appx. at 273.

Contrary to Fourth Circuit law, the Marten Law Objectors seek to have this Court ignore the qualitative demonstration that has already occurred before this Court reflecting the predominance of common issues and defenses, and instead undertake a headcount of illusory differences among Class members.

The Marten Law Objectors also ignore that all class members suffered the same harm—PFAS exposure or risk of exposure to their drinking water—which may vary by degree. But "[t]he possibility that individualized inquiry into Plaintiffs' damages claims will be required does not defeat the class action because common issues nevertheless predominate." *Gunnells*, 348 F.3d at 429; *see also, Brooks v. GAF Materials Corp*., 301 F.R.D. 229 (D.S.C. 2014). Individual questions of damages viewed in light of the overarching common harm should not defeat predominance. *Stillmock*, 385 F. App'x at 273.

The Marten Law Objectors' argument that PWS citizenship in all 50 states impedes predominance should be rejected; "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance." *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 301 (3d Cir. 2011). While multistate classes may face the challenge of applying multiple laws when seeking to certify a litigation class,[347] those considerations dissipate in the face of a settlement. *Sullivan,* 667 F.3d at 301 ("state law variations are largely 'irrelevant to certification of a settlement class[']"). This is so because the settlement "obviates the difficulties inherent in proving the elements of varied claims at trial or in instructing a jury on varied state laws[.]" *Id.* at 304. *See also Jabbari v. Farmer*, 965 F.3d

[347] *See, e.g., Ward v. Dixie Nat. Life Ins. Co*., 257 F. App'x 620, 628–29 (4th Cir. 2007) (identifying criteria for meeting predominance when seeking to certify a class action potentially governed by the laws of multiple states for trial).

1001, 1007 (9th Cir. 2020) ("For purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable" as could result in failure to meet predominance requirement); *In re Serzone Prod. Liab. Litig*., 231 F.R.D. 221, 240 (S.D.W. Va. 2005) (finding that differing state laws are "rendered irrelevant" in the context of settlement and "do not destroy class cohesion."). Here again, the Marten Law Objectors simply ignore the overwhelming authority that refutes their argument.

As discussed *supra,* a core tenet of the Settlement is the single recovery for each Impacted Water Source. Thus, Settlement Class Members include all qualifying PWS, including wholesalers and retailers, each of which may have responsibility to remediate an Impacted Water Source and thus each of which suffered the same type of harm. This common harm outweighs any individual considerations for minor variations between Settlement Class Members.[348]

In sum, none of the considerations identified by the objectors defeat the predominance of the common questions concerning Defendants' conduct.

This Settlement meets every requirement for certification of a settlement class, and every factor relevant to assessing whether the settlement is fair, reasonable, and adequate. The paucity of objections reflect the overwhelming support by this sophisticated class, and the objections offered (most of which are by one law firm) are legally and factually meritless.

V. <u>CONCLUSION</u>

[348] *See e.g., Case v. French Quarter III LLC*, No. 2:12-CV-02518-DCN, 2015 WL 12851717, at *6 (D.S.C. July 27, 2015) (finding the predominance inquiry met in a mass tort class action where the claims arose from a uniform series of conduct and each class member suffered the same type of damage); *In re Flint Water Cases*, 571 F. Supp. 3d 746, 790 (E.D. Mich. 2021) ("In certain 'mass tort accidents,' plaintiffs may meet the predominance requirement even if 'questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved ... [such a finding] does not dictate the conclusion that a class action is impermissible.") (quoting *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188, 1197 (6th Cir. 1988)).

For the foregoing reasons, Class Counsel respectfully request that the Court: (1) grant their Motion for Final Approval; (2) find the Settlement Agreement is fair, reasonable and adequate; (3) find that, for settlement purposes only, the Settlement Class satisfies the requirements of Fed. R. Civ. P. 23; (4) grants their Motion for Attorneys' Fees and Costs ; (5) enter judgment dismissing Claims in the Litigation asserted by Settlement Class Members against Released Persons; (6) and enter a permanent injunction prohibiting any Settlement Class Member from asserting or pursuing any Released Claim against any Released Person in any forum.

Dated: November 21, 2023

Respectfully submitted,

/s/ Michael A. London
Michael A. London
Douglas and London P.C.
59 Maiden Lane, 6th Floor
New York, NY 10038
212-566-7500
212-566-7501 (fax)
mlondon@douglasandlondon.com

Paul J. Napoli
Napoli Shkolnik
1302 Avenida Ponce de León
San Juan, Puerto Rico 00907
Tel: (833) 271-4502
Fax: (646) 843-7603
pnapoli@nsprlaw.com

Scott Summy
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
214-521-3605
ssummy@baronbudd.com

Elizabeth A. Fegan
Fegan Scott LLC
150 S. Wacker Dr., 24th Floor
Chicago, IL 60606
312-741-1019
beth@feganscott.com

Joseph Rice
Motley Rice LLC
28 Bridgeside Blvd.,
Mt. Pleasant, SC 29464
jrice@motleyrice.com

Class Counsel

-and-
Robert Klonoff*
Lewis & Clark School of Law
Jordan D. Schnitzer Professor of Law
10101 S. Terwilliger Boulevard
Portland, Oregon 97219
503-768-6600
klonoff@usa.net

*On the Brief (*pro hac forthcoming)*

CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, FOR FINAL CERTIFICATION OF THE SETTLEMENT CLASS, AND IN RESPONSE TO OBJECTIONS

EXHIBIT LIST

EXHIBIT	DESCRIPTION
A	Declaration of Steven Weisbrot, Esq. of Angeion Group, LLC Regarding Notice Plan Implementation
B	Declaration of Paul J. Napoli Addressing the City of Newburgh's Objection
C	Declaration of California Water Service Company in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
D	Declaration of the City of Camden in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
E	Declaration of City of Freeport, Illinois in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
F	Declaration of City of Sioux Falls in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
G	Declaration of Coraopolis Water and Sewer Authority in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
H	Declaration of Dalton Farms Water System Owned and Operated by the Dutchess County Water and Waste Water Authority in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
I	Declaration of Martinsburg Municipal Authority in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
J	Declaration of Seaman Cottages in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
K	Declaration of the Township of Verona in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
L	Declaration of Village of Bridgeport in Support of Plaintiffs' Motion for Final Approval of the Class Acton Settlement
M	Declaration of City of Brockton, Massachusetts in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
N	Declaration of City of Benwood in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
O	Declaration of Niagara County in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
P	Declaration of the City of Pineville in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
Q	Declaration of Gary J. Douglas in Support of Class Counsel's Motion for Final Approval of Class Settlement, for Final Certification of the Settlement Class, and in Response to Objections
R	Comparison of Marten Law Objections on behalf of City of Fort Worth and North Texas Municipal Water District, and Comparison of Marten Law Objections on behalf of City of Fort Worth and City of Vancouver

EXHIBIT	DESCRIPTION
S	*In Re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 4:07-cv-05944 (N.D. Cal. Jul 13, 2020), ECF No. 5786
T	J. Kray & J. Ferrell, Marten Law. “3M Company and DuPont Settlements.” PowerPoint presentation dated Sept. 11, 2023.
U	J. Ferrell, J. Kray, V. Xu. “Water Utilities Must Decide Whether to Give Up PFAS Claims Against 3M, DuPont.” Sept. 13, 2023.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)))	MDL No. 2:18-mn-2873-RMG
CITY OF CAMDEN, et al. *Plaintiffs,* -vs- E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), et al., *Defendant.*	))))))))))	Case No: 2:23-cv-03230-RMG

DECLARATION OF STEVEN WEISBROT, ESQ. OF ANGEION GROUP, LLC REGARDING NOTICE PLAN IMPLEMENTATION

I, Steven Weisbrot, Esq., declare and state as follows:

1. I am the President and Chief Executive Officer at the class action notice and claims administration firm Angeion Group, LLC ("Angeion"). I am fully familiar with the facts contained herein based upon my personal knowledge and as reported to me by Angeion staff members.

2. My credentials have been previously reported to this Court in my initial declaration which was filed with *Plaintiffs' Motion for Preliminary Approval of Class Settlement, For Certification of Settlement Class and For Permission To Disseminate Class Notice* (Dkt. No. 3393-8) (the "Initial Declaration").

3. The purpose of this declaration is to provide the Court with an update of the work performed related to the Notice Program as outlined in the Initial Declaration.

CAFA NOTICE

4. On July 10, 2023, Plaintiffs filed the *Motion for Preliminary Approval of Class Settlement, For Certification of Settlement Class and For Permission To Disseminate Class Notice*, (Dkt. Nos. 3392 and 3393) with E.I. Dupont De Nemours and Company ("Dupont") with the United States District Court for the District of South Carolina, seeking preliminary approval of the Proposed Settlement. The motion included a copy of the *Class Action Settlement Agreement*, which triggered the notice provisions of 28 U.S.C. § 1715.

5. Seven days later, on July 17, 2023, Dupont served notice of the Proposed Settlement on the attorneys general of all U.S. states and territories, as well as the Attorney General of the United States, pursuant to 28 U.S.C. § 1715(b), via U.S. mail and FedEx ("CAFA Notice"). Attached hereto as **Exhibit A** is a copy of the CAFA Notice.

THE CLASS MEMBER LIST

6. On August 2, 2023, Angeion received the Class List of 14,165 eligible Settlement Class Members from Plaintiffs. This Class List comprised of water districts' contact information was obtained from the U.S. EPA's Safe Drinking Water Information System ("SDWIS").

7. On September 11, 2023, Angeion received 2 additional entities from Plaintiffs that were added to the Class List of Eligible Settlement Class Members.

8. This contact information included names, mailing addresses, email addresses and phone numbers. Angeion analyzed the Class List and processed the mailing addresses through the United States Postal Service's ("USPS") National Change of Address database and Coding Accuracy Support System ("CASS"), which provides updated addresses for entities that have moved in the previous four years and filed a change of address with USPS and standardizes address information to maximize mailed Notice deliverability. As a result of

these efforts, Angeion determined that there were 14,019 mailable Settlement Class Member addresses and 148 that were not mailable and would require additional research and outreach to obtain a mailable address.

SETTLEMENT WEBSITE

9. Angeion worked with the Claims Administrator to establish the following website devoted to this settlement: www.PFASWaterSettlement.com. The settlement website contains general information about the Settlement, court documents, an online claim submission portal, downloadable Long Form Notice, a list of frequently asked questions and answers, important dates and deadlines pertinent to this Settlement, along with a "Contact Us" page whereby Settlement Class Members can send an email with any additional unanswered questions.

TOLL-FREE HOTLINE

10. Angeion worked with the Claims Administrator to establish a toll-free hotline devoted to this case and apprise Settlement Class Members of their rights and options in the Settlement.

MAILED NOTICE

11. On September 5, 2023, Angeion commenced the mailing of the *Notice of Proposed Class Action Settlement and Court Approval Hearing* ("Notice"), via USPS certified mail with tracking and signature required, to the 14,019 Settlement Class Members for whom Angeion had a mailable address. Attached hereto as **Exhibit B**, is a copy of the Notice.

12. Angeion monitored the Notice delivery status for each individual Settlement Class Member. On September 18, 2023, Angeion commenced an outreach program that included online research and the submission of contact information to Angeion's network of data

providers to obtain or confirm the mailing addresses and email addresses for Settlement Class Members that Notice had not been delivered.

13. As of September 23, 2023, the USPS had successfully delivered 11,947 Notices to Settlement Class Members and the remaining 2,072 remained in transit, were waiting at the local Post Office for pickup or were otherwise unable to be delivered.

14. On October 9, 2023, Angeion commenced remailing Notice via USPS certified mail with tracking and signatures required to the 2,072 Settlement Class Members for whom Notice was mailed and not yet delivered and the 148 Settlement Class Members for whom Angeion did not initially have a mailable address.

15. As of October 31, 2023, the USPS had successfully delivered 12,192 (86.1%) Notices to Settlement Class Members and the remaining 1,973 (13.9%), remained in transit, were waiting at the local Post Office for pickup or were otherwise unable to be delivered.

16. On November 1, 2023, Angeion commenced the process of mailing a reminder postcard notice to Settlement Class Members reminding them of the approaching deadlines.

17. Angeion continues to monitor the delivery status of these mailings and believes that the Notice deliverability rate will continue to increase.

EMAIL NOTICE

18. Angeion designed the email notice to avoid many common "red flags" that might otherwise cause a potential Settlement Class Member's spam filter to block or identify the email notice as spam. For instance, Angeion does not include attachments to the email notice because attachments are often interpreted by various Internet Service Providers ("ISP") as spam. Rather, in accordance with industry best practices, Angeion includes a link to all operative documents so that Settlement Class Members can easily access this information.

19. Angeion employed additional methods to help ensure that as many Settlement Class Members as possible received notice via email. Specifically, prior to distributing email notice, Angeion utilized an email updating process to help ensure the accuracy of recipient email addresses. Angeion also reviewed email addresses for mis-transcribed characters and performs other hygiene, as appropriate.

20. The Class List contained email addresses for 9,145 Settlement Class Members. Angeion analyzed and processed these email addresses through address verification software. Angeion validated 9,129 email addresses pertaining to Settlement Class Members.

21. On September 5, 2023, Angeion caused the Summary Notice Email to be transmitted to these 9,129 Settlement Class Member email addresses ("Initial Email Notice").

22. Angeion accounted for the reality that some emails will inevitably fail to be delivered during the initial delivery attempt. Therefore, after the initial noticing campaign was complete, Angeion, following an approximate 24-72-hour rest period, which allows any temporary block at the ISP level to expire, caused a second round of email noticing to continue to any email addresses that were previously identified as soft bounces and not delivered. In our experience, this minimizes emails that may have erroneously failed to deliver due to sensitive servers and optimizes delivery.

23. Upon the completion of the second round of email notice transmissions, the Initial Email Notice was successfully delivered to 8,646 (94.7%) email addresses and 483 (5.3%) were not successfully delivered. A copy of the Summary Email Notice is attached hereto as **Exhibit C**.

24. As of October 31, 2023, as a result of Angeion's outreach program, an additional 648 Summary Email Notices were transmitted and delivered to Settlement Class Members that

had not previously received email notice. In summary, of the 14,167 Settlement Class Members, 9,294 (65.6%) were successfully transmitted the Summary Email Notice.

25. On November 2, 2023, Angeion caused a reminder email to be sent to Settlement Class Members reminding them of the approaching deadlines.

MEDIA CAMPAIGN

26. The media campaign utilized a combination of print and digital media to target Public Water Systems, decision makers at municipalities and other local government organizations.

Publication Notice

27. Angeion caused the Summary Notice to be published one (1) time in key industry-specific titles, such as Journal AWWA, The Municipal, Water Environment & Technology, AWWA Opflow, and the AWWA Source Book. In addition to these, Angeion has scheduled the Summary Notice to be published in the 4th quarter edition of Rural Water. The below chart includes the circulation and publication dates.

Publication	Circulation	Published Dates
American Water Works Association (AWWA)- ***Journal AWWA***	34,680	5-Oct
American Water Works Association (AWWA)- ***Opflow***	34,426	9-Oct
American Water Works Association (AWWA)- ***AWWA Sourcebook***	51,000	1-Nov
National Rural Water Association (NRWA)- ***Rural Water***	22,000	15-Dec
The Municipal	32,000	21-Sep
Water Environment Federation- ***Water Environment & Technology***	42,000	9-Oct

28. Angeion caused the Summary Notice to be published one (1) time each in national publications such as the Wall Street Journal, USA Today National Edition and New York Times and four (4) consecutive weeks in the USA Today California Edition to further diffuse awareness of the Settlement and to comply with the California's Consumer Legal

Remedies Act notification requirements. The chart below includes the circulation and publication dates.

Publication	Circulation	Published Dates
New York Times	308,854	5-Sep
Wall Street Journal	609,654	5-Sep
USA Today National Edition	158,545	8-Sep
USA Today California Edition CLRA	11,313	6-Sep
USA Today California Edition CLRA	11,313	13-Sep
USA Today California Edition CLRA	11,313	20-Sep
USA Today California Edition CLRA	11,313	27-Oct

Digital Notice

29. In addition to print publication, a digital publication campaign was utilized to disseminate the Summary Notice via the websites and digital circulars of key industry-specific organizations and publications, such as the American Water Works Association, National Rural Water Association, The Municipal, Water Environment & Technology, and Water Quality Association. The below chart includes the digital tactics used and published dates.

Publication	Digital Elements	Published Dates
American Water Works Association (AWWA)	Website Banners	9/8-10/31
American Water Works Association (AWWA)	E-TOC Sponsorships	10/6, 11/6
National Rural Water Association (NRWA)	E-newsletter Banners	9/14, 10/12, 10/26
National Rural Water Association (NRWA)	Content portal banners	9/15-12/15
The Municipal	E-newsletter Banner	9/10, 9/20, 10/10, 10/20
The Municipal	Website Banners	9/5-10/31
Water Quality Association (WQA)	Product Showcase Ad	9/20, 9/27, 10/4, 10/11
Water Environment Federation (WEF)	Technology e-blast	9/6, 10/4
Water Environment Federation (WEF)	Re-targeting campaign	9/6-11/30

Paid Search Campaign

30. Angeion caused a paid search campaign on Google to help drive Settlement Class Members who are actively searching for information about the Settlement to the dedicated Settlement website. These paid search ads complement the comprehensive notice efforts, as search engines are frequently used to locate a specific website, rather than a person having to type in the URL. Search terms related to not only the Settlement itself but also the subject matter of the litigation. In other words, the paid search ads were driven by the individual user's search activity, such that if that individual searches for the Settlement, litigation or other terms related to the Settlement, that individual would receive an advertisement directing them to the Settlement website.

Press Release

31. On September 5, 2023, Angeion caused a press release to be distributed over PR Newswire's national and public interest circuits to further disseminate information about the Settlement. A second press release was issued on October 18, 2023, before the Objection and Opt Out deadlines.

CONCLUSION

32. Angeion analyzed the Notice delivery results and determined that as of October 31, 2023, of the 14,167 Settlement Class Members; 7,966 (56.2%) had Notice successfully delivered by certified mail and email, 4,226 (29.8%) had Notice successfully delivered through certified mail only and 1,328 (9.4%) had Notice successfully delivered through email only. Collectively, this represents 95.4% of the 14,167 Settlement Class Members included on the Class List, having Notice successfully delivered. These results for direct Notice coupled with a comprehensive media plan involving settlement notification through national publications (i.e., the *Wall Street Journal*, *New York Times* and *USA Today*),

target key industry-specific titles (i.e. *Journal AWWA, Rural Water, The Municipal, Water Environment & Technology, AWWA Opflow, AWWA Source Book*), target key industry-specific websites and digital circulars (i.e., American Water Works Association, National Rural Water Association, The Municipal, Water Environment & Technology and Water Quality Association), reminder postcard and email notice along with, 2 nationwide press releases is the best notice that is practicable under the circumstances and fully comports with due process Fed. R. Civ. P. 23.

40. I hereby declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Signed on November 21, 2023, in Coral Springs, Florida.

STEVEN WEISBROT

Exhibit A

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

Kevin T. Van Wart, P.C.
To Call Writer Directly:
+1 312 862 2130
kevin.vanwart@kirkland.com

300 North LaSalle
Chicago, IL 60654
United States

+1 312 862 2000

www.kirkland.com

Facsimile:
+1 312 862 2200

July 17, 2023

To: Attorneys General on the enclosed Service List

VIA FED EX AND CERTIFIED MAIL FOR P.O. BOXES

Re: Notice of Proposed Class Action Settlement
In re: Aqueous Film-Forming Foams Products Liability Litigation,
Case No. 18-mn-02873 (D.S.C.)

Dear Attorneys General:

I write on behalf of The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively, the "DuPont Defendants") in the matter of *In re: Aqueous Film-Forming Foams Products Liability Litigation*, Case No. 18-mn-02873 pending before the Honorable Richard M. Gergel in the United States District Court for the District of South Carolina (the "Court"). In compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), the DuPont Defendants hereby serve upon you notice that a proposed class action settlement between Class Representative Plaintiffs City of Camden; City of Brockton; City of Sioux Falls; California Water Service Company; City of Delray Beach; Coraopolis Water & Sewer Authority; Township of Verona; Dutchess County Water and Wastewater Authority and Dalton Farms Water System; South Shore; City of Freeport; Martinsburg Municipal Authority; Seaman Cottages; Village of Bridgeport; City of Benwood; Niagara County; City of Pineville; and City of Iuka ("Plaintiffs"), on behalf of themselves both individually and on behalf of a class of Public Water Systems in this matter, and the DuPont Defendants has been filed with the Court.

The action relates to alleged harms resulting from the presence of PFAS in Public Water Systems.

The proposed Settlement Class is defined as:

(a) All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before the Settlement Date, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level; and

(b) All Public Water Systems in the United States of America that, as of the Settlement Date, are (i) subject to the monitoring rules set forth in UCMR 5 (*i.e.*, "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.

The following are excluded from the proposed Settlement Class:

(a) Any Public Water System that is located in Bladen, Brunswick, Columbus, Cumberland, New Hanover, Pender, or Robeson counties in North Carolina; provided, however, that any such system otherwise falling within clauses (a) or (b) of the Settlement Class definition will be included within the Settlement Class if it so requests.

(b) Any Public Water System that is owned and operated by a State government and cannot sue or be sued in its own name, which systems within clauses (a) and (b)(i) of the Settlement Class definition are listed in Exhibit I to the Settlement Agreement.

(c) Any Public Water System that is owned and operated by the federal government and cannot sue or be sued in its own name, which systems within clauses (a) and (b)(i) of the Settlement Class definition are listed in Exhibit J to the Settlement Agreement.

(d) Any privately owned well or surface water system that is not owned by, used by, or otherwise part of, and does not draw water from, a Public Water System within the Settlement Class.

Please see the Settlement Agreement included on the enclosed drive for the defined terms used in the foregoing Settlement Class definition and exclusions.

The DuPont Defendants deny the allegations in the complaint and deny any liability whatsoever, but have decided to settle this action solely in order to eliminate the burden, expense, and uncertainties of further litigation. In compliance with CAFA, the following documents referenced below relating to the proposed settlement are included on the drive that is enclosed with this letter:

1. Copy of the complaint, all materials filed with the complaint, and any amended complaints.

A copy of Plaintiffs' Class Action Complaint filed with the Court is included on the drive that is enclosed with this letter. The proposed Settlement Agreement would also resolve hundreds of additional cases filed by individual members of the Settlement Class in the Court and in other jurisdictions.

2. Notice of any scheduled judicial hearing.

At this time, the Court has not scheduled a hearing to consider preliminary approval of the proposed settlement.

3. Any proposed or final notification to class members.

The enclosed Settlement Agreement, referenced below, includes proposed forms of notification to the Settlement Class.

4. Any proposed or final class action settlement.

The Settlement Agreement executed by Plaintiffs and the DuPont Defendants, and all exhibit thereto filed with the Court, are included on the enclosed drive.

5. Any settlement or other agreement contemporaneously made between class counsel and counsel for the DuPont Defendants.

In addition to the Settlement Agreement and exhibits enclosed herewith, there is a Confidential Letter Agreement relating to the threshold for Requests for Exclusion from the Settlement Class that would trigger the DuPont Defendants' right to terminate the settlement, which was reached contemporaneously between Plaintiffs and the DuPont Defendants. This Confidential Letter Agreement provides that it will remain confidential and be filed under seal. It is customary for agreements of this nature to remain confidential because, as explained by a leading treatise dealing with such litigation, "[k]nowledge of the specific number of opt outs that will vitiate a settlement might encourage third parties to solicit class members to opt out." FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (4th ed.) § 21.631. Other than the Settlement Agreement and the Confidential Letter Agreement, there are no other agreements contemporaneously made between Plaintiffs and the DuPont Defendants concerning the settlement.

6. Any final judgment or notice of dismissal.

There has been no final judgment or notice of dismissal filed related to the proposed settlement.

7. Class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement.

CAFA requires the DuPont Defendants to provide, "if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official." 28 U.S.C. § 1715(b)(7)(A).

The DuPont Defendants have limited information or records from which the information specified in 28 U.S.C. § 1715(b)(7)(A) can be identified. Based on publicly available information, the DuPont Defendants can identify the names of certain potential Settlement Class Members, but not all. Information about the names of these potential Settlement Class Members and the state or territory in which each is located is included on the enclosed drive. Additional Settlement Class Members may be identified to the Plaintiffs through the claims process outlined in the Settlement Agreement. The DuPont Defendants do not have sufficient information to estimate the proportionate share of the claims of each member of the Settlement Class to the entire settlement.

8. Any written judicial opinion relating to the materials described in items 3–6.

There has been no written judicial opinion relating to the settlement materials described above. At this time, the Court has not scheduled a hearing to consider preliminary approval of the proposed settlement. Proposed dates for opting out, objecting, and final approval are set forth in Plaintiffs' motion for preliminary approval and will be calculated from the date of the court's ruling on that motion.

The DuPont Defendants submit this notice in a good faith effort to comply with any obligations they may have under CAFA. In accordance with 28 U.S.C. § 1715(d), the Court will not finally approve the proposed class action settlement until at least 90 days after service of this notice. Please contact me if you have any questions.

KIRKLAND & ELLIS LLP

Respectfully,

Kevin T. Van Wart, P.C.

Kevin T. Van Wart, P.C.

KIRKLAND & ELLIS LLP

THE DUPONT DEFENDANTS' CAFA NOTIFICATION SERVICE LIST

The Honorable Steve Marshall Attorney General, Alabama 501 Washington Ave. P.O. Box 300152 Montgomery, AL 36130-0152 (334) 242-7300	The Honorable Treg Taylor Attorney General, Alaska 1031 W. 4th Avenue, Suite 200 Anchorage, AK 99501-1994 (907) 269-5602
The Honorable Kris Mayes Attorney General, Arizona 2005 N Central Avenue Phoenix, AZ 85004-2926 (602) 542-5025	The Honorable Tim Griffin Attorney General, Arkansas 323 Center St., Ste. 200 Little Rock, AR 72201 (800) 482-8982
The Honorable Rob Bonta Attorney General, California 1300 I Street, Ste. 1740 Sacramento, CA 95814 (916) 445-9555	CAFA Coordinator Office of the Attorney General Consumer Protection Section 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102 (415) 703-5500
The Honorable Phil Weiser Attorney General, Colorado Ralph L. Carr Colorado Judicial Center 1300 Broadway, 10th Floor Denver, CO 80203 (720) 508-6000	The Honorable William Tong Attorney General, Connecticut 165 Capitol Avenue Hartford, CT 06106 (860) 808-5318
The Honorable Kathy Jennings Attorney General, Delaware Carvel State Office Bldg. 820 N. French St. Wilmington, DE 19801 (302) 577-8400	The Honorable Brian Schwalb Attorney General, District of Columbia 400 6th Street, NW Washington, DC 20001 (202) 727-3400
The Honorable Ashley Moody Attorney General, Florida The Capitol, PL 01 Tallahassee, FL 32399-1050 (850) 414-3300	The Honorable Chris Carr Attorney General, Georgia 40 Capitol Square, SW Atlanta, GA 30334-1300 (404) 656-3300

KIRKLAND & ELLIS LLP

The Honorable Douglas Moylan Attorney General, Guam Office of the Attorney General, ITC Building 590 S. Marine Corps Dr, Ste. 706 Tamuning, Guam 96913	The Honorable Anne E. Lopez Attorney General, Hawaii 425 Queen St. Honolulu, HI 96813 (808) 586-1500
The Honorable Raúl Labrador Attorney General, Idaho 700 W. Jefferson Street, Suite 210 P.O. Box 83720 Boise, ID 83720-1000 (208) 334-2400	The Honorable Kwame Raoul Attorney General, Illinois James R. Thompson Ctr. 100 W. Randolph St. Chicago, IL 60601 (312) 814-3000
The Honorable Todd Rokita Attorney General, Indiana Indiana Government Center South - 5th Floor 302 West Washington Street Indianapolis, IN 46204 (317) 232-6201	The Honorable Brenna Bird Attorney General, Iowa Hoover State Office Bldg., 1305 E. Walnut Des Moines, IA 50319 (515) 281-5164
The Honorable Kris Kobach Attorney General, Kansas 120 S.W. 10th Ave., 2nd Floor Topeka, KS 66612-1597 (785) 296-2215	The Honorable Daniel Cameron Attorney General, Kentucky 700 Capitol Avenue, Capitol Building, Suite 118 Frankfort, KY 40601 (502) 696-5300
The Honorable Jeff Landry Attorney General, Louisiana P.O. Box 94095 Baton Rouge, LA 70804 (225) 326-6000	The Honorable Aaron Frey Attorney General, Maine State House Station 6 Augusta, ME 04333 (207) 626-8800
The Honorable Anthony G. Brown Attorney General, Maryland 200 St. Paul Place Baltimore, MD 21202-2202 (410) 576-6300	The Honorable Andrea Campbell Attorney General, Massachusetts ATTN: CAFA Coordinator/Gen. Counsel Office One Ashburton Place Boston, MA 02108 (617) 727-2200

KIRKLAND & ELLIS LLP

The Honorable Dana Nessel Attorney General, Michigan P.O. Box 30212 525 W. Ottawa St. Lansing, MI 48909-0212 (517) 373-1110	The Honorable Keith Ellison Attorney General, Minnesota Suite 102, State Capital 75 Dr. Martin Luther King, Jr. Blvd. St. Paul, MN 55155 (651) 296-3353
The Honorable Lynn Fitch Attorney General, Mississippi Department of Justice, P.O. Box 220 Jackson, MS 39205 (601) 359-3680	The Honorable Andrew Bailey Attorney General, Missouri Supreme Ct. Bldg. 207 W. High St. Jefferson City, MO 65101 (573) 751-3321
The Honorable Austin Knudsen Attorney General, Montana Justice Building 215 North Sanders Helena, MT 59620-1401 (406) 444-2026	The Honorable Mike Hilgers Attorney General, Nebraska State Capitol, P.O. Box 98920 Lincoln, NE 68509-8920 (402) 471-2682
The Honorable Aaron D. Ford Attorney General, Nevada Old Supreme Tc. Bldg, 100 N. Carson St. Carson City, NV 89701 (775) 684-1100	The Honorable John Formella Attorney General, New Hampshire 33 Capitol St. Concord, NH 03301 (603) 271-3658
The Honorable Matthew J. Platkin Attorney General, New Jersey Richard J. Hughes Justice Complex 25 Market Street, P.O. Box 080 Trenton, NJ 08625 (609) 292-8740	The Honorable Raul Torrez Attorney General, New Mexico P.O. Drawer 1508 Santa Fe, NM 87504-1508 (505) 827-6000
The Honorable Letitia A. James Attorney General, New York Dept. of Law - The Capitol, Fl. 2 Albany, NY 12224-0341 (518) 776-2000	The Honorable Josh Stein Attorney General, North Carolina P.O. Box 629 Raleigh, NC 27602-0629 (919) 716-6400

KIRKLAND & ELLIS LLP

The Honorable Drew Wrigley Attorney General, North Dakota State Capitol 600 E. Boulevard Ave., Dept. 125 Bismarck, ND 58505-0040 (701) 328-2210	The Honorable Edward Manibusan Attorney General, Northern Mariana Islands Administration Building, P.O. Box 10007 Saipan, MP 96950-8907 (670) 664-2341
The Honorable Dave Yost Attorney General, Ohio State Office Tower, 30 E. Broad St. Columbus, OH 43266-0410 (614) 466-4320	The Honorable Gentner Drummond Attorney General, Oklahoma 313 NE 21st Street Oklahoma City, OK 73105 (405) 521-3921
The Honorable Ellen F. Rosenblum Attorney General, Oregon Justice Bldg. 1162 Court St. NE Salem, OR 97301 (503) 378-6002	The Honorable Michelle A. Henry Attorney General, Pennsylvania 16th Floor, Strawberry Square Harrisburg, PA 17120 (717) 787-3391
The Honorable Domingo Emanuelli Hernández Attorney General, Puerto Rico PO Box 902192 San Juan, PR, 00902-0192 (787) 721-2900	The Honorable Peter F. Neronha Attorney General, Rhode Island 150 S. Main St. Providence, RI 02903 (401) 274-4400
The Honorable Alan Wilson Attorney General, South Carolina Rembert C. Dennis Office Bldg. P.O. Box 11549 Columbia, SC 29211-1549 (803) 734-3970	The Honorable Marty J. Jackley Attorney General, South Dakota 1302 E. Highway 14, Ste. 1 Pierre, SD 57501-8501 (605) 773-3215
The Honorable Jonathan Skrmetti Attorney General, Tennessee 425 5th Ave. North Nashville, TN 37243-3400 (615) 741-3491	The Honorable John Scott Interim Attorney General, Texas P.O. Box 12548 Austin, TX 78711-2548 (512) 463-2100
The Honorable Sean D. Reyes Attorney General, Utah State Capitol, Rm. 236 Salt Lake City, UT 84114-0810 (801) 538-9600	The Honorable Charity R. Clark Attorney General, Vermont 109 State St. Montpelier, VT 05609-1001 (802) 828-3173

The Honorable Carol Thomas-Jacobs Attorney General, Virgin Islands GERS Building, 2nd Floor 34-38 Kronprindsens Gade St. Thomas, Virgin Islands 00802 (340) 774-5666	The Honorable Jason Miyares Attorney General, Virginia 202 North Ninth Street Richmond, VA 23219 (804) 786-2071
The Honorable Bob Ferguson Attorney General, Washington 1125 Washington St. SE, PO Box 40100 Olympia, WA 98504-0100 (360) 753-6200	The Honorable Patrick Morrisey Attorney General, West Virginia State Capitol, 1900 Kanawha Blvd, E. Charleston, WV 25305 (304) 558-2021
The Honorable Josh Kaul Attorney General, Wisconsin Wisconsin Department of Justice State Capitol, Room 114 East, P.O. Box 7857 Madison, WI 53707-7857 (608) 266-1221	The Honorable Bridget Hill Attorney General, Wyoming State Capitol Bldg. Cheyenne, WY 82002 (307) 777-7841
The Honorable Fainu'ulelei Falefatu Ala'ilima-Utu Attorney General, American Samoa American Samoa Gov't, Exec. Ofc. Bldg, Utulei, Territory of American Samoa, Pago Pago, AS 96799 (684) 633-4163	The Honorable Merrick Garland Attorney General of the United States U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 (202) 514-2000

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION **This document relates to** *City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG	)	**MDL No. 2:18-mn-02873**

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND COURT APPROVAL HEARING

TO: All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before June 30, 2023, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level; and

All Public Water Systems in the United States of America that, as of June 30, 2023, are (i) subject to the monitoring rules set forth in UCMR 5 (i.e., "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.

All capitalized terms not otherwise defined herein shall have the meanings set forth in the Settlement Agreement and the Allocation Procedures, available for review at **www.PFASWaterSettlement.com**.

A FEDERAL COURT APPROVED THIS NOTICE. PLEASE READ THIS NOTICE CAREFULLY, AS THE PROPOSED SETTLEMENT DESCRIBED BELOW MAY AFFECT YOUR LEGAL RIGHTS AND PROVIDE YOU WITH POTENTIAL BENEFITS. THIS IS *NOT* A NOTICE OF A LAWSUIT AGAINST YOU OR A SOLICITATION FROM A LAWYER.

I. WHAT IS THE PURPOSE OF THIS NOTICE?

The purpose of this Notice is (i) to advise you that a proposed settlement (referred to as the "Settlement") has been reached with the defendants The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de

Nemours and Company n/k/a EIDP, Inc. (each, a "Settling Defendant" and collectively, "Settling Defendants") in the above-captioned lawsuit (the "Action") pending in the United States District Court for the District of South Carolina (the "Court"); (ii) to summarize your rights in connection with the Settlement; and (iii) to inform you of a Court hearing to consider whether to grant final approval of the Settlement, to be held on December 14, 2023 at 10:00 a.m. EST, before the Honorable Richard M. Gergel, United States District Judge of the United States District Court for the District of South Carolina, located at 85 Broad Street, Charleston, South Carolina 29401.

If you received this Notice about the proposed Settlement in the mail, then you have been identified as a potential Settlement Class Member according to the Parties' records. Please read this Notice carefully.

II. WHAT IS THE ACTION ABOUT?

Class Representatives are Public Water Systems that have filed actions against Settling Defendants and other defendants, which actions are currently pending in the above-captioned multi-district litigation, In Re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873 (D.S.C.) (the "MDL").

Class Representatives have alleged that they have suffered harm resulting from the presence of PFAS in Drinking Water and/or are required to monitor for the presence of PFAS in Drinking Water and that Settling Defendants are liable for damages and other forms of relief to compensate for such harm and costs.

In addition to the MDL, certain other cases are pending against Settling Defendants asserting Released Claims (collectively with the MDL, all pending litigation brought by or on behalf of a Releasing Person against a Released Person involved Released Claims shall be referred to as the "Litigation").

There are numerous defendants in addition to Settling Defendants in the MDL and the cases comprising the Litigation. Those other defendants are not part of this Settlement Agreement. The Class Representatives and Settlement Class Members will remain able to seek separate and additional PFAS-related recoveries from those other defendants in addition to the Settlement Amount here. The Parties agree, and Class Counsel have a reasonable basis to believe, that the Settling Defendants collectively comprise a very small share of MDL defendants' total alleged PFAS-related liabilities, on the order of approximately 3-7% or less.

The Settling Defendants deny the allegations in the Litigation and all other allegations relating to the Released Claims and deny that they have any liability to Class Representatives, the Settlement Class, or any Settlement Class Member for any Claims of any kind, and would assert a number of legal and factual defenses against such Claims if they were litigated to conclusion (including against certification of any purported class for

litigation purposes).

This Notice should not be understood as an expression of any opinion by the Court as to the merits of the Class Representatives' claims or the Settling Defendants' defenses.

III. WHO IS PART OF THE PROPOSED SETTLEMENT?

The Class Representatives and Settling Defendants have entered into the Settlement Agreement to resolve Claims relating to PFAS contamination of Public Water Systems. The Court has preliminarily approved the Settlement Agreement as fair, reasonable, and adequate. The Court will hold a Final Fairness Hearing, as described below, to consider whether to make the Settlement final.

The Settlement Class consists of each of the following:

(a) All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before June 30, 2023, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level;

AND

(b) All Public Water Systems in the United States of America that, as of June 30, 2023, are (i) subject to the monitoring rules set forth in UCMR 5 (i.e., "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.

Not all Public Water Systems are potential Settlement Class Members: specifically, Public Water Systems that are owned and operated by a State or the federal government, and cannot sue or be sued in their own name, as well as certain other systems set forth below, are expressly **excluded** from the Settlement Class. In addition, Public Water Systems that do not fall within the Settlement Class definition set forth above are not Settlement Class Members.

The following are excluded from the Settlement Class:

a) Any Public Water System that is located in Bladen, Brunswick, Columbus, Cumberland, New Hanover, Pender, or Robeson counties in North Carolina; provided, however, that any such system will be included within the Settlement Class if it so requests.
b) Any Public Water System that is owned and operated by a State government and cannot sue or be sued in its own name, as listed in Exhibit

I to the Settlement Agreement.

c) Any Public Water System that is owned and operated by the federal government and cannot sue or be sued in its own name, as listed in Exhibit J to the Settlement Agreement.

d) Any privately owned well or surface water system that is not owned by, used by, or otherwise part of, and does not draw water from, a Public Water System within the Settlement Class.

"UCMR 5" means the United States Environmental Protection Agency's ("U.S. EPA") fifth Unregulated Contaminant Monitoring Rule, published at 86 Fed. Reg. 73131.

"UCMR 5 Deadline" means (i) December 31, 2025, or (ii) such later date to which the deadline for completion of sample collection under UCMR 5 may be extended by the U.S. EPA.

"Water Source" means any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water, including water it provides or collects, treats or stores for distribution to customers or users.[1]

IV. WHAT ARE THE KEY TERMS OF THE PROPOSED SETTLEMENT?

The key terms of the proposed Settlement are as follows.

1. *Settlement Amount*. Settling Defendants have agreed to pay the total and maximum dollar amount of one billion one hundred eighty-five million dollars ($1,185,000,000) (the "Settlement Amount"), subject to final approval of the Settlement by the Court and certain other conditions specified in the Settlement Agreement. In no event shall the Settling Defendants be required under the Settlement Agreement to pay any amounts above the Settlement Amount. Any fees, costs, expenses, or incentive awards payable under the Settlement Agreement shall be paid out of, and shall not be in addition to, the Settlement Amount.

2. *Settlement Benefit*. Each Settlement Class Member who has not excluded itself from the Settlement Class will be eligible to receive a settlement check(s) from the Claims Administrator based on the Allocation Procedures developed by Class Counsel, which are subject to final approval by the Court as fair and reasonable. Each Settlement Class Member's settlement amount will be based on information submitted by Settlement Class Members in their Claims Forms and will depend on each Impacted Water Source's flow rate and level of concentration as compared to all other Settlement Class Members' Impacted Water Sources. The allocation process is described below. Precisely how much each Settlement Class Member will receive is unknown at this time because it depends on all the information submitted by all Settlement Class Members.

[1] Other capitalized terms have the meaning given those terms in the Settlement Agreement.

3. ***Settlement Administration.*** The Court has appointed a Special Master and Claims Administrator pursuant to Rule 53 of the Federal Rules of Civil Procedure (FRCP) to oversee the allocation of the Settlement Funds. They will adhere to their duties set forth herein and in the Settlement Agreement. The Special Master will generally oversee the Claims Administrator and make any final decision(s) related to any appeals by Qualifying Settlement Class Members and any ultimate decision(s) presented by the Claims Administrator. The Claims Administrator will perform the actual modeling, allocation and payment distribution functions. The Claims Administrator will seek assistance from the Special Master when needed. The Claims Administrator may seek the assistance of the Plaintiffs' Executive Committee ("PEC") consultants who assisted in providing guidance in designing the Allocation Procedures.

Allocation Procedures Overview

The Allocation Procedures were designed to fairly and equitably allocate the Settlement Funds among Qualifying Settlement Class Members to resolve PFAS contamination of Public Water Systems in such a way that reflects factors used in designing a water treatment system in connection with such contamination. Both the volume of contaminated water and the degree of contamination are the main factors in calculating the cost of treating PFAS contamination; the Allocation Procedures use scientific and EPA-derived formulas to arrive at Allocated Amounts that proportionally compensate Qualifying Settlement Class Members for PFAS-related treatment. The Allocation Procedures are appended as Exhibit C to the Settlement Agreement.

1. ***Claims Form Process.*** The Claims Administrator will verify that each Entity that submits a Claims Form is a Qualifying Settlement Class Member and will confirm the category into which the Settlement Class Member falls.

   - Settlement Class Members fall into one of two categories: Phase One Qualifying Settlement Class Members or Phase Two Qualifying Settlement Class Members. Phase One Qualifying Settlement Class Members will be allocated 55% of the Settlement Funds and Phase Two Qualifying Class Members will be allocated 45% of the Settlement Funds.[2]
     - A Phase One Qualifying Settlement Class Member is a Public Water System that draws or otherwise collects from any Water Source that tested or otherwise analyzed on or before June 30, 2023 and found to contain any PFAS at any level. The Claims Administrator will establish five separate payment sources from

[2] This allocation between Phase One and Phase Two is subject to adjustment by the Court.

which Phase One Qualifying Settlement Class Members may receive Settlement Funds. Such Settlement Class Members will be eligible for compensation from at least one and potentially more of the payment sources. These sources, and the criteria the Claims Administrator will use to determine the amount each Phase One Qualifying Settlement Class Member will receive from them, are described below and fully in the Allocation Procedures.

- A Phase Two Qualifying Settlement Class Member is a Public Water System that is not a Phase One Qualifying Settlement Class Member and is subject to the monitoring rules set forth in UCMR 5 or other applicable state or federal law. The Claims Administrator will establish five separate payment sources from which Phase Two Qualifying Settlement Class Members may receive Settlement Funds. Such Settlement Class Members will be eligible for compensation from at least one and potentially more of these payment sources, one of which will be to offset the costs of PFAS testing. These sources, and the criteria the Claims Administrator will use to determine the amount each Phase Two Qualifying Settlement Class Member will receive from them, are described below and fully in the Allocation Procedures.

The initial step for establishing Settlement Class Membership and eligibility for compensation from any of the Settlement Funds is the completion of the Claimant Information Form. After a Person completes the Public Water System Settlement Claims Form, the Settlement Class Member will be provided with additional relevant Claims Form(s) for the payment sources for which the Settlement Class Member may be eligible. The term "Claims Form" may refer to any of seven separate forms:

1. Phase One Public Water System Claims Form;
2. Phase One Supplemental Fund Claims Form;
3. Phase One Special Needs Fund Claims Form;
4. Phase Two Testing Claims Form;
5. Phase Two Public Water System Claims Form;
6. Phase Two Supplemental Fund Claims Form; and
7. Phase Two Special Needs Fund Claims Form.

These Claims Forms will be available online and can be submitted to the Claims Administrator electronically or on paper. The Claims Forms will vary depending on the applicable Settlement Class Membership category (Phase One or Phase Two) and on the specific sources from which compensation is sought. The Claims Forms are appended as Exhibit D to the Settlement Agreement.

The Claims Administrator will review each Claims Form, verify the completeness of the data it contains, and follow up as appropriate, including to notify Settlement Class Members of the need to cure deficiencies in their submission(s), if any. Based on this data,

the Claims Administrator will then confirm whether each Settlement Class Member is a Phase One Qualifying Settlement Class Member or Phase Two Qualifying Settlement Class Member and determine the amount each Settlement Class Member is owed from each payment source from which the Settlement Class Member seeks compensation. Should any portion of the Settlement Funds remain following the completion of the Claims process, they will be distributed to certain Qualifying Settlement Class Members in a pro rata fashion in proportion to their respective Allocated Amounts. None of any such remaining Settlement Funds shall be returned to the Settling Defendants.

4. ***Payment of Settlement Amount.*** Within ten (10) Business Days after Preliminary Approval, Settling Defendants shall pay or cause to be paid the Settlement Amount in full, in accordance with the payment terms set forth in the Settlement Agreement. If the Settlement does not become final, Settling Defendants are entitled to a refund of the unused Settlement Funds, and no distribution to Settlement Class Members will occur.

5. ***Release.*** All Settlement Class Members who have not excluded themselves from the Settlement Class will release certain Claims against the Settling Defendants, their affiliates, certain predecessors and successors, and other persons as set forth in the Settlement Agreement. This is referred to as the "Release." Generally speaking, the Release will prevent any Settlement Class Member from bringing any lawsuit against the Settling Defendants or making any claims resolved by the Settlement Agreement.

The Release, as set forth in Paragraphs 12.1 through 12.9 of the Settlement Agreement, will be effective as to every Settlement Class Member who has not excluded itself from the Settlement Class, regardless of whether or not that Settlement Class Member files a Claims Form or receives any distribution from the Settlement.

6. ***Attorney Fee/Litigation Cost and Class Representative Awards*****.** The Court will determine the amounts of attorneys' fees and expenses to award to Class Counsel from the Settlement Amount for investigating the facts and law in the Action, the massive amount of litigation surrounding the Action, the trial preparations, and negotiating the proposed Settlement. Class Counsel will request an award of all attorneys' fees and expenses in the amounts due under the Holdback Provisions set forth in CMO No. 3. Class Counsel will make their request in a motion for attorneys' fees and costs in accordance with Section 11.2 of the Settlement Agreement. Class Counsel intend to file a motion for an award of attorneys' fees and costs that will request that amounts due under the Holdback Provisions set forth in Case Management Order No. 3, private attorney/client contracts, and fees of Class Counsel all be paid from the Qualified Settlement Fund. Class Counsel intend to file such motion with the Court no later than October 15, 2023 as ordered by the Court. After the motion for attorneys' fees and costs is filed, copies will be available from Class Counsel, the Settlement website (www.PFASWaterSettlement.com), or from the Court docket for *City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG.

Any attorneys' fees, costs, and expenses approved by the Court will be paid from the Settlement Amount.

7. ***Settlement Administration.*** All fees, costs, and expenses incurred in the administration and/or work by the Notice Administrator, including fees, costs, and expenses of the Notice Administrator, as well as the costs of distributing the Notice, shall be paid from the Settlement Amount. All fees, costs, and expenses incurred in the administration and/or work by the Claims Administrator, including fees, costs, and expenses of the Claims Administrator, shall be paid from the Settlement Amount. All fees, costs, and expenses incurred in the administration and/or work by the Special Master, including fees, costs, and expenses of the Special Master, shall be paid from the Settlement Amount. Settling Defendants shall have no obligation to pay any such fees, costs, and expenses other than the Settlement Amount.

8. ***Dismissal of the Litigation.*** If the Settlement is approved by the Court and becomes final, all pending Litigation will be dismissed with prejudice to the extent it contains Released Claims. If the Settlement is not approved by the Court or does not become final for any reason, the Litigation will continue, and Class Members will not be entitled to receive any Settlement Benefit.

THE PARAGRAPHS ABOVE PROVIDE ONLY A GENERAL SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT. YOU CAN REVIEW THE SETTLEMENT AGREEMENT ITSELF FOR MORE INFORMATION ABOUT THE EXACT TERMS OF THE SETTLEMENT. THE SETTLEMENT AGREEMENT IS AVAILABLE AT WWW.PFASWATERSETTLEMENT.COM.

V. HOW WILL SETTLEMENT FUNDS BE DIVIDED AMONG CLASS MEMBERS?

1. ***Baseline Testing.*** Phase One and Phase Two Settlement Class Members must perform "Baseline Testing" – that is, Settlement Class Members must test every Water Source they own for PFAS. By performing Baseline Testing to determine which Water Sources have current PFAS detections, each Settlement Class Member will be able to submit Claims Forms, have its Water Sources scored, and receive Allocated Awards based on those scores.

Baseline Testing requires that each Water Source be analyzed for at least the 29 PFAS chemicals required under UCMR 5, using a methodology consistent with the requirements of UCMR 5 or applicable State requirements (if stricter). Any Water Source tested before December 7, 2021 that did not result in a PFAS detection must retest. Any Water Source that tested before June 30, 2023 that did result in a PFAS detection does NOT need to retest. However, you would still be required to test any other Water Sources that have not previously had a detection.

Baseline Testing is different from what the EPA requires for UCMR 5. Under UCMR 5, a Public Water System is required to test for PFAS only at the entry points to its distribution system, but Baseline Testing requires Settlement Class Members to test every Water Source. Because Baseline Testing requires more testing than UCMR 5, Phase Two Settlement Class Members will be compensated out of the Settlement Funds for the costs of testing each Water Source to meet Baseline Testing requirements. **Baseline Testing Claims Forms for Phase Two Settlement Class Members must be received by no later than January 1, 2026.**

Baseline Testing may be performed by any laboratory accredited by a state government or federal regulatory agency for PFAS analysis that uses any state- or federal agency-approved PFAS analytical method that is consistent with (or stricter) than the requirements of UCMR 5.

Class Counsel has arranged for discounted testing with the following laboratory to assist Settlement Class Members with Baseline Testing. The listed laboratory will forward the test results to the Claims Administrator. There is no requirement to use the listed laboratories.

Eurofins
Telephone Number: 916-374-4499
Website: https://www.eurofinsus.com/environment-testing/pfas-testing/pfas-water-provider-settlement/

2. ***Base Scores for Water Sources*****.** The Allocation Procedures are designed to allocate money based on factors that dictate the costs of water treatment. It is well documented in the scientific literature and well known throughout the public water industry that the costs associated with water treatment consist of 1) capital costs and 2) operation and maintenance costs. Capital costs are mainly driven by the Impacted Water Source's flow rate. Operation and maintenance costs are mainly driven by the levels of PFAS in the water. The Allocation Procedures utilize capital costs and operation and maintenance costs to generate a score for each Impacted Water Source. The Claims Administrator will input the flow rates and PFAS concentrations from the Claims Forms into an EPA-derived formula that calculates a Base Score for each Impacted Water Source.

3. ***Adjusted Base Scores*****.** Certain Class Members will be eligible for increased scores. Based on the Claims Forms submitted, the Claims Administrator will determine if a Settlement Class Member is eligible for three available enhancements to the score: the Litigation Bump, the Bellwether Bump, and the Regulatory Bump. A Settlement Class Member may qualify for none, one, or multiple bumps.

The Litigation Bump will apply to Settlement Class Members with a pending lawsuit against the Settling Defendants alleging PFAS contaminated Drinking Water. The Bellwether Bump will apply to the ten Settlement Class Members that served as the Public Water Provider Bellwether plaintiffs. The Regulatory Bump will apply when an Impacted Water Source exceeds an applicable state Maximum Contaminant Level (MCL) or the proposed federal MCL as of March 14, 2023.

After the Claims Administrator applies the appropriate bumps to each Impacted Water Source, the Claims Administrator will use the new Adjusted Base Scores to determine how much of the Settlement Funds each Impacted Water Source will receive.

4. ***Very Small Public Water System Payments*.** All Phase One and Phase Two Settlement Class Members that are listed in the Safe Drinking Water Information System (SDWIS) as Transient Non-Community Water Systems (TNCWS) and Non-Transient Non-Community Water Systems (NTNCWS) serving less than 3,300 people may apply for Phase One or Phase Two Very Small Public Water System Payments. Phase One Public Water System Claims Forms for Very Small Public Water Systems are due no later than 60 days after the Effective Date, and Phase Two Public Water System Claims Forms for Very Small Public Water Systems are due by June 30, 2026. The Claims Administrator will issue a payment of $1,250 to the TNCWS and $1,750 to the NTNCWS serving less than 3,300 people.

1. ***Allocated Amounts*.** The information required to calculate Allocated Amounts is not publicly available and is only obtainable through the Claims Forms submitted by Settlement Class Members. Thus, the Allocated Amount that each Settlement Class Member will receive is not determinable until the Claims Administrator analyzes all the Claims Forms submitted by the Claims Form deadlines.

2. ***Special Needs Funds*.** Special Needs Funds will be established by the Claims Administrator for Phase One and Phase Two Settlement Class Members that have expended monetary resources on extraordinary efforts to address PFAS contamination in their Impacted Water Sources. Settlement Class Members can file a Special Needs Fund Claims Form to be considered for reimbursement of these expenditures.

3. ***Supplemental Funds*.** The Claims Administrator will also establish Phase One and Phase Two Supplemental Funds so that Settlement Class Members who did not initially exceed a state or federal MCL when it submitted its Claims Form can request additional funds if it later exceeds a state or federal MCL.

VI. WHO REPRESENTS THE SETTLEMENT CLASS?

The Court has appointed the attorneys from the following law firms to act as counsel for the Class (referred to as "Class Counsel" or "Plaintiffs' Counsel") for purposes of the proposed Settlement:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907

Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

VII. WHAT ARE THE REASONS FOR THE PROPOSED SETTLEMENT?

Class Counsel, Class Representatives, and Settling Defendants have engaged in extensive, arm's-length negotiations, including negotiations facilitated by a Court-appointed mediator, and have, subject to the Preliminary and Final Approval of the Court, reached an agreement to settle and release all Released Claims, on the terms and conditions set forth in the Settlement Agreement.

Class Representatives and Class Counsel have concluded, after a thorough investigation and after carefully considering the relevant circumstances, including the Claims asserted, the legal and factual defenses thereto, the applicable law, the burdens, risks, uncertainties, and expense of litigation, as well as the fair, cost-effective, and assured method of resolving the Claims, that it would be in the best interests of Settlement Class Members to participate in the Settlement in order to avoid the uncertainties of litigation and to assure that the benefits reflected herein are obtained for Settlement Class Members. Further, Class Representatives and Class Counsel consider the Settlement set forth herein to be fair, reasonable, and adequate and in the best interests of Settlement Class Members.

The Settling Defendants, while continuing to deny any violation, wrongdoing, or liability with respect to any and all Claims asserted in the Litigation and all other Released Claims, either on their part or on the part of any of the Released Persons, entered into the Settlement Agreement to avoid the expense, inconvenience, and distraction of further litigation.

VIII. WHAT DO YOU NEED TO DO NOW?

YOU CAN PARTICIPATE IN THE SETTLEMENT. You must file a Claims Form to be eligible to receive a payment under the Settlement Agreement. You can submit your Claims Form online at www.PFASWaterSettlement.com, or you can download, complete and mail your Claims Form to the Claims Administrator at AFFF Public Water System Claims, PO Box 4466, Baton Rouge, Louisiana 70821. The deadline for a Phase One Settlement Class Member to submit a Phase One Public Water System Claims Form is 60 days following the Effective Date, and the deadline for a Phase Two Settlement Class Member to submit a Phase Two Public Water System Claims Form is June 30, 2026.

Regardless of whether you file a Claims Form or receive any distribution under the Settlement, unless you timely opt out as described below, you will be bound by any judgment or other final disposition of the Settlement, including the Release set forth in the Settlement

Agreement, and will be precluded from pursuing claims against the Settling Defendants separately if those Claims are within the scope of the Release.

YOU CAN OPT OUT OF THE SETTLEMENT. If you do not wish to be a Settlement Class Member, and do not want to participate in the Settlement and receive a Settlement Benefit Check, you may exclude yourself from the Settlement Class by completing and mailing a notice of intention to opt-out (referred to as an "Opt-Out"). Any Person within the Settlement Class who wishes to opt out of the Settlement Class and Settlement must file a written and signed statement entitled "Request for Exclusion" with the Notice Administrator and provide service on all Parties in accordance with Federal Rule of Civil Procedure 5.

To be treated as valid, the Request for Exclusion must be sent via certified or first-class mail to the Notice Administrator, Counsel for the Settling Defendants, and Class Counsel at the addresses below.

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

Class Counsel:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907
Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464	

Notice Administrator:

In re: Aqueous Film-Forming Foams Products Liability Litigation c/o Notice Administrator 1650 Arch Street, Suite 2210 Philadelphia, PA 19103

The Request for Exclusion must be received by the Notice Administrator no later than December 4, 2023.

The Request for Exclusion must certify, under penalty of perjury in accordance with 28 U.S.C. § 1746, that the filer has been legally authorized to exclude the Person from the Settlement and must provide:

- an affidavit or other proof of the Settlement Class Member's standing;
- the filer's name, address, telephone, facsimile number and email address (if available);
- the name, address, telephone number, and e-mail address (if available) of the Person whose exclusion is requested; and

The Request for Exclusion must be received by the Notice Administrator no later than December 4, 2023.

Any Person that submits a timely and valid Request for Exclusion shall not (i) be bound by any orders or judgments effecting the Settlement; (ii) be entitled to any of the relief or other benefits provided under this Settlement Agreement; (iii) gain any rights by virtue of this Settlement Agreement; or (iv) be entitled to submit an Objection.

If you own or operate more than one Public Water System and are authorized to determine whether to submit Requests for Exclusion on those Public Water Systems' behalf, you may submit a Request for Exclusion on behalf of some of those Public Water Systems but not the other(s). You must submit a Request for an Exclusion on behalf of each such Public Water System that you wish to opt out of the Settlement Class. Any Public Water System that is not specifically identified in a Request for Exclusion will remain in the Settlement Class.

Any Settlement Class Member that does not submit a timely and valid Request for Exclusion submits to the jurisdiction of the Court and, unless the Settlement Class Member submits an Objection that complies with the provisions of the Settlement Agreement, shall waive and forfeit any and all objections the Settlement Class Member may have asserted.

YOU CAN OBJECT OR TAKE OTHER ACTIONS. Any Settlement Class Member who

has not successfully excluded itself ("opted out") may object to the Settlement. Any Settlement Class Member who wishes to object to the Settlement or to an award of fees or expenses to Class Counsel must file a written and signed statement designated "Objection" with the Clerk of the Court and provide service on Counsel for the Settling Defendants and Class Counsel at the addresses below in accordance with Federal Rule of Civil Procedure 5. Objections submitted by any Settlement Class Member to incorrect locations shall not be valid.

Clerk of the Court:

Clerk, United States District Court for the District of South Carolina 85 Broad Street Charleston, SC 29401

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

Class Counsel:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907

Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

All Objections must certify, under penalty of perjury in accordance with 28 U.S.C. § 1746, that the filer has been legally authorized to object on behalf of the Settlement Class Member and must provide:

- an affidavit or other proof of the Settlement Class Member's standing;
- the filer's name, address, telephone, facsimile number and email address (if available);

- the name, address, telephone, facsimile number and email address (if available) of the Person whose Objection is submitted;
- all objections asserted by the Settlement Class Member and the specific reason(s) for each objection, including all legal support and evidence the Settlement Class Member wishes to bring to the Court's attention;
- an indication as to whether the Settlement Class Member wishes to appear at the Final Fairness Hearing; and
- the identity of all witnesses the Settlement Class Member may call to testify. The deadline to submit an Objection is November 4, 2023.

Settlement Class Members may object either on their own or through any attorney hired at their own expense. If a Settlement Class Member is represented by counsel, the attorney must file a notice of appearance with the Clerk of Court no later than November 4, 2023, the date ordered by the Court for the filing of Objections, and serve such notice on all Parties in accordance with Federal Rule of Civil Procedure 5 within the same time period.

Any Settlement Class Member who fully complies with the provisions for objecting may, at the Court's discretion, appear at the Final Fairness Hearing to object to the Settlement or to the award of fees and costs to Class Counsel. Any Settlement Class Member who fails to comply with the provisions of the Settlement Agreement for objecting shall waive and forfeit any and all objections the Settlement Class Member may have asserted.

IX. WHAT WILL HAPPEN AT THE FINAL FAIRNESS HEARING?

Before deciding whether to grant final approval to the Settlement, the Court will hold the Final Fairness Hearing in Hon. Sol Blatt, Jr., Courtroom of the U.S. Courthouse, 85 Broad Street, Charleston, South Carolina 29401, on December 14, 2023, at 10:00 a.m. EST. At that time, the Court will determine, among other things, (i) whether the Settlement should be granted final approval as fair, reasonable, and adequate, (ii) whether the Released Claims should be dismissed with prejudice pursuant to the terms of the Settlement Agreement, (iii) whether the Settlement Class should be conclusively certified, (iv) whether Settlement Class Members should be bound by the Release set forth in the Settlement Agreement, (v) the amount of attorneys' fees and costs to be awarded to Class Counsel, if any, and (vi) the amount of the award to be made to the Class Representatives for their services, if any. The Final Fairness Hearing may be postponed, adjourned, or continued by Order of the Court without further notice to the Class.

X. HOW CAN YOU GET ADDITIONAL INFORMATION ABOUT THE ACTION, THE PROPOSED SETTLEMENT, THE SETTLEMENT AGREEMENT, OR THE NOTICE?

The descriptions of the Action, the Settlement, and the Settlement Agreement in this Notice

are only a general summary. In the event of a conflict between this Notice and the Settlement Agreement, the terms of the Settlement Agreement control. All papers filed in this case, including the full Settlement Agreement, are available for you to inspect and copy (at your cost) at the office of the Clerk of Court, the Settlement website, or online through PACER. A copy of the Settlement Agreement may also be obtained from Class Counsel by contacting them at the addresses or telephone numbers set forth above. Any questions concerning this Notice, the Settlement Agreement, or the Settlement may be directed to Class Counsel. You may also seek the advice and counsel of your own attorney, at your own expense, if you desire.

DO NOT WRITE OR TELEPHONE THE COURT, THE CLERK'S OFFICE, OR DEFENDANT WITH ANY QUESTIONS ABOUT THIS NOTICE, THE SETTLEMENT, OR THE SETTLEMENT AGREEMENT.

XI. WHAT ARE THE ADDRESSES YOU MAY NEED?

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

If to the Class Representatives, Class Counsel, or Settlement Class Members:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907

Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

If to the Notice Administrator:

In re: Aqueous Film-Forming Foams Products
Liability Litigation
c/o Notice Administrator
1650 Arch Street, Suite 2210
Philadelphia, PA 19103

If to the Claims Administrator:

AFFF Public Water System Claims
PO Box 4466
Baton Rouge, Louisiana 70821

XII. WHAT YOU MUST INCLUDE IN ANY DOCUMENT YOU SEND REGARDING THE ACTION.

In sending any document to the Notice Administrator, Claims Administrator, the Court, Class Counsel, or Settling Defendants' Counsel, you must include the following case name and identifying number on any documents and on the outside of the envelope:

In re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873 (D.S.C.), this document relates to: *City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG.

You must also include your full name, address, email address, and a telephone number where you can be reached.

XIII. WHAT IMPORTANT DEADLINES YOU NEED TO KNOW.

Deadline Description	Deadline Date
Deadline to submit Objections	11/4/2023
Deadline to submit Requests for Exclusion	12/4/2023
Court's Final Fairness Hearing	12/14/2023 at 10:00 AM EST
Phase One Public Water System Claims Form	60 Days after the Effective Date
Phase One Special Needs Claims Form	45 Days after the Phase One Public Water System Claims Form Deadline
Phase Two Testing Claims Form	1/1/2026
Phase Two Public Water System Claims Form	6/30/2026
Phase Two Special Needs Claims Form	8/1/2026
Phase One Supplemental Fund Claims Form	12/31/2030
Phase Two Supplemental Fund Claims Form	12/31/2030

NOTICE OF DUPONT CLASS ACTION SETTLEMENT

IN RE: AQUEOUS FILM FORMING FOAMS PRODUCT LIABILITY LITIGATION

United States District Court, District of South Carolina – Charleston Division
MDL No. 2:18-mn-2873
Case No. 2:23-cv-03230

PLEASE NOTE, the enclosed correspondence relates to the Settlement with The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (each a "Settling Defendant").

YOU MAY RECEIVE ADDITIONAL CORRESPONDENCE RELATING TO ADDITIONAL SETTLEMENTS WITH OR JUDGMENTS INVOLVING OTHER DEFENDANT(S).

Please be aware that documents associated with one Settling Defendant may appear similar to documents associated with another Settling Defendant. However, **each Settlement has its own specific terms and conditions, and each set of documents should be carefully reviewed with this in mind**. Please visit www.PFASWaterSettlement.com for more information and to review settlement-related documents.

SETTLEMENT WEBSITE FOR FILING YOUR CLAIM FOR SETTLEMENT PAYMENT
WWW.PFASWATERSETTLEMENT.COM

NOTICE ID: [insert]

Exhibit C

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND COURT-APPROVAL HEARING

In re: Aqueous Film-Forming Foams Product Liability Litigation, MDL No. 2:18-mn-02873
This Document relates to: City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al., No. 2:23-cv-03230-RMG

UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

TO THE SETTLEMENT CLASS: All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before June 30, 2023, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level; and

All Public Water Systems in the United States of America that, as of June 30, 2023, are (i) subject to the monitoring rules set forth in the U.S. EPA's Fifth Unregulated Contaminant Monitoring Rule ("UCMR 5") (i.e., "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the deadline of sample collection under UCMR 5.

All capitalized terms not otherwise defined herein shall have the meanings set forth in the Settlement Agreement and the Allocation Procedures, available for review at www.PFASWaterSettlement.com.

As used above, "Public Water System" means a system for the provision of water to the public for human consumption through pipes or other constructed conveyances, if such system has at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals. A "Public Water System" shall include the owner and/or operator of that system and any public entity that is legally responsible for funding (by statute, regulation, other law, or contract), other than a State or the federal government, a Public Water System described in such Paragraph or has authority to bring a claim on behalf of such a Public Water System.

What Is The Purpose of This Notice? The purpose of this Notice is (i) to advise you of a proposed settlement of certain claims against The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively the "Settling Defendants") in the United States District Court for the District of South Carolina (the "Court"); (ii) to summarize your rights in connection with the Settlement; and (iii) to inform you of a Court hearing to consider whether to grant final approval of the Settlement (the "Final Fairness Hearing"), to be held on December 14, 2023 at 10:00 a.m., before the Honorable Richard M. Gergel, United States District Judge of the United States District Court for the District of South Carolina, located at 85 Broad Street, Charleston, South Carolina 29401.

What Are The Key Terms of the Proposed Settlement? The Settling Defendants have agreed to pay one billion one hundred eighty-five million dollars ($1,185,000,000)(the "Settlement Amount"), subject to final approval of the Settlement by the Court and certain other conditions specified in the Settlement Agreement. In no event shall the Settling Defendants be required to pay any amounts under the Settlement Agreement above the Settlement Amount. Any fees, costs, or expenses payable under the Settlement Agreement shall be paid out of, and shall not be in addition to, the Settlement Amount. Each Settlement Class Member who has not excluded itself from the Class will be eligible to receive a settlement check(s) from the Claims Administrator based on the Allocation Procedures developed by Class Counsel, which are subject to final approval by the Court as fair and reasonable and which are under the oversight of the Special Master.

What Are My Options?

YOU CAN PARTICIPATE IN THE SETTLEMENT. You must file a Claims Form to be eligible to

receive a payment under the Settlement. You can submit your Claims Form online at **www.PFASWaterSettlement.com**, or you can download, complete and mail your Claims Form to the Claims Administrator at AFFF Public Water System Claims, PO Box 4466, Baton Rouge, LA 70821. The deadlines to submit a Claim Forms are illustrated below. Regardless of whether you file a Claims Form or receive any distribution under the Settlement, unless you timely opt out as described below, you will be bound by any judgment or other final disposition of the Released Claims, including the Release set forth in the Settlement Agreement, and will be precluded from pursuing claims against the Settling Defendants separately if those Claims are within the scope of the Release.

Deadline Description	Deadline Date
Phase One Public Water System Claims Form	60 Days after the Effective Date
Phase One Special Needs Claims Form	45 Days after the Phase One Public Water System Claims Form Deadline
Phase Two Testing Claims Form	1/1/2026
Phase Two Public Water System Claims Form	6/30/2026
Phase Two Special Needs Claims Form	8/1/2026
Phase One Supplemental Fund Claims Form	12/31/2030
Phase Two Supplemental Fund Claims Form	12/31/2030

YOU CAN OPT OUT OF THE SETTLEMENT. If you do not wish to be a Settlement Class Member, and do not want to participate in the Settlement and receive a Settlement Benefit Check, you may exclude yourself from the Class by completing and mailing a notice of intention to opt out. Any Person within the Settlement Class who wishes to opt out of the Settlement Class and Settlement must file a written and signed statement entitled "Request for Exclusion" with the Notice Administrator and provide service on all Parties no later than **DECEMBER 4, 2023**.

YOU CAN OBJECT TO THE SETTLEMENT. Any Settlement Class Member who has not successfully excluded itself ("opted out") may object to the Settlement. Any Settlement Class Member who wishes to object to the Settlement or to an award of fees or expenses to Class Counsel must file a written and signed statement designated "Objection" with the Clerk of the Court and provide service on all Parties in no later than **NOVEMBER 4, 2023**.

VISIT WWW.PFASWATERSETTLEMENT.COM FOR COMPLETE INFORMATION ABOUT YOUR RIGHTS

The Court's Final Fairness Hearing. The Court will hold the Final Fairness Hearing in Hon. Sol Blatt, Jr., Courtroom of the United States District Court for the District of South Carolina, located at 85 Broad Street, Charleston, South Carolina 29401, on **December 14, 2023 at 10:00 a.m**. At that time, the Court will determine, among other things, (i) whether the Settlement should be granted final approval as fair, reasonable, and adequate, (ii) whether the Released Claims should be dismissed with prejudice pursuant to the terms of the Settlement Agreement, (iii) whether the Settlement Class should be conclusively certified, (iv) whether Settlement Class Members should be bound by the Release set forth in the Settlement Agreement, (v) the amount of attorneys' fees and costs to be awarded to Class Counsel, if any, and (vi) the amount of the award to be made to the Class Representatives for their services, if any. The Final Fairness Hearing may be postponed, adjourned, or continued by Order of the Court without further notice to the Class.

How Do I Get More Information? Please visit **www.PFASWaterSettlemeent.com** or call toll free **1-855-714-4341.** You may also contact Class Counsel or the Notice Administrator for more information:

Class Counsel	Class Counsel	Class Counsel
Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, TX 75219 Email: summy@baronbudd.com	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Fl. New York, NY 10038 Email: london@douglasandlondon.com	Paul J. Napoli **Napoli Shkolnik** 1302 Ponce de Leon Santurce, PR 00907 Email: pnapoli@NSPRLaw.com

Notice Administrator	Claims Administrator
In re: Aqueous Film-Forming Foams Products Liability Litigation c/o Notice Administrator 1650 Arch Street, Ste 2210 Philadelphia, PA 19103 PFASSettlement@AngeionGroup.com	AFFF Public Water System Claims PO Box 4466 Baton Rouge, LA 70821 Email: info@pfaswatersettlement.com

The paragraphs above provide only a general summary of the terms of the settlement. In the event of a conflict between this Notice and the Settlement Agreement, the terms of the Settlement Agreement control. You can review the Settlement Agreement itself for more information about the exact terms of the settlement. The Settlement Agreement is available at www.PFASWaterSettlement.com.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))	Master Docket No. 2:18-mn-2873-RMG
CITY OF CAMDEN et al., *Plaintiffs*, v. E.I. DUPONT DE NEMOURS, *Defendant*.	))))))))))	Civil Action No.: 2:23-cv-03230-RMG

DECLARATION OF PAUL J. NAPOLI

Paul J. Napoli, an attorney duly admitted to practice law, affirms the following:

I submit this Declaration to respond to a footnote in the objection to the DuPont settlement filed by the City of Newburgh, New York (See ECF No. 3995), a single potential class member, which suggests that my law firm and I, as Class Counsel, have an alleged conflict due to the fact that in a pair of lawsuits[1] which were filed in 2017 and 2018 and have been on hold since the creation of the AFFF MDL we were counsel for several individual plaintiffs suing the City.

The purpose of this Declaration is to, first, explain that there is no basis to believe that the alleged conflict had any impact on the nature of the settlement currently before this Court. And second, to explain that there is no reason for concern going forward, as my firm and I have

[1] *See Bermo et al v. The Port Authority of New York and New Jersey et al* , 2:18-cv-03522-RMG and *Hamilton et al v. City of Newburgh*, 2:19-cv-02219-RMG.

withdrawn from the representation adverse to the City, so there is no conceivable basis for suggesting there is any current conflict of interest that could impair the ability of me and my firm to continue to zealously represent the interests of the class members, as we have done all along.

The City, albeit, quite obtusely, points out that this alleged conflict applies to just this one class member out of the approximate tens of thousands of other absent class members, and has not suggested how the alleged conflict even theoretically have impacted the negotiation of the settlement in any way that could have impacted the interests of class members. Tellingly, the City has not asked this Court to take any action based on the conflict alleged in the footnote. Counsel for the City simply mentioned the point in a footnote, stating they did so only "in order to discharge any potential obligation" as attorneys. I submit that this allegation merely referenced in passing in a footnote has no conceivable bearing on anything currently before the Court.

As is more fully outlined in the motion for Preliminary Certification, the instant Class Action Settlement was negotiated over a period of years between representatives of Dupont and the three Co-Lead Counsel, of which I am only one. The negotiations were prolonged and, to be frank, very intense, and culminated in a proposed resolution that Co-Lead Class Counsel, and counsel for Dupont, felt adequately provided fair compensation for all the members of the water provider class. The structure proposed was a class resolution that would be headed up by Class Counsel. The suggestion at that time was for each of the three Co-Leads to be named Class Counsel, and for a new independent lawyer to be brought in as Co-Class Counsel to represent Phase Two Class Members.

As the negotiations were nearing conclusion, Elizabeth Fegan, Esq., was introduced to the litigation as a proposed Class Counsel to join the three negotiating Lead Counsel to act in the capacity of an additional proposed Class Counsel along with the three Co-Leads. Ms. Fegan upon

being added to the negotiating group reviewed and analyzed the settlement terms, gave her approval, and agreed to participate as one of the Class Counsel in the proposed class settlement. Over the following weeks, Ms. Fegan participated in finalizing the terms of the settlement and joined with the other proposed Class Counsel and with the proposed class representatives the settlement and preparing the motion for Preliminary Approval.

It is not suggested anywhere that these Co-Class Counsel have in anyway wavered from their position fully supporting the settlement in reaction to the conflict alleged by a lone class member, in the City's footnote. As the Court is aware, after submission of the preliminary approval motion, the Court then appointed five Class Counsel to oversee the DuPont settlement. The Court's order provided for a timeline for the filing of objections.

On November 11, 2023, The City of Newburgh timely filed an objection outlining various bases for its objections, which have been addressed within the main response brief. Included in the City's brief was a lone footnote (ECF No. 3995 at page 3, FN 1) that suggested the undersigned had a conflict of interest arising from our firm's representation of 24 plaintiffs against the City's water district in a pair of cases filed in 2017 and 2018. The City did not raise any argument or make any other comment regarding the alleged conflict aside from this lone footnote. Clearly, this was a circumstance in which it could not be seriously argued that any alleged conflict on the part of me or firm, concerning one of the tens of thousands of class members, provided any basis for attacking the underlying settlement. The counsel for the City did not make any suggestion to that effect; they merely stated that they felt they had a professional obligation to mention the alleged conflict. Moreover, there is not even the slightest suggestion nor any factual, or legal argument, explaining how this alleged conflict related to a single class member could impact this Court's analysis of the class settlement.

Perhaps this footnote was meant as a hint that our firm should consider withdrawing from the representation adverse to the City, to moot any concern. Regardless of whether that was the intent, that was the effect. Upon reading the brief filed by the City, I immediately had my office research the alleged conflict, and determined that amongst the many hundreds of personal injury Complaints which my firm filed, there were in fact two such cases in which our firm was involved. A further review determined that since the lawsuits were filed six years ago, virtually no litigation has occurred, and the cases had merely been transferred to the MDL where they have remained to this day. I personally have never spoken to any of the plaintiffs in the litigation during the course of the firm's representation, as the case was handled by other lawyers in the firm, who have left the firm since. Moreover, I have never had any communications with the City or its counsel related to. Nor do I or my firm, possess any confidential information related to the case.

Immediately upon learning of our firm's representation adverse to the City in this long-moribund litigation, my office contacted ethics counsel. While ethics counsel concluded that there was no actual conflict of interest here, in an abundance of caution we nevertheless contacted the clients involved and advised that we were going to seek to be relieved as counsel. The clients promptly consented to our withdrawal. The following day my office sought to be relieved as counsel in the Newburgh matters and substitute counsel, The Ferraro Law Firm, entered appearances for the clients. (ECF No. 4031 and 4032). On November 17, 2023, this Court granted the motions to be relieved. (ECF No. 4052 and 4053).

There is nothing in the City's passing footnote that suggests that either the settlement is unfair or that anything done by me or my firm regarding the class action was in any way negatively impacted by the fact that my firm was representing plaintiffs in lawsuits that had been inactive

since their filing six years ago. Further, with four highly experienced Co- Counsel involved in this case, in addition to the undersigned, all of whom approved of the settlement, there is absolutely no basis for concern that any issues concerning me, and my firm could have negatively impacted the result of this litigation or have negatively affected either the City or the class as a whole. Our firm represents hundreds of individual water providers with matters before this Court, and we have worked tirelessly to aid each and every one of them, and also to aid the class to obtain the highest achievable recovery for all on the best terms possible.

Dated: November 21, 2023
San Juan, Puerto Rico

____
Pa[illegible]. Napoli

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden, et al. v. 3M Co.*, Case No. 2:23-cv-03147-RMG**

DECLARATION OF CALIFORNIA WATER SERVICE COMPANY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Shawn Bunting, Vice-President and General Counsel of California Water Service Company, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. California Water Service Company is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. California Water Service Company is a public water supplier located in San Jose, California. California Water Service Company supplies drinking water via multiple public water systems throughout California to approximately 2 million people through 496,400 customer connections. California Water Service Company is a Phase One class member in the Settlement

Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 2603].

4. California Water Service Company filed its initial lawsuit in the AFFF MDL on October 14, 2019.

5. California Water Service Company joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. California Water Service Company joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, California Water Service Company recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. California Water Service Company believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because California Water Service Company believes that this settlement provides appropriate relief for Phase 1 class members, including California Water Service Company's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, California Water Service Company has reviewed the publicly-available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While California Water Service Company recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and

reasonable settlement value for California Water Service Company's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for California Water Service Company's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for California Water Service Company's claims in the foreseeable future.

11. California Water Service Company's attorneys thoroughly explained the proposed class-action settlement to California Water Service Company which enabled California Water Service Company to make an informed decision as to whether to participate as a named class representative in this case.

12. When California Water Service Company decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. California Water Service Company agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. California Water Service Company faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to California Water Service Company are a first step by one defendant and

I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on Nov-20-2023, in Warminster, Pennsylvania.

DocuSigned by:

D229B63226EC416...

on behalf of California Water Service Company

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	**MDL No. 2:18-mn-2873-RMG** **This Document relates to:** ***City of Camden, et al. v. 3M Co.*,** **Case No. 2:23-cv-03147-RMG**

DECLARATION OF THE CITY OF CAMDEN IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Daniel S. Blackburn, City Attorney of the City of Camden, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. The City of Camden is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. The City of Camden is a public water supplier located in Camden County, New Jersey. The City of Camden supplies drinking water to approximately 42,700 customers through approximately 12,840 residential and commercial connections. The City of Camden is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603]. The City of Camden has detectable levels of PFAS in numerous wells within its drinking water system.

4. The City of Camden filed its initial lawsuit in the AFFF MDL on May 4, 2021.

5. The City of Camden joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. The City of Camden joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to PFAS in its drinking water system.

7. In joining this litigation as a Class representative, The City of Camden recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination in our drinking water supplies, including for the costs associated with responding to the PFAS contamination.

8. The City of Camden believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because The City of Camden believes that this settlement provides appropriate relief for Phase 1 class members, including The City of Camden's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, The City of Camden has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While The City of Camden recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for The City of Camden's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for The City of Camden's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for The City of Camden's claims in the foreseeable future.

11. The City of Camden's attorneys thoroughly explained the proposed class-action settlement to The City of Camden which enabled The City of Camden to make an informed decision as to whether to participate as a named class representative in this case.

12. When The City of Camden decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly filed class-action lawsuit.

13. The City of Camden agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and, in many instances, the significant costs associated with addressing and treating PFAS contaminated water.

14. The City of Camden faces significant costs associated with responding to PFAS in its drinking water supplies, including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to The City of Camden are a first step by one defendant and I understand that there are other defendants who may also aid in significantly offsetting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on Nov 20, 2023 in Camden, New Jersey

Date *Location*

DANIEL S. BLACKBURN
on behalf of the City of Camden

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Freeport, et al. v. 3M Co.*, Case No. 2:23-cv-01501-RMG**

DECLARATION OF CITY OF FREEPORT, ILLINIOS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Robert Boyer, City Manager of the CITY OF FREEPORT, ILLINOIS declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. CITY OF FREEPORT, ILLINOIS is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. CITY OF FREEPORT, ILLINOIS is a public waters supplier located in CITY OF FREEPORT, ILLINOIS supplies drinking water to approximately 23,650 customers through 9,500 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. CITY OF FREEPORT, ILLINOIS filed its initial lawsuit in the AFFF MDL on April 12, 2023.

5. CITY OF FREEPORT, ILLINOIS joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. CITY OF FREEPORT, ILLINOIS joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, CITY OF FREEPORT, ILLINOIS recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. CITY OF FREEPORT, ILLINOIS the Court approve it because CITY OF FREEPORT, ILLINOIS believes that this settlement provides appropriate relief for Phase 1 class members, including CITY OF FREEPORT's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, CITY OF FREEPORT, ILLINOIS has reviewed the publicly-available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While CITY OF FREEPORT, ILLINOIS recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for CITY OF FREEPORT's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of

future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for CITY OF FREEPORT's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for CITY OF FREEPORT's claims in the foreseeable future.

11. CITY OF FREEPORT's attorneys thoroughly explained the proposed class-action settlement to CITY OF FREEPORT which enabled CITY OF FREEPORT, ILLINOIS to make an informed decision as to whether to participate as a named class representative in this case.

12. When CITY OF FREEPORT, ILLINOIS decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. CITY OF FREEPORT, ILLINOIS agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. CITY OF FREEPORT's faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to CITY OF FREEPORT, ILLNOIS are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20, 2023, in Freeport, Illinois.

City Manager on behalf of City of Freeport, Illinois

EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	**MDL No. 2:18-mn-2873-RMG** **This Document relates to:** ***City of Camden, et al. v. 3M Co.*,** **Case No. 2:23-cv-03147-RMG**

DECLARATION OF CITY OF SIOUX FALLS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Paul TenHaken, Mayor of City of Sioux Falls, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. City of Sioux Falls is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. City of Sioux Falls is a public waters supplier located in Sioux Falls, South Dakota. Plaintiff supplies drinking water to approximately 208,884 customers through 63,089 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August

22, 2023. [ECF No. 3603]. Plaintiff is a Phase One Class Member based on PFAS sampling performed in or around 2012-2013 by the EPA along with several subsequent testing exercises of its own accord, which reflected the presence of PFAS in its drinking water supply.

4. City of Sioux Falls filed its initial lawsuit in the AFFF MDL on June 26, 2019.

5. City of Sioux Falls joined this class action lawsuit as a representative Plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. City of Sioux Falls joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, City of Sioux Falls recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination of drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. City of Sioux Falls believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because Plaintiff believes that this settlement provides appropriate relief for Phase 1 class members, including City of Sioux Falls' claims relating to PFAS in its drinking water supplies.

9. Like all Class members, City of Sioux Falls has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While City of Sioux Falls recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for City of Sioux Falls' PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling

defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for City of Sioux Falls' claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for City of Sioux Falls' claims in the foreseeable future.

11. Plaintiff's attorneys thoroughly explained the proposed class-action settlement to Plaintiff which enabled City of Sioux Falls to make an informed decision as to whether to participate as a named class representative in this case.

12. When City of Sioux Falls decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. City of Sioux Falls agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. City of Sioux Falls' faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to City of Sioux Falls are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20, 2023, in Sioux Falls, South Dakota.

Mayor Paul TenHaken on behalf of City of Sioux Falls

ATTEST:

Tamara Jorgensen asst., City Clerk

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

On this the 20 day of November, 2023, before me, the undersigned officer, personally appeared Paul Tenhaken, Mayor of the City of Sioux Falls, South Dakota, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Notary Public, State of South Dakota

My Commission Expires: 3-21-29
(SEAL)

EXHIBIT G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	**MDL No. 2:18-mn-2873-RMG** **This Document relates to:** ***City of Camden, et al. v. 3M Co.*,** **Case No. 2:23-cv-03147-RMG**

DECLARATION OF CORAOPOLIS WATER AND SEWER AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Raymond McCutcheon, Manager of **CORAOPOLIS WATER AND SEWER AUTHORITY**, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. **CORAOPOLIS WATER AND SEWER AUTHORITY** is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. **CORAOPOLIS WATER AND SEWER AUTHORITY** is a public water supplier located in Coraopolis, Pennsylvania. **CORAOPOLIS WATER AND SEWER AUTHORITY** supplies drinking water to approximately 5,682 customers through 2,569 metered

services. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. **CORAOPOLIS WATER AND SEWER AUTHORITY** filed its initial lawsuit in the Court of Common Pleas of Allegheny County, Pennsylvania on May 8, 2020. The case was transferred to the MDL on June 9, 2020.

5. **CORAOPOLIS WATER AND SEWER AUTHORITY** joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. **CORAOPOLIS WATER AND SEWER AUTHORITY** joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, **CORAOPOLIS WATER AND SEWER AUTHORITY** recognized that it represented Phase 1class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. **CORAOPOLIS WATER AND SEWER AUTHORITY** believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because **CORAOPOLIS WATER AND SEWER AUTHORITY** believes that this settlement provides appropriate relief for Phase 1class members, including **CORAOPOLIS WATER AND SEWER AUTHORITY's claims** relating to PFAS in its drinking water supplies.

9. Like all Class members, **CORAOPOLIS WATER AND SEWER AUTHORITY** has reviewed the publicly-available information which reflects a good faith estimate of its

settlement award under the proposed class action settlement. While **CORAOPOLIS WATER AND SEWER AUTHORITY** recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for **CORAOPOLIS WATER AND SEWER AUTHORITY'S** PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for **CORAOPOLIS WATER AND SEWER AUTHORITY's** claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for **CORAOPOLIS WATER AND SEWER AUTHORITY'S** claims in the foreseeable future.

11. **CORAOPOLIS WATER AND SEWER AUTHORITY'S** attorneys thoroughly explained the proposed class-action settlement to **CORAOPOLIS WATER AND SEWER AUTHORITY** which enabled **CORAOPOLIS WATER AND SEWER AUTHORITY** to make an informed decision as to whether to participate as a named class representative in this case.

12. When **CORAOPOLIS WATER AND SEWER AUTHORITY** decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. **CORAOPOLIS WATER AND SEWER AUTHORITY** agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. **CORAOPOLIS WATER AND SEWER AUTHORITY** faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to **CORAOPOLIS WATER AND SEWER AUTHORITY** are a first step by one defendant, and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 17, 2023 in Coraopolis, Pennsylvania,

Raymond McCutcheon,
Manager
CORAOPOLIS WATER AND SEWER

EXHIBIT H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG**

DECLARATION OF DALTON FARMS WATER SYSTEM OWNED AND OPERATED BY THE DUTCHESS COUTY WATER AND WASTE WATER AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Michael J. Keating, P.E., Executive Director of the Dutchess County Water and Wastewater Authority, owner and operator of the Dalton Farms Water System, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. Dalton Farms Water System is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. Dalton Farms Water System is a public waters supplier located in Poughquag, NY. Dalton Farms Water System supplies drinking water to approximately 2,055 customers through 603 residential and commercial connections. Because of prior PFAS testing which confirmed the

presence of PFAS in the system, Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated June 30, 2023. [ECF No. 3603].

4. Dalton Farms Water System filed its initial lawsuit in the AFFF MDL on October 14, 2022.

5. Dalton Farms Water System joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. Dalton Farms Water System joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, Dalton Farms Water System recognized that it represented Phase One class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. Dalton Farms Water System believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because Dalton Farms Water System believes that this settlement provides appropriate relief for Phase One class members, including Dalton Farms Water System's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, Dalton Farms Water System has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While Dalton Farms Water System recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable

settlement value for Dalton Farms Water System's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for Dalton Farms Water System's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for Dalton Farms Water System's claims in the foreseeable future.

11. Dalton Farms Water System's attorneys thoroughly explained the proposed class-action settlement to Dalton Farms Water System which enabled Dalton Farms Water System to make an informed decision as to whether to participate as a named class representative in this case.

12. When Dalton Farms Water System decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly filed class-action lawsuit.

13. Dalton Farms Water System agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and, in many instances, the significant costs associated with addressing and treating PFAS contaminated water.

14. Dalton Farms Water System faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to Dalton Farms Water System are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 17,2023, in Poughkeepsie, NY .

____
_________ on behalf of Dalton Farms Water System

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden, et al. v. 3M Co.*,**
Case No. 2:23-cv-03147-RMG

DECLARATION OF MARTINSBURG MUNICIPAL AUTHORITY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Jeffrey S. Reid, President, of **MARTINSBURG MUNICIPAL AUTHORITY**, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. **MARTINSBURG MUNICIPAL AUTHORITY** is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. **MARTINSBURG MUNICIPAL AUTHORITY** is a public water supplier located in Martinsburg, Pennsylvania. **MARTINSBURG MUNICIPAL AUTHORITY** supplies drinking water to approximately 3,100 customers through 1300 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont

Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. **MARTINSBURG MUNICIPAL AUTHORITY** filed its initial lawsuit in the Court of Common Pleas of Blair County, Pennsylvania on May 22, 2023.

5. **MARTINSBURG MUNICIPAL AUTHORITY** joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. **MARTINSBURG MUNICIPAL AUTHORITY** joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, **MARTINSBURG MUNICIPAL AUTHORITY** recognized that it represented Phase 1class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. **MARTINSBURG MUNICIPAL AUTHORITY** believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because **MARTINSBURG MUNICIPAL AUTHORITY** believes that this settlement provides appropriate relief for Phase 1class members, including **MARTINSBURG MUNICIPAL AUTHORITY'S** claims relating to PFAS in its drinking water supplies.

9. Like all Class members, **MARTINSBURG MUNICIPAL AUTHORITY** has reviewed the publicly-available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While **MARTINSBURG MUNICIPAL AUTHORITY** recognizes that this is purely a best estimate subject to the claims process, this

amount represents a fair and reasonable settlement value for **MARTINSBURG MUNICIPAL AUTHORITY'S** PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for **MARTINSBURG MUNICIPAL AUTHORITY'S** claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for **MARTINSBURG MUNICIPAL AUTHORITY'S** claims in the foreseeable future.

11. **MARTINSBURG MUNICIPAL AUTHORITY'S** attorneys thoroughly explained the proposed class-action settlement to **MARTINSBURG MUNICIPAL AUTHORITY** which enabled **MARTINSBURG MUNICIPAL AUTHORITY** to make an informed decision as to whether to participate as a named class representative in this case.

12. When **MARTINSBURG MUNICIPAL AUTHORITY** decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. **MARTINSBURG MUNICIPAL AUTHORITY** agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. **MARTINSBURG MUNICIPAL AUTHORITY** faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds

and the good faith estimate provided to **MARTINSBURG MUNICIPAL AUTHORITY** are a first step by one defendant, and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 16, 2023, in Martinsburg, PA.

Jeffrey S. Reid, President
on behalf of
MARTINSBURG MUNICIPAL AUTHORITY

EXHIBIT J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***Seaman Cottages, et al. v. 3M Co.*,**
Case No. 2:23-cv-03238-RMG

DECLARATION OF SEAMAN COTTAGES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Christine Seaman, member of SEAMAN COTTAGES LLC, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. SEAMAN COTTAGES LLC is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. SEAMAN COTTAGES is a public waters supplier located in Eastham, Massachusetts. SEAMAN COTTAGES supplies drinking water to approximately 800 customers through 10 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. SEAMAN COTTAGES filed its initial lawsuit in the AFFF MDL on October 5, 2021.

5. SEAMAN COTTAGES joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. SEAMAN COTTAGES joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, SEAMAN COTTAGES recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination of drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. SEAMAN COTTAGES believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because SEAMAN COTTAGES believes that this settlement provides appropriate relief for Phase 1class members, including SEAMAN COTTAGES' claims relating to PFAS in its drinking water supplies.

9. Like all Class members, SEAMAN COTTAGES has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While SEAMAN COTTAGES recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for SEAMAN COTTAGES' PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive

these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for SEAMAN COTTAGES' claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for SEAMAN COTTAGES' claims in the foreseeable future.

11. SEAMAN COTTAGES' attorneys thoroughly explained the proposed class-action settlement to SEAMAN COTTAGES which enabled SEAMAN COTTAGES to make an informed decision as to whether to participate as a named class representative in this case.

12. When SEAMAN COTTAGES decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. SEAMAN COTTAGES agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and, in many instances, the significant costs associated with addressing and treating PFAS contaminated water.

14. SEAMAN COTTAGES faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to SEAMAN COTTAGES are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20, 2023 in Eastham, Massachusetts

_________ on behalf of SEAMAN COTTAGES

EXHIBIT K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***Township of Verona, et al. v. 3M Co.*, Case No. 2:23-cv-03147-RMG**

DECLARATION OF THE TOWNSHIP OF VERONA IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Joseph O. D'Arco, Township Manager of The Township of Verona, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. The Township of Verona is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. The Township of Verona is a public water supplier located in Essex County, New Jersey. The Township of Verona supplies drinking water to approximately 15,000 customers through approximately 4,179 residential and commercial connections. The Township of Verona is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court

granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603]. The Township of Verona has detectable levels of PFAS in two wells within its drinking water system.

4. The Township of Verona filed its initial lawsuit in the AFFF MDL on January 20, 2022.

5. The Township of Verona joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. The Township of Verona joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, The Township of Verona recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination in drinking water supplies, including for the costs associated with responding to the PFAS contamination.

8. The Township of Verona believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because The Township of Verona believes that this settlement provides appropriate relief for Phase 1 class members, including The Township of Verona's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, The Township of Verona has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While The Township of Verona recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for The Township of Verona's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future

insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for The Township of Verona's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for The Township of Verona's claims in the foreseeable future.

11. The Township of Verona's attorneys thoroughly explained the proposed class-action settlement to The Township of Verona which enabled The Township of Verona to make an informed decision as to whether to participate as a named class representative in this case.

12. When The Township of Verona decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly filed class-action lawsuit.

13. The Township of Verona agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and, in many instances, the significant costs associated with addressing and treating PFAS contaminated water.

14. The Township of Verona faces significant costs associated with responding to PFAS in its drinking water supplies, including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to The Township of Verona are a first step by one defendant and I understand that there are other defendants who may also aid in significantly offsetting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20, 2023, in the Township of Verona, County of Essex, New Jersey.

Joseph O. D'Arco
Township Manager
on behalf of The Township of Verona

EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	**MDL No. 2:18-mn-2873-RMG** **This Document relates to:** ***City of Camden, et al. v. 3M Co.,*** **Case No. 2:23-cv-03147-RMG**

DECLARATION OF VILLAGE OF BRIDGEPORT IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Norma Teasdale, Mayor of Village of Bridgeport, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. Village of Bridgeport is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. Village of Bridgeport is a public waters supplier located in Bridgeport, Ohio. . Village of Bridgeport supplies drinking water to approximately 1,500 customers through 1,150 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order

dated August 22, 2023. [ECF No. 3603]. Plaintiff is a Phase One Class Member based on PFAS sampling performed in 2020 through the State of Ohio's Per-and Polyfluoroalkyl Substances (PFAS) Sampling Initiative, which reflected he presence of PFAS in its drinking water supply.

4. Village of Bridgeport filed its initial lawsuit in the Common Pleas Court of Belmont County, Ohio on Maye 31, 2022 and that matter was eventually removed to federal court and transferred to the AFFF MDL as Case 2:22-cv-02357-RMG.

5. Village of Bridgeport joined this class action lawsuit as a representative Plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. Village of Bridgeport joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, Village of Bridgeport recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination of drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. Village of Bridgeport believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because Plaintiff believes that this settlement provides appropriate relief for Phase 1 class members, including Village of Bridgeport's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, Village of Bridgeport has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While Village of Bridgeport recognizes that this is purely a

best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for Village of Bridgeport's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for Village of Bridgeport's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for Village of Bridgeport's claims in the foreseeable future.

11. Plaintiff's attorneys thoroughly explained the proposed class-action settlement to Plaintiff which enabled Village of Bridgeport to make an informed decision as to whether to participate as a named class representative in this case.

12. When Village of Bridgeport decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. Village of Bridgeport agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. Village of Bridgeport's faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to Village of Bridgeport are a first step by one defendant and I understand that there

are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20 2023, in Bridgeport, Ohio.

Norma Teasdale
Mayor Norma Teasdale on behalf of Village of Bridgeport

EXHIBIT M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Brockton, et al. v. 3M Co.*, Case No. 2:23-cv-03147-RMG**

DECLARATION OF CITY OF BROCKTON, MASSACHUSETTS IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Robert F. Sullivan, Mayor of CITY OF BROCKTON, MASSACHUSETTS, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. CITY OF BROCKTON, MASSACHUSETTS is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. CITY OF BROCKTON, MASSACHUSETTS is a public waters supplier located in CITY OF BROCKTON, MASSACHUSETTS supplies drinking water to approximately approximately 100,000 customers through approximately 26,000 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont

Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. CITY OF BROCKTON, MASSACHUSETTS filed its initial lawsuit in the AFFF MDL on August 10, 2021.

5. CITY OF BROCKTON, MASSACHUSETTS joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. CITY OF BROCKTON, MASSACHUSETTS joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, CITY OF BROCKTON, MASSACHUSETTS recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. CITY OF BROCKTON, MASSACHUSETTS believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because CITY OF BROCKTON, MASSACHUSETTS believes that this settlement provides appropriate relief for Phase 1 class members, including CITY OF BROCKTON'S claims relating to PFAS in its drinking water supplies.

9. Like all Class members, CITY OF BROCKTON, MASSACHUSETTS has reviewed the publicly-available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While CITY OF BROCKTON, MASSACHUSETTS recognizes that this is purely a best estimate subject to the claims process,

this amount represents a fair and reasonable settlement value for CITY OF BROCKTON, MASSACHUSETTS's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for CITY OF BROCKTON, MASSACHUSETTS's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for CITY OF BROCKTON, MASSACHUSETTS's claims in the foreseeable future.

11. CITY OF BROCKTON, MASSACHUSETTS's attorneys thoroughly explained the proposed class-action settlement to CITY OF BROCKTON, MASSACHUSETTS which enabled CITY OF BROCKTON, MASSACHUSETTS to make an informed decision as to whether to participate as a named class representative in this case.

12. When CITY OF BROCKTON, MASSACHUSETTS decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. CITY OF BROCKTON, MASSACHUSETTS agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. CITY OF BROCKTON, MASSACHUSETTS's faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the

good faith estimate provided to CITY OF BROCKTON, MASSACHUSETTS are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 20, 2023, in Brockton, Massachusetts.

Robert F. Sullivan, Mayor on behalf of
CITY OF BROCKTON, MASSACHUSETTS

EXHIBIT N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden, et al. v. 3M Co.*,**

Case No. 2:23-cv-03147-RMG

DECLARATION OF CITY OF BENWOOD IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Walter W. Yates, Mayor of City of Benwood, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. City of Benwood is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. City of Benwood is a public waters supplier located in Benwood, West Virginia. City of Benwood supplies drinking water to approximately 1,100-1,200 customers through 544 residential and commercial connections. Plaintiff is a Phase One class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order

dated August 22, 2023. [ECF No. 3603]. Plaintiff is a Phase One Class Member based on PFAS sampling performed December of 2022 by the West Virginia Department of Health and Human Resources which reflected he presence of PFAS in its drinking water supply.

4. City of Benwood filed its initial lawsuit in the AFFF MDL on March 15, 2023.

5. City of Benwood joined this class action lawsuit as a representative Plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. City of Benwood joined this lawsuit because of the presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system.

7. In joining this litigation as a Class representative, City of Benwood recognized that it represented Phase 1 class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination of drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. City of Benwood believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because Plaintiff believes that this settlement provides appropriate relief for Phase 1 class members, including City of Benwood's claims relating to PFAS in its drinking water supplies.

9. Like all Class members, City of Benwood has reviewed the publicly available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While City of Benwood recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for City of Benwood's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling

defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for City of Benwood's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for City of Benwood's claims in the foreseeable future.

11. Plaintiff's attorneys thoroughly explained the proposed class-action settlement to Plaintiff which enabled City of Benwood to make an informed decision as to whether to participate as a named class representative in this case.

12. When City of Benwood decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. City of Benwood agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. City of Benwood's faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to City of Benwood are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 21, 2023, in Benwood, West Virginia.

Walter W. Yates

Mayor Walter W. Yates on behalf of the City of Benwood

EXHIBIT O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG**

DECLARATION OF NIAGARA COUNTY IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Claude Joerg, [County Attorney] of Niagara County, NY, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. Niagara County, NY is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. Niagara County, NY is a public waters supplier located in Lockport, NY Niagara County, NY supplies drinking water to approximately 150,000 customers through 108 residential and commercial connections. Plaintiff is a Phase Two class member in the Settlement Agreement with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. [ECF No. 3603].

4. Niagara County, NY filed its initial lawsuit in the AFFF MDL on 2/15/2022 .

5. Niagara County, NY joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

6. Niagara County joined this lawsuit because of the future presence of PFAS in its drinking water supplies and the significant costs associated with responding to the PFAS in its drinking water system in the future.

7. In joining this litigation as a Class representative, Niagara County, NY recognized that it represented Phase Two class members with respect to the settlement negotiations, and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be tendered to help address the PFAS contamination of drinking water suppliers, including for the costs associated with responding to the PFAS contamination.

8. Niagara County, NY believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because Niagara County, NY believes that this settlement provides appropriate relief for Phase Two class members, including Niagara County, NY claims relating to PFAS in its drinking water supplies.

9. Like all Class members, Niagara County, NY has reviewed the publicly-available infomation which reflects a good faith estimate of its settlement award under the proposed class action settlement. While Niagara County, NY recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for Niagara County, NY PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation, particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the

near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

10. Participating in the Settlements will provide significant protections for Niagara County claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for Niagara County, NY claims in the foreseeable future.

11. Niagara County, NY attorneys thoroughly explained the proposed class-action settlement to Niagara County, NY which enabled Niagara County, NY to make an informed decision as to whether to participate as a named class representative in this case.

12. When Niagara County decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

13. Niagara County, NY agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

14. Niagara County, NY potentially faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to Niagara County, NY are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 17, 2023, in Lockport, NY .

____
on behalf of Niagara County, NY

EXHIBIT P

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

MDL No. 2:18-mn-2873-RMG

This Document relates to:

***City of Camden et al v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG**

DECLARATION OF THE CITY OF PINEVILLE IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Rich Dupree, Mayor of the City of Pineville, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration and could and would competently testify to them under oath if called as a witness.

2. The City of Pineville is one of the named Plaintiffs in the above-captioned action and submits this declaration in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

3. City of Pineville is a public water supplier located in Pineville, Louisiana. The city of Pineville supplies drinking water to approximately 14,394 customers through 7,400 residential and commercial connections. Plaintiff is a Phase Two class member in the Settlement Agreement

with the DuPont Entities that the Court granted Preliminary Approval of by Order dated August 22, 2023. ECF No. 3603.

4. City of Pineville joined this class action lawsuit as a representative plaintiff on July 12, 2023 [ECF 3230], with the filing of the Class Action Complaint against E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), DUPONT DE NEMOURS INC., THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, and CORTEVA, INC.

5. City of Pineville joined this lawsuit because of concern regarding the risk of PFAS in its drinking water supplies and the significant anticipated costs associated with testing for PFAS and responding to any PFAS that may be detected in its drinking water system.

6. In joining this litigation as a Class representative, City of Pineville recognized that it represented Phase 2 class members with respect to the settlement negotiations and discussed with our attorneys the Defendants' offer of settlement. Throughout the negotiations, it was important to us that funds be earmarked for public water systems whose PFAS levels may currently be below the detection level or have not yet tested, but are required to test for certain PFAS under either UCMR 5 or a separate applicable federal or state law before the UCMR 5 deadline of December 31, 2025, to help address future PFAS contamination, including for the costs associated with responding to the PFAS contamination.

7. City of Pineville believes the proposed settlement is fair, adequate, and reasonable and recommends that the Court approve it because City of Pineville believes that this settlement provides appropriate relief for Phase 2 class members, including City of Pineville's claims relating to PFAS in its drinking water supplies.

8. Like all Class members, City of Pineville has reviewed the publicly-available information which reflects a good faith estimate of its settlement award under the proposed class action settlement. While City of Pineville recognizes that this is purely a best estimate subject to the claims process, this amount represents a fair and reasonable settlement value for City of Pineville's PFAS-related claims against the settling DuPont related defendants given (a) the value secured to resolve the claims at issue; (b) the risks, uncertainties and expense of litigation,

particularly against these defendants; (c) the potential of future insolvency on behalf of the settling defendants; (d) the evolving regulatory landscape that requires action to treat PFAS in drinking water; and (e) given all of the above the ability to begin to receive these much needed funds in the near future rather than, what we understand could be many years from now, and with all of the uncertainty and risk.

9. Participating in the Settlements will provide significant protections for City of Pineville's claim that will not exist if it chooses to opt out or if this settlement is not approved. Thus, the proposed Settlement is the best opportunity to receive fair and reasonable compensation for City of Pineville's claims in the foreseeable future.

10. City of Pineville's attorneys thoroughly explained the proposed class-action settlement to City of Pineville which enabled City of Pineville to make an informed decision as to whether to participate as a named class representative in this case.

11. When the City of Pineville decided to be a named class member in this case, it understood that it had a responsibility to the class and was aware that its name would be affiliated with the publicly-filed class-action lawsuit.

12. City of Pineville agreed to be a named class member because it believed that the proposed settlement would bring significant relief to public waters suppliers around the country that are addressing challenges and in many instances the significant costs associated with addressing and treating PFAS contaminated water.

13. The city of Pineville faces significant costs associated with responding to PFAS in its drinking water supplies including capital costs as well as future costs that may vary over many years and even decades. The proposed settlement funds and the good faith estimate provided to the City of Pineville are a first step by one defendant and I understand that there are other defendants who may also aid in significantly off-setting these current and future expenditures.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts are true and correct.

Executed on November 17, 2023 in Pineville, Louisiana

_________ on behalf of City of Pineville

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))	Master Docket No.: 2:18-mn-2873-RMG

CITY OF CAMDEN, et al., *Plaintiffs,* -*vs*- E. I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), et al., *Defendants.*	)))))))))))	Civil Action No.: 2:23-cv-03230-RMG

DECLARATION OF GARY J. DOUGLAS IN SUPPORT OF CLASS COUNSEL'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT, FOR FINAL CERTIFICATION OF THE SETTLEMENT CLASS, AND IN RESPONSE TO OBJECTIONS

I, the undersigned, GARY J. DOUGLAS, respectfully declare, under penalty of perjury, that the following are true and correct, to the best of my knowledge, information, recollection and belief:

Declarant's Professional Background

1. I am a co-founding partner of the law firm Douglas & London, P.C. ("Douglas & London") with primary offices located at 59 Maiden Lane, 6th Floor, New York, New York 10038.

2. I am licensed to practice law in the State of New York, in the United States District Courts for the Southern and Eastern Districts of New York, and the State of Pennsylvania.

3. Over the course of my three-plus decades as an attorney, I have tried hundreds of cases, including as lead trial counsel in some of the most significant mass tort litigation over the

last several decades, the results of which have assisted in the recovery of billions of dollars in settlements. Some of the more notable cases I have tried include individual product liability cases, such as one of the very first cases to be successfully tried against the tobacco industry (at the time it was only the third such plaintiffs' verdict in the nation and the first in the State of New York) (*Frankson, et al., v. Brown & Williamson Tobacco Corp., et al.*, Case No. 24915/00 (N.Y.S.), and the trials of many other mass tort cases including both pharmaceutical and medical device MDL bellwethers, such as the first successful plaintiffs' verdict in the *Fosamax* litigation (*In re Fosamax Prods. Liab. Litig.*, MDL No. 1789); the first successful plaintiffs' verdict in the *Xarelto* litigation (*In Re: Xarelto Prods. Liab. Litig.*, Case No. 160503416); the first successful plaintiffs' verdict in the nation against an automobile manufacturer for a defective airbag (*Lyzetto Crespo, et al. v. DaimlerChrysler Corp.*, Case No. 97-cv-8246 (S.D.N.Y); and, more recently, serving as Co-lead trial counsel in the first *three* PFAS cases ever to go successfully to verdict on behalf of individual plaintiffs (*In re: E. I. du Pont de Nemours & Co. C-8 Personal Injury Litig.*, MDL No. 2433).

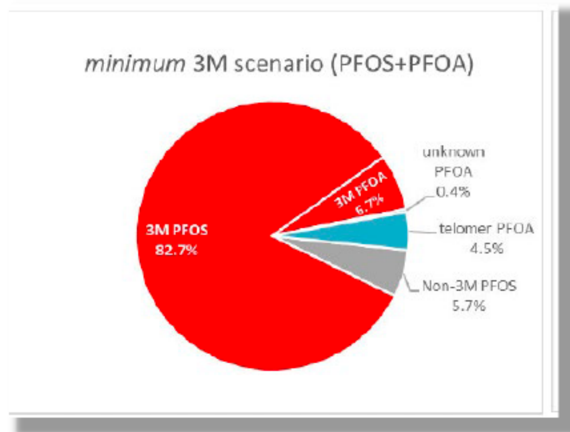
4. Your declarant was also appointed Class Counsel by Judge Edmond A. Sargus to the PFAS medical monitoring class action case currently pending in the United States District Court for the Southern District of Ohio (*Kevin Hardwick v. 3M Co., et, al.*, Case No.2:18-cv-1185).

5. Given my years of experience as a trial lawyer and success in PFAS litigation particularly, I was appointed Co-Chair of the Science Committee by the Plaintiffs' Executive Committee ("PEC") in MDL No. 2873, along with Scott Summy of Baron & Budd, P.C., Christina Cossich of Cossich, Sumich, Parsiola & Taylor, and Robert Bilott of Taft, Stettinius & Hollister, and ultimately also was selected to serve as Lead Trial Counsel for the *City of Stuart, Florida v. 3M Co., et al.* bellwether trial.

City of Stuart v. 3M et al.

6. In my role as Lead Trial Counsel for the *City of Stuart, Florida v. 3M Co., et al.* bellwether case, I am personally aware that right up until the Chapter 11 bankruptcy filing by Kidde-Fenwal, Inc. (May 14, 2023, two weeks and a day prior to the scheduled start of trial), Stuart was prepared to present its case-in-chief against four main defendants, which included: (1) the 3M Company; (2) the Chemours Company, the Chemours Company, FC, LLC, and E. I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively, "DuPont"); (3) Kidde-Fenwal, Inc.; and (4) National Foam, Inc.[1]

7. Accordingly, having been so prepared, I am aware that Stuart expected to establish at trial, based on expert testimony, that more likely than not, 4.5% of the PFAS contamination at Stuart was attributable to the Telomer Defendants (i.e., National Foam, Inc., Kidde-Fenwal, Inc., and DuPont), collectively, as set forth in the pie chart below ("Telomer Contribution"), the data for which is based, in part, on a rigorous chemical fingerprinting analysis.[2]



[1] The City of Stuart's claims against DuPont were severed from the *City of Stuart* trial once Defendant Kidde filed for Chapter 11 bankruptcy given that the liability as between these two entities was so intertwined.

[2] This analysis withstood a *Daubert* challenge. Order regarding Defendants' Co-Lead Counsel's Omnibus Motion to Exclude Plaintiff's Experts' Testimony, at 10-14 [ECF 3509].

8. I am also personally aware that at trial, Stuart intended to present two expert witnesses who would have collectively testified as to the present value of the capital, and operation and maintenance ("O&M") costs associated with treating Stuart's drinking water wells to non-detect. In particular, the evidence presented would have established that, with respect to the drinking water claims ***only***, the present value of Stuart's capital and O&M costs to treat its PFAS contamination was equal to $76,750,290.00.

9. Assuming that the jury attributed the totality of the 4.5% Telomer Contribution to DuPont only (and none was attributed to Kidde or National Foam), then Stuart could have reasonably expected to receive at most 4.5% of $76,750,290.00, or $3,453,763.05, from DuPont. In all likelihood, however, it is reasonable to assume that DuPont's contribution would only be a fraction of that given that it is merely a component part manufacturer and not a AFFF manufacturer (i.e, Kidde and National Foam).

10. This information was available to Plaintiffs' counsel over the course of their negotiations with DuPont, and, as such, counsel had access to real-world analyses of costs associated with treating Class Members' Public Water Systems ("PWS"). Moreover, and importantly, the *Stuart* case was selected as the first bellwether trial because the Parties and the Court agreed it was representative.[3] Thus, counsel had access to real-world data from an agreed

[3] *See* Letter from Plaintiffs' Executive Committee to Your Honor, dated September 9, 2022, regarding sequencing of trials for water provider bellwether cases [ECF No. 2592], at 1-2 (noting the PEC's position that *Stuart* is representative); *see also*, Defense Co-leads' letter to Your Honor, dated September 9, 2022 [ECF No. 2591], at 2-3 (agreeing with the PEC that *Stuart* should be the first bellwether trial and noting that *Stuart*, like "the majority of water providers in the country (and many in this MDL) – serves a relatively small population," that also, "with many others, will require [Stuart] to demonstrate the PFAS…in its water is, in fact, related to AFFF usage by its fire department," and further noting that the "reasonableness of [Stuart's] choice to treat for PFOS/PFOA and the damages theories…[are] important issues that will recur in most water provider cases."

upon representative case among many water systems to determine the appropriate percentage of potential DuPont liability.

11. To put this in further context, your Declarant more recently oversaw the collection of data[4] and calculation of an estimate of Stuart's potential recovery under the DuPont Settlement Agreement consistent with the Allocation Procedures.[5] This calculation resulted in a good faith estimate of $1,686,581.00 that Stuart may receive under the DuPont PWS Settlement.

12. That good faith estimate represents approximately 2.2% of Stuart's total damages associated with its Drinking Water claims, or approximately half of the total Telomer Contribution, which it likely would have shared with the AFFF manufacturers, and is far more than a "fraction" of what it could have expected at trial, which further illustrates the fairness of the Settlement. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-1174 (4th Cir. 1975)(stating that even where a settlement amounts to only a "fraction of the potential recovery" at trial, that will not "render [a] settlement inadequate or unfair.").

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[4] This data includes the Adjusted Flow Rates and PFAS Scores provided by *Stuart*, and as applied according to the Allocation Procedures set forth in the DuPont Settlement Agreement.
[5] Exhibit C to the Settlement Agreement [ECF No. 3393-2].

I declare under penalty of perjury under the law that the foregoing is true and correct.

Executed this 21st day of November 2023, at New York New York.

Gary J. Douglas, Esq.
Douglas & London, P.C.
59 Maiden Lane, 6th Floor
New York, New York 10038
Ph: (212) 566-7500
Fax: (212) 566-7501
Email: gdouglas@douglasandlondon.com

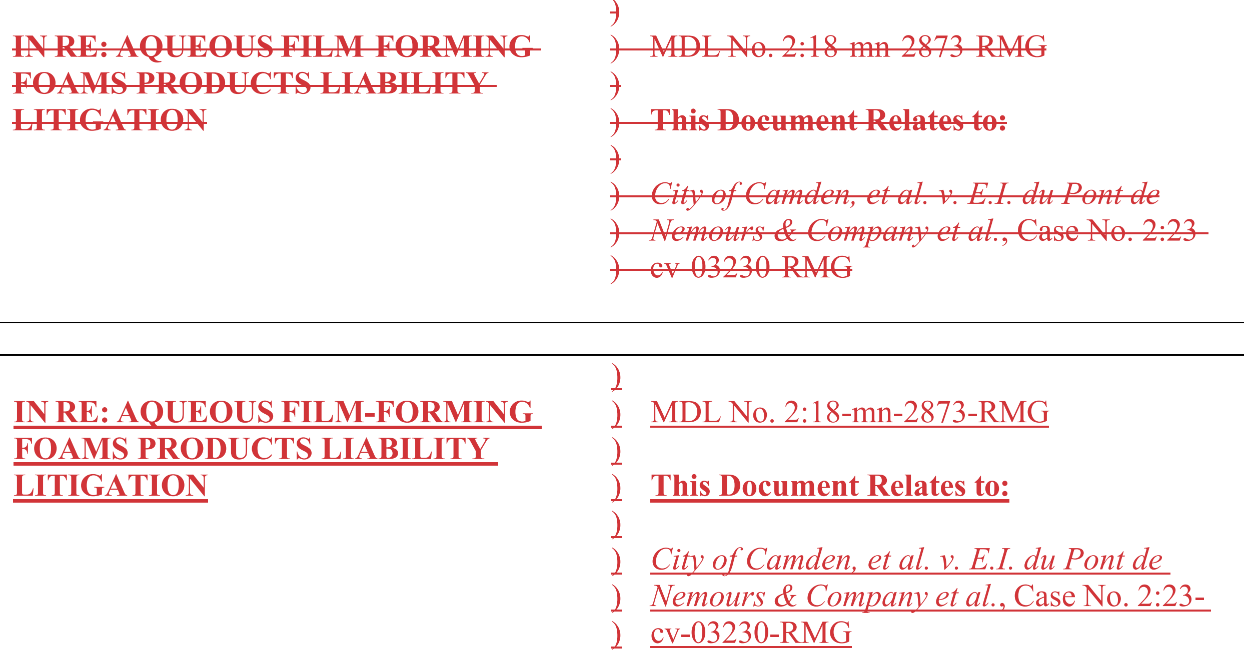
EXHIBIT R

Exhibit R(a)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION



~~**IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION**~~	~~MDL No. 2:18-mn-2873-RMG~~ ~~**This Document Relates to:**~~ ~~*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG~~

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF ~~FORT WORTH~~NORTH TEXAS MUNICIPAL WATER DISTRICT

I. INTRODUCTION

~~The City of Fort Worth,~~North Texas ~~("Fort Worth~~Municipal Water District ("NTMWD"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No.

3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. ~~Fort Worth~~NTMWD objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). ~~Fort Worth~~NTMWD reserves the right to withdraw these objections at any time before the opt-out deadline

of December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions ~~necessarily~~ require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands-

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). ~~Fort Worth~~NTMWD is a member of the settlement class (an Eligible Claimant) because it is a Public Water System ("PWS") in the United States that has detected PFAS in one or more Water Sources as of the DuPont Agreement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of ~~Fort Worth Water~~ NTMWD Deputy Director ~~Christopher Harder~~of Water & Wastewater Billy George); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at

issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims~~.~~, as well as air-pollution claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) ~~EPA~~the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's ~~Public Water System ("PWS")~~ PWS and any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and ~~is patently unfair.~~

is patently unfair.

Moreover, the scope of release could potentially be interpreted to cover claims for air pollution. Air may be polluted with PFAS during the process of disposing of wastewater sludge or water treatment residuals derived from the drinking water treatment process. *See* T.J. Smallwood *et al.*, *Per- and polyfluoroalkyl substances (PFAS) distribution in landfill gas collection systems: leachate and gas condensate partitioning*, 448 J. Hazardous Materials 130926 (2023). This polluted air would arguably be "related to" the Class Member's drinking water provision services. Released air pollution claims like this also lack an identical factual predicate with the claims asserted.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:

~~PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:~~

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://~~https://~~www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS~~-~~

within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at

any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, on this basis as well, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury.[1] *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31,

[1] Nothing in this objection should be construed as waiving any immunities or defenses NTMWD may have under state or federal law. NTMWD expressly preserves all such immunities and defenses.

2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the agreement was not intended to cover personal-injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal-injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

~~injury action involving long-chain PFAS).~~

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision-

applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have ~~refused~~rejected the Agreement or could not assent to it—those that have affirmatively requested exclusion

from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Tex. Const. art. III, § 52; Cal. Const. art. XVI, § 18; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (voiding contracts violating constitutional provision on municipal indebtedness); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately-

represented.”) (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because a myriad~~,~~ of as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person’s judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont’s entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after ~~the U.S. Environmental Protection Agency (“EPA”)~~EPA discovers PFAS in the PWS’s wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win

a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has released DuPont. The airport sues DuPont in contribution, which it can do because it is a non--party to the settlement with DuPont. A court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the

Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, which settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of

one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *Atl. Fin. Mgmt*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would

operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These fundamental changes ~~fundamentally~~ contradict the Court's preliminary approval findings, and fail to satisfy either the notice process or the notice timeline. *Cf. Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("Material alterations to a class settlement generally require a new round of notice to the class and a new Rule

23(e) hearing.”). The Guidance changes the DuPont Agreement and fails to resolve related ambiguities.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement~~.[1]~~.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Guidance did not require additional time for eligible class members to analyze because it “adheres to existing principles” in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Guidance backsteps from providing substantive clarity. The “Scope of Release” section, for example, describes how the claims release should operate, but concludes that “[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement.” Dkt. No. 3858-1. ~~This~~That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

~~[1] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.~~

2. Eligible class participants have not received adequate notice of this Guidance.

The Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opting out that do not allow for coordination with customers or approval by relevant governing bodies. Such a

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

-result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate the Guidance.

The Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pits entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

~~another as they navigate monetary claims and the implications of the proposed releases.~~

~~Fort Worth sells water to over 30 wholesale customers, and other cities and entities within Tarrant, Johnson, Denton, and Parker Counties contract with Fort Worth for drinking water, wastewater and reclaimed water services. Under the Guidance, Fort Worth~~NTMWD provides an illustrative example of the unfairness of what has been proposed here. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. *See* Dkt. No. 3829-1 at 5. In all these relationships, NTMWD serves as a treatment provider, diverting source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable

water to its customers. Under the Guidance, NTMWD would have to meet with each of its customers, analyze and negotiate claims, and seek approval from the various elected bodies. Discussions between and among ~~those~~50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will ~~require~~take more time than the 30 business days afforded.

4. The Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members~~—~~. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the ~~public water system. Both the~~PWS. The Agreement and Guidance both fail to address~~,~~ and appear to have been drafted without appreciation for~~,~~ many features of these interconnected systems.

The Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that

wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No.-

3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds ~~would~~will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Guidance ignores, the potential introduction of PFAS at different points along interconnected systems. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

5. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. ~~Fort Worth's~~NTMWD's water ~~supply~~ sources—from Lavon Lake~~ Worth, the Cedar Creek~~, Lake Jim Chapman, Lake Texoma, Lake Tawakoni, Lake Bonham, Bois d'Arc Lake, Trinity River, and ~~Richland Chambers Reservoirs, the Clear~~East Fork of the Trinity River, ~~Eagle Mountain Lake~~in the Trinity, Sulphur, Sabine, and ~~Benbrook Lake~~ Red River Basins in Texas—flow into ~~its five~~NTMWD's seven water treatment plants~~,~~

~~which collectively can treat up to 500 million~~ at a rate of nearly one billion gallons per day.~~[2]~~ *See* Dkt. No. 3829-1 at 5. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at this scale requires a cost that goes far beyond what

is contemplated under the settlement. The Agreement is inadequate for large-scale water systems like ~~Fort Worth~~NTMWD.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite

~~[2] Fort Worth 2023 Comprehensive Plan, Ch.18, Water Supply & Envt'l Quality, at 18-2 https://www.fortworthtexas.gov/files/assets/public/v/1/the-fwlab/documents/comprehensive-planning/adopted/18-environmental-quality-final-2023.pdf (last visited Nov. 10, 2023).~~

the class, “the predominance criterion is far more demanding.” *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members’ common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, ~~with~~and there are too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in ~~this matter, individual claims dominate. *See id.*~~

this matter, individual claims dominate. *See id.*

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not~~regulated~~. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a conclusory argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs

incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water-

systems; and (2) Class Members whose claims are affected by variations in state law.[3]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of that group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[4] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water per day. *See* Dkt. No. 3829 at 17 n.1. In large systems, a ~~Public Water System~~PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to the claims of the Class Representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

[3] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

[4] Pennsylvania Dep't of Envtl. Prot., Drinking Water State Revolving Fund Project Priority List at 13 (June 2, 2022), ~~13 (June 2, 2022),~~

~~https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal FY_2022_PPL_JUN_REV_1.pdf.~~

grapple with these issues and cannot adequately represent the interests of water providers that do.

https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

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~~b.~~a. ~~Class Representatives only represent 13 states.~~

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives assessed only the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not regulate PFAS in drinking water. By contrast, several states ~~in this country~~ have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.,* 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin.

R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for five types of PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. § 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have left entirely unaddressed the strength of the claims held by Class Members in states with PFAS drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that “no indicia of conflicts of interest exists” among the proposed class and that “Plaintiffs allege the same or similar harms as the absent class members.” Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel’s assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers are in direct conflict because they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs “through the purchase price, under the contract, or otherwise.” *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level, (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members, and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: ~~Money~~Compensation

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between three and seven percent of the historical

PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https~~https://www.amwa.net/press-releases/amwa-reacts-~~://www.amwa.net/press-releases/amwa-reacts- proposed-pfas-settlement. Investigating, testing, purchasing~~,~~ and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. The funds do not begin to approach what ~~companies~~the company with 3–7% of liabilities for PFAS should fairly pay to harmed communities across this country.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the

Court cannot balance plaintiffs' expected recovery against the proposed settlement amount,"

Rollins v. Dignity Health, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. ~~Texas~~Tex. 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. ~~Georgia,~~Ga. 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). ~~This is~~The absence of a damage estimate would constitute reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and~~-~~

adequate. The Agreement lacks even minimal foundational guidance on an estimated range of damages or recovery for Class Members.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* A.D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); E.E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement ~~necessarily~~ was negotiated without any reference to bellwether results. Only-

DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed-

doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel

has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at

*10. Given the class of potentially over 14,000 water providers, *see* Dkt. No. 3393 at 22, the public health consequences of moving forward without the critical information bellwether results provide are dire. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No~~,~~. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) ~~when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation~~ when a retailer treats the water they may receive the full potential allocation even though the

wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase

Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One~~.[5]~~.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with ~~the~~ EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS*

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWS. The use of UCMR 5 data to qualify for Phase One means that many more PWS may qualify under Phase One than previously understood.

-*test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest ~~PWSs~~public water systems are wholesalers that were not required to test under these programs. Wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through ~~the Safe Drinking Water Information System ("SDWIS"),~~SDWIS, including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to provide notice only to those entities that tested under explicit testing programs. Because the proposed class includes ~~PWSs~~public water systems that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active ~~PWS~~public water system in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this ~~large~~ group of over 3,000 PWSs ~~who very likely have tested for PFAS~~ would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested~~-~~

are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to

test under UCMR 3, UCMR 5, and/or state law. Those were the only methods Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id.* at 8.

These complex documents implicate 14,000 ~~PWSs~~public water systems, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing

scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. ~~A city like Fort Worth, serving~~NTMWD serves over ~~1.3~~two million people in ~~Fort Worth and surrounding~~over 70 communities~~,~~, in a 10-county region in North Texas. *See* Dkt. No. 3829-1 at 5. It requires more than two months merely to consult with internal authorities and external members affected by such a critical and far-reaching decision~~.[6]~~.[6]

Time will continue to be an issue even after the settlement's approval. For many Phase One Class Members, 60 days after the Effective Date will not be enough time to perform all the mandated consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers, each of which must follow their own independent decision-making process.

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, and an agreement that is unusually complex. Due to serious

~~[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.~~

ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, ~~Fort Worth~~NTMWD respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for ~~City of Fort Worth~~North Texas Municipal Water District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for ~~City of Fort Worth~~North Texas Municipal Water District

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	) MDL No. 2:18-mn-2873-RMG)) **This Document Relates to:**)) *~~City~~NTMWD of Camden, et al. v. E.~~I~~l. du Pont de*) *Nemours & ~~Company~~Campany et al.*, Case No. 2:23-) cv-03230-RMG)

AFFIDAVIT OF ~~CHRISTOPHER HARDER~~BILLY GEORGE

I, ~~Christopher Harder~~Billy George, hereby declare under penalty of perjury that the following is true and correct:

1. I am ~~Water~~Deputy Director of Water & Wastewater for the North Texas Municipal Water ~~Department of the City of Fort Worth ("City~~District **("NTMWD")**.

2. I submit this declaration in support ~~of the City's~~ofNTMWD's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by ~~the City~~NTMWD since ~~1999~~2015. In my current position as ~~Water~~Deputy Director of Water & Wastewater, I ~~manage the City's~~oversee all aspects of the operation of NTMWD's regional water ~~utility~~and wastewater systems. I also direct NTMWD's water resource management.

~~4.~~ ~~The City~~NTMWD is a Class Member. *See* DuPont Agreement § 5.1. ~~The City~~NTMWD is a Public

4. Water System because it presently provides to the public water for human consumption through ~~at least~~over 15 service connections and ~~regularly serves at least 25~~

~~individuals daily at least 60 days out of the year.~~controls collection, treatment, storage, and distribution facilities for drinking water. *See* DuPont Agreement § 2.40. ~~The City~~NTMWD discovered PFAS in at least one Water Source before the Settlement Date.~~It is also required to test for certain PFAS under UCMR 5.~~

I declare under penalty of ~~pe1jury~~perjury that the foregoing is true and correct, under 28 U.S.C.

§ ~~1746~~1746.

Executed this ~~8th~~9th day of November, 2023, at ~~Fort Worth~~Wylie, Texas.

Christopher Harder

~~Christopher Harder~~

Julie A. Geho
Nov. 8, 2023

~~JULIE A. GEHO~~
~~Notary Public, State of Texas~~
~~Comm. Expires 07-09-2024~~
~~Notary ID 124983447~~

Billy George

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member ~~City of Fort Worth ("City~~North Texas Municipal Water District ("NTMWD") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-~~-~~cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of ~~the City's~~NTMWD's objections to the DuPont Agreement.

3. All objections asserted by ~~the City~~NTMWD and the specific reasons for each objection, including all legal support and evidence ~~the City~~NTMWD wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving ~~the City's~~NTMWD's standing is included as an attachment titled "Affidavit of ~~Harder~~George" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and ~~facsimile~~

~~numbers, and~~ email address for ~~the City~~NTMWD are as follows:

- ~~City of Fort Worth~~
- North Texas Municipal Water District
    - Address: ~~200 Texas Street, Fort Worth~~501 E. Brown St., P.O. Box 2408, Wylie, TX ~~76102~~75098
    - Telephone number: (~~817) 392-7603~~469) 626-4319
    - ~~Facsimile number: (871) 392-8359~~
    - ~~Email address: Christopher.Mosley@fortworthtexas.gov~~
    - Email address: ctsevoukas@ntmwd.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing ~~the City~~NTMWD are as follows:

- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com
- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com

7. ~~The City~~NTMWD wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. ~~The City~~NTMWD does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

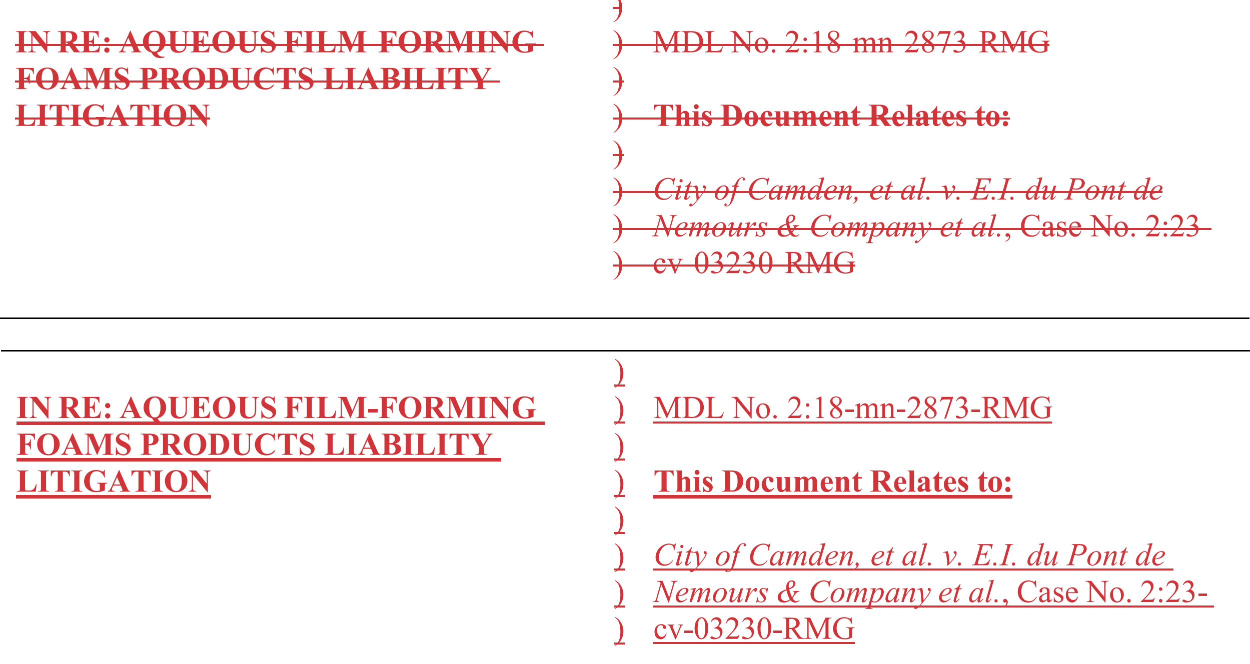
Jessica K. Ferrell

Exhibit R(b)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION



~~**IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION**~~	~~) MDL No. 2:18-mn-2873-RMG~~ ~~) **This Document Relates to:**~~ ~~) *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG~~

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	) MDL No. 2:18-mn-2873-RMG) **This Document Relates to:**) *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF ~~FORT WORTH~~VANCOUVER

I. INTRODUCTION

The City of ~~Fort Worth, Texas ("Fort Worth"),~~Vancouver, Washington, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1,

in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. ~~Fort Worth~~Vancouver objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). ~~Fort Worth~~Vancouver reserves the right to withdraw ~~these objections~~this objection at any time before the opt-out deadline of December 4, 2023, rendering ~~them~~it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions ~~necessarily~~ require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). ~~Fort Worth~~Vancouver is a member of the settlement class ~~(an Eligible Claimant)~~ because it is ~~a Public Water System~~an active public water system ("PWS") in the United States of America that has detected PFAS in one or more ~~Water Sources~~water sources as of the ~~DuPont Agreement~~settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. ~~of Fort Worth Water Director Christopher Harder~~of Tyler Clary); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that

the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the ~~agreement~~Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) ~~EPA~~the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's ~~Public Water System ("PWS") – and~~PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. ~~It in turn defines~~It in turn defines PFAS as those PFAS on the EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

~~PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:~~

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://~~https://~~www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate-

between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at

any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus~~, on this basis as well~~, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the ~~agreement~~Agreement was not intended to cover personal-injury claims. If such

claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal- injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

~~injury action involving long-chain PFAS).~~

2. The Releasing Persons definition ~~would bind~~binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion

from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity~~,~~, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, ~~Tex~~Cal. Const. art. ~~III, § 52; Cal~~XVI, § 18; Tex. Const. art. ~~XVI, § 18~~III, § 52; Wash. Const. art. VIII,

§ 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (~~voiding~~ contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it~~-~~

because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such ~~provisions~~contribution bars do not ~~prevent~~bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully ~~extinguish~~extinguishes any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after ~~the U.S. Environmental Protection Agency (“EPA”)~~EPA discovers PFAS in the PWS’s wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win

a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport~~.~~ in contribution. It cannot sue DuPont because it has released DuPont. The airport~~-~~, also small, cannot bear a large damage award, so it sues DuPont~~ in contribution~~, which it can do because it is a non-~~-~~party to the settlement with DuPont. ~~A~~After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, ~~which~~who settled with DuPont for $100,000, would be responsible for DuPont's $270 million~~ share.~~

share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*,., 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt*,*., Inc. Sec. Litig.*, 718 F. Supp. at 1018. Because theThe DuPont Agreement never identifies a settlement crediting method, *see*. *See generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

§ 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures (“Motion to Supplement”),”) seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a newanew joint claims submission process for interrelated water systems, and took the position that the releases would

operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, ~~and fail to satisfy either~~ the notice process ~~or~~, and the notice timeline~~. The Guidance changes the DuPont Agreement and fails to resolve related ambiguities.~~.[1]

2. The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement~~.[1]~~.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated

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[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. ~~This~~That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

~~[1] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe run water systems, Dkt. No. 50.~~

~~2.~~3. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for ~~opting~~ opt-out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu*

v. Wilkins, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an-

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

~~3.~~4. There is not enough time for interrelated systems to meaningfully evaluate ~~the~~and implement the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-‑out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially ~~pits~~pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

~~another as they navigate monetary claims and the implications of the proposed releases.~~

~~Fort Worth sells water to over 30 wholesale customers, and other cities and entities within Tarrant, Johnson, Denton, and Parker Counties contract with Fort Worth for drinking water, wastewater and reclaimed water services.~~Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting

source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable water to its customers. Under the Guidance, ~~Fort Worth~~Metropolitan and NTMWD would have to meet with each of ~~its~~their customers, analyze and negotiate claims, and seek approval from the various elected bodies~~.~~ in short order.

Discussions between and among ~~those~~at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will ~~require~~take more time than the 30 business days afforded.

~~4.~~5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members~~—~~. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the ~~public water system. Both the~~PWS. The Agreement and Guidance both fail to address~~,~~ and appear to have been drafted without appreciation for~~,~~ many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the

~~wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement.~~Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Interrelated Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds ~~would~~will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems~~.~~, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances~~,~~ and might be wielded to foreclose such claims.

~~5.~~6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. ~~Fort Worth's water supply sources – from Lake Worth, the Cedar Creek and Richland Chambers Reservoirs, the Clear Fork of the Trinity River, Eagle Mountain Lake, and Benbrook Lake in Texas – flow into its five water treatment~~

~~plants,~~For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023),

https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf. Among other technologies, the plant will utilize reverse osmosis, which ~~collectively~~ has been identified as a technology that can ~~treat up~~effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to ~~500 million gallons per day.~~[2]cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1, https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at ~~this~~ scale requires a cost that goes far beyond what is contemplated under the settlement. The ~~Agreement~~settlement is inadequate for ~~large-scale~~largescale water systems ~~like Fort Worth~~.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*.

A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing-

Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite

[2] Fort Worth 2023 Comprehensive Plan, Ch.18, Water Supply & Envt'l Quality, at 18-2 https://www.fortworthtexas.gov/files/assets/public/v/1/the-fwlab/documents/comprehensive-planning/adopted/18-environmental-quality-final-2023.pdf (last visited Nov. 10, 2023).

the class, "the predominance criterion is far more demanding." *See Amchem ~~Prods.,~~Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate. ~~*See id.*~~

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not~~regulated~~. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a ~~conclusory~~thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs

incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[3].[4]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of thatthe group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at.[4] Wholesaler 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a Public Water SystemPWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to Class Representatives class representatives would arise, including:

[4] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

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[3] ~~As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.~~

[4] ~~Pennsylvania Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.~~

~~grapple with these issues and cannot adequately represent the interests of water providers that do.~~

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed ~~only~~ the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not ~~regulate~~have state regulations for PFAS in drinking water. By contrast, ~~several~~many states ~~in this country~~ have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin.

R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for ~~five types of~~5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate~~-~~

water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. ~~§~~ 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have ~~left entirely unaddressed~~not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. **Several groups of Class Members have interests in direct conflict with other groups of Class Members.**

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers ~~are in direct conflict because~~may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs~~-~~

"through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level~~,~~ (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to ~~fewer~~less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members~~,~~ and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between ~~three~~3 and ~~seven~~7 percent of the historical

PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https~~https://www.amwa.net/press-releases/amwa-reacts-~~://www.amwa.net/press-releases/amwa-reacts- proposed-pfas-settlement. Investigating, testing, purchasing~~,~~ and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the ~~settlement agreement~~Agreement provides from the predominant PFAS manufacturer. ~~The~~Simply put, the funds ~~do not begin to approach what companies with 3–7% of liabilities for PFAS should fairly pay to harmed communities across this country~~are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness

of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case.”). While a “cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair,” *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), “any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs’ expected recovery against the proposed settlement amount,”

Rollins v. Dignity Health, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial ~~Nat'l~~National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are

circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance ~~on an estimated range of damages or recovery for Class Members~~.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement~~.~~ in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of ~~the parties'~~plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* ~~A.~~Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); ~~E.~~Eldon

E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to

influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement necessarily was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel

has not otherwise attempted an “analysis of the value of the settlement compared to the potential recovery if the case went to trial.” *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at

*10. Given the class of ~~potentially~~ over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public ~~health consequences of~~of blindly moving forward without the critical information bellwether results provide ~~are dire~~could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat “class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider “whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief.” *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS-contamination, the Agreement appears to treat class members differently by limiting the number-

of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase

Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One~~.[5]~~.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with ~~the~~ EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through

[5] ~~At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.~~

UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. ~~Wholesalers~~Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice ~~only~~ to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is~~-~~

easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to

test under UCMR 3, UCMR 5, and/or state law. ~~Those~~After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and ~~a~~two further ~~modification~~modifications styled as interpretive guidance documents filed ~~October 25~~more than two months after preliminary approval, Dkt. ~~No~~Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing

scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. ~~A city like Fort Worth, serving over 1.3 million people in Fort Worth and surrounding communities, requires more than two months merely~~For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

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[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

Time ~~will continue~~continues to be an issue even after the settlement's approval. For ~~many~~ Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the ~~mandated~~necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers~~,~~ that each ~~of which must follow~~has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, ~~and~~as well as an agreement that itself is ~~unusually~~ complex. Due to serious

~~[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.~~

ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, ~~Fort Worth~~Vancouver respectfully objects to the DuPont Agreement~~ as drafted~~.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
~~*/s/ Jeff B. Kray*~~
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917-
~~Jeff B. Kray, WSBA No. 22174~~
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601

jkray@martenlaw.com
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Fort Worth Vancouver

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
~~*/s/ Jeff B. Kray*~~
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917-
~~Jeff B. Kray, WSBA No. 22174~~ 1191
Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com-
~~jkray@martenlaw.com~~

Attorneys for City of ~~Fort Worth~~Vancouver

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.,* Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF ~~CHRISTOPHER HARDER~~TYLER CLARY

I, ~~Christopher Harder~~Tyler Clary, hereby declare under penalty of perjury that the following is true and correct:

1. I am ~~Water Director~~the water engineering program manager for the ~~Water Department of the~~ City of ~~Fort Worth~~Vancouver ("City~~").~~") water utility.

2. I submit this declaration in support of the City's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. ~~I have been employed by the City since 1999.~~ In my current position as ~~Water Director, I manage~~the water engineering program manager for the ~~City's~~ water utility, I oversee all aspects of utility planning and engineering including production, treatment, storage and distribution for the City.

~~4.~~ The City is a Class Member. *See* DuPont Agreement § 5.1. The City is a Public

4. Water System because it provides to the public water for human consumption through at least 15 service connections and regularly serves at least 25 individuals daily at least 60 days out of the year. *See* DuPont Agreement § 2.40. The City discovered PFAS in at least one Water Source before the Settlement Date. It is also required to test for certain PFAS under UCMR 5.

I declare under penalty of ~~pe1jury~~perjury that the foregoing is true and correct, under 28 U.S.C.

§ 1746.

Executed this ~~8th~~9th day of November, 2023, at ~~Fort Worth, Texas~~Vancouver, Washington.

Christopher Harder

~~Christopher Harder~~

Julie A. Geho
Nov. 8, 2023

~~JULIE A. GEHO~~
~~Notary Public, State of Texas~~
~~Comm. Expires 07-09-2024~~
~~Notary ID 124983447~~

Tyler Clary

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF ~~JESSICA K. FERRELL~~JEFF B. KRAY

I, ~~Jessica K. Ferrell~~Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C.

§ 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of ~~Fort Worth~~Vancouver ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23- cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of ~~Harder~~Clary" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and ~~facsimile~~

~~numbers, and~~ email address for the City are as follows:

- City of ~~Fort Worth~~Vancouver
    - Address: ~~200 Texas~~415 W. 6th Street, ~~Fort Worth, TX 76102~~Vancouver, WA 98668
    - Telephone number: (~~817) 392-7603~~360) 946-3065
    - ~~Facsimile number: (871) 392-8359~~
    - ~~Email address: Christopher.Mosley@fortworthtexas.gov~~
    - Email address: Cary.Driskell@cityofvancouver.us

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com
- ~~Jeff B. Kray~~
    - ~~Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101~~
    - ~~Telephone number: (206) 292-2600~~
    - ~~Facsimile number: (206) 292-2601~~
    - ~~Email address: jkray@martenlaw.com~~

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing

(DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

~~Jessica K. Ferrell~~

EXHIBIT S

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION This Document Relates to: INDIRECT PURCHASER ACTIONS FOR THE 22 STATES	Case No. 07-cv-05944-JST **ORDER GRANTING FINAL APPROVAL** Re: ECF Nos. 5695, 5758

Before the Court is Indirect Purchaser Plaintiffs' motion for final approval of amended settlements pursuant to the Ninth Circuit mandate to reconsider and amend final approval order, final judgment, and fee order. ECF Nos. 5695, 5758. The Court granted preliminary approval of the amended settlements on March 11, 2020, ECF No. 5695, and held a final fairness hearing on July 8, 2020, ECF No. 5782. The Court will grant final approval, and will grant Plaintiffs' request for attorney's fees, costs, and incentive awards.

I. BACKGROUND

A. Original Settlement Agreements

The factual history of this case is well known to the parties and is contained in the Court's prior orders. The case is predicated upon an alleged conspiracy to price-fix cathode ray tubes ("CRTs"), a core component of tube-style screens for common devices including televisions and computer monitors. The conspiracy ran from March 1, 1995 to November 25, 2007, involved many of the major companies that produced CRTs, and allegedly resulted in overcharges of billions of U.S. dollars to domestic companies that purchased and sold CRTs or products containing CRTs. A civil suit was originally filed in 2007, ECF No. 1, consolidated by the Joint Panel on Multidistrict Litigation ("JPML") shortly thereafter, *see* ECF No. 122, assigned as a

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Multidistrict Litigation case ("MDL") to Judge Samuel Conti, *see id.*, and ultimately transferred to the undersigned in November 2015, *see* ECF No. 4162.

In 2015, one group of plaintiffs – the Indirect Purchaser Plaintiffs ("IPP Plaintiffs") – reached class action settlements with six groups of corporate defendants: Phillips,[1] Panasonic,[2] Hitachi,[3] Toshiba,[4] Samsung,[5] and Thomson/TDA.[6] The settlements included a "Nationwide Class" of "[a]ll persons and or entities who or which indirectly purchased in the United States for their own use and not for resale, CRT Products manufactured and/or sold by the Defendants." *See* ECF No. 1526 at 59-60; ECF Nos. 3862-1, 3862-2, 3862-3, 3862-4, 3862-5; ECF No. 3876-1 (adopting the class definitions set forth in the operative complaint). The agreements also included Statewide Damages Classes of indirect purchasers of CRT products seeking money damages under the laws of 21 states and the District of Columbia ("22 Indirect Purchaser State Classes"). *See id.* The Court certified these classes for settlement purposes in its 2016 Final Approval Order. *See* ECF No. 4712 at 7, 36 (adopting Special Master's report and recommendation, ECF No. 4351 at 22-29, and conditionally certifying the 22 Indirect Purchaser State Classes).

The proposed settlements resolved all federal and state-law claims brought by the IPP Plaintiffs against the settling Defendants and obligated the Defendants to pay a total of

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[1] The Philips entities include Koninklijke Philips N.V., Philips Electronics North America Corporation, Philips Taiwan Limited, and Philips do Brasil, Ltda. ECF No. 3862-1 at 2.

[2] The Panasonic entities include Panasonic Corporation, Panasonic Corporation of North America, and MT Picture Display Co. Ltd. ECF No. 3862-2 at 2.

[3] The Hitachi entities include Hitachi, Ltd., Hitachi Asia, Ltd., Hitachi America, Ltd., Hitachi Electronics Devices (USA), Inc., and Hitachi Displays, Ltd. ECF No. 3862-3 at 2.

[4] The Toshiba entities include Toshiba Corporation, Toshiba America, Inc., Toshiba America Information Systems, Inc., Toshiba America Consumer Products, L.L.C., and Toshiba America Electronic Components, Inc. ECF No. 3862-4 at 2.

[5] The Samsung entities include Samsung SDI Co. Ltd., Samsung SKI America, Inc., Samsung SDI Brazil Ltd., Tianjin Samsung SDI Co. Ltd, Shenzhen Samsung SDI Co., Ltd., SKI Malaysia Sdn. Bhd., and SDI Mexico S.A. de C.V. ECF No. 3862-5 at 2.

[6] The Thomson and TDA entities include Technicolor SA, Technicolor USA, Inc., and Technologies Displays Americas LLC. ECF No. 3876-1 at 2.

$541,750,000.[7] *See* ECF No. 3862-1 at 8; ECF No. 3862-2 at 8; ECF No. 3862-3 at 8; ECF No. 3862-4 at 8; ECF No. 3862-5 at 8; ECF No. 3876-1 at 9-10. The settlements provided monetary compensation for class members in the 22 Indirect Purchaser State Classes but did not provide compensation for persons or entities in certain other states, which collectively are now denominated the Omitted Repealer State[8] subclass ("ORS Subclass").[9] The settlement also provided no compensation to persons or entities in states whose laws do not provide for recovery to indirect purchasers ("non-repealer states"), now denominated the Non-Repealer State subclass ("NRS Subclass").[10] *See* ECF Nos. 3862-1, 3862-2, 3862-3, 3862-4, 3862-5, 3876-1. Even though they received no compensation, the settlements required members of the ORS and NRS Subclasses to release their claims for injunctive relief, equitable monetary relief, and damages.

The agreements proposed a distribution plan which included: (1) a "weighted pro-rata distribution to all members of the 22 Indirect Purchaser State Classes that filed valid claims," (2) a minimum payment of at least $25 per claimant, and (3) a maximum payment of "three times the estimated money damages per claimant." ECF No. 5587 at 30; *see* ECF No. 3862 ¶¶ 43-50. The

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[7] Including the prior Chunghwa and LG settlements, the aggregate IPP settlement amount was $576,750,000. ECF No. 4712 at 3.

[8] In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that only direct purchasers could recover damages for price-fixing under Section 4 of the Clayton Act. *Id.* at 735. As the Ninth Circuit has summarized, the Supreme Court "barred indirect purchasers' suits, and left the field of private antitrust enforcement to the direct purchasers." *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 325 (9th Cir. 1980). In response to the *Illinois Brick* decision, many states passed so-called "*Illinois Brick* repealer statutes," which give indirect purchasers the right to sue when firms violate analogous state antitrust laws. *See, e.g.,* Robert H. Lande, New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations, 61 Ala. L. Rev. 447, 448 (2010). Such states are referred to a "repealer states." A state which has not enacted such a statute is referred to as a "non-repealer state."

[9] The ORS Subclass in its current iteration consists of Indirect Purchaser Plaintiffs in the following states: Arkansas, Massachusetts, Missouri, Montana, New Hampshire, Oregon, Rhode Island, South Carolina, and Utah. ECF No. 5518 at 1; ECF No. 5645 at 2. The parties now use the "ORS" abbreviation to signify "other repealer states" rather than "omitted repealer states." ECF No. 5645 at 1 n.1.

[10] The NRS Subclass consists of Indirect Purchaser Plaintiffs in the following Non-Repealer States: Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, Washington, and Wyoming. ECF No. 5518 at 2.

1 plan "assign[ed] different weights to different CRT products based on the overcharge evidence for
2 each." ECF No. 5587 at 30; *see* ECF No. 3862 ¶¶ 44-49.
3 After this Court preliminarily approved the original settlements, the claims administrator
4 carried out a notice plan which involved: (1) mail and email notices sent to 10,082,690 unique
5 addresses, (2) publication of notice on the settlement website, (3) advertisements on Google,
6 Facebook, and other popular websites, and (4) print and online publications throughout the United
7 States, in both English and Spanish. *See* ECF No. 4071-1 ¶ 114; ECF No. 4371 ¶¶ 4-13. These
8 notices directed class members to the settlement website. *See* ECF No. 4371 ¶¶ 9-13. They also
9 advised class members of material settlement terms, the plan of distribution, and Class Counsel's
10 intent to apply for an attorney fee award of up to one-third of the settlement fund. ECF No.
11 4071-1 ¶ 115.
12 On July 7, 2016, this Court granted final approval of the six settlement agreements ("Final
13 Approval Order"). ECF No. 4712 at 1. On August 3, 2016, the Court issued a Fee Order
14 approving an attorney's fees award of $158,606,250 to Class Counsel, an amount comprising
15 27.5% of the aggregate settlement fund. ECF No. 4740 at 2, 5-9. Two objectors appealed the
16 settlement approval and fee award to the Ninth Circuit. ECF No. 4741.
17 On October 1, 2018, while the appeals were pending, the IPP Plaintiffs filed a Motion
18 pursuant to Federal Rule of Civil Procedure 62.1 for an Indicative Ruling on Their Motion to
19 Amend The IPP Fee Order and Amend the Plan of Distribution. ECF No. 5335. Counsel for the
20 IPP Plaintiffs proposed to modify the earlier settlement by reducing the attorney's fees award by
21 $6 million and using those funds to compensate plaintiffs in three states – Massachusetts,
22 Missouri, and New Hampshire – that were omitted from the original settlement. *Id.* at 8.
23 The Court denied the motion on November 8, 2018. ECF No. 5362. The Court concluded
24 that it had erred by approving the settlement in the first place, and that the IPP Plaintiffs' proposed
25 modifications did not cure all the defects in the settlement. *Id.* The Court's primary concern was
26 that the settlement required class members in the Omitted Repealer States to release their claims
27 without compensation. *See* ECF No. 5362 at 1. The order also expressed "concerns about the
28 adequacy of the counsel who negotiated that settlement or whether they may have faced a conflict

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of interest," given that they had released some clients' claims without compensation. *Id.* at 1. In response to the Court's order, the Ninth Circuit remanded "this case so that the district court [could] reconsider its approval of the settlement." *See In re Cathode Ray Tube Antitrust Litig.*, No. 16-16368 (9th Cir. Feb. 13, 2009), ECF No. 238 at 11. The Ninth Circuit did not vacate this Court's Final Approval, Final Judgement, or Fee Order. *Id.*

On remand, this Court confirmed the existing lead counsel for the IPP Plaintiffs and appointed separate counsel for the unnamed ORS and NRS Subclasses. ECF Nos. 5535, 5518. The Court then referred the matter to Magistrate Judge Corley for settlement. ECF No. 5427.

B. Amended Settlement Agreements

After the Ninth Circuit remanded this case, counsel for IPP Plaintiffs[11] and the settling Defendants engaged in mediation sessions before Magistrate Judge Corley and agreed to amend the settlements. ECF No. 5531; ECF No. 5587-1 ¶¶ 2-3.

The amendments alter the settlements in three ways. First, they appoint new settlement class representatives for the states of Hawaii, Nevada, New Mexico, and South Dakota.[12] Second, they narrow the definition of "the Class" to include only the 22 Indirect Purchaser State Classes certified for settlement in the Court's 2016 Final Approval Order. ECF No. 5587-1 at 7, 13, 19, 25, 31, 38. The amended settlements no longer include a Nationwide Class. *See* ECF No. 5587 at 16; ECF No. 5587-1. Only members of the 22 Indirect Purchaser State Classes release their claims against Defendants. Third, the amendments reduce each Defendant's settlement contribution by approximately 5.35%, for a total reduction of $29,000,000. ECF No. 5587 at 17; *see* ECF No. 5587-1 at 7-8, 13-14, 19-20, 25-26, 31-32, 38-39. The amendments offset these

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[11] Counsel for "IPP Plaintiffs" now only represents class members in the 22 Indirect Purchaser State Classes rather than all indirect purchasers in the Nationwide Class. *See* ECF Nos. 5535, 5518.

[12] On September 13, 2019, IPP Plaintiffs filed a stipulation amending their operative complaints to substitute Sandra Riebow for Daniel Riebow as the named plaintiff for the state of Hawaii; Gregory Painter for Gloria Comeaux as the named plaintiff for the state of Nevada; MaryAnn Stephenson for Craig Stephenson as the named plaintiff for the state of New Mexico; and Donna Ellingson-Mack for Jeffrey Speaect as the named plaintiff for South Dakota. ECF Nos. 5584-1, 5584-2. On September 16, 2019, the Court entered the Order. ECF No. 5585.

reductions in settlement amount by requesting that the Court reduce the attorney's fees previously awarded by $29,000,000. *See id.* Interest earned on the original settlement funds since their 2015 deposit in an escrow account will remain in the fund, except that Class Counsel will still be entitled to seek a share of the accrued interest proportionate to their fee and expense award. ECF No. 5587 at 17; *see* ECF No. 5587-1 at 7-8, 13-14, 19-20, 25-26, 31-32, 38-39. All other terms of the original settlement agreements and plan for distribution remain the same. ECF No. 5587-1 at 8, 14, 20, 26, 33, 39.

C. Procedural History

On September 16, 2019, the IPP Plaintiffs filed a motion for preliminary approval of the amended settlements.[13] ECF No. 5695. The Court then issued an order which: (1) granted the motion for preliminary approval, (2) provisionally certified the 22 Indirect Purchaser State Classes for purposes of settlement, (3) authorized the IPP Plaintiffs to provide additional limited notice to certain class members, and (4) set a deadline of May 29, 2020 for certain class members to object ("Preliminary Approval Order"). *Id.* at 19.

Between August 2019 and February 2020, NRS Subclass member Eleanor Lewis and several members of the ORS Subclass filed multiple motions to intervene in this MDL and file an amended complaint. ECF Nos. 5565, 5567, 5643, 5645, 5688, 5689. The Court denied these motions and directed movants to "file their claims in the appropriate forum(s) and seek transfer from the JPML or, if properly filed in the Northern District of California, 'request assignment of [their] actions to the Section 1407 transferee judge in accordance with applicable local rules.'" ECF No. 5684 at 6 (quoting J.P.M.L. R. 7.2(a)); *see also* ECF No. 5626 at 3 (denying original motions to intervene which "attempt[ed] to amend someone else's complaint"); ECF No. 5628 at 3 (same).

[13] IPP Plaintiffs' filed a "motion pursuant to Ninth Circuit mandate to reconsider and amend final approval order, final judgment, and fee order," which the Court construed as a motion for preliminary approval given its requests that the Court "reconsider and approve the amended settlements under Rule 23(e); order notice be given; and amend the Final Approval Order, the Final Judgment, and the Fee Order . . . after a final hearing." ECF No. 5695 at 6.

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In April 2020, the ORS and NRS Subclasses appealed the Court's Preliminary Approval Order and orders denying their motions to intervene to the Ninth Circuit. ECF No. 5695. The subclasses then moved to stay "all proceedings concerning" the Preliminary Approval Order pending resolution of their appeals. ECF No. 5718, 5720. On June 9, 2020, the Ninth Circuit concluded that it lacked jurisdiction over the Preliminary Approval Order and dismissed that portion of the appeal. ECF No. 5738. Thereafter, this Court denied the ORS and NRS Subclasses' motion to stay. ECF No. 5774.

On May 29, 2020, Lewis and some of the ORS purchasers ("ORS/NRS Objectors") filed objections to the amended settlements. ECF Nos. 5732, 5756. On the same day, the Court also received 15 separate but identical objections from purported members of the 22 Indirect Purchaser State Classes. ECF Nos. 5739-5752. On June 12, 2020, the Court received a late-filed objection, identical to those filed by other members of the 22 Indirect Purchaser State Classes.[14] ECF No. 5755.[15] On June 12, 2020, the IPP Plaintiffs and Samsung Defendants filed responses to these objections. ECF No. 5757, 5758. The Court held a final fairness hearing on July 8, 2020. ECF No. 5782.

II. JURISDICTION

This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

III. STANDING TO OBJECT

A. Legal Standard

A party seeking to invoke the Court's jurisdiction has the burden of establishing standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998); *see In re Hydroxycut*

[14] All but three of the 16 objections filed by purported members of the 22 Indirect Purchaser State Classes identify Robert Bonsignore as counsel. ECF Nos. 5739, 5740, 5742-5749, 575, 5752, 5755. Robert Bonsignore also serves as the Court-appointed counsel for the ORS Subclass. *See* ECF No. 5518.

[15] On July 3, 2020, five weeks after the deadline to file objections to the amended settlements, Counsel for the purported members of the 22 Indirect Purchaser State Classes filed a brief "in further support of their objections to the proposed amended settlement agreements." ECF No. 5779. In light of the facts that this supplemental brief was filed well after the deadline to object and these individuals already filed objections to the amended settlements, the Court declines to consider the supplemental brief.

Mktg. and Sales Practices Litig., No. 09md2087 BTM (KSC), 2013 WL 5275618, at *2 (S.D. Cal. Sept. 17, 2013) ("The party seeking to invoke the Court's jurisdiction—in this case, the Objectors—has the burden of establishing standing."). Non-class members generally "have no standing to object to the settlement of a class action." *San Francisco NAACP v. San Francisco Unified School Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989)); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *9 (N.D. Cal. Aug. 28, 2013) ("[A] court need not consider the objections of nonclass members because they lack standing."); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 321 n.6 (N.D. Cal. 2018) (same); *see also In re Equity Funding Corp. of Am. Sec. Litig.,* 603 F.2d 1353, 1360-61 (9th Cir. 1979) (finding that non-class member "lack[ed] standing to object to, or to appeal from the [settlement's] Plan of Allocation or its approval").

A narrow "exception exists to this rule when [a] non-settling defendant can demonstrate that 'it will suffer some plain legal prejudice as a result' of the settlement." *Carillo v. Schneider Logistics Trans-Loading and Distrib., Inc.*, No. 2:11-cv-8557-CAS(DTBx), 2014 WL 688178, at *2 (C.D. Cal. Feb. 21, 2014) (quoting *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987)); *see Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005) (noting the "exception to the general principle barring objections by non-settling defendants to permit a non-settling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement" (citing *Waller*, 828 F.2d at 583)).[16] "Formal legal prejudice" sufficient to warrant the application of this exception exists where a settlement (1) "purports to strip [a non-settling defendant] of a legal claim or cause of action, an action for indemnity or contribution for example" or (2) "invalidates the contract rights of one not participating in the settlement." *Waller*, 828 F.2d at 583.

B. ORS/NRS Objections

The ORS/NRS Objectors argue that the Court should not grant final approval of the

[16] ORS and NRS Objectors assert that the *Smith* court found that "objector-appellants had standing to object because they were 'potentially affected by the settlement.'" ECF No. 5732 at 7 (quoting *Smith*, 421 F.3d at 998). However, the Ninth Circuit opinion in *Smith* contains no such language.

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amended settlements because: (1) "IPP Class Counsel has not provided adequate representation to the ORS and NRS Plaintiffs," (2) some of the 22 Indirect Purchaser State Classes "lack a representative who was properly added to the MDL," (3) "the settlements do not properly account for the value of the ORS and NRS claims," (4) "settlement notice has been constitutionally deficient," and (5) the "fee award should be reduced" or "delayed until the ORS and NRS can participate in negotiations regarding the value of their claims." ECF No. 5732 at 5-6. The IPP Plaintiffs and Samsung Defendants argue that the Court should disregard these objections because the ORS/NRS Objectors lack standing to object to the amended settlements. ECF No. 5757 at 6-14; ECF No. 5758 at 17-24. The Court agrees.

The amended settlements state that the "'Nationwide Class,' . . . and members thereof (except for members of the 22 Indirect Purchaser States Classes), are expressly excluded from 'the Class' and are not bound by the Agreement." *See* ECF No. 5587-1 at 7, 13, 19, 25, 31, 38. The ORS/NRS Subclasses are members of the "Nationwide Class" but are not members of the 22 Indirect Purchaser State Classes. ECF No. 5616 at 8; *see* ECF No. 1526 at 59-60; ECF Nos. 3862-1, 3862-2, 3862-3, 3862-4, 3862-5; ECF No. 3876-1. Therefore, the persons and entities in these subclasses are not members of the amended settlement Class and have no standing to object to the Court's final approval of these agreements. *See Kent v. Hewlett-Packard Co.*, No. 5:09-cv-05341-JF (HRL), 2011 WL 4403717, at *3 (N.D. Cal. Sept. 20, 2011) ("The [objectors] are excluded from the settlement. . . . Because they are not members of the class, [they] lack standing to object.").

The ORS/NRS Objectors argue that they may object as "non-parties" because their "rights *are* impacted" by the amended settlements. ECF No. 5732 at 7 (emphasis in original). In particular, they contend that (1) "if the settlements are approved . . ., ORS and NRS class members may lose the ability to intervene into this case as class members to assert their claims" and (2) "[o]nce the underlying litigation is dismissed following settlement approval, there may no longer be any action in which to intervene."[17] ECF No. 5732 at 8 (internal quotation mark,

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[17] As the Court stated in its Order Denying Motion to Stay, "final approval of IPP Plaintiffs' amended settlements will not terminate the MDL." ECF No. 5774 at 6. The amended settlements

citation, and alteration omitted). According to ORS/NRS Objectors, this "threat of injury from the settlement, 'no matter how small,' suffices to create [] standing." *Id.* (quoting *Brandt v. Vill. Of Winnetka, Ill.*, 612 F.3d 647, 650 (7th Cir. 2010)). However, the single case that ORS/NRS Objectors cite in support of their "threat of injury" theory contains no discussion of *non-party* standing to object to a settlement. *See generally Brandt*, 612 F.3d 647. Instead, it addresses the requirements that a *plaintiff* must meet in order to establish Article III standing to bring an action in federal court. *See id.* at 649-50. In the context of non-party objections to settlements, "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice." *Carillo*, 2014 WL 688178, at *2 (quoting *Argretti v. ANR Freight System, Inc.*, 982 F.2d 242, 247 (7th Cir. 1992)). Formal legal prejudice sufficient to create non-party standing exists only where a settlement purports to strip a non-settling defendant of a legal claim or cause of action or "invalidates the contract rights of one not participating in the settlement." *Waller*, 828 F.2d at 583. ORS/NRS Objectors' arguments show, "[a]t most, [that] the settlement puts [them] at something of a tactical disadvantage in the continuing litigation. Such an injury does not constitute plain legal prejudice." *Id.* at 584 (finding no standing to object where, as here, "[t]he settlement does not cut off or in anyway affect any of [the non-party's] claims; it only disposes of the claims of the classes against [the settling defendant]"). Thus, ORS/NRS have failed to establish any entitlement to raise non-party objections to the amended settlements. *In re Hydroxycut*, 2013 WL 5275618, at *2 ("The party seeking to invoke the Court's jurisdiction—in this case, the Objectors—has the burden of establishing standing."). The Court therefore strikes their objections. *See Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *10 (N.D. Cal. Feb. 20, 2015) ("The court [] finds that all three objectors lack standing and strikes their objections.").

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resolve the actions between the 22 Indirect Purchaser State Classes and several groups corporate defendants. *Id.*; *see* ECF No. 5531; ECF No. 5587-1 ¶¶ 2-3. "The settlements do not release any of the ORS or NRS Subclasses' claims and do not resolve IPP Plaintiffs' claims against several remaining defendants within the MDL. As such, the underlying MDL will not be eliminated upon final approval of the proposed settlement between a particular subset of the classes and defendants contained therein." ECF No. 5774 at 6.

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1 C. **Remaining Objections**

2 The remaining 16 objections purport to be from members of the 22 Indirect Purchaser State Classes and present identical, generalized statements challenging the amended settlements' adequacy of representation, attorney's fees, fairness, and delay in receipt of settlement funds. ECF Nos. 5739-5752, 5755. For instance, the objections assert that: (1) "[t]he proposed settlement class should not be certified for lack of adequate representation" and "both Class Counsel and Class Representatives are inadequate representatives, and some should be conflicted out," (2) "[t]he proposed settlement is not fair, reasonable and adequate and was not negotiated at arm's length," and (3) "[t]he delay arising from Class Counsel's improper conduct cost me and all others similarly situated to lose more time and interest." *Id.* The IPP Plaintiffs argue that the Court should disregard these objections because they fail to "provide proof of class membership" and fail to comply with the requirements of Rule 23(e)(5). ECF No. 5758 at 13-15. The Court agrees.[18]

In its Preliminary Approval Order, the Court granted IPP Plaintiffs' request to send "limited notification [] to certain class members" to "advise recipients of their opportunities to object to the amendments, object to the requested fee award, and appear at the fairness hearing." ECF No. 5695 at 19. In doing so, the Court approved the proposed Notice form, which permits any "member of the 22 Indirect Purchaser State Classes [who] submitted a claim in or objected to the 2016 Settlements" to "ask the Court to deny approval of the Settlements as amended by the Amendments or to the attorneys' fees request by filing objections with the Court." ECF No. 5587-2 at 18; *see* ECF No. 5695 at 16 n.13, 19. The Notice form requires that "objections *must* include . . . [p]roof of membership in one or more of the 22 Indirect Purchaser State Classes." ECF No.

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[18] The Court's order should not be read as holding that a receipt is required for proof of class membership in all cases. The law is to the contrary. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124-25 (9th Cir. 2017); *see also Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 236-40 (N.D. Cal. 2014) (rejecting ascertainability requirement). However, the parties to a class action settlement are free to impose a receipt requirement as a condition of making a valid claim, separate and apart from the issue from class membership. Here, objectors themselves acknowledge that "proof" in this case requires submission of a receipt. *See, e.g.,* ECF No. 5741 at 2 ("Requiring that Class Members to submit a receipt for the purchase as a condition to object does not treat Class Members equitably relative to each other and is evidence of the inadequacy of the Class Representatives and Class Counsel.").

5587-2 at 18 (emphasis added). However, the 16 objectors neither state that they "submitted a claim in or objected to the 2016 Settlements" nor provide "[p]roof of membership in one or more of the 22 Indirect Purchaser State Classes." *See* ECF Nos. 5739-5752, 5755. They have not complied with the required "procedures and so have not established that they are actual class members." *Miller*, 2015 WL 758094, at *9-10. As such "all [16] objectors have failed to establish their standing to challenge the settlement." *Id.* (finding that objectors failed to establish standing to challenge a settlement where they had not complied with the requirement for objectors to provide "documents or testimony sufficient to establish membership in the Settlement Class"); *see In re Hydroxycut*, 2013 WL 5275618, at *2 ("[B]ecause [the objector] has not established that he in fact purchased a Hydroxycut Product, he has not carried his burden of proving standing as a class member, and the Court strikes [his] objection."); *see also Nwabueze v. AT&T Inc.*, No. C 09-01529 SI, 2013 WL 6199596, at *6-7 (N.D. Cal. Nov. 27, 2013) (overruling objection which "failed to comply with the Court's procedural requirements for objecting to the Settlement"). "[O]n this basis alone, the Court may refuse to consider the objections at issue." *Chavez v. PVH Corp.*, No. 13-CV-01797-LHK, 2015 WL 9258144, at *3 (N.D. Cal. Dec. 18, 2015) (overruling objections which were "procedurally improper" and "were made by individuals who [did] not appear to be Class Members"); *see Miller*, 2015 WL 758094, at *10 (striking objections where objectors did not state under oath what products they purchased).[19]

In addition, each of the 16 objections fails to comply with Rule 23. Under Rule 23(e)(5), a settlement "objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection." The objections at issue, however, do not specify whether they apply "only to the objector, to a specific

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[19] Each of the 16 objections states that "[r]equiring [] Class Members to submit a receipt for the purchase as a condition to object does not treat Class Members equitably relative to each other." ECF Nos. 5739-5752, 5755. However, the Notice does not require Class Members to submit a receipt. It requires objectors to provide "[p]roof of membership in one or more of the 22 Indirect Purchaser State Classes," such as a declaration under oath describing which CRT product(s) the objector purchased. ECF No. 5587-2 at 18. Such a requirement is consistent with those approved by other courts within the Ninth Circuit. *See, e.g.*, *Miller*, 2015 WL 758094, at *9-10 (striking objections which failed to provide "documents or testimony sufficient to establish membership in the Settlement Class"); *In re Hydroxycut*, 2013 WL 5275618, at *2 (striking objections where objectors did not provide evidence of their purchases, and therefore of class membership).

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subset of the class, or to the entire class." *See* ECF Nos. 5739-5752, 5755. Nor do they state the grounds for their objections "with specificity." *See id.* Instead, they offer vague assertions regarding "lack of adequate representation," "lawyers who made multiple errors," and a settlement agreement which "does not treat Class Members equitable relative to each other" and "is not fair, reasonable and adequate." *See id.* These assertions are not accompanied by any explanation or supporting facts to specify *how* members of the 22 Indirect Purchaser State Classes were inadequately represented and inequitably treated. *See id.* The objections also contain no detail as to which of the lawyers' "multiple errors" the objectors complain. *See id.* Accordingly, the Court strikes these objections "for failure to follow the objection procedures outlined in the Court–approved Class Notice" and failure to comply with Rule 23. *Kim v. Tinder, Inc.*, No. CV 18-3093-JFW(ASx), 2019 WL 2576367, at *10 (C.D. Cal. June 19, 2019) (overruling "boilerplate identical one page form objections" for failure to comply with Rule 23(e)).

IV. FINAL APPROVAL OF CLASS ACTION SETTLEMENT

A. Legal Standard

"The claims, issues, or defenses of a certified class may be settled ... only with the court's approval." Fed. R. Civ. P. 23(e). "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). In addition, Rule 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* at 1026. To assess a settlement proposal, courts in the Ninth Circuit use a multi-factor test which balances the following factors:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 944 (9th Cir. 2015) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

"Recent amendments to Rule 23 require the district court to consider a similar list of factors before approving a settlement." *Theodore Broomfield v. Craft Brew Alliance, Inc.*, No. 17-

cv-01027-BLF, 2020 WL 1972505, at *5-6 (N.D. Cal. Feb. 5, 2020). These factors include whether: (1) "the class representatives and class counsel have adequately represented the class;" (2) "the proposal was negotiated at arm's length;" (3) "the relief provided for the class is adequate;" and (4) "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). The "specific factors added to Rule 23(e)(2) are not intended to 'displace' any factors currently used by the courts, but instead aim to focus the court and attorneys on 'the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'" *Theodore Broomfield*, 2020 WL 1972505, at *6 (quoting Advisory Committee Notes to 2018 Amendments, Fed. R. Civ. P. 23(e)(2)). "Accordingly, the Court applies the framework set forth in Rule 23 with guidance from the Ninth Circuit's precedent." *Id.*

Settlements that occur before formal class certification "require a higher standard of fairness." *In re Mego Fin. Corp. Sec. Litig.*, 213 F. 3d 454, 458 (9th Cir. 2000). In reviewing such settlements, the court must ensure that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F. 3d 935, 946-47 (9th Cir. 2011).

B. Adequacy of Notice

A court must "direct notice [of a proposed class settlement] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "The class must be notified of a proposed settlement in a manner that does not systematically leave any group without notice." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F. 2d 615, 624 (9th Cir. 1982) (citation omitted). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 567 (9th Cir. 2019) (quoting *Churchill*, 361 F.3d at 575). If a fairness hearing leads to "substantial changes" in the settlement which "adversely affect[] some members of the class, additional notice, followed by an opportunity to be heard, might be necessary." *In re Anthem*, 327 F.R.D. at 330.

Class members of the 22 Indirect Purchaser States have already received "the best notice that is practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B). After this Court

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preliminarily approved the original settlements, the claims administrator carried out a notice plan which included: (1) mail and email notices sent to 10,082,690 unique addresses, (2) publication of notice on the settlement website, (3) advertisements on Google, Facebook, and other popular websites, and (4) print and online publications throughout the United States, in both English and Spanish. *See* ECF No. 4071-1 ¶ 114; ECF No. 4371 ¶¶ 4-13. These notices directed recipients to the settlement website. *See* ECF No. 4371 ¶¶ 9-13. They also advised class members of material settlement terms, the plan of distribution, and Class Counsel's intent to apply for an attorney fee award of up to one-third of the settlement fund. ECF No. 4071-1 ¶ 115. As the Court found in its prior Final Approval Order, this plan "provided the best practicable notice to class members." ECF No. 4712 at 9.

The IPP Plaintiffs' amendments to the settlement agreements did not require additional notice. ECF No. 5695 at 18-19. As the Court noted in its Preliminary Approval Order, the amended settlements "provide the same benefits to the members of the 22 Indirect Purchaser State Classes." ECF No. 5587 at 32; *see* ECF No. 5587-1 at 7-8, 13-14, 19-20, 26-26, 31-33, 38-39. While the amendments reduce the gross settlement fund by $29,000,000, "that reduction is fully offset by a $29,000,000 reduction in Class Counsel's fee request." *Id.* Therefore, the settlement does not have a "material adverse effect on the rights of class members" and there is no reason to conclude that those class members who failed to object or opt out of the original agreements would now choose to do so. *See In re Anthem*, 327 F.R.D. at 330 (finding that, where amendment did not adversely affect class members, "there is no overriding reason to conclude that those Settlement Class Members who failed to opt out would now choose to do so"). The amendments also do not adversely affect the rights of the ORS and NRS Subclasses which were included in the original settlement. Because the amendments narrow the settlement Class, the release no longer applies to the ORS and NRS Subclasses. *See* ECF No. 5587-1 at 7, 13, 19, 25, 31, 38. These groups retain the claims that they previously possessed, if any, and they are free to pursue those claims against the Defendants.

Although not required, the Court granted the IPP Plaintiffs' request to provide additional notice to certain class members. ECF No. 5695 at 19. The settlement administrator, The Notice

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1 Company, Inc., carried out the limited notice procedure as outlined in the Preliminary Approval
2 Order. ECF No. 5758-1. On March 27, 2020, the Notice Company updated the Settlement
3 Website "to include a Detailed Notice concerning the Amendments to the Settlements." *Id.* ¶ 7.
4 The Notice Company then sent an email notice to 92,170 class members and mailed Postcard
5 Notices to 2,151 class members. *Id.* ¶ 5. During the initial dissemination of notices by email,
6 8,562 emails "bounced" and were not deliverable; consequently, a Postcard Notice was sent to the
7 mailing address of those recipients. *Id.* During the initial dissemination of notice by mail, 711
8 Postcard Notices were returned as undeliverable. *Id.* The Notice Company then "conducted skip
9 traces in an effort to obtain additional address information for recipients with undeliverable
10 addresses, which resulted in remailing of the Postcard Notice to 378 recipients." *Id.* In sum,
11 "direct notice was sent to 100% of the persons or entities on the Notice List but was not received
12 by 0.7%, for an overall success rate of 99.3%." *Id.*
13 The notices "each (a) provided a summary of the Amendments to the Settlements and the
14 reduced fee award, (b) stated that May 29, 2020, was the deadline for submitting objections or
15 comments, (c) stated that the Fairness Hearing was scheduled for July 8, 2020, and (d) directed
16 recipients to obtain the Detailed Notice and additional information at www.CRTclaims.com (the
17 "Settlement Website")." *Id.* ¶ 6. Because "the amended settlements provide the same benefits to
18 class members as were available in the original settlement, the Court [found] it unnecessary to
19 provide opt-outs an opportunity to rejoin the settlement." ECF No. 5695 at 19.
20 Due process requires "notice reasonably calculated, under all the circumstances, to apprise
21 interested parties of the pendency of the action and afford them an opportunity to present their
22 objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). In light of the
23 adequacy of the original notice plan and IPP Plaintiffs' provision of additional notice of settlement
24 amendments, the Court finds that the parties have provided adequate notice to class members.
25 **C. Fairness, Adequacy, and Reasonableness**
26 With the exception of the reaction of class members, the Court analyzed the necessary
27 factors and found the settlement to be fair, adequate, and reasonable when it granted preliminary
28 approval of the amended settlements. ECF No. 5695 at 13-17. The Court likewise found it proper

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1 to conditionally certify the proposed settlement class. *Id.* at 8-11. IPP Plaintiffs have now
2 provided additional notice to class members who filed claims, objected, requested updates, or
3 requested exclusion from the original settlements. ECF No. 5758-1. Class members have also
4 been provided an opportunity to object to the amendments, object to the requested fee award, and
5 appear at the fairness hearing. The Court finds no reason to alter either of its conclusions now that
6 class members have been provided additional notice and an opportunity to be heard and the
7 amended settlements are before the Court for final approval.

8 **1. Adequacy of Representation – Rule 23(e)(2)(A)**

9 The Ninth Circuit has explained that "adequacy of representation ... requires that two
10 questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest
11 with other class members and (b) will the named plaintiffs and their counsel prosecute the action
12 vigorously on behalf of the class?" *In re Mego*, 213 F.3d at 462.

13 In its Preliminary Approval Order, the Court found that there was no evidence of a conflict
14 between either class representatives or Class Counsel and the rest of the settling class members.
15 ECF No. 5695 at 10. No contrary evidence has emerged.

16 The Court also found that IPP Plaintiffs' and Class Counsel have vigorously prosecuted
17 this action on behalf of the 22 Indirect Purchaser State Classes through extensive discovery and
18 participation in multiple formal mediation and negotiation sessions. *Id.* Discovery leading up to
19 the settlements has required production and review of millions of documents and the taking of
20 hundreds of depositions, all conducted over eight-plus years. *See* ECF No. 3862 ¶¶ 12, 15. IPP
21 Lead Counsel has "invested considerable time in this case and ha[s] substantial experience with
22 class action litigation." ECF No. 5695 at 10; ECF No. 4073-1 at 6-15. The Court therefore finds
23 that counsel "possessed 'sufficient information to make an informed decision about settlement.'"
24 *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18,
25 2018) (quoting *In re Mego*, 213 F.3d at 459).

26 During the 2016 final approval process, several objectors argued that the absence of
27 recovery by the ORS and NRS Subclasses suggested a conflict of interest between the 22 Indirect
28 Purchaser State Classes and certain members of the Nationwide Class. *See, e.g.,* ECF No. 4113 at

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8; ECF No. 4125 at 4-5; *see Ellis*, 657 F.3d at 985 ("To determine whether named plaintiffs will adequately represent a class, courts must resolve" whether "the named plaintiffs and their counsel have any conflict of interest with other class members."). The amended settlements eliminate these concerns. On remand, the Court appointed separate counsel to represent the ORS Subclass and NRS Subclass. ECF Nos. 5535, 5518; *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 819, 856 (1999) (discussing division of a class "into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel" when class members have divergent interests). Additionally, by narrowing the settlement Class to include only the 22 Indirect Purchaser State Classes, the amendments remove potential conflicts of interests that could result from differences in claims and relief sought by the 22 Indirect Purchaser State Classes verses the ORS and NRS Subclasses. *See Campbell v. Best Buy Stores, L.P.*, No. LA CV 12-07794 JAK (SHx), 2015 WL 12744268, at *5 (noting conflicts of interest that arise from "differences in the type of relief sought, the amount or seriousness of damages sought," and "the theories of law or fact that may benefit some class members"). Therefore, the amendments moot the adequacy-of-representation concerns expressed by objectors to the original settlement.

Accordingly, the Court concludes that this factor weighs in favor of approval.

2. Arm's Length Negotiations – Rule 23(e)(2)(B)

In its Preliminary Approval Order, the Court found that both the original and amended settlements were the product of arm's length negotiations. ECF No. 5695 at 14. Two former jurists "provided their experienced input into the parties' [original] settlement negotiations." ECF No. 4351 at 34; *see* Advisory Committee Notes, Fed. R. Civ. P. 23, subdiv. (e)(2) (2018) ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in [] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."). The amended settlements were a product of negotiations conducted during two mediation sessions supervised by Magistrate Judge Corley. ECF No. 5587-1 ¶¶ 2-3; *see Hefler*, 2018 WL 6619983, at *6 (noting mediation sessions supervised by former judge as an indication of arm's length negotiations).

The Court also "examine[d] the settlements for additional indicia of collusion that would

1 undermine seemingly arm's length negotiations" and found "no indicia of collusion that would
2 undermine the amended settlements." ECF No. 5695 at 14-15; *see In re Bluetooth*, 654 F.3d at
3 946 ("Prior to formal class certification, . . . agreements must withstand an even higher level of
4 scrutiny for evidence of collusion or other conflicts of interest."). The amended settlements
5 request an attorney fee award of 23.66 percent of the settlement fund. ECF No. 5587 at 29; *see*
6 ECF No. 5587-1 at 7-8, 13-14, 19-20, 25-26, 31-32, 38-39; *In re Bluetooth*, 654 F.3d at 942
7 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award.").
8 The amended settlements also do not contain a reversion clause. ECF No. 4712 at 15. Although
9 the agreements contain a "clear sailing" provision, the Court finds no cause for concern because
10 Class Counsel's fee will be awarded from the same common fund as the recovery to the class.
11 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 961 n.5 (9th Cir. 2009); *see also Bayat v. Bank of*
12 *the West*, No. C-13-2376 EMC, 2015 WL 1744342, at *7 (N.D. Cal. Apr. 15, 2015) ("[B]ecause
13 any attorneys' fees award will come out of the common fund, there is no 'clear sailing' agreement
14 here that would warrant against settlement approval."). The findings from the Court's Preliminary
15 Approval order remain applicable. Further, as discussed in greater detail when evaluating the fees
16 motion, the Court finds that the requested fees are in fact reasonable.
17 The Court therefore concludes that this factor weighs in favor or approval.
18 **3. Adequate Relief for the Class – Rule 23(e)(2)(C)**
19 To determine whether the relief provided for the class is adequate, courts must consider:
20 (a) the costs, risks, and delay of trial and appeal, (b) the effectiveness of any proposed method of
21 distributing relief to the class, (c) the terms of any proposed award of attorney's fees, and (d) any
22 agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C).
23 **a. Costs, Risks, and Delay**
24 In its previous Final Approval Order, the Court found that the IPP Plaintiffs would have
25 faced several hurdles in the absence of a settlement – hurdles that "weigh[ed] strongly in favor of
26 approving the Proposed Settlements." ECF No. 4712 at 9. The Court noted that there was a
27 "great risk to IPPs in continuing to pursue litigation, including both uncertainty over the results of
28 pending motions and challenges (and delay) in collecting any winnings." *Id.* (internal quotation

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marks omitted); *see also* ECF No. 4351 at 30-32. In light of these costs, risks, and potential delays, the Court determined that the settlements were "a good recovery and firmly in line with the recoveries in other cases." ECF No. 4712 at 10.

The Court need not revisit these findings. The proposed amended settlements reduce the amounts paid by each Defendant but fully offset these amounts by requested corresponding reductions in Class Counsel's attorney fee award. ECF No. 5587 at 17; *see* ECF No. 5587-1 at 7-8, 13-14, 19-20, 25-26, 31-32, 38-39. Because the net settlement fund available for distribution to class members remains the same, these settlements remain a "good recovery" in light of the costs, risks, and delay of trial and appeal. If anything, the litigation that has taken place since the Court's prior order, and the accompanying passage of time, serve to underscore the Court's findings about risk and delay.

b. Distribution Method

In the prior Final Approval Order, the Court examined and approved the settlements' proposed plan of distribution. ECF No. 26-29. This plan provides for (1) a "weighted pro-rata distribution to all members of the 22 Indirect Purchaser State Classes that filed valid claims," (2) a minimum payment of at least $25 per claimant, and (3) a maximum payment of "three times the estimated money damages per claimant." ECF No. 5587 at 30; *see* ECF No. 3862 ¶¶ 43-50. The amended settlements do not alter this proposed allocation plan, and the Court again approves it.

c. Attorney's Fees

Class Counsel request an award of attorneys' fees totaling 23.66 percent of the settlement fund along with expenses incurred during the litigation. *See In re Bluetooth*, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award."). The Court previously awarded $158,606,250 in attorney's fees in connection with the prior IPP Settlement after considering counsels' motion for attorney's fees and any objections thereto. ECF No. 4740 at 2. Class Counsel request the Court to reduce that fee award by $29,000,000 to fully offset the reduction in the settlement amounts, and ensure that the reductions do not adversely affect the funds available for distribution to claimants. ECF No. 5587 at 17. In addition, all interest earned on the original settlement amounts from the date of deposit in 2015—

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approximately $13,000,000—will remain in the fund for the benefit of class members (except that Class Counsel shall still be entitled to seek a share of the accrued interest on the fund proportionate to their fee and expense award).[20] *Id.* Accordingly, the Court finds that this factor weighs in favor of approval.

4. Equitable Treatment of Class Members – Rule 23(e)(2)(D)

Consistent with Rule 23's instruction to consider whether "the proposal treats class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2)(C)(i), the Court now considers whether the Settlement "improperly grant[s] preferential treatment to class representatives or segments of the class." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

In the previous Final Approval Order, the Court examined and approved the allocation of settlement funds among the 22 Indirect Purchaser State Classes. As noted above, the original settlement provided for (1) a "weighted pro-rata distribution to all members of the 22 Indirect Purchaser State Classes that filed valid claims," (2) a minimum payment of at least $25 per claimant, and (3) a maximum payment of "three times the estimated money damages per claimant." ECF No. 5587 at 30; *see* ECF No. 3862 ¶¶ 43-50. The plan "assign[ed] different weights to different CRT products based on the overcharge evidence for each." ECF No. 5587 at 30; *see* ECF No. 3862 ¶¶ 44-49. The amended settlements do not alter this proposed allocation.

As discussed in the prior Final Approval Order, "[i]t is reasonable to allocate the settlement funds to class members based on . . . the strength of their claims on the merits." *In re Omnivision Techs., Inc.*, No. C-04-2297 SC, 2007 WL 4293467, at *7 (N.D. Cal. Dec. 6, 2007) (internal quotation marks and citations omitted). Because "reimburs[ing] class members based on the extent of their injuries is generally reasonable," the Court finds that this factor weighs in favor of approval. *See In re Oracle Sec. Litig.*, No. 90-cv-00931-VRW, 1994 WL 502054, at * 1 (N.D. Cal. June 18, 1994); *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal.

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[20] By definition, that award will be lower both in absolute numbers and on an hourly basis than the award the Court approved in 2016 – particularly given that counsels' work in reaching the current agreement will not be separately compensated.

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2001) ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable."); *In re Anthem*, 327 F.R.D. at 332 (same).

5. Reaction of the Class

Finally, the Court considers the reaction of class members to the amended settlements. In this case, the Court received 17 objections, consisting of one objection from the excluded ORS/NRS Subclasses and 16 identical objections from individuals who purport to be members of the 22 Indirect Purchaser State Classes. ECF Nos. 5739-5752, 5755, 5756, 5732. As discussed above, the Court strikes these objections because each objector has failed to carry its "burden of proving standing as a class member." *In re Hydroxycut*, 2013 WL 5275618, at *2; *see Moore*, 2013 WL 4610764, at *9 ("[A] court need not consider the objections of nonclass members because they lack standing.").

The Court has received no other objections to the amended settlements. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision*, 559 F. Supp. 2d at 1043 (citation omitted).

After reviewing all of the required factors, the Court continues to find the amended settlements to be fair, reasonable, and adequate, and finds certification of the settlement class to be proper. As such, the Court grants final approval of the amended settlements.

V. ATTORNEY'S FEES

A. Legal Standard

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. P. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at 941. Courts have discretion to "award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *Id.* at 942.

For more than two decades, the Ninth Circuit has set the "benchmark for an attorneys' fee award in a successful class action [at] twenty-five percent of the entire common fund." *Williams*

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v. MGM-Pathe Commc'ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997). Courts in the Ninth Circuit generally start with the 25 percent benchmark and adjust upward or downward depending on:

> the extent to which class counsel "achieved exceptional results for the class," whether the case was risky for class counsel, whether counsel's performance "generated benefits beyond the cash ... fund," the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis.

In re Online DVD-Rental, 779 F.3d at 954-55 (quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-50 (9th Cir. 2002)).

Courts often also cross-check the amount of fees against the lodestar. "Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award." *Vizcaino*, 290 F.3d at 1050.

B. Discussion

In its prior Fee Order, the Court approved an attorney's fees award of $158,606,250 to Class Counsel, an amount which comprised 27.5% of the aggregate common fund.[21] ECF No. 4740 at 2, 5-9. In determining Class Counsel's entitlement to this fee award, the Court conducted a benchmark analysis by examining: "(1) the results achieved for the class; (2) the complexity of the case and the risk of and expense to counsel of litigating it; (3) the skill, experience, and performance of counsel (both sides); (4) the contingent nature of the fee; and (5) fees awarded in comparable cases." *Id.* at 5-9; *see Vizcaino*, 290 F.3d at 1043; *see In re Bluetooth*, 654 F.3d at 941-42. The Court then "perform[ed] a lodestar cross-check to ensure the reasonableness of its selected percent-of-the-fund award." ECF No. 4740 at 10. The Court applied a "10 percent across-the-board reduction" to the lodestar and, thereby, "reduce[d] the lodestar from $90,075,076.90 to $81,067,569.20." *Id.* "Applying this lodestar to a 27.5 percent fee of $158,606,250 result[ed] in a multiplier of 1.96, which is well within the range of acceptable

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[21] The aggregate common fund includes the $541,750,000 paid to resolve all claims brought by the 22 Indirect Purchaser State Classes against the settling Defendants, as well as the amounts paid in the settlements between IPP Plaintiffs and the Chunghwa and LG defendants. *See* ECF No. 4712 at 3; ECF No. 4740 at 1.

1 multipliers." *Id.*

2 Class Counsel now request that the Court reconsider its prior Fee Award "in accordance
3 with the Amendments to the settlement agreements" and "reduce the aggregate fee award to Class
4 Counsel from $158,606,250 plus interest to $129,606,250 plus interest."[22] ECF No. 5587. This
5 newly requested fee award comprises 23.66 percent of the aggregate settlement fund, which is
6 below the Ninth Circuit's 25 percent benchmark for a reasonable fee award. *See In re Bluetooth*,
7 654 F.3d at 942. When the adjusted lodestar employed in its prior Fee Award – $81,067,569.20 –
8 is applied to the 23.66 percent fee, this results in a multiplier of 1.6, which is well within the range
9 of acceptable multipliers.

10 The ORS/NRS Objectors oppose the requested fee award on the basis that it "deducts an
11 unduly small value for the ORS and NRS claims" and "should be reduced" or "delayed until the
12 ORS and NRS can participate in negotiations regarding the value of their claims." ECF No. 5732
13 at 5-6. As discussed above, ORS/NRS Objectors are not members of the settlement class and,
14 therefore, lack standing to object to the requested fee award. *Rodriguez v. Disner*, 688 F.3d 645,
15 660 n.11 (9th Cir. 2012) ("[O]bjectors who do not participate in a settlement lack standing to
16 challenge class counsel's . . . fee award because, without a stake in the common fund pot, a
17 favorable outcome would not redress their injury." (citation omitted)).

18 In addition, 16 objections assert that Class Counsel "will attempt to bill more for the
19 resultant increased costs and time related to their negotiations and work that arise from their
20 inadequate representation and errors."[23] ECF Nos. 5739-5752, 5755. As discussed above, the
21 Court strikes these objections because the objectors have failed established that they purchased
22 any CRT products and, thus, have not "carried [their] burden of proving standing as a class
23 member." *In re Hydroxycut*, 2013 WL 5275618, at *2. The Court also notes that, even if it were
24 to consider these objections, it would find that the "generalized" statements asserted therein "do
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[22] As the Court noted in its Preliminary Approval Order, "[u]nder these circumstances, there [was] no need for class counsel to file a further motion for attorney's fees." ECF No. 5695 at 16 n.13.
[23] As the Court noted in its Preliminary Approval Order, Class Counsel does not request additional fees for work performed after the filing of the original fee motion. ECF No. 16 n.13 ("[C]ounsel's work in reaching the current agreement will not be separately compensated.").

not provide a basis to contravene the Court's benchmark analysis and lodestar cross-check." *Hefler*, 2018 WL 6619983, at *15 (citation omitted); *see Asghari v. Volkswagen Grp. of Am., Inc.*, No. CV 13-02529 MMM (VBKx), 2015 WL 12732462, at *30 (C.D. Cal. May 29, 2015) (overruling objections that "conclusorily assert that the fees are too high as compared to the benefits class members will receive").

Because the Court has verified under both the lodestar method and the percentage-recovery method that the amount of requested fees is reasonable, the Court awards 23.66 percent of the $576,750,000 aggregate settlement amount, or $129,606,250, to Class Counsel.

VI. EXPENSES

An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks and citation omitted). To support an expense award, Plaintiffs should file an itemized list of their expenses by category, listing the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable. *Wren v. RGIS Inventory Specialists*, No. 06-cv-05778-JCS, 2011 WL 1230826, at *30 (N.D. Cal. Apr. 1, 2011), *supplemented*, No. 06-cv-05778-JCS, 2011 WL 1838562 (N.D. Cal. May 13, 2011).

In its prior Fee Order, the Court examined the "aggregate itemized claimed costs from the Litigation Expense Fund and the Future Expense Fund" and considered two objections related to the payment of these expenses. ECF No. 4740 at 17. The Court found "the expenses to be fair and reasonable." *Id.* at 18. No contrary evidence has emerged. As such, the Court adopts the findings of its prior Fee Order and "approves the $4,495,878.02 already paid from the Future Expense Fund, and grants the motion for the reimbursement in the reduced amount of $3,174,647.55." *Id.*

VII. INCENTIVE AWARDS

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." *Radcliffe*, 715 F.3d 1157, 1163 (9th Cir. 2013). "It is well-established in this circuit that named plaintiffs in a class action are eligible for reasonable incentive payments, also known as service awards." *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *31.

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An incentive award of $5,000 is presumptively reasonable, and an award of $25,000 or even $10,000 is considered "quite high." *See Dyer v. Wells Fargo Bank*, 303 F.R.D. 326, 335 (N.D. Cal. 2014) (citing *Harris v. Vector Mktg. Corp.*, No. 08-cv-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012)). Nonetheless, a higher award may be appropriate where class representatives expend significant time and effort on the litigation and face the risk of retaliation or other personal risks; where the class overall has greatly benefitted from the class representatives' efforts; and where the incentive awards represent an insignificant percentage of the overall recovery. ECF No. 4399 at 4-5; *Wren*, 2011 WL 1230826, at *32.

In its prior Fee Order, the Court considered the factors set forth above and approved payments of "$15,000 for each of 25 Court-appointed class representatives and $5,000 for an additional 15 named plaintiffs not appointed by the court but who acted as state representatives for a period of time before being replaced." ECF No. 4740 at 18. No contrary evidence has emerged, and no one has objected to the requested incentive awards. As such, the Court adopts the findings of its prior Fee Order and "authorizes total incentive payments of $450,000 as set forth above." *Id.* at 19.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. For the reasons set forth in its March 11, 2020 Preliminary Approval Order, the Court confirms its certification of the class for settlement purposes only.

2. The Court grants final approval of the proposed amended settlements and plans of allocation.

3. The class members who made timely requests to opt out of the settlement are excluded from the class.

4. The Court grants Class Counsel's request to reduce the aggregate fee award to $129,606,250 plus interest.

5. For the reasons set forth in its August 3, 2016 Fee Order, the Court approves the $4,495,878.02 already paid from the Future Expense Fund, and grants the motion for reimbursement in the amount of $3,174,647.55.

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6. For the reasons set forth in its August 3, 2016 Fee Order, the Court authorizes total incentive payments of $450,000 as set forth above.

7. The Court vacates its July 7, 2016 Final Approval Order, ECF No. 4712, and its August 3, 2016 Fee Order, ECF No. 4740.

8. The Court vacates its July 14, 2016 Final Judgment of Dismissal with prejudice as to the Philips, Panasonic, Hitachi, Toshiba, Samsung SDI, Thomson, and TDA Defendants, ECF No. 4717.

Plaintiffs shall submit a proposed form of judgment within seven days of this order.

IT IS SO ORDERED.

Dated: July 13, 2020

JON S. TIGAR
United States District Judge

EXHIBIT T

3M Company and DuPont Settlements

September 11, 2023

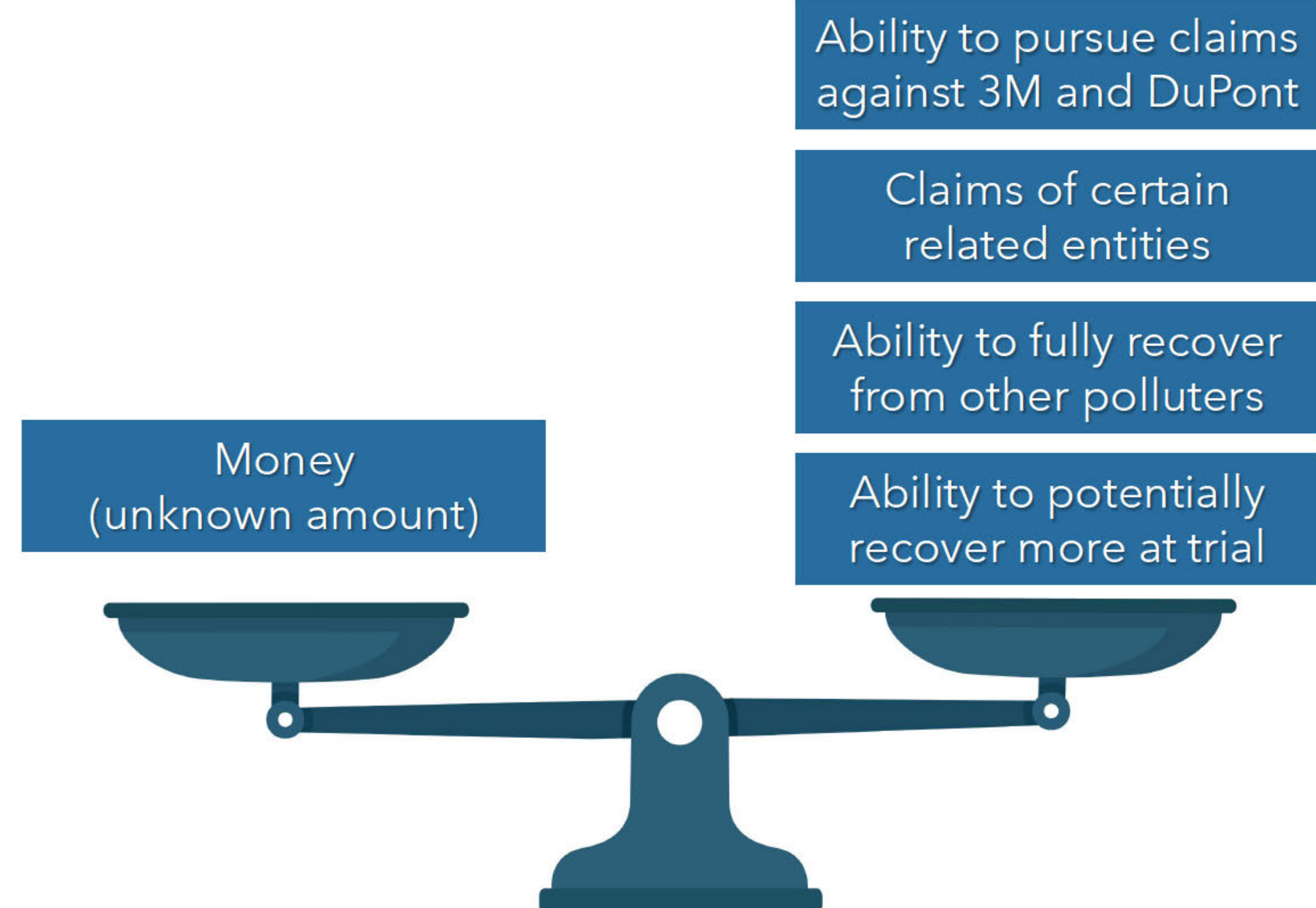
Jeff Kray
Managing Partner
jkray@martenlaw.com
253.686.2594

Jess Ferrell
Partner
jferrell@martenlaw.com
206.375.4886

MARTEN

Leading the Charge

What You Get v. What You Give Up



- Release
- Claims-Over
- Certification
- Timing of payment (3M Settlement)
- Adequacy of funds

Finality – What are 3M and DuPont Requiring from Settling Water Suppliers?

Scope of Release (3M Company)

- "It is the intention of this Agreement that the definitions of 'Release' and 'Released Claims' be as broad, expansive, and inclusive as possible."
- "Released Claims" include "any Claim that may have arisen or may arise at any time in the future out of, relates to, or involves PFAS that has entered or may reasonably be expected to enter Drinking Water or any Releasing Party's Public Water System"

MDL only included cases relating to AFFF, but settlements purport to release claims relating to all PFAS contamination of drinking water sources.

Finality – What are 3M and DuPont Requiring from Settling Water Suppliers?

Scope of Release (DuPont)

- "It is the intention of this Agreement that the definitions of 'Release' and 'Released Claims' be as broad, expansive, and inclusive as possible."
- Any claims arising from conduct of DuPont and related entities before June 30, 2023, and PFAS in the class member's drinking water or property;
- Any claim relating to the development, manufacture, distribution, or use of PFAS in any product, including AFFF;
- Any other claim that could have been brought in the AFFF MDL litigation.

MDL only included cases relating to AFFF, but settlements purport to release claims relating to <u>all</u> PFAS contamination of drinking water sources.

Finality – What are 3M and DuPont Requiring from Settling Water Suppliers?

Protection Against Claims-Over

- If a class member sues a third-party polluter for PFAS in the future and the third party blames 3M or DuPont (a "claim-over"), the class member must reduce its judgment against the polluter.
- Thus, class members' potential recoveries from third parties would be reduced.

Provisions limit Class Members' ability to seek judgments against third parties who seek to recover those costs from 3M or Dupont.

Finality – What are 3M and DuPont Requiring from Settling Water Suppliers?

Certification

- Claims form requires claimants to certify:
  - Claimants' authority to release all Released Claims on behalf of itself and "all other Persons who are Releasing Persons by virtue of their relationship or association with it."
  - In 3M Settlement, claimants must certify they've "consulted with any other entity that has incurred costs in connection with efforts to remove PFAS from, or prevent PFAS from entering, Settlement Class Member's Public Water System, and that Settlement Class Member's claim is on behalf of any such other entity."

Adequacy of Funds – Treatment Cost Estimates

- Estimates of nationwide PFAS treatment costs vary significantly
  - $772 million-$1.2 billion annualized cost (EPA estimate)[1]
  - $5.2 billion annualized cost (Black & Veatch estimate)[2]
- Each water provider will need to individually estimate its own costs

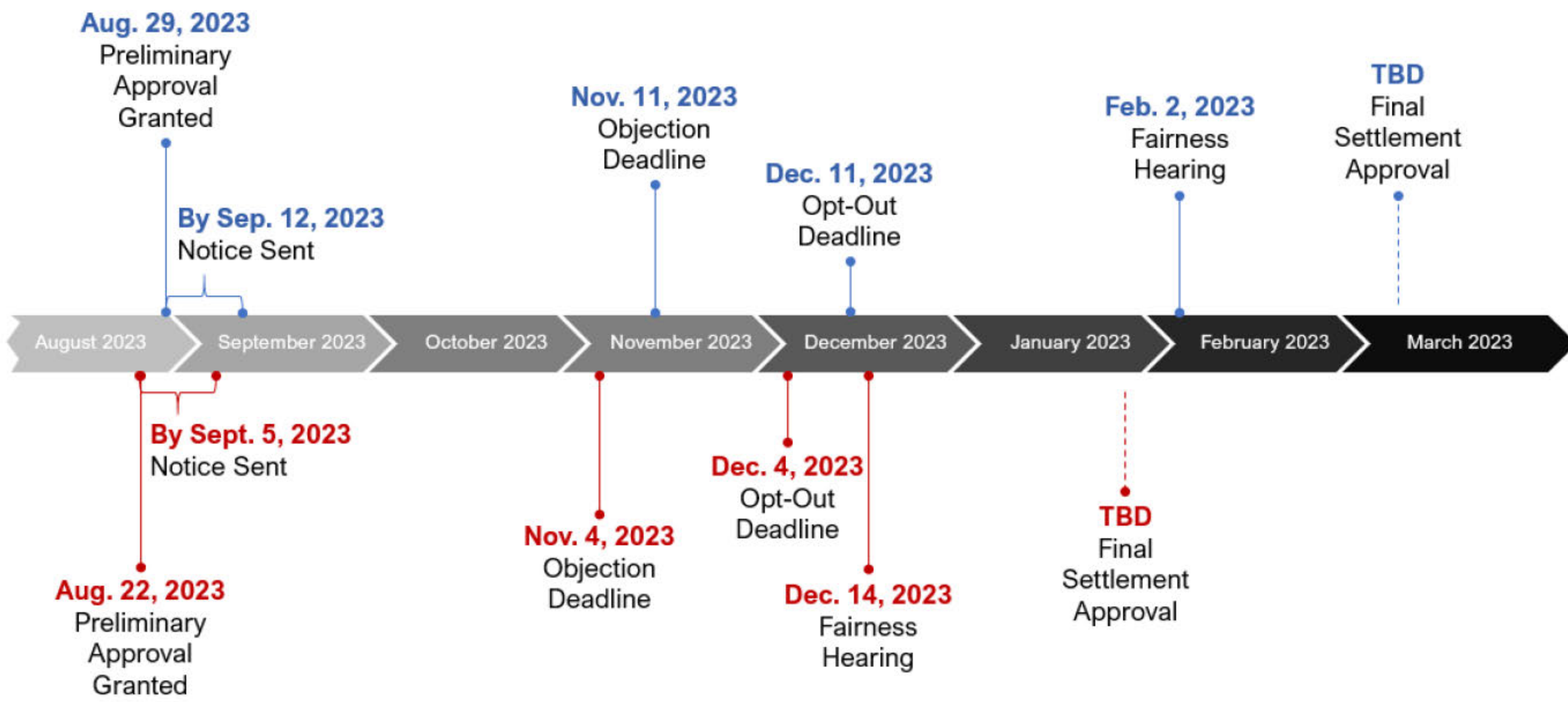
[1] EPA, Economic Analysis for the Proposed Per- and Polyfluoroalkyl Substances National Primary Drinking Water Regulation at 5-2 (March 9, 2023)

[2] Black & Veatch, WITAF 56 Technical Memorandum PFAS National Cost Model Report at App. A-1, prepared for AWMA (March 7, 2023)

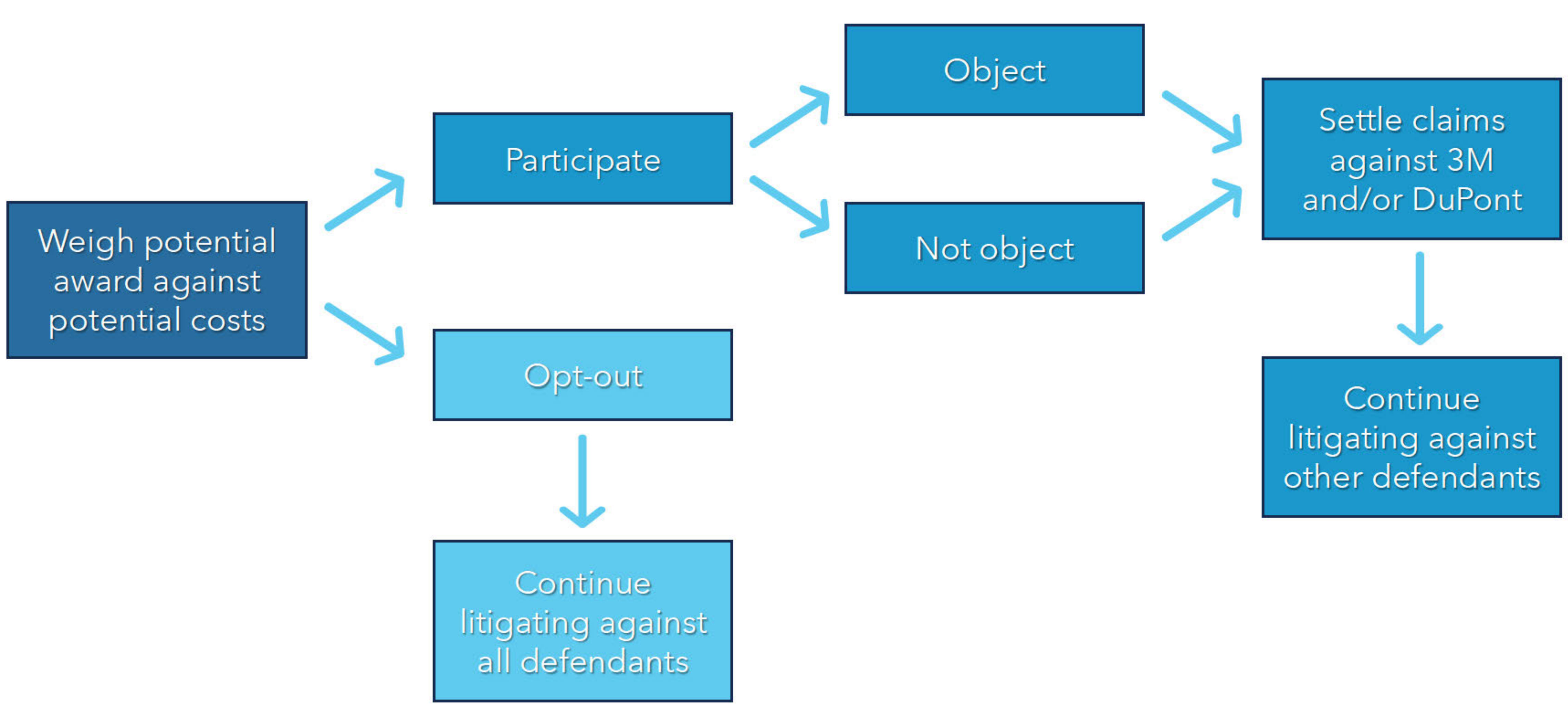
What is the Settlement Approval Process?

- Preliminary approval and notice to proposed class **(We are here)**
- 60 days to object or 90 days for class members to object or opt out
- Court hearing
- Final approval
- Appeals, if any

How Soon Do You Need to Decide?



What Are the Next Steps for Water Providers?



Baseline Testing

- All Class Members may be required to test certain groundwater wells or surface water systems for PFAS as part of baseline testing
- Baseline testing requires:
  - Testing for at least the 29 PFAS analyses that UCMR 5 requires tested
  - Reporting of any concentration of PFAS regardless of UCMR 5's reporting levels
- Failure to test and submit Qualifying Test Results or non-detections:
  - Will disqualify the untested sources from present and future payments
  - AND PWS will be deemed to have released claims for their water sources

Timeline for Baseline Testing

3M Settlement

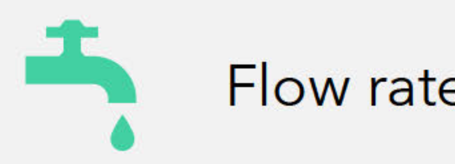
- If the PWS detects PFAS detections before the settlement date, June 22, 2023, it does not have to retest
- Non-detections before January 1, 2019, must retest
- Non-detections on or after January 1, 2019, do not have to retest

DuPont Settlement

- If the PWS detects PFAS before the settlement date, June 30, 2023, it does not have to retest
- Non-detections before December 27, 2021, must retest
- Non-detections on or after December 27, 2021, do not have to retest

How Much Might a Water Supplier Expect to Receive?

PFAS test results



Flow rates

Capital Costs + Operation and Maintenance Cost = Base Score

Base score is adjusted for various "bumps"

Settlement Award = (Adjusted Base Score / Sum of All Adjusted Base Scores) * (Action Fund)

(Imprecise) award estimate ranges are capable of rough calculation using spreadsheets and formula on settlement websites

Are There Other Funding Sources?

For water providers who settle with DuPont and/or 3M, where else may they look for funds to address PFAS impacts to their water systems?

- Claims against other potentially responsible parties, including other defendants in the AFFF PFAS MDL, parties who released PFAS to the environment, etc.
- Grant Funding – Federal/State
- Loans - Federal/State
- Insurance
- Rate increases for water supply customers

Who Should be Involved?

Key water supplier staff

- City Administrator/General Manager
- Public Works Director/Water Utilities Director
- Water Engineer
- Chief Financial Officer
- Board of Directors/City Council
- City Attorney

Outside technical consultants

- Environmental Consultants
- Forensic Economists/Environmental Remediation Cost Specialists
- Modelers

Legal Counsel

Why Hire a Law Firm?

- Complex settlements
- Significant dollar amounts
- Two settlements on nearly the same timeline
- Settlements are not identical
- Decisions about the settlements will have significant consequences
- Certain steps must be taken to maximize recoveries, if participating
- Other defendants remain in the AFFF PFAS MDL – continue litigation, fully capture all damages, understand scope of needs

Questions?

Jeff Kray
Managing Partner

jkray@martenlaw.com
253.686.2594

Jess Ferrell
Partner

jferrell@martenlaw.com
206.375.4886

1191 Second Ave, Suite 2200
Seattle, WA 98101
www.martenlaw.com

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EXHIBIT U

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Water Utilities Must Decide Whether to Give Up PFAS Claims Against 3M, DuPont

By: *Jessica K. Ferrell, Jeff B. Kray, Victor Y. Xu*
Sep 13, 2023

Categories: Newsletter Articles PFAS Series Firm News

Drinking water providers across America have received notices (or will soon) requiring them to decide under imminent court-ordered deadlines whether to join in two multibillion-dollar class settlements in return for releasing their known and unknown PFAS-contamination claims against two of the largest global PFAS manufacturers: 3M Company and DuPont de Nemours, Inc. (and companies associated with DuPont). Members of the proposed class of drinking water providers —estimated at over 12,000—have until December 4, 2023 to decide whether to join in the proposed DuPont settlement and until December 11, 2023 to decide whether to join the proposed 3M settlement. If the water providers simply ignore the class settlement notices, they could unwittingly release their claims against both companies whether or not they receive any settlement payments in return.

The deadlines may come as a surprise to water providers that have not tracked the proposed settlements, tested their drinking water for PFAS, or gathered the information necessary to estimate their treatment costs or the claims that may arise in the future against them.

The considerations relevant to any individual water provider will vary and depend on many factors. A more comprehensive preliminary analysis of some of the pros and cons of settli available from Marten Law upon request here.

Neither this newsletter nor our preliminary analysis are legal advice, and they should not b d upon in making decisions as to how to respond to the 3M and DuPont class settlement no All water providers may wish to consult with their legal and technical counsel.

Background

Since 2018, lawsuits relating to PFAS in aqueous film-forming foam ("AFFF") have been directed to an expansive multi-district litigation ("MDL") in the U.S. District Court for the District of South Carolina (*In re Aqueous Film-Forming Foams Products Liability Multi-District Litigation* (No. 2:18-mn-02873-RMG)).[1] Among the over 5,600 cases pending in the MDL are approximately 400 cases brought by drinking water providers. Often situated near military bases, firefighting facilities, airports, and other sites where AFFF has been used, the water providers allege that PFAS manufacturers and various other defendants contaminated their drinking water. 3M and DuPont historically held two of the largest market shares for PFAS—the Plaintiffs' Executive Committee ("PEC") for the AFFF MDL estimates that since 1965 3M has controlled over 70% of the PFAS market, and DuPont 3–7%.[2]

In June 2023, 3M and DuPont reached separate settlement agreements with the PEC. By design, the agreements are meant to resolve nearly all PFAS-related claims involving drinking water brought by U.S. water providers against those manufacturers, as well as the majority of any claims that could be brought in the future. If the court grants final approval to the agreements, 3M would pay $10.5–12.5 billion to eligible claimants over a 12-year period, and DuPont would pay $1.185 billion—after certain substantial deductions for costs like attorney fees. Despite these large potential payouts, some observers have noted that these amounts would cover only a fraction of the nationwide cost of remediating PFAS-contaminated drinking water.[3]

Although the MDL includes over 400 water-provider plaintiffs, there are more than 12,000 water suppliers identified that would be bound by the settlements as "classes" defined in the agreements. Members of the proposed settlement class are categorized in two "phases": Phase One comprises those water providers that have already detected PFAS in their drinking water supplies; Phase Two comprises those that lack known PFAS detections but either must test for PFAS under EPA regulations by the end of 2025 or serve over 3,300 people. Some water suppliers may know very little about the ongoing litigation. Some may not know whether there is PFAS in their water supplies. Few if any know what claims they may face from government regulators, their customers, neighbors, or other third parties in the future. Nevertheless, all settlement-eligible water suppliers who do not "opt out" of the proposed settlement will be bound by the agreements, including the agreements' release of their claims.

Procedure for Settlement Approval

Proposed class settlement agreements must generally follow the below rules:

- *Preliminary approval*: The plaintiffs seeking a class settlement must propose an agreement for the court's review and demonstrate that the agreement is facially "fair, reasonable, and

adequate" such that the notice and approval process should be started in earnest.[4] There is an opportunity at this stage to object, as discussed below. The court approved both the 3M and DuPont settlements preliminarily in late August. Its preliminary approval of the 3M settlement came after negotiations that resulted in several amendments to address various concerns that had been raised by states, territories, and water providers regarding the original agreement.[5]

- *Conditional certification of a settlement class*: The court must then make a preliminary determination that a class could be certified under the applicable criteria of numerosity of parties, commonality of questions of law or fact, typicality of claims and defenses, and whether the proposed class representatives would fairly and adequately protect class interests.[6] The court also conditionally certified classes for the 3M and DuPont settlements late last month.

- *Notice to class*: If a court preliminarily approves the agreement and conditionally certifies a class, it will order delivery of notice to the class, which must provide comprehensive information on the case, the class to be certified, the claims at issue, the right to object and opt out, and the binding effect of the settlement agreement on all class members who do not opt out.[7] The DuPont and 3M notice periods have already begun.

- *Objection and opt-out period*: The notice specifies deadlines by which class members must object to final approval (*i.e.*, alert the court to problems with the fairness or adequacy of the settlement) or opt out (*i.e.*, forego settlement and continue litigating against 3M and/or other PFAS manufacturers). Those deadlines fall in November and December of this year for both settlements, as detailed below.

- *Final approval*: Finally, the court will hold a hearing and determine whether the agreement is fair, reasonable and adequate, with consideration to the substantive and procedural fairness of the agreement.[8] In the AFFF MDL, those hearings will occur in December 2023 (DuPont) and February 2024 (3M).

What's Coming

The following are important upcoming deadlines for the 3M and DuPont settlements:

3M:[9]

- **September 12, 2023** (or earlier): Putative class counsel began mailing settlement notices to water providers, including every water provider in the U.S. with over 3,300 connections.

- **November 11, 2023**: Deadline for water providers to object.

- **December 11, 2023**: Deadline for water providers to opt out.

- **February 2, 2024**: Final fairness hearing.

DuPont:[10]

- **September 5, 2023** : Putative class counsel mailed settlement notices to water providers, including every water provider in the U.S. with over 3,300 connections.
- **November 4, 2023**: Deadline for water providers to object.
- **December 4, 2023:** Deadline for water providers to opt out.
- **December 14, 2023**: Final fairness hearing.

If the court finally approves either settlement agreement, the deadlines to file claims will begin 60 days after the time to seek appellate review of the court's order granting final approval expires.[11]

What Do Water Providers Give Up, and What Do They Get?

From a water supplier's perspective, the choice as to whether to participate typically involves three broad questions: First, how much money do we need, if any, to treat our water for PFAS, and what is the universe of funding available? Second, what would we be giving up if we participate in the settlements? Third, how much money might we get from the settlements?

Answering each question requires information that depends on the individual circumstances of each potential class member. But possible considerations include:

- The scope of released claims;
- The differences between the releases in the 3M and DuPont settlements;
- Adequacy of the settlement amount;
- Other potential sources of PFAS treatment funds; and
- Individual settlement award allocations.

For more information, as mentioned, please request a copy of our more comprehensive analysis of the settlement agreements here.

Conclusion

Water providers will soon receive class settlement notices that they will be forced to act upon as soon as early November, implicating a host of complex considerations. Marten Law represents a number of water providers, some of which are plaintiffs in the AFFF MDL. For more information about how the proposed settlements may impact any individual water provider, please contact any of our attorneys below.

Jessica Ferrell, Marten Law, 206-292-2636, jferrell@martenlaw.com

Jeff Kray, Marten Law, 206-292-2608, jkray@martenlaw.com

Victor Xu, Marten Law, 503-329-6043, vxu@martenlaw.com

[1] Transfer Order, *In re Aqueous Film-Forming Foams Products Liability Litigation*, MDL No. 2873 (J.P.M.L. Dec. 7, 2018), https://www.jpml.uscourts.gov/....

[2] PEC, AFFF MDL FAQs at 3, https://afff-mdl.com/wp-conten... (last accessed Sep. 8, 2023).

[3] Black & Veatch, *WITAF 56 Technical Memorandum PFAS National Cost Model Report*, prepared for AWMA (March 7, 2023).

[4] Fed. R. Civ. P. 23(e)(1)(B); 4 Newberg and Rubenstein on Class Actions § 13:10 (6th ed.).

[5] Order, Dkt. No. 3626, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Aug. 29, 2023); *see generally* Jessica Ferrell et al., *AGs and Water Utilities Oppose 3M Settlement, Criticize DuPont's as Too Small*, Marten Law (Aug. 14, 2023), https://www.martenlaw.com/news....

[6] Fed. R. Civ. P. 23(a); 4 Newberg and Rubenstein on Class Actions § 13:16 (6th ed.).

[7] Fed. R. Civ. P. 23(c)(2).

[8] Fed. R. Civ. P. 23(e)(2).

[9] Order, Dkt. No. 3626, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Aug. 29, 2023).

[10] Order, Dkt. No. 3603, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. Aug. 22, 2023).

[11] Br. Supp. Pls.' Mot. for Prelim. Approval of Class Settlement at 33, Dkt. No. 3370-1, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. July 3, 2023); Memo. of Law Supp. Pls.' Mot. For Prelim. Approval of Class Settlement at 32, Dkt. No. 3393, *In re Aqueous Film-Forming Foams Prod. Liab. Litig.*, 2:18-mn-2873-RMG (D.S.C. July 10, 2023)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))	Master Docket No.: 2:18-mn-2873-RMG
CITY OF CAMDEN, et al., *Plaintiffs,* -*vs*- E.I. DUPONT DE NEMOURS AND COMPANY (n/k/a EIDP, Inc.), et al., *Defendants.*	)))))))))))	Civil Action No.: 2:23-cv-03230-RMG

APPENDIX OF OBJECTIONS TO THE E.I. DUPONT DE NEMOURS AND COMPANY, ET AL. PUBLIC WATER SYSTEM CLASS ACTION SETTLEMENT AGREEMENT

Exhibit No.	ECF No.	Objector	Attorney	Page No. of Plaintiffs' Response to Objection
A	3954	City of Fort Worth	Marten Law	pp. 62, 66, 71, 76, 82, 86, 89, 90, 96, 98, 99, 101, 103, 104, 110, 105, 106, 107, 110 and 115
B	3955	Metropolitan Water District	Marten Law	pp. 66, 67, 71, 76, 82, 86, 87, 90, 96, 98, 101, 102, 103, 104, 105, 107, and 115,
C	3960	North Texas Municipal Water District	Marten Law	pp. 62, 82, 86, 87, 89, 90, 96, 98, 101, 103, 104, 105, 107, and 115
D	3962	City of Vancouver	Marten Law	pp. 62, 63, 66 67, 71, 76, 82, 86, 87, 89, 90, 96, 98, 101, 103, 104, 105, 107, and 115
E	3965	Lakewood Water District	Marten Law	pp. 66, 67, 71, 76, 77, 80, 82, 86, 89, 90, 96, 98, 101, 103, 104, 105, 107 and 115
F	3968	City of DuPont	Marten Law	pp. 66, 71, 76, 82, 86, 87, 90, 96, 103, 104, 105, 107, and 115

Exhibit No.	ECF No.	Objector	Attorney	Page No. of Plaintiffs' Response to Objection
G	3970	City of Airway Heights	Marten Law	pp. 66, 71, 76, 82, 85, 90, 96, 98, 101, 103, 104, 105, 106, 109, 113, and 115
H	3972	City of Tacoma	Marten Law	pp. 66, 67, 71, 76, 82, 85, 87, 89, 90, 96, 98, 101, 103, 104, and 105
I	3974	Hannah Heights Owners Association	Marten Law	pp. 66, 71, 76, 82, 85, 87, 89, 90, 96, 103, 104, 105, and 115
J	3978	City of Las Cruces	Marten Law	pp. 66, 67, 71, 76, 77, 85, 87, 89, 90, 96, 98, 101, 103, 104, 105, 107, and 115
K	3979	City of Dallas	Marten Law	pp. 66, 71, 76, 77, 82, 85, 87, 89, 90, 96, 98, 101, 103, 104, 105, 107, and 115
L	3981	Brazos River Authority	Marten Law	pp. 62, 71, 82, 85, 87, 89, 90, 96, 98, 101, 103, 104, and 113
M	3983	Lakehaven Water & Sewer District	Marten Law	pp. 66, 71, 76, 82, 85, 87, 89, 90, 96, 103, 104, 105, 107, and 115
N	3986	City of Moses Lake	Marten Law	pp. 66, 71, 76, 77, 82, 85, 87, 89, 96, 103, 104, 105, 107, and 115
O	3987	Eagle River Water & Sanitation	Marten Law	pp. 66, 71, 76, 82, 85, 87, 89, 90, 96, 103, 104,
P	3989	Upper Eagle Regional Water	Marten Law	pp. 66, 71, 76, 82, 85, 87, 89, 90, 96, 103, 104, and 115
Q	3991	Lower Colorado River Authority	Marten Law	pp. 62, 71, 82, 85, 87, 89, 90, and 104
R	3995	City of Newburgh	Knauf Shaw	pp. 41, 58, 82, 87, 89, 90, 107
S	3997	Broward County	Broward County Attorney's Office	pp. 82 and 85
T	3998	Town of East Hampton, Town of Harrietstown, and Town of Islip	Rigano LLC	pp. 67 and 98
U	4008	Widefield Water & Sanitation	Jones & Keller	pp. 76, 87 and 89
V	4028	City of La Crosse	Crueger Dickinson	pp. 82 and 85
W	3895	Leech Lake Band of Ojibwe	Lieff Cabraser Heimann & Bernstein, LLP	pp. 93 and 95

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF FORT WORTH

I. INTRODUCTION

The City of Fort Worth, Texas ("Fort Worth"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Fort Worth objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Fort Worth reserves the right to withdraw these objections at any time before the opt-out deadline of December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions necessarily require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Fort Worth is a member of the settlement class (an Eligible Claimant) because it is a Public Water System in the United States that has detected PFAS in one or more Water Sources as of the DuPont Agreement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Fort Worth Water Director Christopher Harder); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) EPA or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System ("PWS")—and any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines

PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at

any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, on this basis as well, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the agreement was not intended to cover personal-injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal-injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-

injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any “in privity with” the Class Member and “any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System’s ability to provide safe or compliant Drinking Water.” *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 (“In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.”).

A “settlement agreement is a contract and must be interpreted as such.” *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). “This applies to class settlements as well as to the resolution of litigation between individual parties.” *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) (“Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms.” (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion

from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Tex. Const. art. III, § 52; Cal. Const. art. XVI, § 18; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (voiding contracts violating constitutional provision on municipal indebtedness); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after the U.S. Environmental Protection Agency ("EPA") discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win

a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has released DuPont. The airport sues DuPont in contribution, which it can do because it is a non-party to the settlement with DuPont. A court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, which settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *Atl. Fin. Mgmt*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would

rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, and fail to satisfy either the notice process or the notice timeline. The Guidance changes the DuPont Agreement and fails to resolve related ambiguities.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[1] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. This caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

[1] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

2. Eligible class participants have not received adequate notice of this Guidance.

The Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opting out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate the Guidance.

The Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pits entities within an interrelated water system against one

another as they navigate monetary claims and the implications of the proposed releases.

Fort Worth sells water to over 30 wholesale customers, and other cities and entities within Tarrant, Johnson, Denton, and Parker Counties contract with Fort Worth for drinking water, wastewater and reclaimed water services. Under the Guidance, Fort Worth would have to meet with each of its customers, analyze and negotiate claims, and seek approval from the various elected bodies. Discussions between and among those government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will require more than the 30 business days afforded.

4. The Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members—that may themselves be wholesalers. Wholesalers represent a critical part of the public water system. Both the Agreement and Guidance fail to address, and appear to have been drafted without appreciation for, many features of these interconnected systems.

The Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that

wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds would be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Guidance ignores, the potential introduction of PFAS at different points along interconnected systems. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

5. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. Fort Worth's water supply sources—from Lake Worth, the Cedar Creek and Richland Chambers Reservoirs, the Clear Fork of the Trinity River, Eagle Mountain Lake, and Benbrook Lake in Texas—flow into its five water treatment plants,

which collectively can treat up to 500 million gallons per day.[2] Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at this scale requires a cost that goes far beyond what is contemplated under the settlement. The Agreement is inadequate for large-scale water systems like Fort Worth.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite

[2] Fort Worth 2023 Comprehensive Plan, Ch.18, Water Supply & Envt'l Quality, at 18-2 https://www.fortworthtexas.gov/files/assets/public/v/1/the-fwlab/documents/comprehensive-planning/adopted/18-environmental-quality-final-2023.pdf (last visited Nov. 10, 2023).

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the class, "the predominance criterion is far more demanding." *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate. *See id*.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not regulated. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a conclusory argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs

incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[3]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of that group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[4] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water per day. *See* Dkt. No. 3829 at 17 n.1. In large systems, a Public Water System may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to Class Representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to

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[3] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

[4] Pennsylvania Dep't of Envtl. Prot., Drinking Water State Revolving Fund Project Priority List at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

grapple with these issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives assessed only the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not regulate PFAS in drinking water. By contrast, several states in this country have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.,* 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for five types of PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. § 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have left entirely unaddressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers are in direct conflict because they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level, (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members, and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between three and seven percent of the historical

PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing, and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. The funds do not begin to approach what companies with 3–7% of liabilities for PFAS should fairly pay to harmed communities across this country.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount,"

Rollins v. Dignity Health, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement lacks even minimal foundational guidance on an estimated range of damages or recovery for Class Members.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* A.D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); E.E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement necessarily was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel

has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of potentially over 14,000 water providers, *see* Dkt. No. 3393 at 22, the public health consequences of moving forward without the critical information bellwether results provide are dire. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase

Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with the EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to provide notice only to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to

test under UCMR 3, UCMR 5, and/or state law. Those were the only methods Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing

scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. A city like Fort Worth, serving over 1.3 million people in Fort Worth and surrounding communities, requires more than two months merely to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

Time will continue to be an issue even after the settlement's approval. For many Phase One Class Members, 60 days after the Effective Date will not be enough time to perform all the mandated consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers, each of which must follow their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, and an agreement that is unusually complex. Due to serious

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Fort Worth respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Fort Worth

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Fort Worth

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF CHRISTOPHER HARDER

I, Christopher Harder, hereby declare under penalty of perjury that the following is true and correct:

1. I am Water Director for the Water Department of the City of Fort Worth ("City").

2. I submit this declaration in support of the City's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by the City since 1999. In my current position as Water Director, I manage the City's water utility.

4. The City is a Class Member. *See* DuPont Agreement § 5.1. The City is a Public Water System because it provides to the public water for human consumption through at least 15 service connections and regularly serves at least 25 individuals daily at least 60 days out of the year. *See* DuPont Agreement § 2.40. The City discovered PFAS in at least one Water Source before the Settlement Date. It is also required to test for certain PFAS under UCMR 5.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 8th day of November, 2023, at Fort Worth, Texas.

Christopher Harder

Nov. 8, 2023

JULIE A. GEHO
Notary Public, State of Texas
Comm. Expires 07-09-2024
Notary ID 124983447

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Fort Worth ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Harder" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for the City are as follows:

- City of Fort Worth
    - Address: 200 Texas Street, Fort Worth, TX 76102
    - Telephone number: (817) 392-7603
    - Facsimile number: (871) 392-8359
    - Email address: Christopher.Mosley@fortworthtexas.gov

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com
- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jessica K. Ferrell

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company, et al.*, Case No. 2:23-cv-03230-RMG

OBJECTIONS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

I. INTRODUCTION

The Metropolitan Water District of Southern California ("Metropolitan"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company and public water providers ("DuPont") ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company, et al.*, Case No. 2:23-cv-03230-RMG. Metropolitan objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2).

The DuPont Agreement includes several, material deficiencies with respect to core requirements of Rule 23, each of which is central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category. While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case

in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the parties to address the deficiencies identified.

Metropolitan reserves the right to withdraw these objections at any time before the opt-out deadline of December 4, 2023, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id. Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Metropolitan is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Mickey Chaudhuri); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS to be monitored under EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR 5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate

between them, rendering release overbroad).

c. The release includes personal-injury claims.

The release encompasses claims for personal injury. *See generally* DuPont Settlement § 12.1. Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. The release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve-out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement including the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and

collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained below, considering only the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive Interrelated Guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is

axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the agreement or could not assent to the agreement—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. And to the extent that the Claims-Over provision operates as an indemnity provision, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; *Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void).

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS" participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury

and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, the other 50% of the cleanup costs and 50% of the damages to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of the liability for the cleanup and the customers' damages would have been zero. Instead, it is $150 million—the 50% shares of the cleanup costs and of the damages which the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Instead of having to pay zero had it not settled with DuPont, the PWS would have to pay DuPont's 90% share of $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS

contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created an entirely new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how

[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3919-1.
[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a "clarification."

3. Eligible class participants have not received adequate notice of this Interrelated Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for negotiations or for approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

4. There is not enough time for interrelated systems to meaningfully evaluate and implement the new claims process in the Interrelated Guidance.

The Interrelated Guidance sets out an entirely new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3919-1.

for assessment and division by the Claims Administrator. This new process necessarily would require time to implement, as interrelated water systems now have to convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. The current deadlines would allow for none of those steps. The Interrelated Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Metropolitan provides an illustrative example of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. Under the Interrelated Guidance, Metropolitan would have to meet with each of its customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Negotiations between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of one of the companies with the greatest responsibility for PFAS contamination in the world. Under the proposed settlement, a PWS will waive most future claims, potentially increase its own liability through the claims-over provision, and reduce recoveries against other polluters in the future. Each PWS has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

There are a variety of issues unique to wholesalers and their retailer customers that have not been addressed by the proposed settlement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members—that may themselves be wholesalers and/or retailers. Wholesalers represent a critical part of the PWS. The Agreement and Interrelated Guidance both fail to address, and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Interrelated Guidance leaves it up to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Interrelated Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds would be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. Finally, it is not clear that the Claims Administrator has the requisite knowledge and experience to know how

to properly allocate funds between complex water systems.[4] The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement fails to address and the Interrelated Guidance ignores that PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023), https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf. Among other technologies, the plant will utilize reverse osmosis, which has been identified as a technology that can effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1,

[4] Water systems present a unique set of technical challenges that require specialized knowledge to understand—especially so with interconnected systems. The credentials presented for the Claims Administrator do not evidence familiarity with water system operations sufficient to make decisions that would meet the fairness standard. *See generally* Dkt. No. 3393-9.

https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at scale requires a cost that goes far beyond what is contemplated under the settlement. The settlement is simply inadequate for largescale water systems.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v.*

Windsor, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not regulated. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No.

3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[5]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to

[5] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS); WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in these and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in these and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members may have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may potentially have differing interests if they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Interrelated Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS, which is in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members, and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS

market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (providing market share estimate). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to proposed PFAS settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. In addition, it is estimated that PWSs in the United States will incur about $47.3 billion in capital costs *alone* to comply with the proposed federal maximum contaminant level ("MCL") for PFOA and PFOS. See Dkt. No. 3524 at 28, tbl. 6-1.[6] Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. *See also* Dkt. No. 3622 at 1 (amici curiae letter from several Attorneys General stating the settlement amount "falls far short of what is needed to address the harm 3M's products have caused public water systems and appears at odds with the scope of release that would be required in exchange for participation in the Settlement"). Simply put, the funds are inadequate and place the burden of PFAS contamination on ratepayers and taxpayers.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at

[6] The three columns of the table on the far right estimate the number of "Entry Points to the Distribution System" that are impacted by those PFAS, the per-entry-point capital costs, and the total cost for PWSs of various sizes.

*10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are

not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially recover at trial against DuPont. Bellwether trials are a ubiquitous feature of modern mass tort litigation and play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to

determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks.

The DuPont Agreement necessarily was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases, and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the

apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters its system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water, it may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[7] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Interrelated Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are

[7] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily

available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a *requirement* of Rule 23. *See id.* at 176. Otherwise, those potential class members who have voluntary PFAS test results would unwittingly be forced to settle, waive their claims, and receive no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount

of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. No. 3858-1 & 3919-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS may pose a threat to public health, ecosystems, and the broader environment. These chemicals—which are manufactured and distributed by companies such as DuPont—have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires

more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[8]

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Interrelated Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has its own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Metropolitan respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell

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[8] This is particularly true for those wholesalers who did not receive notice. *See supra* Part III.C.3.

/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for the Metropolitan Water District of Southern California

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

//s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101

Phone: (206) 292-2600

Fax: (206) 292-2601

jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for the Metropolitan Water District of Southern California

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF MICKEY CHAUDHURI IN SUPPORT OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA'S OBJECTIONS TO THE PROPOSED SETTLEMENT AGREEMENT

I, MICKEY CHAUDHURI, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Interim Group Manager of Water System Operations for The Metropolitan Water District of Southern California ("Metropolitan").

2. I submit this declaration in support of Metropolitan's objections to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by Metropolitan since 2006, when I joined Metropolitan as an engineer. In my current position as Water System Operations Interim Group Manager, I manage water operations for Metropolitan, a group within Metropolitan with approximately 900 employees responsible for operating Metropolitan's complex public water system.

4. Metropolitan is an "Active Public Water System" as defined by the proposed settlement agreement. Metropolitan constitutes "a system for the provision of water to the public

for human consumption through pipes or other constructed conveyances, with at least fifteen (15) service connections or regularly serves at least twenty-five (25) individuals," consistent with the use of the term "public water system" in the Safe Drinking Water Act, 42 U.S.C. § 300f(4)(A). and 40 C.F.R. Part 141. DuPont Settlement Agreement Section 2.40.

5. Metropolitan draws or otherwise collects water from an Impacted Water Source. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

____

Executed on this 9th day of November 2023

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Metropolitan Water District of Southern California ("Metropolitan") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of Metropolitan's objections to the DuPont Agreement.

3. All objections asserted by Metropolitan and the specific reasons for each objection, including all legal support and evidence Metropolitan wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving Metropolitan's standing is included as an attachment titled "Affidavit of Chaudhuri" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for Metropolitan are as follows:

- Metropolitan Water District of Southern California
  - Address: 700 North Alameda Street, Los Angeles, CA 90012
  - Telephone number: (213) 217-6332
  - Facsimile number: (213) 217-6890
  - Email address: jteraoka@mwdh2o.com and mscully@mwdh2o.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing Metropolitan are as follows:

- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com

7. Metropolitan wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. Metropolitan does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jeff B. Kray

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF NORTH TEXAS MUNICIPAL WATER DISTRICT

I. INTRODUCTION

North Texas Municipal Water District ("NTMWD"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. NTMWD objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). NTMWD reserves the right to withdraw these objections at any time before the opt-out deadline

of December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). NTMWD is a member of the settlement class (an Eligible Claimant) because it is a Public Water System ("PWS") in the United States that has detected PFAS in one or more Water Sources as of the DuPont Agreement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of NTMWD Deputy Director of Water & Wastewater Billy George); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at

issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims, as well as air-pollution claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—and any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and

is patently unfair.

Moreover, the scope of release could potentially be interpreted to cover claims for air pollution. Air may be polluted with PFAS during the process of disposing of wastewater sludge or water treatment residuals derived from the drinking water treatment process. *See* T.J. Smallwood *et al.*, *Per- and polyfluoroalkyl substances (PFAS) distribution in landfill gas collection systems: leachate and gas condensate partitioning*, 448 J. Hazardous Materials 130926 (2023). This polluted air would arguably be "related to" the Class Member's drinking water provision services. Released air pollution claims like this also lack an identical factual predicate with the claims asserted.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS

within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus on this basis as well, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury.[1] *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31,

[1] Nothing in this objection should be construed as waiving any immunities or defenses NTMWD may have under state or federal law. NTMWD expressly preserves all such immunities and defenses.

2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the agreement was not intended to cover personal-injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal-injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision

applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have rejected the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Tex. Const. art. III, § 52; Cal. Const. art. XVI, § 18; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (voiding contracts violating constitutional provision on municipal indebtedness); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately

represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because a myriad of as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has released DuPont. The airport sues DuPont in contribution, which it can do because it is a non-party to the settlement with DuPont. A court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the

Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, which settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of

one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *Atl. Fin. Mgmt*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These fundamental changes contradict the Court's preliminary approval findings, and fail to satisfy either the notice process or the notice timeline. *Cf. Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("Material alterations to a class settlement generally require a new round of notice to the class and a new Rule

23(e) hearing."). The Guidance changes the DuPont Agreement and fails to resolve related ambiguities.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

2. Eligible class participants have not received adequate notice of this Guidance.

The Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opting out that do not allow for coordination with customers or approval by relevant governing bodies. Such a

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

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result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate the Guidance.

The Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pits entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

NTMWD provides an illustrative example of the unfairness of what has been proposed here. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. *See* Dkt. No. 3829-1 at 5. In all these relationships, NTMWD serves as a treatment provider, diverting source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable

water to its customers. Under the Guidance, NTMWD would have to meet with each of its customers, analyze and negotiate claims, and seek approval from the various elected bodies. Discussions between and among 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

4. The Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No.

3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Guidance ignores, the potential introduction of PFAS at different points along interconnected systems. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

5. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. NTMWD's water sources—from Lavon Lake, Lake Jim Chapman, Lake Texoma, Lake Tawakoni, Lake Bonham, Bois d'Arc Lake, Trinity River, and East Fork of the Trinity River, in the Trinity, Sulphur, Sabine, and Red River Basins in Texas—flow into NTMWD's seven water treatment plants at a rate of nearly one billion gallons per day. *See* Dkt. No. 3829-1 at 5. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at this scale requires a cost that goes far beyond what

is contemplated under the settlement. The Agreement is inadequate for large-scale water systems like NTMWD.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, and there are too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in

this matter, individual claims dominate. *See id*.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a conclusory argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water

systems; and (2) Class Members whose claims are affected by variations in state law.[3]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of that group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[4] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water per day. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to the claims of the Class Representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

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[3] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

[4] Pennsylvania Dep't of Envtl. Prot., Drinking Water State Revolving Fund Project Priority List at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

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Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives assessed only the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not regulate PFAS in drinking water. By contrast, several states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.,* 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for five types of PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. § 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have left entirely unaddressed the strength of the claims held by Class Members in states with PFAS drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers are in direct conflict because they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members, and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Compensation

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between three and seven percent of the historical

PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. The funds do not begin to approach what the company with 3–7% of liabilities for PFAS should fairly pay to harmed communities across this country.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount,"

Rollins v. Dignity Health, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Tex. 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Ga. 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). The absence of a damage estimate would constitute reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and

adequate. The Agreement lacks even minimal foundational guidance on an estimated range of damages or recovery for Class Members.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* A.D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); E.E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed

doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of potentially over 14,000 water providers, *see* Dkt. No. 3393 at 22, the public health consequences of moving forward without the critical information bellwether results provide are dire. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the

wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS*

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWS. The use of UCMR 5 data to qualify for Phase One means that many more PWS may qualify under Phase One than previously understood.

test results. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest public water systems are wholesalers that were not required to test under these programs. Wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through SDWIS, including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to provide notice only to those entities that tested under explicit testing programs. Because the proposed class includes public water systems that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active public water system in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this group of over 3,000 PWSs would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested

are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. Those were the only methods Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 public water systems, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. NTMWD serves over two million people in over 70 communities in a 10-county region in North Texas. *See* Dkt. No. 3829-1 at 5. It requires more than two months merely to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

Time will continue to be an issue even after the settlement's approval. For many Phase One Class Members, 60 days after the Effective Date will not be enough time to perform all the mandated consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers, each of which must follow their own independent decision-making process.

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, and an agreement that is unusually complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, NTMWD respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for North Texas Municipal Water District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for North Texas Municipal Water District

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *NTMWD of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF BILLY GEORGE

I, Billy George, hereby declare under penalty of perjury that the following is true and correct:

1. I am Deputy Director of Water & Wastewater for the North Texas Municipal Water District ("NTMWD").

2. I submit this declaration in support of NTMWD's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by NTMWD since 2015. In my current position as Deputy Director of Water & Wastewater, I oversee all aspects of the operation of NTMWD's regional water and wastewater systems. I also direct NTMWD's water resource management.

4. NTMWD is a Class Member. *See* DuPont Agreement § 5.1. NTMWD is a Public Water System because it presently provides to the public water for human consumption through over 15 service connections and controls collection, treatment, storage, and distribution facilities for drinking water. *See* DuPont Agreement § 2.40. NTMWD discovered PFAS in at least one Water Source before the Settlement Date.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 9th day of November, 2023, at Wylie, Texas.

Billy George

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member North Texas Municipal Water District ("NTMWD") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of NTMWD's objections to the DuPont Agreement.

3. All objections asserted by NTMWD and the specific reasons for each objection, including all legal support and evidence NTMWD wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving NTMWD's standing is included as an attachment titled "Affidavit of George" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for NTMWD are as follows:

- North Texas Municipal Water District
  - Address: 501 E. Brown St., P.O. Box 2408, Wylie, TX 75098
  - Telephone number: (469) 626-4319
  - Email address: ctsevoukas@ntmwd.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing NTMWD are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. NTMWD wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. NTMWD does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jessica K. Ferrell

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF VANCOUVER

I. INTRODUCTION

The City of Vancouver, Washington, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Vancouver objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Vancouver reserves the right to withdraw this objection at any time before the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Vancouver is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Tyler Clary); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on the EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate

between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such

claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity,, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it

because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguishes any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million

share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube.*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement") seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created anew joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated

[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

3. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

4. There is not enough time for interrelated systems to meaningfully evaluate and implement the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting

source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable water to its customers. Under the Guidance, Metropolitan and NTMWD would have to meet with each of their customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the

Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Interrelated Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances and might be wielded to foreclose such claims.

6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023),

https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf. Among other technologies, the plant will utilize reverse osmosis, which has been identified as a technology that can effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1, https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at scale requires a cost that goes far beyond what is contemplated under the settlement. The settlement is inadequate for largescale water systems.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing

Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[4]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to class representatives would arise, including:

[4] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate

water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs

"through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness

of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are

circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to

influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number

of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is

easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Vancouver respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601

jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of Vancouver

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of Vancouver

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

	)	
IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	
	)	**This Document Relates to:**
	)	
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG
	)	

AFFIDAVIT OF TYLER CLARY

I, Tyler Clary, hereby declare under penalty of perjury that the following is true and correct:

1. I am the water engineering program manager for the City of Vancouver ("City") water utility.

2. I submit this declaration in support of the City's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. In my current position as the water engineering program manager for the water utility, I oversee all aspects of utility planning and engineering including production, treatment, storage and distribution for the City.

4. The City is a Class Member. *See* DuPont Agreement § 5.1. The City is a Public Water System because it provides to the public water for human consumption through at least 15 service connections and regularly serves at least 25 individuals daily at least 60 days out of the year. *See* DuPont Agreement § 2.40. The City discovered PFAS in at least one Water Source before the Settlement Date. It is also required to test for certain PFAS under UCMR 5.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C.

§ 1746.

Executed this 9th day of November, 2023, at Vancouver, Washington.

Tyler Clary

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Vancouver ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Clary" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for the City are as follows:

- City of Vancouver
  - Address: 415 W. 6th Street, Vancouver, WA 98668
  - Telephone number: (360) 946-3065
  - Email address: Cary.Driskell@cityofvancouver.us

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF LAKEWOOD WATER DISTRICT

I. INTRODUCTION

Lakewood Water District, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Lakewood Water District objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Lakewood Water District reserves the right to withdraw this objection at any time before the opt-out deadline of

December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id. Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to

guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Lakewood Water District is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Randall Black); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that

the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency's ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS"—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate

between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.E.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such

claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity,, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it

because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Lit. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million

share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated Guidance did not

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[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

3. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process elements, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

4. There is not enough time for interrelated systems to meaningfully evaluate and implement the Interrelated Guidance.

The Interrelated Guidance sets out an entirely new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting

source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable water to its customers. Under the Guidance, Metropolitan and NTMWD would have to meet with each of their customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

There are a variety of issues unique to wholesalers and their retailer customers that have not been addressed by the proposed settlement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement.

In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the settlement unacceptable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances and might be wielded to foreclose such claims.

6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023),

https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf. Among other technologies, the plant will utilize reverse osmosis, which has been identified as a technology that can effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1, https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at scale requires a cost that goes far beyond what is contemplated under the settlement. The settlement is inadequate for largescale water systems.

D. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while

still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[4]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their

[4] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state

regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

E. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS

market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is

fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials are a ubiquitous feature of modern mass tort litigation and play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*,

76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.E.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

some segments of the class are treated differently than others.").

F. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and

classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and

non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

G. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a

network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Lakewood Water District respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Lakewood Water District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Lakewood Water District

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*District of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF RANDALL BLACK

I, Randall Black, hereby declare under penalty of perjury that the following is true and correct:

1. I am General Manager of the Lakewood Water District ("District"). I have been the Lakewood Water District General Manager for the past 29 years and have been employed by the Lakewood Water District for over 38 years.

2. I submit this declaration in support of the District's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. My duties and responsibilities as General Manager include leading and overseeing all functions of the six departments within the organization, acting as contact for emergency response, supervising the implementation of improvements programs, overseeing the budgeting process and making recommendations on rates for overall system improvements, and acting as the highest-ranking spokesperson for public contact.

4. The District is a Class Member. *See* DuPont Agreement § 5.1. The District is a Public Water System because it presently provides to the public water for human consumption

through at least 15 service connections and regularly serves at least 25 individuals daily at least 60 days out of the year. *See* DuPont Agreement § 2.40. The District discovered PFAS in one or more Water Sources before the Settlement Date. It is also required to test for certain PFAS under UCMR 5.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 9th day of November, 2023, at Lakewood, Washington.

Randall Black

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Lakewood Water District ("Lakewood") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of Lakewood's objections to the DuPont Agreement.

3. All objections asserted by Lakewood and the specific reasons for each objection, including all legal support and evidence Lakewood wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving Lakewood's standing is included as an attachment titled "Affidavit of Black" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for Lakewood are as follows:

- Lakewood Water District
    - Address: 11900 Gravelly Lake Drive SW, Lakewood, WA 98499
    - Telephone number: (253) 588-4423
    - Email address: rblack@lakewoodwater.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing Lakewood are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com

7. Lakewood wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. Lakewood does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jeff B. Kray

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF DUPONT

I. INTRODUCTION

City of DuPont, Washington, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. City of DuPont objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). City of DuPont reserves the right to withdraw this objection at any time before the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may

not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). City of DuPont is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Larry Clark); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for “PFAS that entered” a Class Member’s “facilities or real property,” unless (1) such claims involve facilities or real property that are “separate from and not related to a Public Water System” or (2) the U.S. Environmental Protection Agency (“EPA”)or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member’s drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally “related” to a Class Member’s PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on the U.S. Environmental Protection Agency’s Fifth Unregulated Contaminant Rule (“UCMR 5”), “any substance asserted to be PFAS in Litigation,” *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per-

> and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is

overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.E.1, individually and collectively signal that the agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . .

seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double

recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent that the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such

contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The

PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Part III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class

Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

D. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52.

Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including Class Members whose claims are affected by variations in state law.[1] While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare*

[1] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as

PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

E. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of

PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to proposed PFAS settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285

(7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result

shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.E.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

F. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. No. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWS, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across

staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, City of DuPont respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917
Marten Law, LLP

1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of DuPont

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jeff B. Kray
/s/ Jessica K. Ferrell
Jeff B. Kray, WSBA No. 22174
Jessica K. Ferrell, WSBA No. 36917
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of DuPont

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF STANDING re OBJECTIONS

I, Larry F. Clark, hereby declare under penalty of perjury that the following is true and correct:

1. I am The Water system Supervisor.
2. I submit this declaration in support of the City of Dupont Water's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by City of DuPont Water since 2023. In my current position as Water System Supervisor, I am the responsible person in charge of our water system.
4. City of DuPont Water is an Active Public Water System as defined by the agreement. City of DuPont Water is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.
5. City of DuPont Water 1) draws or otherwise collects water from an Impacted Water Source and 2) as of June 30, 2023, is subject to the monitoring rules set forth in UCMR 5 (serves

more than 3,300 people), or is required under applicable federal or state law to test or otherwise analyze any of its Water Sources for PFAS before the UCMR 5 deadline. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9th day of November, 2023.

Larry F. Clark

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of DuPont ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Clark" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for the City are as follows:

- City of DuPont
    - Address: 1700 Civic Drive, DuPont, WA 98327
    - Telephone number: (253) 912-5214
    - Email address: gkarg@dupontwa.gov

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF AIRWAY HEIGHTS

I. INTRODUCTION

The City of Airway Heights, Washington, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Airway Heights objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). The City of Airway Heights reserves the right to withdraw this objection at any time before the opt-out deadline of

December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> > (i) the costs, risks, and delay of trial and appeal;
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Airway Heights is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Albert Tripp); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class

Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more

inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent

to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty.*

Water Dist. No. 4 v. Century Holdings, Ltd., 29 Wash. App. 207, 211 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property

damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement") seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.

2. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[1] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or approval

[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate and implement the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking

water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable water to its customers. Under the Guidance, Metropolitan and NTMWD would have to meet with each of their customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class

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Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and

recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[2]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePl

[2] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

an/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin.

R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time,

whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to proposed PFAS settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at

*10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are

not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims,

whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*,

55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[3] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a

[3] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S.

at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[4]

[4] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.2.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Airway Heights respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

<u>/s/ Jessica K. Ferrell</u>
<u>/s/ Jeff B. Kray</u>
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601

jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of Airway Heights

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of Airway Heights

EXHIBIT A

IN THE UNITED STATES CITY COURT
FOR THE CITY OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF ALBERT TRIPP

I, Albert Tripp, hereby declare under penalty of perjury that the following is true and correct:

1. I am City Manager of the City of Airway Heights ("City"). I have been City Manager since 2008 and before that was employed as the City's Public Works Director for three years.

2. I submit this declaration in support of the City's objection to the proposed DuPont settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. My duties and responsibilities as City Manager include supervising all employees of the City, directing and supervising the administration of all departments, offices, and agencies of the City, creating an annual budget for submission to the city council, reporting to the city council all finances and administrative activities of the City each year, and enforce all laws and ordinances of the City. As City Manager, I directly supervise the Public Works Director, Kevin Anderson, who manages water operations for the City.

4. The City is a Class Member. *See* DuPont Agreement § 5.1. The City is a Public

Water System because it presently provides to the public water for human consumption through at least 15 service connections and regularly serves at least 25 individuals daily at least 60 days out of the year. *See* DuPont Agreement § 2.40. The City discovered PFAS in one or more Water Sources before the Settlement Date. It is also required to test for certain PFAS under UCMR 5.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 9th day of November, 2023, at Airway Heights, Washington.

Albert Tripp

Albert Tripp

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Airway Heights ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Tripp" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email for the City are as follows:

- City of Airway Heights
    - Address: P.O. Box 969, Airway Heights, WA 99004
    - Telephone number: (509) 244-5578
    - Facsimile number: (509) 244-3413
    - Email address: atripp@cawh.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jeff B. Kray

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF THE CITY OF TACOMA

I. INTRODUCTION

The City of Tacoma, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. The City of Tacoma objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). The City of Tacoma reserves the right to withdraw this objection at any time before the opt-out deadline of December

4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The City of Tacoma is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of William Dewhirst); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class

Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS —or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate

between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such

claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent that the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it

because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million

share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated

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[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and tribe-run water systems, Dkt. No. 50.

Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

3. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

4. There is not enough time for interrelated systems to meaningfully evaluate and implement the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting

source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons per day, and sending potable water to its customers. Under the Guidance, Metropolitan and NTMWD would have to meet with each of their customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

There are a variety of issues unique to wholesalers and their retailer customers that have not been addressed by the proposed settlement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the

Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Interrelated Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023),

https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf. Among other technologies, the plant will utilize reverse osmosis, which has been identified as a technology that can effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1, https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at scale requires a cost that goes far beyond what is contemplated under the settlement. The settlement is inadequate for largescale water systems.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing

Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[4]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems,

[4] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

numerous questions of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be

exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims

Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness

of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case.”). While a “cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair,” *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), “any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs’ expected recovery against the proposed settlement amount,” *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) (“A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.”).

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) (“To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake.”). The formula used to create the settlement’s allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are

circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to

influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number

of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort”). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation’s largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel’s environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System (“SDWIS”), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is

easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

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[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, the City of Tacoma respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray

Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601

jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for The City of Tacoma

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for The City of Tacoma

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF WILLIAM DEWHIRST

I, William Dewhirst hereby declare under penalty of perjury that the following is true and correct:

1. I am Superintendent of Tacoma Water, a division of Tacoma Public Utilities, a department of the City of Tacoma.
2. I submit this declaration in support of City of Tacoma, by and through Tacoma Water, a division of Tacoma Public Utilities' objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by Tacoma Water since 2017. In my current position as Superintendent of Tacoma Water, I oversee all water utility operations.
4. Tacoma Water is an Active Public Water System as defined by the agreement. Tacoma Water is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals.

5. Tacoma Water draws or otherwise collects water from an Impacted Water Source. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9TH day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Tacoma ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Dewhirst" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for the City are as follows:

- City of Tacoma
    - Address: 747 Market Street, Room 1120, Tacoma, WA 98402
    - Telephone number: (253) 591-5626
    - Email address: cbacha@cityoftacoma.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves the right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF HANNAH HEIGHTS OWNERS ASSOCIATION

I. INTRODUCTION

Hannah Heights Owners Association ("Hannah Heights"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Hannah Heights objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Hannah Heights reserves the right to withdraw this objection at any time before the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and

adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses.

Moreover, the funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>   (i) the costs, risks, and delay of trial and appeal;

> (ii) the effectiveness of any proposed method of distributing
> relief to the class, including the method of processing
> class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including
> timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Hannah Heights is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water

sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Caitlin Doran); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total

separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed

Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability

arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.D.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement

Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity

provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer

damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of

one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common

questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[1]

a. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum

[1] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations. Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23

D. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS

market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks

omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result

shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

E. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across

staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Hannah Heights respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP

1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Hannah Heights Owners Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Hannah Heights Owners Association

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF CAITLIN DORAN

I, Caitlin Doran, hereby declare under penalty of perjury that the following is true and correct:

1. I am President of the Hannah Heights Owners Association Board of Directors.
2. I submit this declaration in support of Hannah Heights Owner Association's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been a member of the Hannah Heights Owners Association Board of Directors since 2016 and President since 2018. In my current position as President, I oversee management of all Association services including our Water System.
4. Hannah Heights Owner Association is an Active Public Water System as defined by the agreement. Hannah Heights Owner Association is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement

Agreement Section 2.40.

5. Hannah Heights Owner Association draws or otherwise collects water from an Impacted Water Source. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

____

Executed on this 2nd day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Hannah Heights Water Association ("Hannah Heights") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of Hannah Heights's objections to the DuPont Agreement.

3. All objections asserted by Hannah Heights and the specific reasons for each objection, including all legal support and evidence Hannah Heights wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving Hannah Heights's standing is included as an attachment titled "Affidavit of Doran" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone number, and

email address for Hannah Heights are as follows:

- Hannah Heights Water Association
    - Address: 417 Straits View Dr., Friday Harbor, WA 98250
    - Telephone number: (360) 370-5820
    - Email address: katybdoran@gmail.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing Hannah Heights are as follows:

- Jeff B. Kray
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
    - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
    - Telephone number: (206) 292-2600
    - Facsimile number: (206) 292-2601
    - Email address: jferrell@martenlaw.com

7. Hannah Heights wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. Hannah Heights does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF LAS CRUCES

I. INTRODUCTION

The City of Las Cruces, Washington, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Las Cruces objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Las Cruces reserves the right to withdraw this objection at any time before the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense

of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Las Cruces is a member of the settlement class because it is an active public water system ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Tyler Clary); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate

of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency's ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS —or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate

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between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such

claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity,, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it

because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million

share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube.*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement") seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created anew joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguity.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated

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[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and Tribe-run water systems, Dkt. No. 50.

Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Interrelated Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the claims release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

3. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice.[3] Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Interrelated Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812

[3] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

(1985).

4. There is not enough time for interrelated systems to meaningfully evaluate and implement the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so, and potentially pit entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed releases.

Wholesalers the Metropolitan Water District of Southern California ("Metropolitan") and the North Texas Municipal Water District ("NTMWD") provide illustrative examples of the unfairness of what has been proposed here. Metropolitan wholesales raw and treated drinking water to its 26 public member agencies. Some of Metropolitan's member agencies are themselves water wholesalers, meaning they purchase water from Metropolitan, may themselves treat that water, and ultimately sell that water to their own retail member agencies. NTMWD comprises 13 member cities, supplies treated water to 34 direct customer contracts, and provides treated water to 32 retail customers. In all these relationships, NTMWD serves as a treatment provider, diverting source water supplies to seven water treatment plants, with a capacity of nearly one billion gallons

per day, and sending potable water to its customers. Under the Guidance, Metropolitan and NTMWD would have to meet with each of their customers, analyze and negotiate claims, and seek approval from the various elected bodies in short order.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Guidance, the provider would waive most future claims against that company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

5. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that *themselves* may be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how

to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Interrelated Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances and might be wielded to foreclose such claims.

6. The Agreement ignores the challenges of PFAS treatment at scale.

The Agreement's focus on treatment ignores the challenges posed by treatment at the scales required for wholesalers and large water systems. For example, Metropolitan has a program to develop one of the largest water recycling plants in the world. The Pure Water Southern California ("PWSC") program would purify treated water for 1.5 million people. *See* Metropolitan, *Fact Sheet: Pure Water Southern California Program Benefits* (Mar. 2023), https://www.mwdh2o.com/media/wrfpnkwl/purewater_programbenefits_digital032023.pdf.

Among other technologies, the plant will utilize reverse osmosis, which has been identified as a technology that can effectively remove PFAS from water. The project budget "including construction, engineering, and other costs" is estimated to cost more than $3 billion, and these costs are being updated. *See* Los Angeles Economic Development Corporation, *Metropolitan Water District: Regional Recycled Water Program* at ES-1, https://www.mwdh2o.com/media/21765/laedc_mwd_rrwp_20210902.pdf. Although the plant will serve all Metropolitan customers (its 26 member agencies), the PWSC water will be delivered at only a few connections. Implementing the limited set of technologies available to treat PFAS—like filtration or reverse osmosis—at scale requires a cost that goes far beyond what is contemplated under the settlement. The settlement is inadequate for largescale water systems.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they "have

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asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[4]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons *per month*, *see* Penn. Dep't of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf, whereas wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have

[4] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare*

42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See*

MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d

615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether

the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see*

Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

(1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to only provide notice to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1,

3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[6]

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further

[6] This is particularly true for those wholesalers who did not receive notice. *See supra*, Part III.C.3.

parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Las Cruces respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com

jkray@martenlaw.com

Attorneys for City of Las Cruces

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for City of Las Cruces

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF ADRIENNE L. WIDMER

I, Adrienne L. Widmer, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Utilities Director for the City of Las Cruces.

2. I submit this declaration in support of City of Las Cruces's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by the City of Las Cruces since 2006. In my current position as Utilities Director, I have been in this position since 2022.

4. The City of Las Cruces is an Active Public Water System as defined by the agreement. The City of Las Cruces is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.

5. The City of Las Cruces draws or otherwise collects water from an Impacted Water Source and is as of June 30, 2023, subject to the monitoring rules set forth in UCMR 5 and/or is

required under applicable federal or state law to test or otherwise analyze any of its Water Sources for PFAS before the UCMR 5 deadline. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 9th day of November 2023, at 4:30 p.m., in Las Cruces, New Mexico

Adrienne L. Widmer

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Las Cruces ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Widmer" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for the City are as follows:

- City of Las Cruces
  - Address: 680 N Motel Boulevard, Las Cruces, NM 88001
  - Telephone number: (575) 528-3512
  - Facsimile number: (575) 528-3513
  - Email address: awidmer@lascruces.gov

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. The City wishes to have counsel appear at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____

Jessica K. Ferrell

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF THE CITY OF DALLAS

I. INTRODUCTION

The City of Dallas, Texas, which operates the non-jural entity known as Dallas Water Utilities, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company (together, "DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. The City of Dallas objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). The City of Dallas reserves the right to withdraw this objection at any time before the opt-out deadline of December

4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed Release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the proposed settlement to address inadequacies previously identified by parties who fall into that category.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands

of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The City of Dallas is a member of the settlement class (an Eligible Claimant) because it is an active Public Water System ("PWS") in the United States of America that has detected PFAS in one or more water sources as of the DuPont Agreement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Sarah Standifer) Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The Release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class

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Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The Release is so overbroad as to render the agreement unfair and unreasonable.

a. The Release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The Release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—and any remote relationship between the two would be sufficient to foreclose a claim under the Release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The Release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the Release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the Release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The Release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, on this basis as well, the Release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve-out in the Release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current Release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the Release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the agreement was not intended to cover personal-injury claims. If such claims were intended to be included in the Release, then the settlement amount is even more

inadequate than explained herein, considering just the personal-injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a

contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have rejected the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167 (Cal. Ct. App. 1977) (voiding contracts violating constitutional provision on municipal indebtedness); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was

entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000.

It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has released DuPont. The airport sues DuPont in contribution, which it can do because it is a non-party to the settlement with DuPont. A court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS

contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

Furthermore, for the City of Dallas and other Texas municipal corporations, the Claims-Over provision, although no longer technically called an indemnity provision, would render the DuPont Agreement void because it violates the prohibition in the Texas Constitution that "no debt shall ever be created by any city," unless the city creates a sinking fund at the same time sufficient to pay the interest. Tex. Const. art. XI, § 5. As discussed in the example above, it is likely that the Claims-Over provision could lead to a PWS owing more than it received in the settlement, but as that potential liability cannot currently be estimated, it is not possible to meet the constitutional requirement to create a sinking fund at the same time as the settlement is approved, and therefore, the participation of the City of Dallas or any other Texas municipal corporation subject to article XI, section 5 of the Texas Constitution would render the DuPont Agreement void so long as the Claims-Over provision remains in the agreement.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement

would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement") seeking to amend the underlying DuPont Agreement through incorporating the Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862. With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the Releases would rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These fundamental changes contradict the Court's preliminary approval findings, and fail to satisfy either the notice process or the notice timeline. *Cf. Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("Material alterations to a class settlement generally require a new round of notice to the class and a new Rule 23(e) hearing."). The Guidance changes the DuPont Agreement and fails to resolve related ambiguities.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[1] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Guidance substantively altered the Agreement with regard to interrelated systems. They vaguely asserted that the Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Guidance conjured a heretofore unmentioned process to address joint claims, and mandated that such claims be addressed on forms that do not yet exist. In other sections, the Guidance backsteps from providing substantive clarity. The "Scope of Release" section, for example, describes how the Release should operate, but concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

2. Eligible class participants have not received adequate notice of this Guidance.

The Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, and have potential claims waived by their customers, due to fast-approaching deadlines for opting out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu*

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[1] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and tribe-run water systems, Dkt. No. 50.

v. Wilkins, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate the Guidance.

The Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems must now convene, analyze their water sales agreements, negotiate allocations based on treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. *Cf. Pearson*, 893 F.3d at 986 (material alteration of settlement requires new notice). The operative deadlines will allow for none of those steps. The Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems, yet fails to provide adequate time to do so and potentially pits entities within an interrelated water system against one another as they navigate monetary claims and the implications of the proposed Releases.

The City of Dallas is both a PWS for the residents of Dallas and a wholesaler of raw and treated water to 27 customers, including cities, other governmental entities, and one of the busiest international airports in the world.[2] Discussions between and among myriad government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with a substantial

[2] Dallas Water Utilities, *Water Delivery: Distribution, Pumping and Water Quality Divisions*, https://dallascityhall.com/departments/waterutilities/DCH%20Documents/pdf/WaterDelivery.pdf (last accessed Nov. 10, 2023).

responsibility for PFAS contamination in the United States. Under the DuPont Agreement and Guidance, the provider would waive most future claims, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will require more than the 30 business days afforded.

4. The Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. Both the Agreement and Guidance fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the

remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Guidance ignores, the potential introduction of PFAS at different points along interconnected systems. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances and might be wielded to foreclose such claims.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, “the predominance criterion is far more demanding.” *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members’ common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate. *See id.*

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member’s claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) (“[A] class may be divided into subclasses that are each treated as a class under this rule.”).

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a conclusory argument that Class Representatives have asserted claims “undoubtedly typical of those of the Settlement Class Members” because they

"have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[3]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of that group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[4] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water per day. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to the claims of the class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses

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[3] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

[4] *See* Penn. Dep't of Envtl. Prot., Drinking Water State Revolving Fund Project Priority List at 13 (June 13, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives assessed the strength only of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not regulate PFAS in drinking water. By contrast, several states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.,* 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for five PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available

to the City of Stuart. These distinctions matter. Class Counsel left entirely unaddressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers are in direct conflict because they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See infra* Part III.F.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker

claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Compensation

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont

has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion annually. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. Simply put, the funds do not approach what companies with a sizable share (3–7%) of liabilities for PFAS should fairly pay to harmed communities across this country.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the

Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). The absence of a damage estimate would constitute reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and

adequate. The Agreement lacks even minimal foundational guidance on an estimated range of damages or recovery for Class Members.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of potentially over 14,000 water providers, *see* Dkt. No. 3393 at 22, the public health consequences and potential drastic increase in water rates nationwide from moving forward without the critical information bellwether results provide are severe. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see*

Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[5] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175

[5] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

(1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS test results*. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information System ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to provide notice only to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be forced into settlement, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this group of over 3,000 PWSs who very likely have tested for PFAS would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested are not readily ascertainable and easily identifiable, then the Agreement should have been limited to encompass only those water systems required to test under UCMR 3, UCMR 5, and/or state law. Those were the only methods Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem*, 521 U.S. at 628 ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court

preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. City of Dallas Water Utilities provides water to nearly three million people in Dallas and 27 nearby communities.[6] Such an entity requires more than two months to consult with internal authorities and external members affected by such a critical and far-reaching decision.[7]

Time will continue to be an issue even after the settlement's approval. For many Phase One Class Members, 60 days after the Effective Date will not be enough time to perform all the mandated consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination

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[6] *See supra* n.2.
[7] This is particularly true for those wholesalers who did not receive notice. *See supra* Part III.G.1.

between water suppliers, each of which must follow their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, and an agreement that is unusually complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, the City of Dallas respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Dallas

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 29, 2023 Preliminary Approval Order for Settlement Between Public Water Systems and DuPont (Dkt. No. 3603), the Settlement Agreement Between Public Water Systems and DuPont (Dkt. No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Dallas

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF SARAH STANDIFER

I, Sarah Standifer, hereby declare under penalty of perjury that the following is true and correct:

1. : I am the interim director of the Dallas Water Utilities department of the City of Dallas.
2. I submit this declaration in support of the City of Dallas's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by the City of Dallas since 2002. I have been an executive in water resource management at the City of Dallas since 2008 and was appointed interim director of Dallas Water Utilities in June 2023.
4. The City of Dallas operates an Active Public Water System as defined by the agreement through its Dallas Water Utilities department. Dallas Water Utilities operates a system for the provision to the public of water for human consumption through pipes or other conveyances, with significantly more than the minimum 15 service connections and regularly serves significantly more than the minimum 25 individuals daily 365 days out of

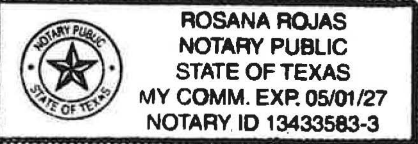
the year. DuPont Settlement Agreement Section 2.40.

5. The City of Dallas 1) draws or otherwise collects water from an Impacted Water Source and 2) as of June 30, 2023, is subject to the monitoring rules set forth in UCMR 5 because it serves more than 3,300 people and is required under applicable federal or state law to test or otherwise analyze any of its Water Sources for PFAS before the UCMR 5 deadline. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

SARAH STANDIFER, Affiant

SWORN TO AND SUBSCRIBED before me on the 9th day of November, 2023.



Notary Public, State of Texas

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Dallas ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Standifer" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for the City are as follows:

- City of Dallas
  - Address: 1500 Marilla St., 7DN, Dallas, TX 75201
  - Telephone number: (214) 670-3476
  - Facsimile number: (214) 670-0622
  - Email address: stacy.rodriguez@dallas.gov

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____
Jessica K. Ferrell

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF BRAZOS RIVER AUTHORITY

I. INTRODUCTION

Brazos River Authority ("BRA"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company (collectively "DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. BRA objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). BRA reserves the right to withdraw these objections at any time before the opt-out deadline of December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

II. BACKGROUND ON BRA AND SUMMARY OF OBJECTIONS

BRA is a conservation and reclamation district created by the Texas Legislature in 1929 under Section 59, Article XVI of the Texas Constitution. Serving customers and communities throughout Texas, BRA primarily provides raw (untreated) water. Many of BRA's water customers are cities or other local entities that are, like BRA, political subdivisions of the State. As a wholesale water provider, BRA also owns and operates a system that would qualify as a Public Water System ("PWS") under the Agreement, which treats and distributes water to three customers who then distribute water to their individual customers. BRA also operates a separate water treatment plant which is part of a system that would qualify as a PWS under the Agreement.

BRA is not a Class Member as to either PWS, however, because BRA did not detect PFAS before the Settlement Date and it is not required to test for PFAS under UCMR 5 or other federal or state law. *See* DuPont Agreement § 5.1. BRA could arguably be construed to be in the Settlement Class as to the PWS that it owns and operates because BRA has analyzed that PWS for PFAS before the UCMR 5 deadline. *See* DuPont Agreement § 5.1. Regardless, BRA does not believe it is a Class Member. BRA could arguably be construed as a Releasing Person under Section 2.45 of the Agreement as drafted, as discussed below. This is unfair and unreasonable and violates, *inter alia*, Federal Rule of Civil Procedure 23(e). Because its rights stand to be prejudiced, BRA may object to the Agreement even if it is not construed to be within the Settlement Class. *See In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1387, 1983-1 Trade Cas. (CCH) ¶ 65409 (D. Md. 1983) (acknowledging the exception to the general rule that a nonparty has standing to object to a class settlement if the nonparty demonstrates plain legal prejudice from the settlement); *see also* Newberg and Rubenstein on Class Actions § 13:24 (noting that nonparties

have standing to object to settlements where their legal rights are prejudiced and that the objector "may then object to any aspect of the settlement").

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The Agreement's definition of Releasing Person and Release are overbroad. A non-Eligible Claimant could arguably be a Releasing Person due to the breadth of the definitions of Releasing Person. *See* DuPont Agreement § 2.45. Released Claims include both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. *Id.* §§ 2.43, 12.1.

While styled as a claims-over provision, Section 12.7 of the DuPont Agreement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of subsidiary systems whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That unfairness would be exacerbated here by last-minute amendments, like the Interrelated Guidance, cobbled onto the DuPont Agreement to address inadequacies previously identified by entities that provide wholesale water service. The Interrelated Guidance raises significant concerns about what types of wholesale water providers are included as class members, seeming to suggest that those entities that do not treat water could be included, while also subjecting wholesale water providers to the Agreement's Release even if that entity opts out.

Systems that provide wholesale untreated water should be excluded from the settlement class, and should not be construed as Releasing Persons.

The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the DuPont Agreement. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection.

As primarily a provider of raw water and a non-Eligible Claimant, however, BRA focuses its objections on the threshold definitional issues that stands to prejudice its rights: BRA is not a Class Member, Party, or Eligible Claimant. It is a Person, however, so could arguably fall under the definition of a Releasing Person. This cannot stand. To the extent the DuPont Agreement as drafted purports to achieve that result, it is unfair, unreasonable and unlawful, and cannot be approved under Rule 23(e)(2) without modification.

III. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>   (i) the costs, risks, and delay of trial and appeal;

> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Id. Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court also has a duty to ensure that the proposed settlement will not bargain away, or waive, the interests of non-parties. BRA's legal rights could be materially prejudiced by the DuPont Agreement as drafted. While BRA does not concede it is a Class Member, Eligible Party, Releasing Party, or otherwise subject to the Agreement, it has standing to object. Non-class members may "challenge a class action settlement when the settlement will prejudice them." Rahman v. Vilsack, 673 F. Supp. 2d 15, 19 (D.D.C. 2009). Plain legal prejudice exists "if the settlement strips the party of a legal claim or cause of action, such as a cross claim or the right to present relevant evidence at trial," or when there is "interference with a party's contract rights or a party's ability to seek contribution or indemnification." New England Health Care Emps. Pension Fund v. Woodruff, 512 F.3d 1283, 1288 (10th Cir. 2008) (quotations omitted). The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge

must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

IV. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). BRA is not a member of the Settlement Class but has standing to object because DuPont could argue it qualifies as a Releasing Person if its customers participate. *See* DuPont Agreement §§ 2.45, 5.1; *see also* Ex. A (Aff. of B. Brunett); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals"). *Woodruff*, 512 F.3d at 1288 (10th Cir. 2008).

A. Objection Topic: Nonsensical and unjust results occur when applying the Guidance and Agreement Definitions to BRA and its member systems

BRA owns and operates East Williamson County Regional Water System (Granger Lake), a PWS under the Agreement which treats and distributes water to three customers (City of Taylor, Jonah Water Special Utility District, and the Lone Star Regional Water Authority), which then distribute water to their individual customers. BRA also operates the City of Leander Water Treatment Plant, which is a part of a PWS under the Agreement. BRA is not a Class Member as to either the East Williamson or Leander PWSs because BRA did not detect PFAS before the Settlement Date, is not required to test for PFAS under UCMR-5, and is not required under other federal or state law to test or otherwise analyze its Water Sources or the water it provides for PFAS before the UCMR 5 Deadline. *See* DuPont Agreement § 5.1. BRA sells East Williamson water,

but is not an Eligible Claimant for either Phase One or Phase Two. However, customers of East Williamson—the City of Taylor and Jonah Water Special Utility District—are Eligible Claimants because they are required to test for PFAS under UCMR 5. *See id.* Lone Star Regional Water Authority, a wholesaler itself which is not required to test for PFAS under UCMR 5 or other federal or state law before the UCMR 5 Deadline, appears to fall in the same camp as BRA. Because the City of Taylor and Jonah Water Special Utility District purchase water from BRA, however, their Water Source is not a Water Source for allocation purposes, *id.* Ex. C § 4(h)(iii)(e)), so they cannot receive an allocation award. Thus, if those entities participate, they would presumably receive no allocation yet would release DuPont—and, due to the certification provisions and Interrelated Guidance—could release BRA as well as to their respective Water Sources. *See id.* § 2.45, 2.71, Ex. C, Claims Form; Dkt. No. 3858-1.

The Interrelated Guidance and Multiple Systems Guidance (addressed below) attempt to cure this defect by stating that the clauses "were not intended, and should not be interpreted by the Claims Administrator, to preclude a retail customer from recovering for water that it purchases from a wholesaler, to the extent that the retail customer bears all or part of the PFAS treatment costs for that water." Interrelated Guidance at 6. However, neither Guidance amends the Agreement definition of Water Source, which states that "a purchased water connection from a seller that is a Water Source is not a Water Source." DuPont Agreement, Ex. C § 4(h)(iii)(e). Therefore, the Claims Administrator could, and likely would still provide an allocation of zero dollars to City of Taylor, Jonah Water Special Utility District, and the Lone Star Regional Water Authority and similar situated customers, even where the seller (BRA) is not an Eligible Claimant. This means that these entities could participate in the Agreement, releasing all of their and BRA's claims relating to PFAS in their water supply while neither BRA nor its customers are able to

receive a penny for the Release. This is an unjust and illogical result, but is the result of a literal reading of the Agreement.

B. Objection Topic: Release

1. The Releasing Persons definition binds parties that never assented to settlement and are not Class Members.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including those "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent

to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

2. The Covenant Not to Sue bars non-parties from bringing future claims against DuPont.

Section 12.2 of the DuPont Agreement would prevent any Releasing Persons from bringing suit for any Claim against the company. This would bar BRA, if it is a Releasing Person, from any future suit against DuPont related to PFAS contamination of Water Sources even though BRA is not a party to the suit. This would impermissibly bind BRA's future legal rights. Settlements operate as contracts between parties and cannot bind entities that do not assent to the settlement. *See supra* Part IV.B.1.

3. The Release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the

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very same set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The Release is so overbroad as to render the agreement unfair and unreasonable.

a. The Release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The Release encompasses claims for "PFAS that entered" a Releasing Person's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's PWS—or even any remote relationship between the two would be sufficient to foreclose a claim under the Release as written. Another example is the transmission of untreated raw water to an entity that will treat the water and convey it to retail water customers. If the retail customer is a Releasing Person, the Class Member could be held to have released a cleanup claim in full should there be a spill before the untreated water reaches the Class Member's system. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The Release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," and:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the Release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the Release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the Release is entirely untethered from the required identical factual predicate.

c. The Release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus on this basis as well, the Release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve-out in the Release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury.[1] *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current Release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the Release, the DuPont

[1] Nothing in this objection should be construed as waiving any immunities or defenses BRA may have under state or federal law. BRA expressly preserves all such immunities and defenses.

Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the Agreement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.G.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the Release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

C. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. Taken together, these two provisions function like an indemnity—differing from the initial indemnity provision only in minor ways. To the extent the Claims-Over provision operates as an indemnity provision, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the Agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (finding contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating

indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was “void as beyond the power of the Water District and contrary to the state constitution”).

The contribution bar prevents any non-Releasing Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 (“If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.”) (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person’s judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont’s entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the Agreement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later

sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has participated in the settlement. The airport sues DuPont in contribution, which it is allowed to do because it is a non-party to the settlement with DuPont. A court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and the customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part IV.B.3.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS

contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

D. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance and Multiple System Guidance constitute improper late amendments to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. On November 6, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily

Approved Allocation Procedures ("Motion to Supplement 2"), seeking to amend the underlying DuPont Agreement through incorporating the Multiple System Guidance by reference. Dkt. No. 3919. The Court granted each motion the next day. Dkt. No. 3862; Dkt. No. 3930.

With these entirely new documents, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created an entirely new joint claims submission process for interrelated water systems, and took the position that the Releases would operate to rely on the language of the water sale agreements within those interrelated systems. Class Counsel also announced for the first time how entities that own or operate multiple PWSs might opt out or participate as to each individual PWS. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline. *Cf. Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("Material alterations to a class settlement generally require a new round of notice to the class and a new Rule 23(e) hearing."). The Interrelated Guidance changes the DuPont Agreement and fails to resolve related ambiguities.

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They argued, for instance, that the Interrelated

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[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and tribe-run water systems, Dkt. No. 50.

Guidance did not require additional time for eligible class members to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance creates more confusion as to the systems included and the scope of the release.

a. Ambiguity as to systems included.

The Interrelated Guidance introduces new, undefined terms including: Wholesaler, Retailer, and Purchased Water. Dkt. No. 3858-1. Wholesalers represent a critical part of the PWS and are not uniform in nature. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. A wholesaler of treated water may sell treated water to its members or customers. A wholesaler of untreated raw water may sell that water to its members or customers who may, themselves, in turn be wholesalers. Untreated water may be purchased by another entity that in turn treats the water and then sells the treated water to systems that provide drinking water to end-users. The Agreement and Interrelated Guidance both fail to address and appear to have been drafted without appreciation for many features and distinctions among these types of water systems. The Interrelated Guidance is not specific as to what type of Wholesalers or Purchased water are covered by the DuPont Agreement so fail to accord with practical realities.

Wholesale untreated raw water should be explicitly excluded from the Agreement if it is actually intended to address only claims related to treating Drinking Water. If BRA is not an Eligible Claimant, it should not and cannot be held to be a Releasing Party under fundamental principles of due process and fairness.

b. Ambiguity as to scope of release.

The Interrelated Guidance backsteps from providing substantive clarity as to the scope of the release. The "Scope of Release" section in the Interrelated Guidance, for example, describes how the claims release should operate, and as discussed above purports to subject a wholesaler to

the release even if it has opted out. *See supra* Part IV.B.1. Then, the section concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

2. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, either as Class Members or Releasing Persons, and have potential claims waived by their customers, due to fast-approaching deadlines for opting out that do not allow for coordination with customers or approval by relevant governing bodies. Such a result would violate fundamental due process, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

3. There is not enough time for interrelated systems to meaningfully evaluate the Interrelated Guidance.

The Interrelated Guidance sets out a new joint claims process by which interrelated water systems may together submit a unified claim or may separately file submissions for assessment and division by the Claims Administrator. This would require time to implement, as interrelated water systems now convene, analyze their water sales agreements, negotiate allocations based on

treatment practices as well as potential claims, decide whether to join or opt-out, and ultimately seek approval of those decisions from the relevant governing bodies. The operative deadlines will allow for none of those steps. The Interrelated Guidance puts the onus on wholesalers and their customers to determine the fairest application of the Settlement as between their systems.

Discussions between and among at least 50 government agencies cannot happen overnight. The Agreement seeks to settle the liability of an entity with one of the greatest responsibilities for PFAS contamination in the world. Under the DuPont Agreement and Interrelated Guidance, the provider would waive most future claims against the company, potentially add liability through the claims-over provision (requiring the settling party to absorb DuPont's share), and thus reduce recoveries against other polluters in the future. Each entity has its own elected councilmembers and boards that must ultimately approve the joint claim. Reaching agreement will take more time than the 30 business days afforded.

4. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that may *themselves* be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Interrelated Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the

Agreement. In such circumstances, the Interrelated Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems, PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

The Interrelated Guidance and the Agreement conflict in how they address treated water. The DuPont Agreement provides that treated water cannot constitute a Water Source for Allocation purposes. *See* DuPont Agreement, Ex. C § 4(h)(iii)(e). That would apparently render any treated water input for a water system unavailable for an allocation. The Interrelated Guidance provides, in conclusory terms, that the DuPont Agreement would not prevent recovery as to a treated water source that required additional treatment. Dkt. No. 3858-1 at 6. While the Interrelated Guidance

purports to alter this aspect of the underlying agreement, Class Counsel have asserted that the Agreement text controls and remains unchanged. *See, e.g.*, *supra* Part IV.D.1. Those positions are at odds; the Guidance introduces an entirely new way to deal with raw or treated water.

E. Objection Topic: Overbroad Definition of Water Source

Water Source is defined as **"**any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water." Dupont Agreement § 2.71. The fact that this includes raw, untreated water means that the Release would, as worded, apply to claims arising from PFAS entering a PWS's Water Source. *Id.* § 12.1.1. In other words, entities that draw water from vast swaths of rivers, streams, lakes that are the source of raw, untreated water could be left without any recourse against the Released Persons (DuPont) should PFAS contamination later be identified in those water bodies. Further, the downstream entities would also release their claims without any payment because the Allocation Procedures state that "a purchased water connection from a seller that is a Water Source is not a Water Source." *Id.* Ex. C § 4(h)(iii)(e). The overly broad definition of Water Source is beyond the claims of this litigation and may prevent any entity in a complex system from having a valid claim for Settlement Funds even if one or more are Class Members.

F. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. Along a single surface water source, there may be thousands of PWSs that draw, use, treat, and return water to that source. *See, e.g.*, Dkt. No. 3829-1 at 16 (describing the many entities that Metropolitan would have to consult with under such a scenario).

Groundwater sources are also implicated—groundwater recharge from surface waters as well as general treatment by groundwater users may implicate a host of different entities. The Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. It is not clear how this certification potentially excludes other Class Members from making claims. It is also not clear whether this certification would implicate non-water systems that treat their water outputs, such as landfills. The logistical complexities involved in the mandated consultation, paired with the vague scope of that consultation, make this requirement unfair in operation.

G. Objection Topic: Notice

1. Notice is inadequate as to wholesalers and other water systems that are reasonably identifiable and should be given individual notice.

In the Interrelated Guidance, Class Counsel asserted for the first time that the DuPont Agreement applies to wholesale water providers and acknowledged that most wholesalers are registered as PWSs with EPA. *See* Dkt. No. 3858-1 at 1. As an entity providing untreated water, it is BRA's position that it is not a Class Member, and there has not been sufficient notice to support a purported alteration through Guidance that could make it one. Class Counsel and DuPont were required to develop a Notice Plan reasonably calculated to reach wholesalers who have detections of PFAS and qualify as Phase One Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). That did not occur.

Individual notice is required for class members who are readily identifiable and whose contact information is easily ascertainable. *See Eisen v. Carlisle and Jackson*, 417 U.S. 156, 175 (1974). The proposed class was defined to include any active PWS that conducted testing under UCMR 3, UCMR 5, or a comparable state program, *as well as any system that had positive PFAS*

test results. Class Counsel failed to construct a Notice Plan that accounted for this final category. The Notice Plan utilized public information to identify water systems that tested for PFAS through UCMR 3 or UCMR 5 testing or similar state programs. *See* Dkt. No. 3393-2 at 153. However, many of the nation's largest PWSs are wholesalers that were not required to test under these programs. Any of these wholesalers who tested for PFAS through voluntary self-initiative or through voluntary programs set by regulatory bodies were not captured by the Notice Plan. As Class Counsel's environmental consultant Mr. Rob Hesse noted in his declaration, other information regarding these water systems would have been publicly available through the Safe Drinking Water Information Service ("SDWIS"), including their populations served and classification. *Id*. at 4. It was on that basis that Class Counsel and Mr. Hesse swore that Class Members were ascertainable from reasonably accessible records available to Class Counsel. *See* Dkt. No. 3393 at 26; Dkt. No. 3393-11 at 4–8. Yet the decision was made to provide notice only to those entities that tested under explicit testing programs. Because the proposed class includes PWSs that voluntarily tested for PFAS and the contact information for all such systems is readily available, individual notice should have gone to *every* active PWS in SDWIS. *See Eisen*, 417 U.S. at 175 (requiring individual notice to the 2,250,000 class members whose names and addresses were easily ascertainable). Individual notice to identifiable class members whose information is easily ascertainable is not within the discretion of Class Counsel; it is a requirement of Rule 23. *See id.* at 176. Otherwise, those potential class members who held voluntary test results would unwittingly be subject to the Release, waiving their claims, and receiving no funds.

The Notice Plan should have included individual notice to all wholesalers to ensure that this large group of over 3,000 PWSs would receive notice. If Class Counsel should argue that such an amended Notice Plan would be overbroad and that these Class Members who voluntarily tested

are not readily ascertainable and easily identifiable, then the Agreement should be limited only to those water systems required to test under UCMR 3, UCMR 5, and/or state law. After all, those were the only methods that Class Counsel chose to use to construct notices. *See* Dkt. No. 3393-11 at 4–5.

2. Notice to Phase Two Class Members violates due process.

Phase Two Class Members will be forced to decide whether to participate or opt out, without understanding whether they have PFAS in their water systems. Even if Phase Two Class Members test their water and find non-detects, these Class Members may still have PFAS contamination in the form of future releases, current releases that have not made it to test sites, and non-tested PFAS. The Supreme Court has cautioned that courts must defend such an "unselfconscious and amorphous" group when they cannot appreciate their potential future injuries. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."). No amount of notice could sufficiently protect these water systems that simply do not know their potential claims.

H. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4,

2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate the contamination of public drinking water on an unprecedented scale, and potentially more than 12,000 PWSs. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more.

Time will continue to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers, that each of which has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, in the context an agreement that is unusually complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

V. CONCLUSION

For the foregoing reasons, BRA respectfully objects to the DuPont Agreement as draft.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Brazos River Authority

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Brazos River Authority

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF BRAD BRUNETT IN SUPPORT OF BRAZOS RIVER AUTHORITY

I, Brad Brunett, hereby declare under penalty of perjury that the following is true and correct:

1. I am Regional Manager, Central and Lower Basins, at Brazos River Authority ("BRA").

2. I submit this declaration in support of BRA's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by BRA since 1997. In my current position as Regional Manager, I oversee all water and wastewater treatment operations currently engaged in at Brazos River Authority, as well as raw water supply within the central and lower basin areas.

4. BRA is a conservation and reclamation district created by the Texas Legislature in 1929 under Section 59, Article XVI of the Texas Constitution. BRA primarily provides untreated water to its customers. BRA also owns and operates an Active Public Water System as defined by the Agreement because it is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly

serves at least 25 individuals. *See* DuPont Agreement § 2.40. BRA also operates a water treatment plant that is part of a Public Water System that is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. *See id.*

5. BRA 1) does not have any Water Sources that were tested or otherwise analyze tested for PFAS as of the Settlement Date, and 2) is not required to test for PFAS under UCMR 5 or required under applicable federal or state law to test or otherwise analyze any of its Water Sources or the water it provides for PFAS before the UCMR 5 Deadline. *See* DuPont Agreement § 5.1. Although BRA is not required to test for PFAS under UCMR 5, BRA otherwise analyzed its Water Source for PFAS before the UCMR 5 deadline. *See id.* Regardless, BRA does not believe it is a Class Member.

6. I understand that DuPont could argue that BRA is a Releasing Person, however, under the DuPont Agreement if any of its many customers participate in the Agreement. *See* DuPont Agreement § 2.45. BRA provides water quality testing and other environmental services for the benefit of all its customers and provides treatment for some of its customers. DuPont may argue that BRA is "in privity with" or "acting on behalf of" a Class Member if any of its Public Water System customers participate. *See id.* This is particularly concerning given the scope of the Release and breadth of the definition of Releasing Person as it relates to the Public Water System that BRA owns and operates and the water treatment plant that BRA operates. BRA's legal rights could therefore be materially prejudiced by the DuPont Agreement as drafted and—while BRA does not concede it is a Class Member, Eligible Claimant, Releasing Person, or otherwise subject to the Agreement—has standing to object. *See New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288, 1288 (10th Cir. 2008) (holding that non-party to class action settlement has standing to object if settlement would prejudice non-party by, for example, "any interference with [its] contract rights or . . . ability to seek contribution or indemnification," or "strip[ing it] of a legal claim or

cause of action") (internal quotations, citations omitted).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Waco, TX.

Brad Brunett

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Brazos River Authority ("Brazos") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the Brazos's objections to the DuPont Agreement.

3. All objections asserted by Brazos and the specific reasons for each objection, including all legal support and evidence Brazos wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving Brazos's standing is included as an attachment titled "Affidavit of Brunett" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for Brazos are as follows:

- Brazos River Authority
  - Address: 4600 Cobbs Dr., Waco, TX 76710
  - Telephone number: (254) 761-3247
  - Facsimile number: (254) 761-2307
  - Email address: Destiny.Rauschhuber@brazos.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing Brazos are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. Brazos wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. Brazos does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

____

Jessica K. Ferrell

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF LAKEHAVEN WATER & SEWER DISTRICT

I. INTRODUCTION

Lakehaven Water & Sewer District, by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company (collectively "DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Lakehaven Water & Sewer District objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Lakehaven Water & Sewer District reserves the right to withdraw this objection at any time before

the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> > (i) the costs, risks, and delay of trial and appeal;
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may

not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Lakehaven Water & Sewer District is a member of the settlement class because it is an active public water system in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Lakehaven Water & Field Operations Manager Joseph Bolam); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be

extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's public water system ("PWS")—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on EPA's Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances,

> fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be

released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve-out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.F.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont

Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and

accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations

exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards. The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS

contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance constitutes an improper late amendment to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. The Court granted that motion the next day. Dkt. No. 3862.

With this entirely new document, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the releases would operate to rely on the language of the water sale agreements within those interrelated systems. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These changes fundamentally contradict the Court's preliminary approval findings, the notice process, and the notice timeline.[1]

2. The Interrelated Guidance fails to address fundamental issues unique to wholesalers and their customers.

A variety of issues unique to wholesalers and their retailer customers are not addressed by the Agreement. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS. They may sell treated or raw water to their members. Members that *themselves* may be wholesalers. Wholesalers represent a critical part of the PWS. The Agreement and Guidance both fail to address and appear to have been drafted without appreciation for many features of these interconnected systems.

The Interrelated Guidance does not address how settlement funds will be allocated when a related wholesaler and retail purchaser disagree on opt-out decisions, even though it recognizes that wholesalers and retailers may make conflicting decisions regarding whether to join the Agreement. In such circumstances, the Interrelated Guidance leaves to the Claims Administrator to decide how to "divide the Allocated Amount based on relative capital and O&M costs of PFAS treatment." Dkt. No. 3858-1 at 2–3. Ignoring for the moment the fact that neither the Agreement

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[1] This same argument similarly applies to the Multiple System Guidance, Dkt. No. 3918-1.

nor the Claims Administrator properly has any role or authority with respect to a party once it has opted out of the settlement, until the Administrator acts, the Guidance confesses there is no way to assess how much money either entity would receive in such a circumstance. It is not clear what happens to the remaining funds that would have been designated to the opted-out entity. Nor is it clear how funds will be allocated from different Phases if the wholesaler and retail purchaser are members of different phases of the disbursement. The potential resulting confusion and unfairness render the DuPont Agreement untenable.

The Agreement also failed to address, and the Interrelated Guidance ignores, the potential introduction of PFAS at different points along interconnected systems. PFAS may be introduced into the water system at multiple points along a system. Water is not protected from contamination as soon as it is channeled, treated, or sold to another entity. As a result, the claims of a wholesaler may be distinct from the claims of a retailer further along the water system. The Interrelated Guidance, as well as the underlying Agreement, do not offer a mechanism to cope with those circumstances, and might be wielded to foreclose such claims.

D. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class

Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

E. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into

subclasses that are each treated as a class under this rule.”).

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a thin argument that Class Representatives have asserted claims “undoubtedly typical of those of the Settlement Class Members” because they “have asserted claims for actual or threatened injuries caused by PFAS contamination[,]” they have alleged that the DuPont Entities “knowingly sold defective PFAS and failed to warn of those defects[,]” and they have asserted a “common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating” their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives’ claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[2]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of the group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[3] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water *per day*. *See* Dkt. No. 3829 at 17 n.1. In large systems, a PWS may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions

[2] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe’s Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests “beyond those of the Plaintiff Water Providers.” Dkt. No 50-1.

[3] *See* Penn. Dep’t of Envtl. Prot., *Drinking Water State Revolving Fund Project Priority List* at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

of law and fact inapplicable to class representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these complex issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives only assessed the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not have state regulations for PFAS in drinking water. By contrast, many states have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.*, 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for 5 PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate

water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the claims available to the City of Stuart. These distinctions matter. Class Counsel have not adequately addressed the strength of the claims held by Class Members in states with drinking water regulations.

3. Several groups of Class Members have interests in direct conflict with other groups of Class Members.

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers may have differing interests if they compete for the same allocation for the same water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs

"through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount. *See supra* Part III.C.1.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to less types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

F. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness

of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case.”). While a “cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair,” *Officers for Justice v. Civil Serv. Comm’n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), “any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs’ expected recovery against the proposed settlement amount,” *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) (“A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.”).

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) (“To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake.”). The formula used to create the settlement’s allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are

circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred, leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to

influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.F.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

G. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. For only one example, Metropolitan is a wholesaler with multiple water sources with a network that spans over 200 miles, serves 26 Member Agencies that in turn provide water to over 300 retailers/utilities that serve 19 million consumers. *See* Dkt. No. 3829-1 at 5. Such an entity requires more than 2 months to consult with internal authorities and external members affected by such a critical and far-reaching decision.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious

ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Lakehaven Water & Sewer District respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray

Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for Lakehaven Water & Sewer District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for Lakehaven Water & Sewer District

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF JOSEPH BOLAM

I, Joseph Bolam, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Water & Field Operations Manager of Lakehaven Water & Sewer District ("the District").
2. I submit this declaration in support of the District's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by the District since 2018. Prior to that, I was employed by the District from 1985–2006. In my current position as Water & Field Operations Manager, I manage the operations of the District's water and field departments. As a part of my duties, I oversee maintenance of the District's water facilities and infrastructure. This includes reviewing and approving all water quality testing, including for PFAS.
4. The District is an Active Public Water System as defined by the agreement. The District is a system for the provision to the public of water for human consumption through pipes or

other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.

5. The District draws or otherwise collects water from an Impacted Water Source. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9th day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Lakehaven Water and Sewer District ("Lakehaven") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of Lakehaven's objections to the DuPont Agreement.

3. All objections asserted by Lakehaven and the specific reasons for each objection, including all legal support and evidence Lakehaven wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving Lakehaven's standing is included as an attachment titled "Affidavit of Bolam" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for Lakehaven are as follows:

- Lakehaven Water and Sewer District
  - Address: 31627A 1st Ave., South, PO Box 4249, Federal Way, WA 98063
  - Telephone number: (253) 946-5401
  - Facsimile number: (253) 839-9738
  - Email address: Jbowman@lakehaven.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing Lakehaven are as follows:

- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com

7. Lakehaven wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. Lakehaven does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF CITY OF MOSES LAKE

I. INTRODUCTION

The City of Moses Lake, Washington ("Moses Lake"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company (collectively "DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. Moses Lake objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). Moses Lake reserves the right to withdraw these objections at any time before the opt-

out deadline of December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may

not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Moses Lake is a member of the settlement class (an Eligible Claimant) because it is a Public Water System in the United States that has detected PFAS in one or more Water Sources as of the DuPont Agreement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Moses Lake City Engineer Richard Law); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System ("PWS")—and any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including

> fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, on this basis as well, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.E.1, individually and collectively signal that the agreement was not intended to cover personal-injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal-injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . .

seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double

recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Tex. Const. art. III, § 52; Cal. Const. art. XVI, § 18; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, *see Cox*, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (voiding contracts violating constitutional provision on municipal indebtedness); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic

due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS sues the airport. It cannot sue DuPont because it has released DuPont. The airport sues DuPont in contribution, which it can do because it is a non-party to the settlement with DuPont. A

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court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, which settled with DuPont for $100,000, would be responsible for DuPont's $270 million share.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to

Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *Atl. Fin. Mgmt*, 718 F. Supp. at 1018. Because the DuPont Agreement never identifies a settlement crediting method, *see generally* DuPont Agreement § 12.7, Class Members are unable to fairly assess the merits of the agreement.

C. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Section III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

D. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate. *See id.*

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not regulated. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

2. Proposed Class Representatives have claims atypical of many Class Members.

Class Counsel and DuPont offer a conclusory argument that Class Representatives have asserted claims "undoubtedly typical of those of the Settlement Class Members" because they

"have asserted claims for actual or threatened injuries caused by PFAS contamination[,]" they have alleged that the DuPont Entities "knowingly sold defective PFAS and failed to warn of those defects[,]" and they have asserted a "common damages theory that seeks recovery of the costs incurred in testing, monitoring, remediating and/or treating" their drinking water. *See* Dkt. No. 3393 at 51–52. Class Representatives' claims are atypical because their claims lack many of the nuances of the Class Members they seek to represent, including: (1) large, interrelated water systems; and (2) Class Members whose claims are affected by variations in state law.[1]

a. No Class Representatives own or operate large, complex water systems that wholesale drinking water to multiple entities.

Of the 17 Class Representatives, only four include wholesale water supply as a part of their business. *See* Dkt. No. 7 at 6–16. The largest wholesaler of that group—Martinsburg Municipal Authority—has a maximum flow of 375,000 gallons per month.[2] Wholesaler Class Members can have systems that provide an average of 730 million gallons of treated water per day. *See* Dkt. No. 3829 at 17 n.1. In large systems, a Public Water System may be entirely separated from end water users through the sale of water to intermediaries. In litigating claims for these large systems, numerous questions of law and fact inapplicable to Class Representatives would arise, including: who would constitute necessary parties under Rule 19; which of these various entities have claims for damages against the manufacturers; what claims and defenses these water providers have against each other; whether retailers have claims for increased rates; whether manufacturers have

[1] As explained in the Memorandum of Law in Support of Leech Lake Band of Ojibwe's Motion to Intervene for Limited Purpose to Clarify Settlements, none of the Class Representatives are Tribes, and Tribes have interests "beyond those of the Plaintiff Water Providers." Dkt. No 50-1.

[2] Penn. Dep't of Envtl. Prot., Drinking Water State Revolving Fund Project Priority List at 13 (June 2, 2022), https://files.dep.state.pa.us/Water/BPNPSM/InfrastructureFinance/StateRevolvFundIntendUsePlan/2022/DRINKING_WATER_Federal-FY_2022_PPL_JUN_REV_1.pdf.

defenses to claims for increased rates; whether wholesalers or retailers have contractual authority to release claims on behalf of each other, and more. These questions significantly affect the claims and interests of water providers within complex systems. Class Representatives have not had to grapple with these issues and cannot adequately represent the interests of water providers that do.

b. Class Representatives only represent 13 states.

Class Representatives present claims atypical to the class because each plaintiff's *prima facie* case is shaped by state law. While there may be similarities between states, the differences can be stark. Some states have adopted no regulations for PFAS, while others have adopted drinking water and cleanup standards. The Class Representatives assessed only the strength of the claims for the City of Stuart, Florida. *See* Dkt. No. 3393 at 42–44. Florida does not regulate PFAS in drinking water. By contrast, several states in this country have enforceable maximum contaminant levels ("MCLs") for multiple types of PFAS in drinking water. *See, e.g.,* 310 Code Mass. Regs. 22.07G (regulating six types of PFAS with a combined 20 ppt MCL); Mich. Admin. Code R. 325.10604g (regulating seven types of PFAS with individual MCLs); N.H. Code Admin. R. Env-Dw 705.06 (MCLs for four types of PFAS); N.J. Admin. Code 7:10-5.2 (MCLs for three types of PFAS). Washington State has both State Action Levels for five types of PFAS in drinking water and broad cleanup regulations that apply to *any* type of PFAS. WAC 246-290-315(4)(a), tbl.9; WAC 173-303-040, -100(6). Water providers in Washington and other states with such laws may be exposed to significantly more liability to investigate PFAS sources, treat drinking water, remediate water supplies, and take other actions as required by state regulators. Further, unlike the federal Superfund law, Washington law holds liable any person who sells a hazardous substance. *Compare* 42 U.S.C. § 9607(a), *with* RCW 70a.305.040(a)(5). Water providers in Washington and other states therefore have unique state law claims that are much stronger and broader than the

claims available to the City of Stuart. These distinctions matter. Class Counsel have left entirely unaddressed the strength of the claims held by Class Members in states with drinking water regulations.

3. **Several groups of Class Members have interests in direct conflict with other groups of Class Members.**

Class Representatives assert, without support, that "no indicia of conflicts of interest exists" among the proposed class and that "Plaintiffs allege the same or similar harms as the absent class members." Dkt. No. 3393 at 52–53. However, conflicts of interest are apparent on the face of the DuPont Agreement. The fact that Class Members are divided into two Phases—those with a current injury as of the Settlement Date and those with only a future injury—belies Class Counsel's assertion. The appointment of Ms. Elizabeth Fegan as separate counsel to represent the Phase Two Class Members further indicates conflict *among* the Class Representatives. *See* Dkt. No. 3393-4 at 9. That appointment fails to meet the general requirement for subclass designation, and it in no way addresses a variety of other conflicts, such as the following.

- **Within Phase Two**: Phase Two Class Members with little or no PFAS detections have an interest in recovering monitoring costs and maintaining an ample fund available long-term in case the PFAS levels increase over time, whereas Phase Two Class Members with high detections, particularly above regulatory limits, have an interest in obtaining the maximum amount of funding as soon as possible after detection.

- **Between Wholesalers and Retailers**: Wholesalers and their customers are in direct conflict because they compete for the same allocation for the water source. *See* Dkt. No. 3858-1 at 2–3. Under the Guidance, the Claims Administrator will have broad authority to interpret contracts between wholesalers and their customers to determine who bears the treatment costs "through the purchase price, under the contract, or otherwise." *Id*. Because the settlement fund is so inadequate, each party will have an interest in ensuring that it receives the full allocation amount.

- **Between Class Members with or without Regulatory Violations**: Class Members with regulatory violations have both stronger claims and an interest

in receiving the maximum amount of funding upfront to treat their water as soon as possible, whereas Class Members without such violations have weaker claims and an interest in recovering monitoring costs while ensuring that more funds are available later in case their detections increase over time.

- **Between Class Members with Well-Researched or Less-Researched PFAS**: Class Members with detections of relatively well researched PFAS such as PFOA and PFOS have an interest in basing allocation on the quantities of those chemicals in the water supply while other Class Members may not even be able to detect the types of PFAS in their systems. Other Class Members may have detections of PFAS chemicals for which there is currently no regulatory level, (either enacted or proposed) but for which there may be in the future as PFAS research continues. Class Members with well-researched PFAS that have regulatory limits and health risks have an interest in recovering now based on those detections, while those without such detections have an interest in maximizing future funding as more is discovered about the types of PFAS in their systems. This conflict is shown by the bias in the allocation procedures for Class Members who have detections of PFOA and PFOS versus those who only have detections of other PFAS. *See* Dkt. No. 3393-2 at 86.

- **Between Class Members that have PFAS with or without EPA-approved Test Methods**: The Agreement allocates funds largely based on those PFAS that have EPA-approved test methods as applied through UCMR 5. Nonetheless, the Agreement releases claims for all types of PFAS, even those that are not yet detectable by water providers. Water providers with these types of potential future claims but no current claims have an interest in either restricting the release of claims to fewer types of PFAS or ensuring funding well into the future when they might be able to detect these types of PFAS in direct conflict with Class Members who have detectable PFAS and have an interest in compensation as soon as possible.

Extensive and material conflicts exist among Class Members, and adequate procedures were not put in place to protect them against these conflicting interests; certification without such safeguards would not comply with Rule 23.

E. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and

it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between three and seven percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing, and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement agreement provides from the predominant PFAS manufacturer. The funds do not begin to approach what companies with 3–7% of liabilities for PFAS should fairly pay to harmed communities across this country.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d

615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether

the settlement award is fair, reasonable, and adequate. The Agreement lacks even minimal foundational guidance on an estimated range of damages or recovery for Class Members.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement. They provide an opportunity to assess the underlying facts of disputes and the strengths of the parties' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* A.D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); E.E. Fallon *et al.*, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed

doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of potentially over 14,000 water providers, *see* Dkt. No. 3393 at 22, the public health consequences of moving forward without the critical information bellwether results provide are dire. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.E.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

4. The settlement funds are not allocated properly between wholesalers and retailers and between different Phases.

The Agreement fails to treat "class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). In order to assess this factor, the Court must consider "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of release may affect class members in different ways that bear on the apportionment of relief." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768, 808 (3d Cir. 1995).

Rather than consistently compensate entities that may incur costs associated with PFAS contamination, the Agreement appears to treat class members differently by limiting the number of entities that may claim funds while nevertheless requiring all participating entities to broadly release their claims against DuPont. For example: (1) when a retail water supplier obtains treated water from a wholesale supplier, it may not obtain funds, even if PFAS enters their system, *see* Dkt. No,. 3393-2 at 88, *but see* Dkt. No. 3856-1 at 2–3 (providing guidance to the contrary); (2) when a retailer treats the water they may receive the full potential allocation even though the

wholesaler may face costs related to contamination, Dkt. No. 3858-1 at 2–3; (3) the allocation between Phase One and Phase Two Claimants provides more funding for Phase One, even if Phase Two claimants discover greater contamination, Dkt. No. 3393 at 28; and (4) the methodologies used by Class Counsel may have vastly undercounted and therefore undercompensated Phase One.[3] This differentiated treatment for proposed class members is a clear sign that the settlement is not fair. *See Gen. Motors*, 55 F.3d at 808 ("[O]ne sign that a settlement may not be fair is that some segments of the class are treated differently than others.").

F. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and a further modification styled as interpretive guidance filed October 25, Dkt. No. 3858-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient

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[3] At a basic level, the estimate of Phase One members used data from UCMR 3, which tested a far more limited set of active PWSs. The use of UCMR 5 data to qualify for Phase One means that many more PWSs may qualify under Phase One than previously understood.

time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more. Moses Lake requires more than two months merely to consult with internal authorities and external members affected by such a critical and far-reaching decision.

Time will continue to be an issue even after the settlement's approval. For many Phase One Class Members, 60 days after the Effective Date will not be enough time to perform all the mandated consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers, each of which must follow their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, and an agreement that is unusually complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, Moses Lake respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Moses Lake

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class Counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for City of Moses Lake

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF RICHARD LAW

I, Richard Law, hereby declare under penalty of perjury that the following is true and correct:

1. I am the City Engineer for the City of Moses Lake, Washington.
2. I submit this declaration in support of the City of Moses Lake's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by the City of Moses Lake since 2006 as a project engineer, then Interim City Engineer from 2017-2018, and in my current position as City Engineer since 2018.
4. The City of Moses Lake is an Active Public Water System as defined by the agreement. The City of Moses Lake is a system for the provision to the public of water for human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.
5. The City of Moses Lake draws or otherwise collects water from an Impacted Water Source.

DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9th day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Moses Lake ("City") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the City's objections to the DuPont Agreement.

3. All objections asserted by the City and the specific reasons for each objection, including all legal support and evidence the City wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the City's standing is included as an attachment titled "Affidavit of Law" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for the City are as follows:

- City of Moses Lake
  - Address: 401 S. Balsam, Moses Lake, WA 98837
  - Telephone number: (509) 764-3717
  - Facsimile number: (509) 746-3739
  - Email address: kkenison@basinlaw.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the City are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. The City wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The City does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jessica K. Ferrell

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF EAGLE RIVER WATER AND SANITATION DISTRICT

I. INTRODUCTION

Eagle River Water and Sanitation District ("ERWSD") by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. ERWSD objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). ERWSD reserves the right to withdraw this objection at any time before the opt-out deadline of December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including potentially claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and provides insufficient time to comply with a consultation certification.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should prove fatal to the proposed settlement. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may

not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). ERWSD is a member of the settlement class because it is an active public water system in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Roman); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) EPA or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Indeed, the wastewater being treated from homes and businesses is derived directly from the water distributed for potable use by the Public Water System. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on the U.S. Environmental Protection Agency's ("EPA") Fifth Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances,

> fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be

released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the problem and likely range of damage recovery at trial), *see infra* Part III.D.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition binds parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an

array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the agreement or could not assent to the agreement—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of

preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

ERWSD has particular concerns about the Releasing Parties definition owing to its relationship with the Upper Eagle River Water Authority ("UERWA"). The Colorado Department of Public Health & Environment handles the two entities together for purposes of regulatory compliance programs, but each entity operates separate surface water and/or groundwater diversions and water treatment plants. ERWSD also treats wastewater from UERWA's customers, and in that respect they may be considered to be "in privity." The Agreement could thus be read such that UERWA, if it participates, will release ERWSD's claims, even if ERWSD opts out, despite neither of the two entities having legal authority to bind the other entity. This is concerning, especially if the release is broadly interpreted to include wastewater treatment liabilities.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent that the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140

Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in

any amount required to fully extinguishes any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a PWS participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after the EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability and customer damages would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary

. . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

D. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See*

MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the settlement Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d

615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt. No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether

the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement necessarily was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation costs, *see supra* Part III.D.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

E. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader

environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, ERWSD respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

s/ Jessica K. Ferrell
s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for Eagle River Water and Sanitation District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

s/ Jessica K. Ferrell
s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for Eagle River Water and Sanitation District

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF SIRI ROMAN, P.E.

I, Siri Roman, P.E., hereby declare under penalty of perjury that the following is true and correct:

1. I am General Manager of the Eagle River Water and Sanitation District (ERWSD) and Upper Eagle Regional Water Authority (UERWA).
2. I submit this declaration in support of the ERWSD and UERWA's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by ERWSD and UERWA since 2012. In my current position as General Manager I report to the publicly elected board of the ERWSD and the appointed board of the UERWA. I oversee all aspects of the water and wastewater utility including operations, engineering, planning, finance, administration, customer service, communications, information technology and operational technology.
4. ERWSD and UERWA are Active Public Water Systems as defined by the agreement. ERWSD and UERWA constitute a system for the provision to the public of water for

human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.

5. ERWSD and UERWA draws or otherwise collects water from an Impacted Water Source (or) 2) as of June 30, 2023, is subject to the monitoring rules set forth in UCMR 5 (serves more than 3,300 people), or is required under applicable federal or state law to test or otherwise analyze any of its Water Sources for PFAS before the UCMR 5 deadline. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9 day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Eagle River Water and Sanitation District ("ERWSD") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of ERWSD's objections to the DuPont Agreement.

3. All objections asserted by ERWSD and the specific reasons for each objection, including all legal support and evidence ERWSD wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving ERWSD's standing is included as an attachment titled "Affidavit of Roman" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for ERWSD are as follows:

- Eagle River Water and Sanitation District
  - Address: 1525 Spruce Street, Suite 200, Boulder, CO 80302
  - Telephone number: (303) 431-9141
  - Facsimile number: 1-800-803-6648
  - Email address: sbushong@BH-Lawyers.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing ERWSD are as follows:

- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com

7. ERWSD wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. ERWSD does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves the right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF UPPER EAGLE REGIONAL WATER AUTHORITY

I. INTRODUCTION

Upper Eagle Regional Water Authority ("UERWA") by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company ("DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. UERWA objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). UERWA reserves the right to withdraw this objection at any time before the opt-out deadline of

December 4, 2023, rendering it null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The proposed release is overbroad, encompassing both alleged and unalleged claims, including potentially claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered in the damages calculation in this proposed settlement. Section 12.7 of the proposed settlement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and provides insufficient time to comply with a consultation certification.

While the DuPont Agreement acknowledges some conflicts among class members by identifying a representative for Phase Two claims, that minimal gesture cannot begin to address the fact that, despite a modest number of common legal issues, the case presents class member factual and legal conflicts that are dominant and overwhelming, starting with the inadequately narrow and atypical claims of those presented as class representatives. The funds proposed are grossly inadequate even to address the small number of Class Member claims currently supported by factual estimates, and consequently never could be deemed sufficient to address the thousands of additional claims possessed by retail and wholesale water systems across the country. Such deficiencies would have been made clear by a bellwether case, the absence of which, alone, should

prove fatal to the proposed settlement. As described in detail below, the Court should reject the proposed settlement and direct the Parties to address the deficiencies identified.

II. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litigation, Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation."). The Court has an affirmative duty to protect the interests of the "class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

III. ARGUMENT

The DuPont Agreement as drafted is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). UERWA is a member of the settlement class because it is an active public water system in the United States of America that has detected PFAS in one or more water sources as of the settlement date. *See* DuPont Agreement § 5.1; *see also* Ex. A (Aff. of Roman); Ex. B (Aff. of Counsel) (certifying information as required under Agreement); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

A. Objection Topic: Release

1. The release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the

very same set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The release is so overbroad as to render the Agreement unfair and unreasonable.

a. The release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The release encompasses claims for "PFAS that entered" a Class Member's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) EPA or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full. Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System—or even any remote relationship between the two would be sufficient to foreclose a claim under the release as written. Indeed, the wastewater being treated from homes and businesses is derived directly from the water distributed for potable use by the Public Water System. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on the U.S. Environmental Protection Agency's ("EPA") Unregulated Contaminant Rule ("UCMR 5"), "any substance asserted to be PFAS in Litigation," *and*:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims

that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, the release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve out in the release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury. *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023); Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the proposed settlement (when compared to the scope of the

problem and likely range of damage recovery at trial), *see infra* Part III.D.1, individually and collectively signal that the Agreement was not intended to cover personal injury claims. If such claims were intended to be included in the release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

2. The Releasing Persons definition would bind parties that never assented to settlement.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including any "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. A so-called interpretive guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Persons (as defined in the Settlement Agreement) with respect to the water provided to (or supplied by) the Settlement Class Member.").

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This

applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). It is axiomatic that one cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted)). But binding parties that have refused the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

UERWA has particular concerns about the Releasing Parties definition owing to its relationship with the Eagle River Water and Sanitation District ("ERWSD"). The Colorado Department of Public Health & Environment handles the two entities together for purposes of regulatory compliance programs, but each entity operates separate surface water and/or groundwater diversions and water treatment plants. ERWSD also treats wastewater from UERWA's customers, and in that respect they may be considered to be "in privity." The Agreement could thus be read such that ERWSD, if it participates, will release UERWA's claims, even if UERWA opts out, despite neither of the two entities having legal authority to bind the other entity.

B. Objection Topic: Third-Party Claims

1. The Claims-Over provision functions as an indemnity.

The DuPont Agreement provides a "contribution bar" and a "Claims-Over" provision. DuPont Agreement §§ 12.7.1, 12.7.2. The DuPont Agreement contains a "Protection Against Claims-Over," which, taken with the contribution bar, essentially would function like an indemnity provision in many instances. To the extent the Claims-Over provision functionally operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. Of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such

contribution bars do not bar claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litig. 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguishes any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party.

An example illustrates the unfairness inherent in the proposed settlement structure. Consider the scenario where a Public Water System ("PWS") participates in the DuPont Agreement and receives $100,000. It is later sued for cleanup by its state environmental agency and for personal injury and property damage by its customers, after the EPA discovers PFAS in the PWS's wells at concentrations exceeding the applicable cleanup level. The PWS ultimately is found liable to clean up its water supply at a cost of $100 million. Its customers win a judgment of $200 million for personal injury and property damages. The PWS then learns that the source of the PFAS in its water supply is AFFF applied during firefighting training exercises over a 30-year

period at a local airport. The PWS provides water to a small community. It can ill afford to pay damages, so it sues the airport, in contribution. It cannot sue DuPont because it has released DuPont. The airport, also small, cannot bear a large damage award, so it sues DuPont, which it can do because it is a non-party to the settlement with DuPont. After five years of litigation, a court allocates 50% of the cleanup costs and 50% of the damages suffered by the customers to DuPont, 50% to the airport, and nothing to the PWS. DuPont then tenders its damages under the Claims-Over provision of the settlement to the PWS. Had the PWS not settled with DuPont, its share of cleanup liability would have been zero. Instead, it is $150 million—the 50% share the court allocated to DuPont. That such a result is possible renders the settlement unacceptable under applicable Rule 23 standards.

The result for the PWS would be even worse if the court determines the airport to be only 10% liable and DuPont to be 90% liable—a potentially more realistic scenario. In that event, the PWS would be required to reduce the $300 million judgment "by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." DuPont Agreement § 12.7.2. The PWS, who settled with DuPont for $100,000, would be responsible for DuPont's $270 million share. Here, instead of having to pay zero had it not settled with DuPont, the PWS would have to pay $270 million.

Such hypothetical third-party suits are neither remote nor unlikely. They are already occurring. *See supra* Part III.A.1.c. And because the DuPont Agreement defines a Released Claim that could trigger the Claims-Over provision so broadly as to include far more than just PFAS contamination to the water supply, the universe of potential defendants, plaintiffs, and claims that could trigger the provision is immense.

2. The Agreement fails to name a settlement crediting method.

The Fourth Circuit has held that a failure to name a settlement crediting method "may deprive the plaintiff class members of information affecting their ability to assess fairly the merits of the settlement." *Jiffy Lube*, 927 F.2d at 161. "The plaintiff class's interest in the choice of setoff method is such that at least one court has held that the decision on setoff method must be considered by the class and its representatives before the settlement can be approved pursuant to Rule 23(c)." *Id.* (citing *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988)). "Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement." *In re Atl. Fin. Mgmt., Inc. Sec. Litig.*, 718 F. Supp. at 1018. The DuPont Agreement never identifies a settlement crediting method. *See generally* DuPont Agreement § 12.7. Accordingly, Class Members are unable to fairly assess the merits of the Agreement.

C. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained previously, *see supra* Part III.A.2, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that

may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

D. Objection Topic: Class Conflicts

1. Common questions of law and fact do not predominate across the class.

Although Class Counsel contends 16 common questions of law or fact sufficiently unite the class, "the predominance criterion is far more demanding." *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (ruling that putative class members' common exposure to asbestos products supplied by defendants may have been enough to satisfy commonality but not predominance). The proposed class is too broad, with too diffuse an array of individual questions of law and fact, claims and defenses, for common questions to predominate. Indeed, in this matter, individual claims dominate.

For example, putative Class Members have varying amounts and types of PFAS in their systems, some of which are regulated and some of which are not. Many have not detected PFAS. Some Class Members purchase treated water from a wholesaler, others purchase raw water, while still others supply raw and/or treated water they distribute—some to consumers, others to retailers. Some have claims against the federal government. Class Members are located in all 50 states, with varying state laws and remedies. These numerous and different factual and legal circumstances significantly affect the strength of each Class Member's claim and thus the potential damages and recovery. These individual and subgroup questions predominate over the relatively few common

questions of fact alleged by Class Counsel. Only a settlement with appropriate subclasses could address the predominance issue. *See* Fed. R. Civ. P. 23(c)(5) ("[A] class may be divided into subclasses that are each treated as a class under this rule.").

E. Objection Topic: Money

1. The settlement funds are insufficient to redress DuPont's harm to water providers.

Under the DuPont Agreement, DuPont will pay $1,185,000,000 to Eligible Claimants. *See* MDL Dkt. No. 3393-2 at 10. Even assuming this figure reflects the settlement's true value—and it does not—the settlement amount pales in comparison to the PFAS-related damages that DuPont has caused across the country while controlling between 3 and 7 percent of the historical PFAS market. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023). Estimates indicate the nationwide cost of drinking water treatment of PFAS may range between $3–6 billion *annually*. *See* Ass'n of Met. Water Agencies, *AMWA Reacts to Proposed PFAS Settlement*, https://www.amwa.net/press-releases/amwa-reacts-proposed-pfas-settlement. Investigating, testing, purchasing and installing treatment infrastructure, and operating and maintaining equipment for decades will entail remediation costs orders of magnitude above what the Agreement provides from the predominant PFAS manufacturer. Simply put, the funds are inadequate.

2. The DuPont Agreement failed to compare the value of the settlement to the damages the class could have obtained at trial.

The "most important factor in evaluating the fairness and adequacy of a proposed settlement is an analysis of the value of the settlement compared to the potential recovery if the case went to trial," and courts reject settlements that fail to sufficiently assess awards in this

manner. *In re Force Prot., Inc. Derivative Litig.*, No. 2:08-1904-CWH, 2012 WL 12985420, at *10 (D.S.C. Mar. 30, 2012); *In re Corrugated Container Antitrust Litig.*, 634 F.2d 195, 212 (5th Cir. 1981) (approving settlement where expert opined on total damages to class); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("In determining the fairness, adequacy and reasonableness of the proposed compromise, the . . . settlement terms should be compared with the likely rewards the class would have received following a successful trial of the case."). While a "cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair," *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 628 (9th Cir. 1982), "any fraction has a denominator, and without knowing what it is the Court cannot balance plaintiffs' expected recovery against the proposed settlement amount," *Rollins v. Dignity Health*, 336 F.R.D. 456, 463 (N.D. Cal. 2020) (internal quotation marks omitted). It is reversible error to approve a settlement without providing a quantification of the alternative outcomes to a settlement. *See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 285 (7th Cir. 2022) ("A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes. Still, much more could have been done here without **. . .** turning the fairness hearing into a trial of the merits.").

The proposed settlement suffers a fundamental flaw because it fails to provide even a single estimated range of aggregate damages or recovery for proposed class members. *Iris Connex, LLC v. Dell, Inc.*, 235 F.Supp.3d 826, 849 (E.D. Texas 2017) ("To determine whether a settlement is fair and made in good faith, it is not the absolute value of the settlement but rather the prospective recovery that must be evaluated, i.e., how much is at stake."). The formula used to create the settlement's allocation table is based on a combination of adjusted flow and PFAS levels. *See* Dkt.

No. 3393-2 at 86–94. Although this calculation relied on a theory of cost for PFAS filtration, it is not a replacement for an estimate of aggregate damages to Class Members. Such calculations are not impossible to conduct, and many courts have relied on expert testimony presenting methods for estimating damages and theorizing different levels of recovery. *See In re Domestic Air Transp. Antitrust Litigation*, 148 F.R.D. 297, 322 (N.D. Georgia, 1993) (providing that although there are circumstances where a precise dollar valuation cannot be given to a settlement, an expert can provide an estimated range of value). This is reversible error. *See Reynolds*, 288 F.3d at 285. Although the circumstances, uncertainties, and complexities of the proposed settlement make it difficult to produce a single estimate of damages, a potential range is critical to determine whether the settlement award is fair, reasonable, and adequate. The Agreement is inadequate because it lacks even minimal foundational guidance.

3. The lack of a bellwether trial renders the DuPont Agreement unfair and inadequate.

No bellwether trial has occurred leaving unaddressed what damages Class Members stood to potentially earn at trial against DuPont. Bellwether trials are a ubiquitous feature of modern mass tort litigation and play a critical role in guiding parties toward an equitable and adequate settlement in several ways. They provide an opportunity to assess the underlying facts of disputes and the strengths of plaintiffs' and defendants' arguments, and form a bulwark against bias in settlement negotiations. The information provided by bellwether verdicts or settlements sheds light on a global settlement process that otherwise would be conducted exclusively between defendants and inherently self-interested lead plaintiffs' attorneys. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593–94 (2008); Eldon E. Fallon et al., *Bellwether Trials in*

Multidistrict Litigation, 82 TUL. L. REV. 2323, 2342 (2008) (bellwether trials give parties an "understanding of the litigation that is exponentially more grounded in reality"); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) ("Bellwether trials are meant to produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis."). In contrast, juries are disinterested parties with no financial stake in the outcome of the MDL, making them less susceptible to influences that may warp a settlement in favor of a small segment of plaintiffs, their counsel, or even defendants. Introducing jury participation through bellwether trials protects the many parties that do not have direct input into settlement talks in MDLs.

The DuPont Agreement necessarily was negotiated without any reference to bellwether results. Only DuPont and Class Counsel weighed in on the value and structure of the settlement, behind closed doors. No jury served as an objective counterbalance to potential biases and no bellwether result shed light on what funds could actually be recovered from DuPont. Class Counsel has not otherwise attempted an "analysis of the value of the settlement compared to the potential recovery if the case went to trial." *In re Force Prot., Inc. Derivative Litig.*, 2012 WL 12985420, at *10. Given the class of over 14,000 water providers, *see* Dkt. No. 3393 at 22, the potential impact on ratepayers and the public of blindly moving forward without the critical information bellwether results provide could be significant. Especially considering indications that the total settlement funds amount to a small fraction of expected nationwide PFAS remediation

costs, *see supra* Part III.D.1, the lack of any bellwether result raises serious fairness and adequacy concerns.

F. Objection Topic: Time

The proposed Class Members have been given insufficient time to consider whether to opt out of the settlement. The DuPont Agreement was filed on July 10, 2023, Dkt. No. 3393-2, with amendments filed August 7, Dkt. No. 3521-1, and two further modifications styled as interpretive guidance documents filed more than two months after preliminary approval, Dkt. Nos. 3858-1, 3819-1. By order issued August 22, 2023, the Court preliminarily approved the DuPont Agreement and set the deadline for opting out on December 4, 2023. *See* Dkt. No. 3603 at 8–10. Notice of preliminary approval was sent to proposed Class Members on September 5, 2023. *Id*. at 8.

These complex documents implicate 14,000 PWSs, and the contamination of public drinking water on an unprecedented scale. *See* Dkt. No. 3393-11 at 6–7. There is a growing scientific consensus that many PFAS pose a threat to public health, ecosystems, and the broader environment. These chemicals have effectively spread through our drinking water system, and they do not abide by the clean divisions within that system. Although 60 days may be sufficient time in other class settlements, this case is uniquely complex. It requires a decision-making process that involves significant amounts of internal and external communication and assessment across staff, water system managers, governing bodies, engineers, environmental consultants, attorneys, and more.

Time continues to be an issue even after the settlement's approval. For Phase One Class Members, 60 days after the Effective Date likely will not be enough time to perform all the necessary consultations before submitting their Claims Forms. Pursuant to Class Counsel's

Guidance, many proposed Class Members must consult with upstream and downstream parties on how to divide allocated awards. Further, the Claims Forms require consultation with yet further parties upstream. Assessing the available claims, reaching a division of any award, and preparing this supplementary form will require a great deal of communication, negotiation, and coordination between water suppliers that each has their own independent decision-making process.

These inherent complications exist alongside a shifting regulatory environment that makes future costs difficult to estimate, as well as an agreement that itself is complex. Due to serious ambiguities in the DuPont Agreement and the high stakes at issue, Class Members need more time to reach an informed decision.

IV. CONCLUSION

For the foregoing reasons, UERWA respectfully objects to the DuPont Agreement.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jferrell@martenlaw.com
jkray@martenlaw.com

Attorneys for Upper Eagle Regional Water Authority

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

<u>/s/ Jessica K. Ferrell</u>
<u>/s/ Jeff B. Kray</u>
Jessica K. Ferrell, WSBA No. 36917 1191
Jeff B. Kray, WSBA No. 22174
Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com
Attorneys for Upper Eagle Regional Water Authority

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al., Case No. 2:23-cv-03230-RMG*

AFFIDAVIT OF SIRI ROMAN, P.E.

I, Siri Roman, P.E., hereby declare under penalty of perjury that the following is true and correct:

1. I am General Manager of the Eagle River Water and Sanitation District (ERWSD) and Upper Eagle Regional Water Authority (UERWA).
2. I submit this declaration in support of the ERWSD and UERWA's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.
3. I have been employed by ERWSD and UERWA since 2012. In my current position as General Manager I report to the publicly elected board of the ERWSD and the appointed board of the UERWA. I oversee all aspects of the water and wastewater utility including operations, engineering, planning, finance, administration, customer service, communications, information technology and operational technology.
4. ERWSD and UERWA are Active Public Water Systems as defined by the agreement. ERWSD and UERWA constitute a system for the provision to the public of water for

human consumption through pipes or other conveyances, with at least 15 service connections or regularly serves at least 25 individuals. DuPont Settlement Agreement Section 2.40.

5. ERWSD and UERWA draws or otherwise collects water from an Impacted Water Source (or) 2) as of June 30, 2023, is subject to the monitoring rules set forth in UCMR 5 (serves more than 3,300 people), or is required under applicable federal or state law to test or otherwise analyze any of its Water Sources for PFAS before the UCMR 5 deadline. DuPont Proposed Settlement Exhibit C at 5-6.

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed on this 9 day of November, 2023.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JEFF B. KRAY

I, Jeff B. Kray, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Upper Eagle Regional Water Authority ("UERWA") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of UERWA's objections to the DuPont Agreement.

3. All objections asserted by UERWA and the specific reasons for each objection, including all legal support and evidence UERWA wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving UERWA's standing is included as an attachment titled "Affidavit of Roman" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile

numbers, and email address for UERWA are as follows:

- Upper Eagle Regional Water Authority
  - Address: 1525 Spruce Street, Suite 200, Boulder, CO 80302
  - Telephone number: (303) 431-9141
  - Facsimile number: 1-800-803-6648
  - Email address: sbushong@BH-Lawyers.com

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing UERWA are as follows:

- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com
- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com

7. UERWA wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. UERWA does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jeff B. Kray

EXHIBIT Q

IIN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

OBJECTION OF LOWER COLORADO RIVER AUTHORITY

I. INTRODUCTION

The Lower Colorado River Authority ("LCRA"), by and through its below-signed counsel, respectfully submits these objections to the proposed settlement between Defendants DuPont de Nemours, Inc., the Chemours Company, Corteva, Inc., and E.I. DuPont de Nemours and Company (collectively, "DuPont") and public water providers ("DuPont Agreement" or "Agreement"), as well as the Interpretive Guidance on Interrelated Drinking-Water Systems ("Interrelated Guidance"), Dkt. No. 3858-1, and the Interpretative Guidance on Entities That Own and/or Operate Multiple Public Water Systems ("Multiple System Guidance"), Dkt. No. 3919-1, in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG. LCRA objects to the Agreement as presented by Proposed Class Counsel ("Class Counsel") because it does not meet the standard for approval under Federal Rule of Civil Procedure 23(e)(2). LCRA reserves the right to withdraw these objections at any time before the opt-out deadline of

December 4, 2023, rendering them null and void, and to opt out of the Agreement. DuPont Agreement §§ 9.6.5, 9.7.4.

II. BACKGROUND ON LCRA AND SUMMARY OF OBJECTIONS

LCRA is a conservation and reclamation district created by the Texas Legislature in 1934 under Section 59, Article XVI of the Texas Constitution. LCRA serves customers and communities throughout Texas. Pursuant to its enabling legislation, Chapter 8503, Special District Local Laws Code, LCRA sells raw, untreated water to over 120 firm customers in Central Texas, who divert water directly from raw water sources managed by LCRA (e.g. lakes and rivers). Many of these customers are cities or other local entities that are, like LCRA, also political subdivisions of the State. Chapter 49, Texas Water Code authorizes LCRA to provide laboratory services. LCRA Environmental Laboratory Services provides environmental lab testing, to persons and entities within and outside of LCRA's statutory territory.

LCRA is not a Class Member, however, because LCRA did not detect PFAS before the Settlement Date and is not required by state or federal law to test or otherwise analyze for PFAS. *See* DuPont Agreement § 5.1. LCRA could, however, arguably be construed as a Releasing Person under Section 2.45 of the DuPont Agreement as drafted, as discussed below. This is unfair and unreasonable and violates, *inter alia*, Federal Rule of Civil Procedure 23(e).Because its rights stand to be prejudiced, LCRA may object to the Agreement. *See In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1387, 1983-1 Trade Cas. (CCH) ¶ 65409 (D. Md. 1983) (acknowledging that nonparty has standing to object to a class settlement if the nonparty demonstrates plain legal prejudice from the settlement); *see also* Newberg and Rubenstein on Class Actions § 13:24 (noting that nonparties have standing to object to settlements where their legal rights are prejudiced and that the objector "may then object to any aspect of the settlement").

The DuPont Agreement includes simultaneous, material deficiencies with respect to core requirements of Rule 23, each of which should be central to a determination of the fairness and adequacy of the proposal, and many of which courts have deemed sufficient, individually, as a basis for rejecting a settlement. The Agreement's definition of a Releasing Person and Release are overbroad. A non-Eligible Claimant could arguably be a Releasing Party due the breadth of the definitions of Person and Releasing Party. DuPont Agreement § 2.45. Released Claims encompass both alleged and unalleged claims, including claims addressing wastewater, stormwater, and real property cleanup damages and even extending to unknown and unasserted personal injury claims that are nowhere even considered. *Id*. §§ 2.43, 12.1.

While now styled as a claims-over provision, Section 12.7 of the DuPont Agreement operates as an indemnity in many foreseeable instances and would significantly increase the Releasing Persons' potential exposure to further losses. The proposal is grossly unfair to interconnected water distribution systems and seeks to require those entities, including scores of systems (related or not) whose decisions require complex public processes, to satisfy deadlines that all know to be impossible. That outcome would be additionally unfair due to last-minute amendments cobbled onto the DuPont Agreement to address inadequacies previously identified by entities that provide wholesale water service. The Interrelated Guidance raises significant concerns about what types of wholesale water providers are included as Class Members. For instance, the Interrelated Guidance suggests that even those entities that do not treat water could be included, while also subjecting wholesale water providers to the DuPont Agreement's Release even if that entity opts-out. Systems that provide raw, untreated water should be excluded from the settlement class and should not be construed as a Releasing Person. Finally, in a case in which water systems were readily identifiable using publicly available information, thousands of water

systems, including many that had publicly acknowledged PFAS contamination in their systems, were apparently not notified of the settlement, depriving those entities of a fundamental due process protection. As a provider of raw, untreated water and a non-Class Member however, LCRA focuses its objections on the threshold definitional issues that stands to prejudice its rights: LCRA is not a Class Member or Party. It is a Person, however, so could arguably fall under the definition of a Releasing Person. This cannot stand. To the extent the DuPont Agreement as drafted purports to achieve that result, it is unfair, unreasonable, and unlawful, and cannot be approved under Rule 23(e)(2) without modification.

III. STANDARD OF REVIEW

The Court may only approve a class settlement when it determines that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The Court must examine whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Id.

Under Rule 23(e), courts play the role of fiduciary to absent class members, zealously scrutinizing the proposed settlement to combat the omnipresent "danger that the parties and counsel will bargain away the interests of the unnamed class members in order to maximize their own." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013); *see also Holmes v. Cont'l*

Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) ("Careful scrutiny by the court is necessary to guard against settlements that may benefit the class representatives or their attorneys at the expense of the absent class members."); *Sharp Farms v. Speaks*, 917 F.3d 276, 293–94 (4th Cir. 2019) ("When the court reviews a proposed class-action settlement, it acts as a fiduciary for the class.").

The Court also has a duty to ensure that the proposed settlement will not bargain away, or waive, the interests of non-parties. LCRA's legal rights could be materially prejudiced by the DuPont Agreement as drafted. While LCRA does not concede it is a Class Member, Releasing Person, or otherwise subject to the Agreement, it has standing to object. Non-class members may "challenge a class action settlement when the settlement will prejudice them." *Rahman v. Vilsack*, 673 F. Supp. 2d 15, 19 (D.D.C. 2009). Plain legal prejudice exists "if the settlement strips the party of a legal claim or cause of action, such as a cross claim or the right to present relevant evidence at trial," or when there is "interference with a party's contract rights or a party's ability to seek contribution or indemnification." *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008) (quotations omitted). The Court's role far exceeds a mere rubberstamp. *See* Manual for Complex Litig., Fourth, § 21.61 ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.").

IV. ARGUMENT

LCRA objects to the DuPont Agreement because it is not "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Although LCRA maintains that as a provider of raw, untreated water, it is not a Class Member, the DuPont Agreement is so broad that it brings in non-Class Members and entities that have expressly chosen to opt out of the Settlement Class into the scope of the Release. The DuPont Agreement jeopardizes and threatens to waive LCRA's future rights and would

severely limit its ability to bring claims against Defendants. LCRA, therefore, preemptively files these objections to preserve its rights. *See* DuPont Agreement § 2.45; *see also* Ex. A (Aff. of Executive Vice President of External Affairs and Chief People Officer T. Oney); Ex. B (Aff. of Counsel) (certifying information as required under Agreement).

A. Objection Topic: Release

1. The Releasing Persons definition would bind parties that never assented to settlement and are not Class Members.

The definition of Releasing Persons purports to bind not just the Class Member, but an array of other entities, including those "in privity with" the Class Member and "any person . . . seeking recovery on behalf of a Settlement Class Member or seeking recovery for harm to a Public Water System within the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water." *See* DuPont Agreement § 2.45. As drafted, this definition is so broad that it could apply to LCRA due to LCRA's provision of raw, untreated water to potential Class Members or its provision of PFAS testing. The Interrelated Guidance issued by the parties advancing the settlement confirms that the Releasing Persons provision applies, notwithstanding whether those Releasing Persons can or want to participate in the DuPont Settlement. *See* Dkt. No. 3858-1 at 5 ("In general, by participating in the Settlement, a Settlement Class Member releases claims on behalf of itself and its Releasing Person. . . with respect to the water provided to (or supplied by) the Settlement Class Member."). As to Wholesalers, the Interrelated Guidance states: "In general, if a wholesaler opts out of the Settlement Class and its retail customer is a Settlement Class Member, the release would extend to the wholesaler as to the water it provided to the Settlement Class Member." Dkt. No. 3858-1 at 5.

A "settlement agreement is a contract and must be interpreted as such." *Cox v. Shah*, 187 F.3d 629 (4th Cir. 1999); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 759 (D.S.C. 1999). "This applies to class settlements as well as to the resolution of litigation between individual parties." *Dahingo v. Royal Caribbean Cruises, Ltd.*, 312 F. Supp. 2d 440, 445 (S.D.N.Y. 2004). One cannot be bound by a contract without assenting to it. *See, e.g.*, *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 236 (4th Cir. 2019) ("Under South Carolina law, a contract is formed between two parties when there is, inter alia, a mutual manifestation of assent to its terms." (internal quotation marks and brackets omitted). But binding parties that have rejected the Agreement or could not assent to it—those that have affirmatively requested exclusion from the class or those that are not Class Members in the first place—is exactly what the DuPont Agreement attempts to do. The Releasing Persons definition purports to bind even entities over which a Class Member has no control, such as contractual counterparties that expressly opted out of the DuPont Agreement. Whatever the merits of the parties' goal of preventing "double recovery," Dkt. No. 3858-1 at 5, that goal may not be accomplished through an unfair means that also violates a fundamental tenet of contract law—that all bound parties must have assented.

2. The Covenant Not to Sue bars non-parties from bringing future claims against DuPont.

Section 12.2 of the DuPont Agreement would prevent any "Releasing Persons" from bringing suit for any "Claim alleging or asserting any Released Claims or challenging the validity of the release." This would bar LCRA, if it held to be a Releasing Person, from any future suit against DuPont related to PFAS contamination even though LCRA is not a party to the suit. This impermissibly constrains LCRA's and other non-parties' future legal rights. Settlements operate as contracts and cannot bind parties who do not assent to the settlement. *See supra* Part IV.A.1.

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3. The Release is overbroad.

There is no identical factual predicate among the released future contamination and cleanup claims and the claims alleged in litigation. *See* DuPont Agreement § 12.1. A court can approve a release only of claims that share an "identical factual predicate" with claims alleged in the case at issue. *Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015); 4 Newberg and Rubenstein on Class Actions § 13:61 (6th ed.) ("[C]ourts often police a proposed settlement agreement to ensure that the release is not overly broad, that is, that it does not release claims outside the factual predicate of the class's claims"). "Claims have an 'identical factual predicate' when they depend upon the *very same* set of facts." *McAdams v. Robinson*, 26 F.4th 149, 160 (4th Cir. 2022) (internal quotation marks and brackets omitted) (emphasis added).

The DuPont Agreement would release a wide range of unalleged claims that lack an identical factual predicate with claims alleged by Class Members. Those claims cannot be extinguished. The Release is so overbroad as to render the agreement unfair and unreasonable.

a. The Release seeks to include almost all wastewater, stormwater, and real property cleanup claims.

The Release encompasses claims for "PFAS that entered" a Releasing Person's "facilities or real property," unless (1) such claims involve facilities or real property that are "separate from and not related to a Public Water System" or (2) the U.S. Environmental Protection Agency ("EPA") or a State establishes new more stringent requirements on stormwater or wastewater cleanup. *See* DuPont Agreement §§ 12.1.1, 12.1.2. Under the first exception, the required absolute and total separation of such cleanup claims from drinking water poses what in many instances would be an insurmountable barrier. For example, even if wastewater is treated and recycled to make up just a fraction of a Class Member's drinking water supplies, under the applicable definition, the Class Member could be held to have released a wastewater cleanup claim in full.

Putting aside recycled wastewater, arguments could be made that a wastewater or stormwater system is marginally "related" to a Class Member's Public Water System ("PWS")—or even any remote relationship between the two would be sufficient to foreclose a claim under the Release as written. Another example is the transmission of untreated raw water to an entity that will treat the water and convey it to retail water customers. If the retail customer is a Releasing Person, the Class Member could be held to have released a cleanup claim in full should there be a spill before the untreated water reaches the Class Member's system. Such a broad release of wastewater, stormwater, and real property claims diverges from the factual predicate of the claims asserted and is patently unfair.

b. The Release includes claims for unknown PFAS for which no claims are asserted in litigation.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," and:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per- and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Settlement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id*. Because this PFAS definition is based partly on chemical structures, the Release could encompass claims relating to up to 15,000 different chemicals. *See* Nat'l Institute of Env't Health Sciences, *PFAS*, https://www.niehs.nih.gov/health/topics/agents/pfc (last accessed Nov. 1, 2023). Water providers will only know, at most, about contamination by the 29 PFAS

within UCMR-5, and the water providers in litigation with DuPont have only sought damages for the few PFAS they have tested for and detected—not 15,000 different chemicals. Accordingly, by seeking to encompass claims for thousands of chemicals, more than 99% of which are not subject to a single claim in this litigation, the Release is entirely untethered from the required identical factual predicate. *Cf. Canter v. Midland Credit Mgmt., Inc.*, No. 3:14-cv-02939-MMA-MDD, 2017 WL 2817065, at *4 (S.D. Cal. June 28, 2017) (ruling that even if there was some "overlap" in subject matter between consumer-protection claims asserted in litigation and released claims that included different consumer-protection claims, there was no identical factual predicate between them, rendering release overbroad).

c. The Release includes personal-injury claims.

Personal-injury claims relating to PFAS in drinking water fit within "any and all Claims . . . that arise from or relate to PFAS that entered Drinking Water of a Public Water System . . . at any time before the Settlement Date." DuPont Agreement § 12.1.1. No water providers have alleged or could allege personal-injury claims in litigation against DuPont, nor have they sought recovery for such claims advanced against them by third parties. The claims proposed to be released and the litigated claims lack the required identical factual predicate. Thus, on this basis as well, the Release is overbroad and cannot meet the standard required by Rule 23.

The lack of any carve-out in the Release for personal-injury claims matters a great deal. Customers are already beginning to sue water providers for personal injury.[1] *See, e.g.*, Compl, *Vincent v. Aquarion Water Co.*, No. FBT-CV23-6128205-S (Conn. Sup. Ct. Oct. 16, 2023);

[1] Nothing in these objections should be construed as waiving any immunities or defenses LCRA may have under state or federal law. . LCRA expressly preserves all such immunities and defenses.

Compl., *Hoffnagle v. Conn. Water Co.*, No. HHD-CV-23-6175540-S (Conn. Sup. Ct. Oct. 31, 2023). Water providers are facing, and will continue to face, considerable exposure to liability arising from conditions for which they likely bear no responsibility. If they participate in a settlement with the current Release language, they would have no contribution recourse against DuPont, a major tortfeasor. *See* AFFF MDL FAQs at 3, https://afff-mdl.com/wp-content/uploads/PFAS-FAQ.pdf (last accessed Nov. 1, 2023) (stating that DuPont is responsible for 3–7% of PFAS liabilities). In stark contrast to the breathtaking scope of the Release, the DuPont Agreement's structure, the method supposedly used to support the damages calculation, and the relatively small dollar amount of the DuPont Agreement (when compared to the scope of the problem and likely range of damage recovery at trial), individually and collectively signal that the agreement was not intended to cover personal injury claims. If such claims were intended to be included in the Release, then the settlement amount is even more inadequate than explained herein, considering just the personal injury decisions to date. *See, e.g.*, *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 921 (6th Cir. 2022) (affirming jury verdicts of $40 million and $250,000 for just one plaintiff and his wife in personal-injury action involving long-chain PFAS).

B. Objection Topic: The Claims-Over provision functions as an indemnity

The initial DuPont Agreement contained an explicit indemnity provision. After 17 States and Sovereigns objected (Dkt. No. 3462), DuPont and Class Counsel revised Section 12.7 of the agreement by substituting "Protection Against Claims-Over" for the indemnity. The DuPont Agreement contains a "Protection Against Claims-Over," and a contribution bar. DuPont Agreement §§ 12.7.1, 12.7.2. To the extent the Claims-Over provision operates as an indemnity, it may contravene state constitutions and statutes that regulate the circumstances and procedures

under which municipalities and other political subdivisions may assume debt. *See, e.g.*, Cal. Const. art. XVI, § 18; Tex. Const. art. III, § 52; Wash. Const. art. VIII, § 6; RCW 39.36.020(2)(a)(ii). In that event, the settlement agreement—which is a contract, Cox, 187 F.3d at 629—would be void. *See Starr v. City & Cnty. of San Francisco*, 72 Cal. App. 3d 164, 167, 140 Cal. Rptr. 73, 74 (Cal. Ct. App. 1977) (finding contracts violating constitutional provision on municipal indebtedness void); *Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942) (construing county contract as containing indemnity and refusing to enforce it because it was entered into in violation of state law regulating indebtedness of municipalities); *Whatcom Cnty. Water Dist. No. 4 v. Century Holdings, Ltd.*, 29 Wash. App. 207, 211, 627 P.2d 1010, 1012 (Wash. Ct. App. 1981) (agreement construed as creating municipal debt and accordingly was "void as beyond the power of the Water District and contrary to the state constitution").

The contribution bar prevents any non-Released Person (i.e., non-settling defendants in the MDL) from suing DuPont for contribution or indemnity. DuPont Agreement § 12.7.1. Such contribution bars are widely used in multi-party litigations to facilitate partial settlements. But such provisions do not prevent claims by non-parties to the litigation, as such a bar would violate basic due process. *See Jiffy Lube*, 927 F.2d at 158 ("If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented.") (citing Manual for Complex Litigation 2d, § 23.14 at 166 (1985)). Section 12.7.1 cannot apply to either direct actions against DuPont or contribution actions against DuPont by non-parties to the MDL.

Because myriad, as-yet-unknown parties that are not subject to the contribution bar may bring actions against Releasing Persons and DuPont, under the settlement as proposed, Releasing Persons may lose the benefits of any settlements they receive from DuPont. Section 12.7.2 of the

DuPont Agreement requires that if an action by a Releasing Person against a non-party gives rise to a contribution award against DuPont by the non-party (a Claim-Over), the Releasing Person must, in effect, indemnify DuPont by reducing the amount of the Releasing Person's judgment in any amount required to fully extinguish any Claim-Over—that is, to pay DuPont's entire share of liability for contribution to the non-party. This is a particularly egregious outcome where the Releasing Person, like LCRA, is not a Class Member and receives no benefit from the settlement.

Further, a governmental entity, such as LCRA, or other political subdivisions of the State of Texas, are, generally, not authorized to provide such an arrangement. *See Galveston, H. & S. A. Ry. Co. v. Uvalde Cnty.*, 167 S.W.2d 305, 306 (Tex. Civ. App. 1942), writ refused W.O.M. (Mar. 10, 1943) (finding an indemnity is a pledge of credit and County could not "pledg[e] the credit of the county to cover an unlimited liability which might arise in the future and thereby subject the county to possible financial ruin.") *see also* Tex. Const. art. III, § 52 (restricting political subdivision's ability to lend credit).

C. Objection Topic: Interconnected Drinking Water Systems

1. The Interrelated Guidance and the Multiple Systems Guidance constitute improper late amendments to the DuPont Agreement.

On October 25, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement"), seeking to amend the underlying DuPont Agreement through incorporating the Interrelated Guidance by reference. Dkt. No. 3858. On November 6, 2023, Class Counsel filed a Joint Motion to Supplement the Preliminarily Approved Allocation Procedures ("Motion to Supplement 2"), seeking to amend the underlying DuPont Agreement through incorporating the Multiple System Guidance by reference. Dkt. No. 3919. The Court granted each motion the next day. Dkt. No. 3862; Dkt. No. 3930.

With these entirely new documents, Class Counsel announced for the first time that the proposed settlement class was intended to include water wholesalers, created a new joint claims submission process for interrelated water systems, and took the position that the Releases would rely on the language of the water sale agreements within those interrelated systems. Class Counsel also announced for the first time how entities that own or operate multiple PWSs might opt out or participate as to each individual PWS. Together, those pronouncements operate as material substantive amendments to the underlying DuPont Agreement because they alter both the distribution of settlement monies and the claims process, and significantly expand the scope of entities covered. These fundamental changes contradict the Court's preliminary approval findings, the notice process, or the notice timeline. *Cf. Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) ("Material alterations to a class settlement generally require a new round of notice to the class and a new Rule 23(e) hearing.").

Some form of amendment or guidance was and remains necessary to clarify several ambiguous aspects of the DuPont Agreement.[2] In their Motion to Supplement (Dkt. No. 3858), Class Counsel equivocates on whether the Interrelated Guidance substantively altered the Agreement with regard to interrelated systems. They vaguely asserted, for instance, that the Interrelated Guidance did not require additional time for Eligible Claimants or others to analyze because it "adheres to existing principles" in the DuPont Agreement. Dkt. No. 3859 at 3. Yet, the Interrelated Guidance creates only more confusion as to the scope of the settlement class and the scope of the Release.

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[2] Of note, two separate groups have raised questions regarding the scope of the Agreement as proposed: two large wholesalers raising concerns regarding the status of wholesale water providers, Dkt. No. 40; and the Leech Lake Band of Ojibwe with respect to Tribes and tribe-run water systems, Dkt. No. 50.

2. Ambiguity as to systems included.

The Interrelated Guidance introduces new, undefined terms including: Wholesaler, Retailer, and Purchased Water. Dkt. No. 3856-1. Wholesalers represent a critical part of the PWS and are not uniform in nature. Wholesalers process massive quantities of water that far exceed that processed by the typical PWS.

There are various types of wholesale water arrangements. For example, a wholesaler of treated water may sell treated water to its customer systems. A wholesaler of raw, untreated water may sell that water to its customers who may, themselves, in turn be wholesalers. Raw, untreated water may be purchased by another entity that, in turn, treats the water and then sells the treated drinking water to systems that provide drinking water directly to end-users or to other PWSs that provide water to end-users. In the wholesale context, LCRA provides raw, untreated water.

The Agreement and Interrelated Guidance both fail to address and appear to have been drafted without appreciation for many features and distinctions among these types of water systems. The Interrelated Guidance is not specific as to what type of Wholesalers or Purchased Water are covered by the DuPont Agreement so fail to accord with practical realities.

Raw, untreated water should be excluded from the Agreement if it is intended to address claims related to treating Drinking Water only. Because LCRA is not a Class Member, it should not and cannot be held to be a Releasing Person under fundamental principles of due process and fairness.

3. Ambiguity as to scope of Release.

The Interrelated Guidance backsteps from providing substantive clarity as to the scope of the Release. The "Scope of Release" section in the Guidance, for example, describes how the Release should operate, and as discussed above purports to subject a wholesaler to the Release

even if it has opted out. *See supra* Part IV.A.1. Then, the section concludes that "[u]ltimately, whether claims are released will turn on the application of the release provisions of the Settlement Agreement." Dkt. No. 3858-1. That caveat in essence invalidates the entire related portion of the exercise apparently mischaracterized as a clarification.

4. Eligible class participants have not received adequate notice of this Guidance.

The Interrelated Guidance is a substantive change to the DuPont Agreement that requires notice. Class Counsel failed to provide notice to large portions of eligible claimants that are directly implicated by the Guidance. As a result, wholesalers may unknowingly be bound by the settlement, either as Class Members or Releasing Persons, and have potential claims waived by their customers, due to fast-approaching deadlines for opt-out that do not allow for coordination with customers or for approval by relevant governing bodies. Such a result would violate fundamental due process elements, especially when wholesalers could easily have been identified and informed of their potential claims through a public database search. *See Ashok Babu v. Wilkins*, No. 22-15275, 2023 WL 6532647, at *1 (9th Cir. Oct. 6, 2023) (noting that due process requires notice to be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

D. Objection Topic: Overbroad Definition of Water Source

Water Source is defined as "any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water." Dupont Agreement, § 2.71. This definition is so broad that it could be read to encompass raw, untreated water such as that diverted by LCRA customers from the raw, untreated water sources managed by LCRA (e.g., lakes and rivers). The Release would, as worded, apply to claims arising from

PFAS entering a PWS's Water Source. *Id*. In other words, entities that sell or draw water from vast swaths of rivers, streams, lakes that are the source of raw, untreated water could be left without any recourse against the Released Persons should PFAS contamination later be identified in those water bodies. Further, the downstream entities would also release their claims without any payment because the Allocation Procedures state that "a purchased water connection from a seller that is a Water Source is not a Water Source." *Id.* Ex. C, § 4(h)(iii)(e). The overly broad definition of Water Source is beyond the claims of this litigation and may prevent any entity in a complex system from having a valid claim for Settlement Funds even if one or more are Class Members.

E. Objection Topic: Consultation Requirement

The DuPont Agreement Claims Form requires that the Class Member declare under penalty of perjury that it "has authority to release all Released Claims on behalf of itself and all other Persons who are Releasing Persons by virtue of their relationship or association with it." *See* DuPont Agreement Claims Form. But as explained, *see* Part IV.A.1, the definition of Releasing Persons includes persons (like those in contractual relationships with Class Members) over which Class Members lack any authority to bind and with which Class Members do not have a principal-agent relationship. The definition also facially encompasses persons that may have opted out. Nonetheless, the Claims Form language would appear to require a Class Member to identify and consult with all such entities, and ultimately make claims *on their behalf*. A Class Member cannot reasonably certify that it has authority to release on behalf of Releasing Persons when the Class Member does not have such authority as a matter of law. Accordingly, the certification in the DuPont Claims Form is flawed and unfair in operation.

V. CONCLUSION

For the foregoing reasons, LCRA respectfully objects to the DuPont Agreement as drafted.

Dated: November 10, 2023.

Respectfully submitted:

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
Marten Law, LLP
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Lower Colorado River Authority

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Court's August 22, 2023 Order on Motion of Class counsel for Preliminary Approval of Settlement Agreement regarding The Chemours Company, et al. (Dkt. No. 3603), the Class Action Settlement Agreement, (Dkt No. 3393-2), and Federal Rule of Civil Procedure 5.

Dated: November 10, 2023.

/s/ Jessica K. Ferrell
/s/ Jeff B. Kray
Jessica K. Ferrell, WSBA No. 36917
Jeff B. Kray, WSBA No. 22174
1191 Second Ave, Suite 2200
Seattle, WA 98101
Phone: (206) 292-2600
Fax: (206) 292-2601
jkray@martenlaw.com
jferrell@martenlaw.com

Attorneys for Lower Colorado River Authority

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	MDL No. 2:18-mn-2873-RMG
	)	**This Document Relates to:**
	)	*City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF LOWER COLORADO RIVER AUTHORITY

I, Thomas E. Oney, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Executive Vice President of External Affairs and Chief People Officer at Lower Colorado River Authority ("LCRA").

2. I submit this declaration in support of LCRA's objection to the proposed settlement agreement. The following is based upon my personal knowledge, and if called as a witness, I could and would competently testify to the facts contained herein.

3. I have been employed by LCRA since 2014. In my current position as Executive Vice President of External Affairs and Chief People Officer, I oversee all of LCRA's public-facing and advocacy functions, including Communications, Community Resources, Environmental Affairs, Public Affairs and Regulatory Affairs as well as LCRA's Human Resources team.

4. LCRA is a conservation and reclamation district created by the Texas Legislature in 1934 under Section 59, Article XVI of the Texas Constitution., LCRA provides untreated

water to over 120 firm customers in Central Texas. Many of LCRA's customers are cities or other local entities that are, like LCRA, also political subdivisions of the State. LCRA also operates the LCRA Environmental Laboratory Services, which provides environmental lab testing, including for PFAS. LCRA does not concede that it is subject to the Settlement as an "Eligible Claimant" or "Releasing Person" or for any other reason. As drafted, however, it could arguably be construed to be a "Releasing Person" under § 2.45 of the DuPont Agreement. LCRA therefore files these objections in order to protect its rights from being materially prejudiced.

5. LCRA 1) did not have an Impacted Water Source as of the Settlement Date and 2) is not required to test for certain PFAS under UCMR-5 deadline; nor is it required under state or federal law to test or otherwise analyze its Water Source or water it provides for PFAS § 5.1. However, LCRA's rights could be affected by the DuPont Agreement because, as written, DuPont could argue that LCRA would qualify as a "Releasing Person" if any of its customers participate in the Settlement. *See* DuPont Agreement § 2.45. Further, because LCRA provides water quality testing and other environmental services for the benefit of all its customers, DuPont could argue it is "in privity" or "acting on the behalf of" Settlement Class Members if any of its PWS customer participate, sweeping it into the definition of "Releasing Person." *See id.*

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at 3700 Lake Austin Blvd., Austin, Texas 78703.

Thomas E. Oney

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF JESSICA K. FERRELL

I, Jessica K. Ferrell, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1. of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner at the law firm of Marten Law LLP ("Marten Law"). I certify that I have been legally authorized to object on behalf of Settlement Class Member Lower Colorado River Authority ("River Authority") in *City of Camden, et al. v. E.I. du Pont de Nemours & Company et al.*, Case No. 2:23-cv-03230-RMG.

2. I am over the age of eighteen and competent to testify as to the facts stated herein. I submit this affidavit in support of the River Authority's objections to the DuPont Agreement.

3. All objections asserted by the River Authority and the specific reasons for each objection, including all legal support and evidence the River Authority wishes to bring to the Court's attention are included in the memo titled "Objections" (DuPont Agreement Section 9.6.1.4.).

4. An affidavit proving the River Authority's standing is included as an attachment titled "Affidavit of Oney" (DuPont Agreement Section 9.6.1.1.).

5. Per DuPont Agreement Section 9.6.1.2., the name, address, telephone and facsimile numbers, and email address for the River Authority are as follows:

- Lower Colorado River Authority
  - Address: 3700 Lake Austin Blvd., Austin TX 78703
  - Telephone number: (512) 578-3200
  - Facsimile number: (512) 576-4010
  - Email address: Lyn.Clancy@LCRA.org

6. Per DuPont Agreement Section 9.6.1.3., the name, address, telephone and facsimile numbers, and email address of counsel representing the River Authority are as follows:

- Jessica K. Ferrell
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jferrell@martenlaw.com
- Jeff B. Kray
  - Address: 1191 Second Ave, Suite 2200, Seattle, WA 98101
  - Telephone number: (206) 292-2600
  - Facsimile number: (206) 292-2601
  - Email address: jkray@martenlaw.com

7. The River Authority wishes to have counsel appear on its behalf at the Final Fairness Hearing (DuPont Agreement Section 9.6.1.5.).

8. The River Authority does not intend, at this time, to call any witnesses to testify at the Final Fairness Hearing but reserves its right to provide timely notice if it later identifies any

such witnesses it intends to call (DuPont Agreement Section 9.6.1.6.).

I declare under penalty of perjury that the foregoing is true and correct, under 28 U.S.C. § 1746.

Executed this 10th day of November, 2023, at Seattle, Washington.

Jessica K. Ferrell

EXHIBIT R

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAM PRODUCTS LIABILITY LITIGATION	)))))))))	MDL No. 2:18-mn-2873-RMG This document relates to: *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), et al., Case No. 2:23-cv-03230-RMG*

OBJECTIONS OF THE CITY OF NEWBURGH

The City of Newburgh, New York ("City"), by its counsel Knauf Shaw, LLP, submits the following objections to the proposed settlement agreement as amended ("DuPont Agreement") between the DuPont Defendants and public water providers in the above-captioned action. The Affidavit of Amy K. Kendall in support of these Objections, dated November 11, 2023, is attached as Exhibit 1.

The City is an active public water system in the United States providing drinking water to approximately 29,000 people in the City of Newburgh, New York. The City discovered PFAS in its former, primary drinking water source in 2016.

1. The Release in Section 12 ("Release") is Overly Broad.

A. The Release Covers All Known and Unknown PFAS Chemicals.

The DuPont Agreement releases claims as to PFAS in drinking water. It in turn defines PFAS as those PFAS on UCMR 5, "any substance asserted to be PFAS in Litigation," and:

> per- and polyfluoroalkyl acids (and any salts thereof), per- and polyfluoroalkyl halides, per- and polyfluoroalkyl alcohols, per- and polyfluoroalkyl olefins, per- and polyfluoroalkane sulfonyl fluorides (including any acids and salts thereof), perfluoroalkyl iodides, per- and polyfluoroalkyl ether-based substances, fluoropolymers, perfluoropolyethers, per- and polyfluoroalkanes, side-chain fluorinated aromatics, per- and polyfluorinated phosphates and phosphonates, per- and polyfluorinated sulfonamides, per-

> and polyfluorinated urethanes, and chemical precursors and degradation products of all such substances, including fluorinated monomers, polymers and side-chain fluorinated polymers and metabolites of all such substances . . . .

DuPont Agreement § 2.38. This definition then states its "intention" that it "be as broad, expansive, and inclusive as possible." *Id.*

The Release is framed as relating to all current or future Claims related to PFAS. There are thousands of known PFAS compounds, but only a few are reasonably understood. Compensation under the DuPont Agreement is based primarily on PFOS and PFOA, and possibly one other PFAS. The Release would relieve defendants of *all* liability for *all* PFAS compounds, when there are not even available, approved testing methods for many of them, and the impacts of these chemicals on humans are barely understood. The DuPont Agreement is not fair, reasonable or adequate as it is asking the class participants to release DuPont from future unknown liability for thousands of PFAS compounds that have not been effectively studied and understood based upon inadequate compensation for only a limited subset of PFAS compounds which have known treatment costs.

B. The Release Includes Personal Injury Claims.

It is unfair and unreasonable to require the Class Members to release claims arising from personal injury actions. *See generally* DuPont Agreement §12.1. Personal injury claims relating to PFAS in drinking water fit within "all Claims" … "that arise from or relate to PFAS that entered Drinking Water of a Public Water System within the Settlement Class, its Water Sources, its facilities or real property, or any of its Test Sites at any time before the Settlement Date." *Id.*

No water providers have alleged or could allege personal-injury claims in litigation against DuPont. But the City has been sued by individuals alleging personal injuries related to PFAS in the City's drinking water in two separate actions which are also pending in this MDL, *Bermo, et*

al. v. DuPont, 2:18-cv-03522-RMG, and *Hebrank v. City of Newburgh,* 2:18-cv-2219-RMG.[1] The City denies liability for the claims in these actions, and further denies that the claims are viable. By signing the DuPont Agreement as it is currently written, the City would have to release its claims against DuPont in those personal injury actions. This is fundamentally unfair because the DuPont Agreement is purportedly limited to Drinking Water Claims. If the DuPont Agreement extends to cover personal injury claims, the amount of the settlement is wholly inadequate.[2]

The Court has recognized that the claims made by water providers are important and significantly different from those alleging personal injury, such that the Court ordered the claims of water providers proceed through discovery and to a bellwether trial first (though the trial did not proceed due to the settlements). Water providers, including the City, are facing considerable liability while bearing no fault. If they participate in a settlement including the current release language, they would have no contribution recourse against DuPont. For example, if the City participates in the DuPont Agreement as the release language is currently written, it would not be able to recover from DuPont for amounts that may be awarded to personal injury plaintiffs in existing cases in this MDL. The calculations of allocation amounts set forth in the DuPont Agreement are predicated on the operation and maintenance of treatment systems—the drinking water system -- not potential damages associated with personal injury claims. *See generally* DuPont Agreement Exhibit C. Thus there is no identical factual predicate between the release of the water provider's Drinking Water claims and claims for indemnification for personal injury

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[1] While counsel has attempted to raise this issue before, in order to discharge any potential obligation under Rule 8.3 of the New York Rules of Professional Conduct, counsel advises this tribunal of a conflict of interest between Class Counsel Paul Napoli's representation of the class of "public water suppliers", including the City of Newburgh, and his representation of personal injury plaintiffs against the City of Newburgh in the above-referenced actions which may affect the terms of the DuPont Agreement as described herein.

[2] Another ambiguity is how the responsibility of DuPont in any Claim-Over would be offset. Section 12 references "applicable law" in multiple places. While under Paragraph 13.18 the DuPont Agreement is to be interpreted under South Carolina law, in New York the effect of a release given to a joint tortfeasor is determined by New York General Obligations Law §15-108.

claims.

C. Clause (ii) of Paragraph 12.1.1 of the DuPont Agreement Is Overly Broad.

Paragraph 12.1.1(ii) of the DuPont Agreement releases claims that arise out of, relate to, or involve "the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS alone or in products that contain PFAS as an active ingredient, byproduct, or degradation product, including AFFF…." Exposure to and remediation of PFAS results from DuPont's activities set out in Clause (ii) and therefore any claim against DuPont will be released. This broad release extends impermissibly beyond the scope of alleged claims, which are limited to PFAS in Drinking Water and Public Water Systems.

D. The Phrase "not related" Contained in Paragraph 12.1.2 Is Overly Broad and Makes the Exceptions Essentially Meaningless.

The City of Newburgh brought its actions as: 1) the owner of real property in the Towns of New Windsor and Newburgh containing the Washington Lake Reservoir ("Washington Lake"), the former primary water supply for the City, portions of the City's drinking water reservoir watershed, and other parts of the City's public water supply and distribution system; 2) as a user of waters that flow through the City's watershed; and 3) as the operator of the public water supply system for City residents, businesses and other water users.

Paragraph 12.1.2 states that the Release does not apply where a Class Member "also owns real property or owns and operates a facility that is *separate from and not related to* a Public Water System and does not provide Drinking Water (emphasis added)."

For the City, its former Water Source, Washington Lake, is real property that it owns, pays taxes on and is contaminated with PFAS. It is not just the water in the lake that is contaminated—water which may never again become Drinking Water if the sources of the PFAS contamination are not removed and remediated. The sediment at the bottom of the lake is contaminated and the

contaminants there can continue to move in to and contaminate the water. Washington Lake is "separate from" the City's Public Water System, because it is a "Water Source" or possibly a former "Test Site" but cannot be said to be "not related in any way" to the City's Public Water System. Similarly, property owned by the City in the City's watershed is "separate from" the City's Public Water System, but no property in the watershed meets the requirement of being "not related in any way" to the City's Public Water System. Paragraph 12.1.2.1 references an airport or fire training facility as being "not related," but that ignores how groundwater and surface water flow and how PFAS contamination is spread. The discharge of PFAS-containing AFFF at airports and fire training facilities result in surface, stormwater and groundwater contamination that caused and is still causing the contamination of the City's property and its former water supply. It probably cannot be said that airports and fire training facilities are "not in any way related" to the City's or other water suppliers' public water systems. The fact that they are intimately connected is the reason PFAS contamination is so widespread. This overly broad language carries with it the potential to extinguish all of the Class Members' claims against DuPont related to damage to real property.

This Section also purports to exempt wastewater or stormwater systems, but it probably cannot be said that these systems are "not related to" the City's public water system. For example, the City of Newburgh operates a wastewater treatment facility. Much of the water going into the wastewater treatment facility started in the City's Water Source and moved through its Public Water System as those terms are defined in the DuPont Agreement. Additionally, to operate a Public Water System, filters, including those that become contaminated with PFAS, have to be flushed and the flushed water goes to the wastewater treatment facility. This is likely the case for other class members as well. Therefore, it cannot be said that a wastewater facility is "separate

from and not in any way related" to the Public Water System or Water Sources. This again ignores how water flows. The condition in subsection (a) effectively nullifies the exception. The Release is therefore not narrowly tailored to claims for Public Water Systems / Drinking Water and therefore is not fair, reasonable or adequate.

CONCLUSION

For these reasons, the City of Newburgh requests that the Court reject the DuPont Agreement.

Dated: November 11, 2023

Amy K. Kendall, Esq.
NY Reg. #2932317
Knauf Shaw LLP
2600 Innovation Square
100 S. Clinton Avenue
Rochester, NY 14604
Telephone: (585) 546-8430
Fax: (585) 546-4324
Email: akendall@nyenvlaw.com

DECLARATION

I declare under penalty of perjury that I have been legally authorized to file the foregoing objections on behalf of the City of Newburgh and that the foregoing is true and correct, except as to those statements alleged upon information and belief, and those statements I believe to be true and correct.

Amy K. Kendall, Esq.

2:23-mn-02873-RMG Date Filed 11/11/23 Entry Number 4089-1 Page 8 of 9

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2023, the foregoing document was filed via CM/ECF and by enclosing a copy of the same in a first-class, postage paid envelope addressed to the parties below and placing the envelope in an official depository of the U.S. Postal Service at 1335 Jefferson Rd, Rochester, NY 14692.

Clerk of the Court:

Clerk, United States District Court for the
District of South Carolina
85 Broad Street
Charleston, SC 29401

DuPont Parties:

The Chemours Company
Office of the General Counsel
1007 Market Street
Wilmington, DE 19801
Attn: Kristine M. Wellman

Jeffrey M. Wintner
Graham W. Meli
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

DuPont de Nemours, Inc.
974 Centre Rd.
Wilmington, DE 19806
Attn: Erik T. Hoover

Kevin T. Van Wart
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Corteva Inc.
974 Centre Road
Building 735
Wilmington, DE 19805
Attn: Cornel B. Fuerer

Michael T. Reynolds
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019

EIDP, Inc.
974 Centre Road
Building 735
Wilmington, DE 19805
Attn: Thomas A. Warnock

Class Counsel:

Scott Summy
Baron & Budd, P.C.
3102 Oak Lawn Ave., Ste. 1100
Dallas, Texas 75219

Michael A. London
Douglas & London
59 Maiden Lane, 6th Floor
New York, NY 10038

Paul J. Napoli
Napoli Shkolnik
1302 Av. Ponce de Leon
San Juan, Puerto Rico 00907

Elizabeth A. Fegan
Fegan Scott LLC
150 S. Wacker Drive, 24th Floor
Chicago, IL 60606

Joseph F. Rice
Motley Rice LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 2946

/s/ *Amy K. Kendall*

Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAM PRODUCTS LIABILITY LITIGATION	)))))))	MDL No. 2:18-mn-2873-RMG This document relates to: *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), et al.*, Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF AMY K. KENDALL

I, Amy K. Kendall, hereby declare under penalty of perjury in accordance with 28 U.S.C. § 1746 and Section 9.6.1 of the proposed settlement between Defendant DuPont and public water providers ("DuPont Agreement") that the following is true and correct:

1. I am a partner in the law firm of Knauf Shaw LLP, attorneys for the City of Newburgh, New York. As such, I am fully familiar with the facts set forth herein.

2. I certify that I have been legally authorized to object on behalf of Settlement Class Member City of Newburgh, New York ("City") in *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.) et al.*, Case No. 2:23-cv-03230-RMG.

3. I submit this Affidavit in support of the City's objections to the DuPont Agreement.

4. The City has standing. The City is a public water supplier in the State of New York serving approximately 29,000 people.

5. The City commenced an action against DuPont in the Supreme Court in the State of New York on August 18, 2023, which case was removed to federal court and transferred to this multidistrict litigation (2:23-cv-04891) alleging *inter alia* damages in connection with the contamination of the City's watershed, property, and drinking water source by PFAS.

6. Pursuant to Section 9.6.1.2 of the DuPont Agreement, the filer and claimant information is as follows:

The City of Newburgh's information is:

City of Newburgh
Todd Venning, Chief Executive Officer / City Manager
City Hall
83 Broadway
Newburgh, NY 12550
Telephone: (845) 569-7301
Fax: (845) 569-7339
Email: TVenning@cityofnewburgh-ny.gov

This Objection is filed by the City of Newburgh's counsel:

Alan J. Knauf
Amy K. Kendall
2600 Innovation Square
100 S. Clinton Avenue
Rochester, NY 14604
Telephone: (585) 546-8430
Fax: (585) 546-4324
Email: aknauf@nyenvlaw.com
akendall@nyenvlaw.com

7. Pursuant to Section 9.6.1.3 of the DuPont Agreement, the following counsel represent the City in connection with the AFFF multidistrict litigation:

Michelle Kelson, Corporation Counsel
City of Newburgh
City Hall
83 Broadway
Newburgh, NY 12550
Telephone: (845) 569-7335
Fax: (845) 569-7339
Email: mkelson@cityofnewburgh-ny.gov

Alan J. Knauf
Amy K. Kendall
Knauf Shaw LLP
2600 Innovation Square
100 S. Clinton Avenue

Rochester, NY 14604
Telephone: (585) 546-8430
Fax: (585) 546-4324
Email: aknauf@nyenvlaw.com
akendall@nyenvlaw.com

John J. Walsh
Hodges Walsh & Burke, LLP
55 Church Street, Suite 211
White Plains, NY 10601
Telephone: (914) 385-6000
Fax: (914) 385-6060 fax
Email: jwalsh@hwb-lawfirm.com

8. Pursuant to Section 9.6.1.5 of the DuPont Agreement, the City, through its counsel Alan J. Knauf and Amy Kendall, wishes to appear at the Final Fairness Hearing.

9. Pursuant to Section 9.6.1.6 of the DuPont Agreement, the City does not at this time intend to call witnesses since the City does not believe that by making its objections it raises any factual issues that require the testimony of witnesses, but reserves the right to provide timely notice if it later identifies any witnesses it intends to call.

10. I declare under penalty of perjury that the foregoing is true and correct under 28 U.S.C. § 1746.

Dated: November 11, 2023
Rochester, New York

Amy K Kendall

Amy K. Kendall

EXHIBIT S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCT LIABILITY LITIGATION	)	**MDL NO. 2873**
	)	**Master Docket No. 2:18-mn-2873**
This document relates to:	)	**JUDGE RICHARD GERGEL**
City of Camden, et al v. E.I. DuPont de Nemours and Company, et al., *Case No. 2:23-cv-03230-RMG*	)	
Broward County Florida v. 3M Company, et al., Case No. 2:23-cv-05337-RMG	)	

BROWARD COUNTY'S OBJECTIONS TO DUPONT SETTLEMENT

Broward County ("Broward"), a political subdivision of the State of Florida, by its undersigned counsel, submits this Objection to the Class Action Settlement Agreement ("Settlement") between the Class Representatives on behalf of the Settlement Class Members and defendants The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively, "DuPont") pursuant to Section 9.6 of the Settlement.[1]

A. First Objection: Overbroad Releases (Real Property, Stormwater, and Wastewater Claims)

1. The Settlement is unclear concerning the impact of the releases on real property, stormwater, and wastewater claims that can be traced—in however small a part—to Drinking Water. Section 12.1.3 does not clearly permit (that is, does not clearly exclude from the scope of the release in Sections in Sections 12.1.1 and 12.1.2) claims for remediation, testing, monitoring,

---

[1] All defined terms used herein are intended to refer to the terms as defined in the Settlement. Where corrections are suggested herein, bold/underlined text indicates additions and strikethrough text indicates deletions.

or treatment of stormwater, wastewater, or real property if the damage was caused in some part, however small, by contaminated Drinking Water. Section 12.1.1(i) and (iii) purport to release claims that arise from or relate to PFAS “that entered Drinking Water of a Public Water System within the Settlement Class, its Water Sources, its facilities or real property,” without regard to whether the damage to the facility or real property may be only minimally related to contamination by Drinking Water.

2. Section 12.1.2 states that the releases include claims that arise out of or relate to the “discharge” of water by a Public Water System “(including stormwater or wastewater)” with respect to PFAS that has entered “its facilities or real property.” As written, the scope could be argued to include stormwater, wastewater, and real property claims that arise, however minimally, from Drinking Water discharge, directly or indirectly, into the stormwater or wastewater system or onto real property. The exception in subparagraph (a) is clearly intended to retain these claims, but suffers from the ambiguity created by the final phrase: “to the extent such Claims seek damages not arising from or relating to alleged harm to Drinking Water.” Almost any stormwater, wastewater, or real property Claim could be argued to arise from or related to—in some small part—Drinking Water.

3. The release could also be contended to preclude claims relating to biosolids or reuse water (also referred to as “reclaimed” water) tainted with PFAS, despite the clear intent of the Settlement not to release claims for PFAS-related real property or wastewater treatment and remediation. Reuse water is essentially treated wastewater, and biosolids are a wastewater byproduct. PFAS-claims arising from reuse and biosolids clearly relate to the “processing of stormwater or wastewater at or by such separate [non-Drinking Water] real property or facility” and thus clearly are intended to be captured by the exception under Section 12.1.2(a); however,

the phrasing of the releases could be construed to nonetheless waive these claims: e.g., Section 12.1.1 (releasing claims that "relate to PFAS that entered . . . its facilities or real property"); Section 12.1.2 (releasing Claims regarding "processing of water by a Public Water System[2] within the Settlement Class (including stormwater or wastewater) with respect to PFAS that entered its Water Sources, its facilities or real property").

4. Further, Section 12.1.2 exacerbates the ambiguity through the prefatory phrase "[w]ithout limiting Paragraph 12.1.1, ..." As thus written, the intended exceptions in Section 12.1.**2**(a) and (b) are not exceptions from Section 12.1.**1**, and could be construed not to save the stormwater, wastewater, and real property claims from the overbreadth of Section 12.1.1, despite the apparent intent to save such claims.

5. To remedy these ambiguities, simple amendments could be made to the Sections 12.1.2 and 12.1.3 as follows:

Proposed Correction:

12.1.2. Without limiting Paragraph 12.1.1, the Released Claims include Claims that arise out of or relate to the . . . Public Water System . . . with respect to PFAS that entered its Water Sources, its facilities or real property, . . . except (a) where a Settlement Class Member also owns real property or owns or operates a facility that is separate from and not related to a Public Water System and does not provide Drinking Water . . . , Claims relating to the discharge, remediation, testing, monitoring, treatment or processing of stormwater or wastewater at or by such separate real property or facility**, or damages to**

[2] The reference to "Public Water System" does not clarify the ambiguity, because Section 2.40 defines "Public Water System" include "the owner and/or operator of that system," so that any entity—such as Broward—that owns or operates a Public Water System **is** a Public Water System arguably even with respect to its separate stormwater and wastewater systems.

the real property, are preserved to the extent such Claims seek damages not arising from or relating to alleged harm to **the Public Water System (other than damages arising from or relating to, directly or indirectly, in whole or in part, by PFAS-contaminated** Drinking Water**)**, or (b) . . . .

12.1.3. Notwithstanding Paragraphs 12.1.1 and 12.1.2, (x) the Released Claims shall not include Claims that arise from or relate to a Test Site as to which PFAS is deemed under Paragraph 12.6 to have entered the water or facilities or real property of the Public Water System after the Settlement Date; ~~and~~ (y) any Releasing Person that is not a Public Water System but that is legally responsible for funding (by statute, regulation, other law, or contract) or that has authority to bring a Claim on behalf of, or to seek recovery for harm to, a Public Water System in the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water, gives the release only to the extent of Claims that seek to recover for alleged harm to such Public Water System, and "Released Claims" shall not include other Claims of such Releasing Person**; and (z) the Released Claims shall not include Claims relating to the discharge, remediation, testing, monitoring, treatment, or processing of stormwater or wastewater (or products generated therefrom) by the Settlement Class Member, provided the real property, stormwater system, or wastewater system, as applicable, is separate from the Public Water System and does not provide Drinking Water, and further provided such claims do not seek damages to treat, remediation, test, monitor, or process Drinking Water or otherwise remedy the Public Water System**.

B. Second Objection: Overbroad Releases (Third-Party Real Property Damages)

6. The scope of the releases could also be construed to prevent Broward from impleading DuPont to bear responsibility if Broward were sued by third parties for real property,

stormwater, or wastewater claims. For example, if runoff from use of PFAS-contaminated products at a Broward property (e.g., an airport) damaged adjoining real property or the municipal stormwater system, Broward would be unable to hold DuPont responsible for that liability.

7. To remedy the unintended release of third-party claims, Section 12.1.4 should be modified as follows:

Proposed Correction:

12.1.4. This Agreement shall not release any Claims owned by a State or the federal government where brought, respectively, by the State or the federal government**, or any claim for contribution or indemnity by a Releasing Person relating to a third-party claim by a person or entity that is not a Settlement Class Member or a Released Person for PFAS-related damages to the extent such damages do not arise directly from Drinking Water or the Settlement Class Member's Public Water System**.

C. Third Objection: Overbroad Catchall

8. Section 12.1.1(iv) includes in the scope of Released Claims any other claim "that were or could have been asserted in the Litigation." Despite the clear intention of the Settlement to be limited to Drinking Water, this casual catchall arguably includes all real property, personal injury, wastewater, stormwater, biosolid, and every other conceivable PFAS-related claim. Clearly this is not the intent, but the verbiage is overbroad and needs limitation. This should not be a general release that could be construed to end this case against DuPont on all remaining claims.

Proposed Correction:

". . . (iv) that were or could have been asserted in this litigation **for damages relating to PFAS for harm to the Public Water System** . . ."

D. Fourth Objection: Overbroad Definition of "Releasing Persons"

9. Under Section 2.45(c), "Releasing Persons" includes the Settlement Class Member's past, present, and future officers, directors, employees, board members, agents, etc., "individually or in their official, corporate, or personal capacity." Applied to Broward, the obligations of Releasing Persons would thus include nine County Commissioners (in every iteration over the history of Broward), more than 6,000 current employees, thousands more past or future employees, and a vast array of contractors. Settlement Class Members cannot practically or legally release *individual, personal* claims, consent to jurisdiction and covenant not to sue (Section 12.2), or undertake the vast myriad of other obligations on behalf of all of those persons and entities.

10. This objection could be ameliorated in part by modifying Section 2.45 as follows:

Proposed Correction:

2.45 "Releasing Persons" means . . . (c) any past, present, or future officer, director, employee, trustee, board member, shareholder, representative, agent, servant, insurer, attorney, subrogee, predecessor, successor, or assignee of any of the above, ~~individually or~~ in their official, corporate~~, or personal~~ capacity; . . ."

11. The undersigned is legally authorized to object to the Settlement on behalf of Broward County, Florida. *See* Declaration of Alan Garcia (Exhibit 1) at ¶ 3.

12. Broward County is an Eligible Claimant under the Settlement: Broward County owns and operates one or more active drinking water systems, including Safe Drinking Water Information System ("SDWIS") Nos. FL4060167 and FL4060163. *See* Garcia Decl., ¶ 2. In addition, Broward County filed a complaint in this action on October 24, 2023, *Broward County, Florida v. 3M Company, et al.,* No. 2:23-cv-05337-RMG (D.S.C.).

13. The contact information for Broward County is as follows:

a. Counsel for Broward County:

René D. Harrod, Fla. Bar No. 627666
Ricardo Abraham, Fla. Bar No. 1038488
Matthew S. Haber, Fla. Bar No. 105203
Broward County Attorney's Office
115 South Andrews Avenue, Suite 423, Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Facsimile: (954) 357-7641
rharrod@broward.org
rabraham@broward.org
mhaber@broward.org

b. Broward County, by its Water and Wastewater Services:

Broward County Water & Wastewater Services
Director Alan Garcia and Operations Director Mark Darmanin
2555 W. Copans Road, Pompano Beach, Florida 33069
Telephone: (954) 831-3250
Facsimile: (954) 831-0842
agarcia@broward.org
mdarmanin@broward.org

14. In support of the foregoing objections, Broward wishes to appear at the Final Fairness Hearing and would present testimony from: Alan Garcia, Director, Broward County Water and Wastewater Services; and Mark Darmanin, Operations Director, Broward County Water and Wastewater Services.

Date: November 11, 2023

Respectfully submitted,

/s/ René D. Harrod

René D. Harrod, Fla. Bar No. 627666
Ricardo Abraham, Fla. Bar No. 1038488
Matthew S. Haber, Fla. Bar No. 105203
Broward County Attorney's Office
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
rharrod@broward.org
rabraham@broward.org
mhaber@broward.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 10th day of November, 2023 and was thus served electronically upon counsel of record.

/s/ René D. Harrod

René D. Harrod, Fla. Bar No. 627666
Ricardo Abraham, Fla. Bar No. 1038488
Matthew S. Haber, Fla. Bar No. 105203
Broward County Attorney's Office
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
rharrod@broward.org
rabraham@broward.org
mhaber@broward.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BROWARD COUNTY, FLORIDA	)	
	)	**MDL NO. 2873**
Plaintiff,	)	
	)	**Master Docket No. 2:18-mn-2873**
v.	)	
	)	**JUDGE RICHARD GERGEL**
3M COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF ALAN GARCIA

1. I am the Director for Broward County's Water and Wastewater Services.

2. Broward County is an Eligible Claimant as defined in the proposed settlements because Broward County owns and operates one or more active public water systems, including Safe Drinking Water Information System ("SDWIS") Nos. FL4060167 and FL4060163.

3. Counsel for Broward County is legally authorized to object to the proposed settlements on behalf of Broward County.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/9/23

By:______________________
Alan Garcia, Director
Broward County Water and Wastewater Services

EXHIBIT T

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** ***City of Camden v. E.I. Dupont De Nemours, Case No. 23-03230-RMG*** ***Town of East Hampton v. 3M Co. Case No. 19-01639-RMG*** ***Shipman v. 3M Co. Case No. 18-03340-RMG*** ***Town of Harrietstown v. 3M Co. Case No. 21-00862-RMG*** ***Town of Islip, New York v. 3M Co. Case No. 21-01915-RMG***

AFFIRMATION IN SUPPORT OF THE OBJECTION OF THE TOWN OF EAST HAMPTON, TOWN OF ISLIP AND TOWN OF HARRIETSTOWN TO FINAL APPROVAL OF THE PROPOSED DUPONT SETTLEMENT

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N.Y. Const. Art. X, § 5 23

Nicholas C. Rigano, Esq., an attorney duly admitted to practice law in the Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the Eastern District of New York, the Southern District of New York and the State of New York, hereby affirms under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Partner with the firm Rigano LLC, attorneys for Town of East Hampton, Town of Islip, and Town of Harrietstown (collectively, "Towns"). I am fully familiar with the facts and circumstances set forth herein and know them to be true, except for those stated to be based on information and belief, and as to those matters, I believe them to be true. This objection is submitted on behalf of Towns, and those similarly situated, in opposition to final approval of the proposed class action settlement (the "Proposed Settlement") among a class of public water systems and The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc. and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (collectively, the "Dupont Entities") (Dkt. No. 3393). For the reasons below, Towns respectfully request that: (i) the Proposed Settlement be amended in accordance with this Objection, (ii) approval of the Proposed Settlement be denied, and/or (iii) such other, further and different relief be granted as is deemed just and proper.

2. Towns have filed a Motion to Intervene in this action [Dkt. No. 3933], which has not yet been fully briefed or decided by this Court. Towns motion to intervene is fully incorporated herein to the extent necessary. Towns also fully incorporate and restate herein all objections to the Proposed Settlement filed by other parties.

3. I have been legally authorized to object on behalf of Towns. I wish to appear and be heard at the Final Fairness Hearing. At this time, Towns do not intend to call any witnesses at the Final Fairness Hearing, but Towns reserve their rights to do so. My address is set forth in the signature block below.

4. Town of East Hampton's address is Town of East Hampton c/o Town Attorney, 159 Pantigo Rd. East Hampton, NY 11937, Tel: (631) 324-8787, Fax: (631) 329-5371, rconnelly@ehamptonny.gov.

5. Town of Harrietstown's address is Town of Harrietstown, c/o Town Supervisor Jordanna Mallach, 39 Main Street, Saranac Lake, NY 12983, Tel: (518) 891-1470, Fax: (518) 891-6265, jmallach@harrietstown.org.

6. Town of Islip's address is Town of Islip c/o Town Attorney 655 Main Street, Islip, NY 11751, Tel: (631) 224-5550, Fax: (631) 224-5573, mwalsh@islipny.gov.

PRELIMINARY STATEMENT

7. The Proposed Settlement broadly defines the term "Releasing Persons" to include many parties across the country, such as Towns, that have no apparent ability to opt out fully from the Proposed Settlement or to recover money thereunder. Under the agreement, "Releasing Persons" broadly release the Dupont Entities from all historical claims associated with PFAS.

8. Towns operate airports in New York State that have been designated as superfund sites. Towns are required to remediate those sites to applicable standards under the direction of the New York State Department of Environmental Conservation ("NYSDEC"). In instances where drinking water is impacted, Towns are required to remediate drinking water both on-site and off-site of airport properties. Towns have conducted (and continue to conduct) this remediation by entering into agreements with public water suppliers to extend the public water main and/or connect wells of "Public Water Systems" to alternative water sources at Towns' expense and at NYSDEC's direction.

9. This remediation appears to cause Towns to be "Releasing Persons" because that term includes: (i) anyone in "privity" (an undefined term) with a "Settlement Class Member", and

(ii) anyone "legally responsible for funding" a "Settlement Class Member". If not revised, the Proposed Settlement may: (i) inequitably cause Towns and similarly situated parties to release the Dupont Entities from all PFAS claims, and (ii) inhibit Towns and similarly situated remedial parties from remediating drinking water in the future.

10. Further, the definition of the proposed class is ambiguous. As written, the class includes all "Transient Non-Community Water Systems" and all "Non-Transient Non-Community Water Systems", regardless of whether those water systems are registered in the Safe Drinking Water Information System database ("SDWIS"). These terms are defined so broadly that they covertly include many parks, golf courses, rest stops, convenience stores, hotels, restaurants, office buildings, schools, colleges, hospitals, factories, etc. throughout the United States, as well as their owners and operators. If the well at such location had a PFAS detection "at any level" or the well is sampled for PFAS by December 31, 2025, such "Public Water System" is pulled into the class, limiting the class member's recovery to less than $2,000 in exchange for a broad sweeping release to the Dupont Entities. This is true whether or not such "Public Water System" is in the SDWIS database or otherwise receives a class notice from the Dupont Entities, leaving many municipalities and business owners at risk. Further, in order to opt out from the Settlement Class, a party is required to identify on its Request for Exclusion form every single well it owns or operates that falls under the definition of "Transient Non-Community Water Systems" and all "Non-Transient Non-Community Water Systems". This is an impossible burden for the Towns placing them at real risk of getting a mere $2,000 in exchange for involuntarily giving the Dupont Entities a releases Towns' multi-million dollar claims.

11. In fact, the class notice does not fully explain these issues, exacerbating the problem. Further, this settlement has been touted by Class Counsel and by the press as one with

"water providers". Unsuspecting parties throughout the country, such as golf courses, hotels and municipalities operating a park or airport (like Towns), remain uninformed that they may be releasing the Dupont Entities of valuable PFAS claims for nominal or no consideration.

12. Towns were not invited to participate in the negotiations. While Towns do appreciate the effort of all parties and the skill required of all attorneys to negotiate such a complex document, Towns respectfully submit that both the Dupont Proposed Settlement and 3M Proposed Settlement require rigorous scrutiny because the public treasury is at stake. It is apparent that "Transient Non-Community Water Systems" and all "Non-Transient Non-Community Water Systems" falling under the class are not ascertainable, their claims are not typical of Proposed Class Representatives, and they are not adequately represented. Accordingly, the Proposed Settlement does not meet Rule 23 requirements.

13. Towns requested Class Counsel clarify many of these important issues prior to filing this objection, but Towns did not receive a substantive response. Towns respectfully request that the Proposed Settlement be amended accordingly, approval of the Proposed Settlement be denied, and/or such other, further and different relief be granted as is deemed just and proper.

BACKGROUND

I. Pertinent Terms of the Proposed Settlement

14. Allocation Procedure: "Transient Non-Community Water Systems" will receive a settlement payment of $1,250 and "Non-Transient Non-Community Water Systems" serving less than 3,300 people will receive a settlement payment of $1,750. Proposed Settlement, Ex. C (Allocation Procedure), 4(f)(ii).

15. Claims-Over: "The Order Granting Final Approval will . . . bar any Claim by any Non-Released Person against any Released Person for contribution, indemnification, or otherwise

seeking to recover all or a portion of any amounts paid by or awarded against that NonReleased Person to any Settlement Class Member or Releasing Person by way of settlement, judgment, or otherwise (a "Claim-Over") on any Claim that would be a Released Claim were such Non-Released Person a Settling Defendant, to the extent that a good-faith settlement (or release thereunder) has such an effect under applicable law . . . If a Released Claim asserted by a Settlement Class Member gives rise to a Claim-Over against a Released Person and a court determines that the Claim-Over can be maintained notwithstanding the order referenced in Paragraph 12.7.1, the Settlement Class Member shall reduce the amount of any judgment it obtains against the Non-Released Person who is asserting the Claim-Over by whatever amount is necessary, or take other action as is sufficient, to fully extinguish the Claim-Over under applicable law. Nothing herein prevents a Settlement Class Member from pursuing litigation against a Non-Released Person and collecting the full amount of any judgment, except to the extent it is necessary to protect the Released Person to fully extinguish a Claim-Over under applicable law." Proposed Agreement, §§12.7.1, 12.7.2.

16. "Final Judgment" means "that the Order Granting Final Approval has become final and non-appealable . . . ." Proposed Settlement, § 2.23.

17. "Non-Transient Non-Community Water System" means a "Public Water System that is not a Community Water System and that regularly serves at least 25 of the same people over 6 months per year. A 'Non-Transient Non-Community Water System' shall include the owner and/or operator of that system." Proposed Settlement, § 2.29.

18. "Person" means "any type of person or entity, whether natural, legal, private or public." Proposed Settlement, § 2.37.

19. "PFAS" includes thousands of chemicals. *See* Proposed Settlement, § 2.38.

20. “Public Water System” means “a system for the provision of water to the public for human consumption through pipes or other constructed conveyances, if such system . . . regularly serves at least twenty-five (25) individuals . . . A ‘Public Water System’ shall include the owner/operator of that system and, for purposes of Paragraph 5.1.1 only, shall also include any Entity that is legally responsible for funding (by statute, regulation, other law, or contract), other than a State or the federal government, a Public Water System described in clauses (a) or (b) of such Paragraph . . . For purposes of this Settlement Agreement, ‘Public Water System’ includes Community Water Systems, Non-Transient Non-Community Water Systems, and Transient Non-Community Water Systems (including, in each case, Inactive Water Systems).” Proposed Settlement, § 2.40.

21. “Released Claims” means “[u]pon entry of the Final Judgment, the Releasing Persons shall have . . . released . . . the Released Persons from any and all Claims arising out of or relating to conduct by, or liability of, Released Persons before the Settlement Date . . . (ii) that arise from or relate to the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS alone or in products that contain PFAS as an active ingredient, byproduct, or degradation product, including AFFF . . . (iv) that were or could have been asserted in the Litigation . . . .” Proposed Settlement, § 12.1.1.

22. “Released Claims” addition: “Without limiting Paragraph 12.1.1, the Released Claims include Claims that arise out of or relate to the discharge, remediation, testing, monitoring, treatment or processing of water by a Public Water System within the Settlement Class (including stormwater or wastewater) with respect to PFAS that entered its Water Sources, its facilities or real property, or any of its Test Sites at any time before the Settlement Date (as set forth in Paragraph 12.6) . . . . “ Proposed Settlement, § 12.1.2.

23. Released Claims carveout: "any Releasing Person that is not a Public Water System but that is legally responsible for funding (by statute, regulation, other law, or contract) . . . a Public Water System in the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water gives the release only to the extent of Claims that seek to recover for alleged harm to such Public Water System, and 'Released Claims' shall not include other Claims of such Releasing Person". Proposed Settlement, § 12.1.3(y).

24. "Released Persons" means the Dupont Entities (as defined herein) and related Parties. *See* Proposed Settlement, p. 1, § 2.44.

25. "Releasing Persons" means "(a) Settlement Class Members . . . (d) any Person, other than a State or the federal government, in privity with or acting on behalf of any of the foregoing, including in a representative or derivative capacity; (e) any Person, other than a State or the federal government, that is legally responsible for funding (by statute, regulation, other law, or contract) a Settlement Class Member or has authority to . . . seek recovery for . . . the ability of such system to provide safe or compliant Drinking Water; and (f) any Person, other than a State or the federal government . . . seeking recovery for . . . the Public Water System's ability to provide safe or compliant Drinking Water." Proposed Settlement, § 2.45 (as amended).

26. "Requests for Exclusion": "Any Person within the Settlement Class who wishes to optout of the Settlement Class and Settlement must file a written and signed statement entitled 'Request for Exclusion' with the Notice Administrator and provide service on all Parties in accordance with Federal Rule of Civil Procedure 5." Proposed Settlement, § 9.7.

27. Requests for Exclusion guidance provides: "[y]ou must submit a Request for an Exclusion on behalf of each such Public Water System that you wish to opt out of the Settlement

Class. Any Public Water System that is not specifically identified in a Request for Exclusion will remain in the Settlement Class." *See* Interpretive Guidance Dkt. No. 3967, pp. 5-6.

28. "Settlement Class" includes: "[a]ll Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before the Settlement Date, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level" . . . and "All Public Water Systems in the United States of America that, as of the Settlement Date, are . . . (ii) required under applicable federal or state law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline [*i.e.*, December 2025)]." Proposed Settlement, § 5.1.1.

29. "Settlement Class Member" means "any Public Water System or Entity that is a member of the Settlement Class . . . ." Proposed Settlement, § 2.52.

30. "Settlement Date" means June 30, 2023. Proposed Settlement, p.1.

31. "Transient Non-Community Water System" means "any Public Water System that is not a Community Water System and that does not regularly serve at least 25 of the same nonresident persons per day for more than six months per year. A 'Transient Non-Community Water System' shall include the owner and/or operator of that system." Proposed Settlement, § 2.66.

II. Preliminary Approval of the Proposed Settlement

32. On July 14, 2023, the Court held a status conference where counsel for Towns was heard. During that hearing, lead Plaintiff's counsel stated: "one of the things that we don't believe [Towns are] prejudiced because [Towns'] claims have not been released. They've not been waived.

They've not been impacted by this."[1] As set forth herein, that statement does not appear to be correct.

33. On July 17, 2023, Towns objected to the Proposed Settlement on a preliminary basis. *See* Dkt. No. 3415.[2] On August 22, 2023, the Court entered the Preliminary Approval Order. *See* Dkt. No. 3603.

ARGUMENT

POINT I
TOWNS HAVE STANDING TO OBJECT

34. The United States Supreme Court set forth the elements of standing in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not `conjectural' or `hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 454 (4th Cir. 2017). For the reasons set forth below, Towns have standing in two ways: (i) as "Settlement Class Members" and (ii) as "Releasing Persons".

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[1] Ex 1, p. 39:5-8. Exhibit 1 is a true and correct copy of the transcript of the Jul. 14, 2023 hearing before this Court.

[2] Towns did not object to preliminary approval on some of the grounds set forth herein in reliance on Class Counsel's statement to this Court. Thereafter, Towns' counsel determined that Class Counsel's statement appears to be inaccurate.

35. Settlement Class Members undoubtedly have standing to object. *See* Proposed Settlement, § 9.6; *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Further, independent of their status as "Settlement Class Members", Towns appear to be "Releasing Persons". In other words, even if Towns successfully opt out, the Proposed Settlement requires Towns to give a release of all PFAS claims to the Dupont Entities against Towns' will. That release could reasonably include Towns' causes of action pending in this MDL against the Dupont Entities for tens of millions of dollars. Accordingly, as "Releasing Persons", Towns suffer "plain legal prejudice" by the Proposed Settlement, which gives Towns' standing to object here even if they are not "Settlement Class Members". *See Bragg v. Robertson*, 54 F. Supp. 2d 653, 664 (S.D.W. Va. 1999) ("Formal legal prejudice occurs where a non-settling defendant is 'strip [ped] of a legal claim or cause of action,' or where the agreement interferes with his contract rights or his ability to seek indemnification or contribution. Conversely, a 'showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient' to meet the standard.") (internal citations omitted). Indeed, Towns have moved to intervene on this basis. *See* Dkt. No. 3933.

I. Towns' Standing as Class Members

36. Towns own and operate on-site wells that supply drinking water to "at least 25 of the same people over 6 months per year" and/or does not regularly serve "at least 25 of the same nonresident persons per day for more than six months per year" at various parks, office buildings, and other commercial establishments that supply water. This includes terminal buildings and hangars at Towns' airports themselves, but also properties throughout their respective townships. Accordingly, the Towns fall under the Proposed Settlement's definition of "Transient Non-Community Water System" and "Non-Transient Non-Community Water System", which are both

expressly included in the definition of "Public Water System." *See* Proposed Settlement, §§ 2.29, 2.40, 2.66.

37. Further, Towns fall under the "Settlement Class" because they have detected "PFAS at any level" and are "required under applicable federal or state law to test . . . their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline". Proposed Settlement, § 5.1.1. For example, Town of Harrietstown received a settlement notice because it owns and operates the well that supplies water to the "Airport Café", which is registered as a "Transient Non-Community Water System" with a SDWIS ID of NY1604733.[3] That well is located within the bounds of the airport superfund site and the Town of Harrietstown has sampled and will continue to sample that well under state law before the UCMR 5 deadline in accordance with NYSDEC's direction. Similarly, at Town of East Hampton's airport, PFAS has been detected at several on-site drinking water wells that regularly serve more than twenty-five (25) nonresident people at the terminal and hangars.[4]

38. Accordingly, Towns are "Settlement Class Members" pursuant to section 5.1.1. While the Towns have multi-million dollar claims against the Dupont Entities pending in this MDL, the Proposed Settlement appears to entitle each Town to a payment of less than $2,000 in exchange for the release of all of their claims against all Dupont Entities.[5] *See* Proposed Settlement, § 12.1.1; Ex. C, §4(f)(ii). Towns have standing as "Settlement Class Members" to object.

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[3] A true and correct copy of that notice is annexed hereto as Exhibit 2.

[4] A true and correct copy of excerpts of the report that contain this data as produced with Town of East Hampton's Plaintiff Fact Sheet is annexed hereto as Exhibit 3.

[5] Towns reserve all rights, including to opt out of the Settlement Class and this Settlement Agreement.

II. Towns' Standing as Pending Intervenors Due To Their Status as "Releasing Persons"

39. "Releasing Persons", a broader term than "Settlement Class Members", release all Dupont Entities of all historical PFAS claims. Towns appear to be "Releasing Persons" regardless of their status as "Settlement Class Members". For example, on July 9, 2018, in accordance with NYSDEC's direction, Town of East Hampton entered into a written agreement with Suffolk County Water Authority ("SCWA"), a public water supplier with SDWIS ID NY5110526, to have SCWA extend its public water main approximately nine (9) miles in the Town.[6] Town agreed to reimburse SCWA its costs and in fact did so by paying SCWA no less than $7,591,425.93.[7]

40. Further, NYSDEC, under state law, directed Town to connect many properties to SCWA's newly extended public water main at Town's expense, including restaurants (*e.g.*, The Wainscott Diner and Bar) and hotels (*e.g.*, the Wainscott Inn) that regularly serve more than twenty-five (25) people.[8] Prior to the connections, some of which are pending, each property obtained water from an on-site well with PFAS detections, meaning those now-connected "Public Water Systems" may be "Settlement Class Members". By its affirmative claims pending in this MDL, Town of East Hampton seeks recovery of costs associated with these connections.

41. Accordingly, Town of East Hampton appears to be a "Releasing Person" for any of the following reasons: (i) Town is in "privity" (an undefined term) with "Settlement Class Members" (*i.e.*, SCWA, the restaurants and the hotels), (ii) Town is "legally responsible for

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[6] A true and correct copy of that agreement is annexed as Exhibit 4.

[7] A true and correct copy of the payment from Town of East Hampton to Suffolk County Water Authority is annexed as Exhibit 5. Suffolk County Water Authority commenced suit against AFFF manufacturers. That litigation is pending in this MDL and is styled *Suffolk County Water Authority v. 3M Co.,* 18-03337-RMG. SCWA seeks cost recovery for PFOA/S impacts in a variety of its wells. SCWA does not allege in its complaint that it seeks recovery of costs expended to extend the public water main in the Town, presumably because SCWA was reimbursed by the Town.

[8] A true and correct copy of that notice from NYSDEC is annexed as Exhibit 6.

funding" them, and (iii) Town, by its affirmative claims pending in this MDL, "seek[s] recovery for . . . the ability of such system to provide safe or compliant Drinking Water". Town of Harrietstown and Town of Islip similarly are required to remediate contamination from their airports allegedly entering drinking water of "Settlement Class Members" in accordance with NYSDEC's direction.

42. Further, Section 12.1.2 clarifies that "Released Claims include Claims that arise out of or relate to the discharge, remediation, testing, monitoring, treatment or processing **of water** by a Public Water System within the Settlement Class (including stormwater or wastewater) with respect to PFAS that entered its Water Sources, **its facilities or real property**, or any of its Test Sites at any time before the Settlement Date." Proposed Settlement, § 12.1.2 (emphasis added). The section clarifies that the release applies to "the discharge, remediation, testing, monitoring, treatment or processing **of water**" (not the defined term "Drinking Water"), meaning that a municipality (or other party) engaging in "remediation, testing, monitoring, treatment" of groundwater under a superfund cleanup who also appears to qualify as "Public Water System", like Towns, releases all of its PFAS claims against the Dupont Entities.

43. The carveout from "Released Claims" found in section 12.1.3(y) does not cure this problem. That provision provides:

> any Releasing Person that is not a Public Water System but that is legally responsible for funding (by statute, regulation, other law, or contract) or that has authority. . . to seek recovery for harm to, a Public Water System in the Settlement Class or the Public Water System's ability to provide safe or compliant Drinking Water, gives the release only to the extent of Claims that seek to recover for alleged harm to such Public Water System, and 'Released Claims' shall not include other Claims of such Releasing Person.

Proposed Settlement, § 12.1.3(y). As discussed above, Towns appear to be "Public Water Systems" as defined under the agreement, so the carveout does not apply. Further, the provision

does not carve out "Releasing Persons" in "privity" with "Settlement Class Members". Accordingly, Towns may be considered "Releasing Persons" such that they may be forced to release all their existing PFAS claims against the Dupont Entities with no option to avoid that release and for no consideration.

* * *

44. If the Proposed Settlement is approved Towns will have an "injury in fact" that is actual, concrete, and particularized, "fairly . . . trace[able]" to the Proposed Settlement, and "likely" to be "redressed by a favorable decision." For the grounds set forth fully in Towns' Motion to Intervene [Dkt. No. 3933], Towns have standing to object.

POINT II
THE PROPOSED SETTLEMENT IS NOT FAIR, REASONABLE OR ADEQUATE

45. The purpose of a Fairness Hearing is to allow the Court to determine whether the Proposed Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations. If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (internal citations omitted).

46. The Fourth Circuit has articulated the role of the Court in a Fairness Hearing as follows:

> First, an objector to a class settlement must state the basis for its objection with enough specificity to allow the parties to respond and the court to evaluate the issues at hand. This requirement is somewhat analogous, though not necessarily identical, to the notice pleading required for complaints. *See* Fed. R. Civ. P. 8(a) ("[A] claim for relief must contain: ... a short and plain statement of the claim showing that the pleader is entitled to relief.").

> Second, the parties propounding the settlement, in addition to bearing the initial burden to show that the proposed class meets the Rule 23(a) requirements for certification and that a proposed settlement is fair, reasonable, and adequate, must show that the objection does not demonstrate that the proposed settlement fails one of those requirements. The showing necessary to prevent an objection from derailing a settlement will, of course, vary with the strength of the objection itself; frivolous objections may need very little to overcome them, while weightier objections will require more.
>
> Third, the district court, at all times, remains a fiduciary of the class. *Sharp Farms* , 917 F.3d at 293–94. The district court must protect the class's interests from parties and counsel overeager to settle (who may deny absent class members relief that they would otherwise receive) and frivolous objectors (who may impede or delay valuable compensation to others). The district court may, in its discretion, grant an objector discovery to assist the court in determining an objection's merit. *See* Newberg § 13:32 ("The touchstone for [granting an objector discovery] is that it will ultimately assist the court in determining the fairness of the settlement.").

1988 Tr. for Allen Children v. Banner Life Ins. Co., 28 F.4th 513, 521 (4th Cir. 2022).

47. As this Court cited in the Preliminary Approval Order, "[f]ormal legal prejudice occurs where a non-settling defendant is 'strip[ped] of a legal claim or cause of action,' or where the agreement interferes with his contract rights or his ability to seek indemnification or contribution. Conversely, a 'showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient' to meet the standard." *Bragg*, 54 F. Supp. 2d at 664 (internal citations omitted). Here, the Proposed Settlement, if approved, will prejudice Towns.

I. <u>Notice of the Proposed Settlement is Deficient</u>

48. The Class Notice of the Proposed Settlement is deficient. The Fourth Circuit has held:

> To bind an absent class member, notice to the class must provide "minimal procedural due process protection. The [absent class member] must receive notice plus an opportunity to be heard and participate in the litigation. That notice must be "reasonably calculated, under all the circumstances, to apprise [absent class members] of the pendency of the action and afford them an opportunity to present their objections."

McAdams v. Robinson, 26 F.4th 149, 157-58 (4th Cir. 2022) (citing *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 314 (1950)). Notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . . ." *Mullane,* 339 U.S. at 314; *Wright v. Owens Corning,* 679 F. 3d 101, 108 (3rd Cir. 2012). Constructive notice to known claimants does not satisfy due process. *See U.S. v. Chatham*, 323 F.2d 95, 98 (4th Cir. 1963) ("But service by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible, impractical, nor unreasonable."); *Chemetron Corp. v. Jones*, 72 F.3d 341, 345 (3d Cir. 1995) ("If claimants were "known" creditors, then due process entitled them to actual notice of the bankruptcy proceedings.").

49. As set forth above, the "Settlement Class" is exponentially larger than water suppliers with SDWIS IDs. The Proposed Settlement covertly defines the Settlement Class to include parks, rest stops, golf courses, convenience stores, hotels, restaurants, office buildings, schools, colleges, hospitals, factories, etc. that have an on-site well, regardless of whether they have a SDWIS ID.

50. Yet, it appears that notice of the Proposed Settlement was only distributed to the owners/operators of "Non-Transient Non-Community Water Systems" and "Transient Non-Community Water Systems" with SDWIS IDs. Indeed, the Town of Harrietstown received a class notice for its operation of the well that supplies water to its Airport Café, which has a SDWIS ID. But Town of East Hampton and Town of Islip, which operate many facilities that fall into the

"Settlement Class" definition, did not receive notice. Class Counsel and the Dupont Entities knew, or should have known, that Town of East Hampton could be a "Settlement Class Member" because in 2019, the Town produced reports with its Plaintiff Fact Sheet showing PFAS detections in on-site drinking water wells that supply water to the Town's airport terminal and various hangars.[9]

51. Accordingly, it appears that potentially thousands of similarly situated unsuspecting municipalities and businesses throughout the country may unknowingly be class members as a result of, *inter alia*, the Proposed Settlement's deficient notice. To be clear, the definitions of "Transient Non-Community Water System", "Non-Transient Non-Community Water System", "Public Water System", "Settlement Class Member" and "Settlement Class" do not require these potential class members to be registered in SDWIS, exponentially expanding the universe of unsuspecting class members who have not received actual notice of the settlement but will be unwillingly releasing their PFAS claims against the Dupont Entities.

52. The class notice is not "reasonable" under the circumstances because, upon information and belief, it was not sent to potentially thousands of identifiable class members (like Town of East Hampton). Those class members were not informed that they may be releasing their valuable PFAS claims against the Dupont Entities for less than $2,000 and cannot determine whether they will object. This is particularly problematic because municipalities are at risk meaning the public treasury is at stake.

53. Further, the scope of the "Settlement Class" is misleading. Outside of the Proposed Settlement, the terms "Transient Non-Community Water Systems" and "Non-Transient Non-Community Water Systems" are generally associated with water systems registered in SDWIS.

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[9] *See* Ex. 3.

See, e.g., Safe Drinking Water Act (SDWA) Resources and FAQs, available at https://echo.epa.gov/help/sdwa-faqs. These types of water suppliers know of their status because they are listed in the SDWIS database.

54. Various operators spanning golf courses, hospitals, municipalities, hotels, etc. may not be registered in SDWIS and would have no reason to believe they are "Public Water Systems". There is nothing in the class notice that would lead such a recipient to believe that they are in fact a potential class member that could be waiving multi-million dollar claims for a payment of less than $2,000. And the notice is certainly ambiguous as to whether a party, like each of the Towns, could be releasing all of their historical PFAS claims against the Dupont Entities as a "Releasing Party". The notice is deficient, and the Proposed Settlement should be denied on this basis alone. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997) ("Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.").

II. Proposed Class Members Are Not Ascertainable, Class Representative Claims Are Atypical and Class Members Are Not Adequately Represented

55. Class members falling under the broad definitions of "Transient Non-Community Water Systems" and "Non-Transient Non-Community Water Systems" are not "readily identifiable". *See Peters v. Aetna Inc.*, 2 F.4th 199, 241-42 (4th Cir. 2021). "If class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.*

56. To ascertain or identify "Transient Non-Community Water Systems" and "Non-Transient Non-Community Water Systems" as defined under the Proposed Settlement, one must

"engage in a highly individualized inquiry" to determine: (i) how water is supplied to countless properties throughout the United States, (ii) determine if well(s) serving those properties have been tested or will be required to test for PFAS, and (iii) determine how many people those wells regularly serve. This is unrealistic. Tens of thousands, if not more, members of the proposed Settlement Class are not ascertainable.

57. Further, Proposed Class Representatives have failed to show that their claims are typical of the class in accordance with Rule 23(a)(3). Typicality requires:

> [T]he named plaintiff's claim and the class claims must be so interrelated that the interests of the class members will be fairly and adequately protected in their absence. The essence of the typicality requirement is captured by the notion that "as goes the claim of the named plaintiff, so go the claims of the class. The typicality requirement goes to the heart of a representative parties' ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements. The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim. That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned. But when the variation in claims strikes at the heart of the respective causes of actions, we have readily denied class certification.

Deiter v. Microsoft Corp., 436 F.3d 461, 466-67 (4th Cir. 2006).

58. Proposed Class Representatives have failed to show that any of them are "Transient Non-Community Water Systems" or "Non-Transient Non-Community Water Systems" as defined under the Proposed Agreement. In other words, Proposed Class Representatives have failed to show that they will receive less than $2,000 in exchange for broad and expansive releases to the Dupont Entities. Accordingly, Proposed Class Representative claims are not typical of the class.

59. Finally, for the same reasons as to why Proposed Class Representative's claims are not typical of the class, Rule 23(a)(4) is not satisfied because class members falling under the definition of "Transient Non-Community Water Systems" and "Non-Transient Non-Community Water Systems" are not adequately represented by Proposed Class Members and Proposed Class Counsel. Those parties negotiated the unconscionable consideration entitling "Transient Non-Community Water Systems" and "Non-Transient Non-Community Water Systems" to receive less than $2,000 in exchange for broad sweeping releases to the Dupont Entities not only for drinking water claims, but for all claims, including claims for contribution, cost recovery and diminution in property value.

* * *

As the Proposed Class Members are not ascertainable, claims of Proposed Class Representatives are not typical, and Proposed Class Members are not adequately represented, the Proposed Settlement should be denied. Any of the foregoing grounds alone would be sufficient to deny approval.

III. <u>Towns Are Harmed By The Proposed Settlement</u>

60. The Towns are harmed by the Proposed Settlement in three ways. *First*, like many unsuspecting municipalities, restaurant owners, golf courses, parks, farms, etc., Towns are class members under the definition of "Transient Non-Community Water Systems" and/or "Non-Transient Non-Community Water Systems." This status would entitle Towns and those similarly situated to a payment of $1,250 and/or $1,750 in exchange for a release of Towns' multi-million dollar claims against the Dupont Entities. This is patently unjust.

61. This is compounded by the November 10, 2023 Interpretative Guidance filed by Class Counsel and the Dupont Entities [Dkt. No. 3967]. That guidance states "[y]ou must submit

a Request for an Exclusion on behalf of each such Public Water System that you wish to opt out of the Settlement Class. Any Public Water System that is not specifically identified in a Request for Exclusion will remain in the Settlement Class." *Id.* at 5-6. In other words, in the short time required to opt out, Towns are required to identify: (i) every single well that supplies water to a property they own or operate, (ii) determine if each well regularly serves more than twenty-five (25) people, and (iii) determine if each well has detected any PFAS at any level or will be tested before December 31, 2025 (which requires speculation). This task is an impossible one no matter how much time is provided. If Towns accidentally fail to identify one such well, Towns will get less than $2,000 and release their multi-million dollar claims against all of the Dupont Entities. *See* Interpretive Guidance [Dkt. No. 3967], pp. 5-6. This cannot be.

62. *Second*, under the Proposed Settlement, the term "Releasing Persons" is broader than "Settlement Class Members." Accordingly, a party who is a "Releasing Person" but is not a "Settlement Class Member" could release all of its claims against the Dupont Entities for no consideration and with no option to avoid doing so.

63. The Town of East Hampton's actions taken in accordance with NYSDEC direction and state law illustrate the problem. Town entered into a written agreement with SCWA, a "Public Water System", to extend the public water main so that alternative drinking water may be provided to PFAS impacted properties. Town paid SCWA over $7.5 million for that work. To the extent SCWA does not opt out (over which Town has no control), Town will involuntarily be a "Releasing Party" because Town is in "privity" (an undefined term) with SCWA and funded it pursuant to a contract.

64. In addition, Town of East Hampton, in compliance with NYSDEC direction and state law, has paid to connect drinking water wells that serve various restaurants, hotels and

commercial businesses allegedly downgradient of the Town's airport to the public water main because the wells had PFOA/S in excess of New York State's 10 ppt MCL.[10] All of those businesses, to Town's knowledge, do not have a SDWIS ID but, under the Proposed Settlement, qualify as "Public Water Systems" because they appear to be "Non-Transient Non-Community Water Systems" and/or "Transient Non-Community Water Systems". Like Town of East Hampton, those businesses presumably did not get actual notice of the settlement, so there is a high chance they will not opt out. In such likely case, they would be deemed "Settlement Class Members" apparently triggering Town of East Hampton's status as "Releasing Person". This would mean that Town of East Hampton would get $0 from this Proposed Settlement, but the Dupont Entities would receive wide-sweeping releases from the Town's multi-million dollar causes of action for contribution and affirmative claims. This is contrary to Class Counsel's statement at the July 14, 2023 hearing (prior to entry of the Preliminary Approval Order) that Town's claims are not released, waived or prejudiced. *See* Ex. 1, p. 39:5-8.

65. Notably, this concern is not an isolated occurrence. Responsible parties at superfund sites throughout the country are being required to provide alternative water supplies and treat downgradient impacted wells of "Public Water Systems" at an enormous cost. The Proposed Settlement here requires those parties to release the Dupont Entities for no consideration. This cannot stand.

66. *Third*, the Claims-Over provision requires Towns as either "Settlement Class Members" or "Releasing Persons" to indemnify the Dupont Entities for all known and unknown current and future claims that have been or may be brought. *See* Proposed Settlement, §§ 12.7.1, 12.7.2. This provision is illegal as it violates the prohibition under the New York State

[10] *See, e.g.,* Ex. 6.

Constitution for any municipality: (i) to "be liable for the payment of any obligations issued by . . . a public corporation"; and (ii) "to contract indebtedness for any purpose or in any manner which, including indebtedness, shall exceed an amount equal to [7%] of the average full valuation of taxable real estate of such [town]". *See* N.Y. Const. Art. X, § 5, Art. VII § 4(c).

III. Towns Should Be Permitted To Opt Out From The Settlement Class (If They So Desire) and Object To The Proposed Settlement Due To Their Status As "Releasing Persons"

67. The Proposed Settlement provides:

> Any Person that submits a timely and valid Request for Exclusion shall not (i) be bound by any orders or judgments effecting the Settlement; (ii) be entitled to any of the relief or other benefits provided under this Settlement Agreement; (iii) gain any rights by virtue of this Settlement Agreement; or (iv) be entitled to submit an Objection.

Proposed Settlement, § 9.7.3. This provision does not permit the Towns to both opt out and object. But to the extent Towns successfully opt out, they are still prejudiced as "Releasing Persons" for the reasons set forth above.

68. Towns should not be forced to risk being in the Settlement Class in order to pursue the instant objection. Towns should be afforded the ability to object to the Proposed Settlement on the grounds that they fall under the definition of "Releasing Persons" in the event they opt out. Further, Towns should be permitted to opt out from the Settlement Class, if they so desire, by submitting a single request for exclusion for each Town without having to identify each and every "Public Water System" including every "Transient Non-Community Water System" and "Non-Transient Non-Community Water System" they own or operate.

IV. Even If The Foregoing Issues Are Addressed, The Proposed Settlement Still Is Not Fair, Reasonable or Adequate Because It Arbitrarily Settles Remediation Claims of Public Water Systems But Not Remediation Claims of Superfund Plaintiffs.

69. The Manual for Complex Litigation requires lead MDL attorneys to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel." David F. Herr, *Manual for Complex Litigation* (2018) at § 10.22. The interwoven connection between superfund remediation and public water remediation cannot be ignored. Superfund remediation often requires remediation of upgradient water to standards to protect downgradient water sources. Superfund remediation also often requires remediation of water systems themselves. Further, like water providers, superfund plaintiffs' causation burden is simplified as compared to personal injury plaintiffs.

70. As stated in Towns' objection to preliminary approval, Towns are prejudiced because the Dupont Entities do not have enough money to remediate the world.[11] There is no reason to bifurcate remediation claims, requiring Towns and those similarly situated to sit on the sidelines.

71. The proposed $1.185 billion settlement here will strip the DuPont Entities of their limited assets to the detriment of superfund plaintiffs, whose remediation cases are indefinitely stayed in this MDL. This is problematic because: (i) Dupont Entities' actions and resulting contamination of the planet have been well-documented;[12] (ii) the DuPont Entities' remediation

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[11] *See* Dkt. No. 2601 (Decision on Defendants' Motion for Summary Judgment), p. 20, n.14 ("Plaintiffs note that 'PFOA and PFOS have been found in virtually every corner of the earth, in nearly every living thing: from house dust, to human blood, to wildlife everywhere, including in fish and animals as far away as the Arctic circle.'"). The representations that "Class Counsel has estimated that the DuPont Entities' share of the MDL defendants' total alleged PFAS-related liabilities is somewhere between three and seven percent" is confounding. *See* Dkt. No. 3393, p. 6. A few months ago, before the *City of Stuart* bellwether trial, Class Counsel correctly argued that all defendants, including Dupont, were "in for a penny, in for a pound" meaning joint and several liability applies.

[12] *See, e.g.,* Motion to Approve DuPont Settlement, p. 5 ("[s]ince the 1950s, the DuPont Entities have developed, designed, formulated, manufactured, sold, transported, stored, loaded, mixed applied and/or used PFAS

liabilities are enormous; and (iii) the DuPont Entities have insufficient liquidity and may be insolvent. An entire section of Plaintiffs' motion for preliminary approval is dedicated to the risk that DuPont Entities' plausible insolvency poses to public water systems.[13] Plaintiffs even state that bankruptcy risk to water providers is a "significant concern."[14] This same risk to Towns and other similarly situated remediation plaintiffs, though, is wrongfully ignored.

72. Final approval is not warranted in the Proposed Settlement's current form. The court has wide discretion in deciding whether to certify a proposed class and grant final approval. *See Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010). This Court exercised that discretion by requiring the narrowing of the initially proposed release contemplated in the settlement of the action styled *Campbell v. Tyco Fire Products LP, et al.,* Case No 19-00422.[15]

CONCLUSION

WHEREFORE, Towns respectfully request that the Proposed Settlement be amended to address the concerns herein, approval of the Proposed Settlement be denied, and/or such other, further and different relief be granted as is deemed just and proper.

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alone or in end products that contain PFAS as an active ingredient, byproduct or degradation product."); *Hardwick v. 3M Co.*, 589 F. Supp. 3d 832, 841 (S.D. Ohio 2022) (citing ATSDR Multi-Site PFAS Study, available at https://www.atsdr.cdc.gov/pfas/activities/studies/multi-site.html); Gaber, *et al.*, *The Devil they Knew: Chemical Documents Analysis of Industry Influence on PFAS Science*, Annals of Global Health, 2023 (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10237242/) (last accessed Jul. 24, 2023).

[13] *See* Motion to Approve DuPont Settlement, § V.B.3.

[14] *Id.*

[15] *See* Dkt. No. 1814.

Dated: Melville, New York
November 11, 2023

RIGANO LLC
Attorneys for Town of East Hampton,
Town of Harrietstown and Town of Islip

By: */s/ Nicholas C. Rigano*
Nicholas C. Rigano, Esq.
Rigano LLC
538 Broad Hollow Road, Suite 301
Melville, New York 11747
(631) 756-5900
nrigano@riganollc.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 11th day of November 2023 and was therefore served electronically and served by mail upon counsel of record as set forth in the Notice of Proposed Class Action Settlement and Court Approval Hearing.

/s/ Nicholas C. Rigano
Nicholas C. Rigano, Esq.
Rigano LLC
538 Broad Hollow Road, Suite 301
Melville, New York 11747
(631) 756-5900
nrigano@riganollc.com

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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IN RE:  AQUEOUS FILM-FORMING  *  MDL No. 2:18-mn-2873
FOAMS PRODUCTS LIABILITY      *
LITIGATION                    *  July 14, 2023
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TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Plaintiffs:

Motley Rice LLC
BY: FRED THOMPSON III, ESQ.
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464

Douglas and London PC
BY: MICHAEL A. LONDON, ESQ.
59 Maiden Lane, 6th Floor
New York, NY 10038

Napoli Shkolnik PLLC
BY: PAUL J. NAPOLI, ESQ.
1301 Avenue of the Americas
10th Floor
New York, NY 10019

Baron and Budd
BY: SCOTT SUMMY, ESQ.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

For the Defendants:

Duffy and Young LLC
BY: BRIAN C. DUFFY, ESQ.
96 Broad Street
Charleston, SC 29401

Nelson Mullins
BY: DAVID E. DUKES, ESQ.
1320 Main Street, 17th Floor
Columbia, SC 29201

Williams & Connolly LLP DC
BY: JOSEPH G. PETROSINELLI, ESQ.
725 12th Street NW
Washington, DC 20005

Mayer Brown LLP
BY: MICHAEL A. OLSEN, ESQ.
DAN RING, ESQ.
71 S. Wacker Drive
Chicago, IL 60606

For the United States of America:
US Department of Justice
BY: CHRISTINA M. FALK, ESQ.
Environmental Torts, Civil Div.
175 N Street NE
Washington, DC 20002

Also Appearing:
GARY DOUGLAS, ESQ.
JAMES P. RIGANO, ESQ.
BRENT DWERLKOTTE, ESQ.

Court Reporter:
KAREN E. MARTIN, RMR, CRR
PO Box 835
Charleston, SC 29402

Proceedings reported by stenographic court reporter. Transcript produced with computer-aided transcription software.

1 Friday, July 14, 2023
2 (WHEREUPON, court was called to order at 9:09 AM.)
3 **THE COURT:** Good morning. Please be seated.
4 Well, folks, we look like we've got a big crowd.
5 There must be big money on the table. What a surprise.
6 Well, folks, I know we have had a lot of
7 important developments in the last several weeks, months
8 actually. I want to commend the efforts of counsel, the
9 leadership of the PEC and for 3M and for Dupont. I think
10 they've all done a very commendable job.
11 We have now on the record the proposed
12 settlement agreements. They are complicated. And they
13 take -- they're going to take a fair amount of study and
14 explanation. And I expect the parties are going to be --
15 counsel are going to be asked questions. And I think
16 y'all need to explain.
17 One of the things I thought would be helpful
18 today is, first, we'll go through the Dupont settlement,
19 and then the 3M, just so folks here can get a little bit
20 of the flavor of your view. But I will just say for all
21 counsel who are involved here, you need to expect some
22 explanation, to explain to your colleagues who have not
23 been involved, what this means.
24 So, Mr. London, let me lead off with you.
25 You're usually the chosen one here. Let me just ask a

1 question which I'm sure a lot of the folks representing
2 water districts might have. Have we determined the
3 allocations for each water district in each of the
4 settlements?
5 MR. LONDON: Your Honor, Michael London. So,
6 Your Honor, that is one of the more challenging or
7 complicated questions here. There is an allocation model
8 that is a conceptual model. Because as in any aggregate
9 case, it is difficult, if not impossible, to determine the
10 exact amount any claimant will receive, any plaintiff
11 claimant will receive until the claim forms and the data
12 is submitted, provided, and assessed.
13 THE COURT: Explain that because I think it's
14 important.
15 MR. LONDON: Okay. My colleague, Mr. Summy --
16 and I can discuss it at this level. But I think I should
17 allow Mr. Summy to address the conceptual allocation model
18 that has been designed and is just an incredible process.
19 It is completely subjective, right, which is an important
20 criteria here because it is based upon real data and not
21 guesswork.
22 THE COURT: But when you say subjective, there's
23 data. It's based upon --
24 MR. LONDON: Did I say subjective?
25 THE COURT: Yes. (Laughter)

1 MR. LONDON: I meant objective. Jesus. Pardon
2 me.
3 THE COURT: My sentencing is subjective but not
4 your allocation.
5 MR. LONDON: Yes, Judge, we throw darts at the
6 wall. No, it's objective, Your Honor.
7 THE COURT: I think you ought to hand off to
8 Mr. Summy right now. (Laughter)
9 MR. LONDON: If I can't get subjective and
10 objective down, it's this heat today.
11 MR. SUMMY: Good morning, Your Honor. Scott
12 Summy. It is objective and let me explain why.
13 (Laughter)
14 The way this works is is we've spent a lot of
15 time on an allocation model. And we spent about three
16 hours yesterday with a lot of the plaintiff's lawyers
17 going through this because we thought it was important.
18 THE COURT: For the very reason I'm raising
19 here.
20 MR. SUMMY: Yes, exactly.
21 THE COURT: Mr. Summy, you can't ask people to
22 sign on to a settlement they don't know what -- they've
23 got to be able to tell their clients roughly what they're
24 going to get. I understand it may not be down to the
25 penny, but they need to have an idea because they can't

1 really evaluate is this in their client's interest.
2 MR. SUMMY: That's exactly right, Your Honor.
3 And the way we did it is these water providers -- when we
4 were designing a model that would allocate among about
5 6,000 water systems around the country, it's not an easy
6 task, but our experts we've been consulting with for well
7 over a year and what they basically said is, we said,
8 look, would be the fairest way to design a settlement that
9 would allocate money across the country?
10 And they said, look, the way you would do it is
11 you do it by each water source. Because you look at what
12 are the factors that we take into account for treating
13 something like PFAS. And there's two factors. Those two
14 factors are flow rate; that is, how much water is moving
15 through the system that has to be filtered, and then
16 what's called O and M, which is operation and maintenance
17 costs, which is ongoing costs over a number of years where
18 you're changing out the filter media as it gets clogged up
19 with the contaminants. And that's a simplistic way to do
20 it.
21 But what we don't know, because it's proprietary
22 to each water system is, we don't know their flow rate.
23 That's something only they know. And then we take into
24 account the maximum concentration that is in each water
25 system. We know what's been reported to the public or to

1 the state governments, but we don't know -- we may not
2 know exactly their highest levels.
3 But what we have done, and we have taken a year
4 and a half to do it, we really have, it's taken a lot of
5 time is, we've gone to the federal government in all 50
6 states. And we have gathered all of the data where it
7 shows the detection of PFAS for any water system in
8 America that would be included in this settlement.
9 **THE COURT:** And how many are there?
10 **MR. SUMMY:** Depending on if you're talking about
11 3M or Dupont, when you're talking about 3M, there's a
12 little over 6,000 water systems. The Dupont class
13 definition is a little broader because they included some
14 of the very small systems, so it goes up above that around
15 7,000.
16 And what we've done though is we've collected
17 all of this data. And we have used science to develop a
18 model that takes into account what we call EPA cost
19 curves. Because we wanted to keep all subjectivity out of
20 this and make it completely objective based upon the
21 science. And so we have modeled it out, the experts have,
22 not me, but the experts have. And we have taken all of
23 this data and we've made some assumptions. We've made
24 some assumptions about the flow rates because we don't
25 know exactly what those are.

1 THE COURT: But it's an educated estimate?
2 MR. SUMMY: Absolutely. What we did is we used
3 population. So if a well or a water system is in a larger
4 population area, we have assumed that those water systems
5 have a higher flow rate. The small towns where, you know,
6 there's a thousand people in the town with two wells,
7 we've assumed that those are lower flow rates. So these
8 are reasonable assumptions. And we've made good faith
9 estimates and we've put them into the model and we've ran
10 a conceptual model. That conceptual model is a good faith
11 estimate.
12 And this is one of the things we announced
13 yesterday to all the folks during the three-hour meeting.
14 I spent three hours sort of going through the entire
15 settlement agreements and the allocation model. We've
16 said, look, we will meet with anyone who wants to meet
17 with our team and we will put your client's systems in.
18 They are already in there. We'll put them in. We'll show
19 you what it kicks out. It's not going to be exact because
20 when people file their original claim forms, we'll get
21 those exact flow rates. But we've made good faith
22 estimates and this will help you --
23 THE COURT: And they might even be able to come
24 to you and say actually the data you have isn't
25 accurate --

1 **MR. SUMMY:** That's actually correct.
2 **THE COURT:** -- could you run this number?
3 **MR. SUMMY:** Absolutely. And we told them that
4 yesterday. We said, look, when you come to the meeting
5 with us, bring your information if you want. Bring your
6 flow rates, bring your concentrations, and those are
7 what's important. We'll put them into the model. We can
8 change it right there. We'll put it into the model. It
9 will be a little more accurate.
10 So we've, you know, tried to really bend over
11 backwards. We told everyone yesterday, I think there was
12 some concern about, hey, you guys need to be more open.
13 But we were so busy getting everything done, we told
14 everyone yesterday we are done with that now. Now we are
15 an open book. We'll have meetings weekly if people need
16 it. We'll help you with your clients. We'll help you
17 with the conceptual model. Anybody who needs anything
18 from us, we'll be completely transparent.
19 And we've put a lot of work into this. We're
20 very proud of it. It's very elegant in our opinion. And
21 the reason is, and this is something that's very important
22 is, as the Court knows there's a changing landscape that's
23 going on in that the settlements have what's called Phase
24 One and Phase Two.
25 Phase One are folks that are water systems that

1 already have detections. But we know at the same time
2 there's folks that haven't tested yet. But the US
3 Government, under UCMR5, is requiring over the next three
4 years, including this year, for water systems to test for
5 PFAS, 29 analogs.
6 **THE COURT:** And that's the difference between
7 the 10.5 and the 12.5 billion?
8 **MR. SUMMY:** Well, what happens -- that is
9 correct. But what happens is in the 3M deal is is we
10 don't know how many systems are going to test positive.
11 Okay? So that was sort of the reason for the 10.5 to
12 12.5.
13 So what we did with 3M is we set a floor and a
14 cap on the Phase Twos. The Phase Ones are 6.875 billion
15 that are going to be paid to the ones that have detections
16 now. Above that, they're going to pay about 3.7 billion
17 guaranteed as a floor.
18 But what's going to happen is is that once this
19 testing occurs, and we've taken our testing -- because 3M
20 has agreed to pay for the testing. Because what happens
21 is is UCMR5 requires you to test one time in the
22 distribution system. Our testing goes well beyond that.
23 3M is going to pay for you to test every single one of
24 your wells, every single one of your systems. They're
25 going to pay for it.

1 So once that's done, those claim forms will come
2 in. And our time period for having to do that is the
3 exact time period, it matches up perfectly with what the
4 government is requiring these same folks to do. So we've
5 mirrored it so that it would be elegant and so that
6 they're working with the regulatory system and working
7 with the settlement at the same time.
8 And then what happens is is once all of that is
9 done, then the claims administrator will look at it and
10 see, all right, if we award the folks in Phase Two the
11 same as Phase One, this is what it comes to. If that is
12 below the floor, they're going to pay the floor. And then
13 if there's extra money, we will pay everyone pro rata,
14 sprinkle it back over everybody. If it comes in between
15 the floor and the cap, that's what they'll pay. And
16 everybody in Phase Two will get the same as Phase One.
17 If it comes in above that, okay, in other words,
18 Phase Two costs more than we thought, because 3M is paying
19 more -- or paying the money over time, we have an
20 equalizer clause. So we can take some of the future
21 payments that were going to Phase One, shift those to
22 Phase Two so that the Phase Twos get the same as Phase
23 Ones.
24 **THE COURT:** So it's equitable.
25 **MR. SUMMY:** That's correct. It was very

1 important for us to make it very fair, very equitable.
2 And we think it's a very elegant way to do it. We spent a
3 lot of time working this out with 3M in putting this
4 together.
5 **THE COURT:** Well, you're a veteran of these
6 water cases, Mr. Summy.
7 **MR. SUMMY:** Yes.
8 **THE COURT:** And the settlement, how does it sort
9 of fall in terms of size with other settlements of this
10 type?
11 **MR. SUMMY:** It's a good question, Your Honor.
12 As the Court knows, I've been doing this a long time with
13 water contaminants and representing public water systems.
14 And this by far trumps anything that I've ever been
15 involved with. And I've been involved in some big cases.
16 But this is, first of all, it's a landmark
17 settlement because it's the largest drinking water
18 settlement in US history. It's extremely large. And part
19 of that is, the reason for that is is that, you know, this
20 PFAS, these PFAS chemicals are widespread and they have
21 hit a lot of systems. There have never been this many
22 water systems hit with a single family of chemicals like
23 this before.
24 And at the same time what's never occurred is
25 the federal government and state governments all at one

1 time have become very concerned about it and, you know,
2 rushing to pass regulations. So all of these water
3 systems are in a situation where they're dealing with, you
4 know, the pending federal and state regulations. And so
5 it's sort of created this perfect storm.
6 But this settlement is -- we're very proud of it
7 because it's extremely large. We think that the way we've
8 structured it is very elegant. We think that, look, it's
9 never easy to try to come up with a way to settle this
10 many cases at one time. And it's never easy when -- and
11 this is one of the things I was trying to explain
12 yesterday is, you know, we're hearing some grumblings
13 about, well, it's just still not enough. But at the same
14 time, you know, we're dealing with --
15 **THE COURT:** Ask the asbestos lawyers about that.
16 If you press too hard --
17 **MR. SUMMY:** That's correct.
18 **THE COURT:** -- you're litigating in bankruptcy
19 court.
20 **MR. SUMMY:** Well, and that's what we tried to
21 explain yesterday. I mean, it is a lot of money that 3M
22 and Dupont, when you start adding it together, are paying.
23 And there's only so much money we can get from them. And
24 that's just the reality.
25 **THE COURT:** Mr. Summary, you may remember, early

1 in this litigation I said I'm looking at some of the best
2 lawyers in America. And you're going to spend a lot of
3 time going after each other. That's good. Y'all need to
4 also consider going to congress together, informing them
5 of the scope of this problem. Because it may be bigger
6 than, when you get to the final analysis that the private
7 industry that may be responsible for this, it just doesn't
8 have the capacity to remediate this completely.
9 **MR. SUMMY:** You're exactly right, Your Honor.
10 One of the things that I was trying to say yesterday is
11 that this problem is bigger than the defendants. It just
12 is. And people can be mad about it, but that's just the
13 way it is. And one of the things that I told folks
14 yesterday is with your clients, go get as much -- you
15 know, there is grant money out there. And Ms. Falk's
16 talked about it before. The Government has put out
17 $10 billion or so out there on the streets.
18 **THE COURT:** You say that very casually.
19 $10 billion is a lot of money.
20 **MR. SUMMY:** I know. It really is.
21 **MR. LONDON:** I remember when Ms. Falk told us
22 that, there was like a pause on the phone.
23 **MR. SUMMY:** It's a lot of money and we've
24 encouraged our clients, you know, go get some of that
25 money. Apply for it. And one of the things that we did

1 in the allocation agreement is we've instructed that,
2 look, if you've taken government money, you don't get
3 penalized for having taken government money in the
4 settlement. Because it may take what you get here and put
5 it with what you get from the federal government to try to
6 get you as close as you can to what you need. So we're
7 very cognizant of that. But at the same time, there's
8 only so much money we can get from these defendants for
9 this problem. And we feel like we have, we have stretched
10 the bounds of that.
11 **THE COURT:** Well, you know, one of the sort of
12 really impressive parts of that Ohio, Southern West
13 Virginia settlement Mr. Douglas was so involved in was
14 they took a part of the money and did these leach studies,
15 right, that really informed. And, you know, my suggestion
16 is is that the plaintiffs and the defendants ought to pool
17 some resources, perhaps even to hire lobbyists on behalf
18 of their clients, to go to congress and really in an
19 educational effort for people to appreciate the scope of
20 this problem.
21 **MR. SUMMY:** I think that's right.
22 **THE COURT:** And I really think y'all need to be
23 putting your heads together about joint cooperation. You
24 know, I once had a surgeon tell me in a deposition, the
25 enemy of perfect -- of the good is perfect. There is no

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1 perfect solution to this problem. It just isn't.
2 And you're going to do the good. You're going
3 to do as best you can from as many places as you can. The
4 10 billion from the federal government is useful, you
5 know. That's definitely something to pay attention to and
6 to master. But if it's not enough, and it may well not be
7 enough, then y'all need to go educate congress about the
8 needs here and the federal government about the scope of
9 the needs. And maybe there needs to be more.
10 But, you know, I was with Judge Barbier who did
11 the Gulf Horizon litigation. And, you know, it was very
12 clear from our conversation that this is in the range of
13 the Gulf Horizon settlement. That's ultimately what it's
14 going to be. And he gave me a lot of advice about
15 managing it. And I'm sure we'll have many challenges
16 along the way. But it's -- it is significant. It is not
17 perfect.
18 **MR. SUMMY:** That is correct. You've nailed it,
19 Your Honor. It truly isn't perfect but we think it's very
20 good.
21 **THE COURT:** Let's talk about the process of
22 obtaining approval. Step one, of course, is there is this
23 preliminary motion for approval, which is, as we all know,
24 just has to be in the range of a possible settlement, so a
25 sort of low threshold. And then we have a period of

1 notice. And then an opportunity to raise objections and
2 to opt out. Am I correct about all this?
3 **MR. SUMMY:** You're correct.
4 **THE COURT:** I think the plan is about 60 days
5 after the notice.
6 **MR. SUMMY:** That is correct.
7 **THE COURT:** And I would think during that period
8 there's going to be a lot of discussion with y'all. You
9 need to be readily available to be there.
10 Let me be honest for folks who are considering
11 opting out. Let me just be honest. We are probably
12 several years away from me returning cases that aren't
13 resolved to my colleagues in the district court. My goal
14 is to get it all resolved, but if I can't do it, I'm going
15 to send it back to my 675 colleagues. I'll be the least
16 popular federal judge in America if I do that. And, you
17 know, we've got a lot of -- even in the water districts,
18 we'll talk about that in a minute, we've got a fair amount
19 of work still to be done for parties not part of these
20 settlements.
21 So, realistically, we're talking about years
22 before it would ever be remanded. And then you know your
23 case of your individual dockets, likely years more before
24 you'd actually get to a trial. And so your clients need
25 to know, you know, the old lesson of the bird in hand is

1 worth two in the bush what you're doing. And it may well
2 be that folks look at it and say, you know, on my
3 particular situation, it's just better to opt out. That's
4 their right. But we're talking about years before -- and
5 I would think if there were appeals and so forth, you're
6 probably talking about a decade before it would all be
7 over. So you just need to weigh that.
8 But the MDL system isn't perfect either. We've
9 had folks come in and say, you know, good god, why can't
10 you deal with my motion? And I'm really sympathetic. If
11 I were in that lawyer's position I would feel exactly the
12 same way.
13 But, you know, I remember in one case I was
14 asked, you know, why can't you hear all my motions? We
15 were in the middle of doing government contractor
16 immunity, a small issue. And I said, well, how many cases
17 do you have pending around the country? 1,200. Okay?
18 Can you imagine what would happen if a defendant had to
19 defend in hundreds of different federal jurisdictions? We
20 know how complicated it is here doing one bellwether. I
21 mean, it would be enormous.
22 So is an MDL system perfect? Absolutely not.
23 Is it the best of the alternatives? Yes. And so I think
24 everybody ought to weigh as we look at this. And, you
25 know, if you have objections, and you have people bringing

1 to you problems, perhaps some you didn't anticipate, you
2 know, we can talk about how we might fix those. When you
3 do something this complicated, there might be tweaks that
4 one can make that would fix a problem.
5 And my understanding from my mediator is that
6 there's been good dialogue between counsel for Dupont, 3M,
7 and the plaintiffs. And that, you know, if there are
8 issues, you know, y'all are trying to be transparent.
9 You'll share them. You'll see if there's a solution that
10 can be made. I think this is a really important period of
11 dialogue and transparency. And, of course, people are
12 going to have issues they're going to have a chance to
13 bring up in front of me if they object to the settlement,
14 and I'll weigh in myself. So this is a really critical
15 moment.
16 Mr. Summy, let me ask you this. I noticed in
17 the Dupont settlement there was a request for me to issue
18 an All Writs Act injunction. I've done that before. It's
19 not something I do frequently. Obviously, it wouldn't be
20 appropriate in most cases. But there are rare situations
21 where that might be appropriate. Give me the argument,
22 the best argument why I should issue an All Writs Act
23 injunction regarding the Dupont settlement?
24 MR. SUMMY: Your Honor, that is a provision that
25 was very important to Dupont.

1 THE COURT: I can understand that, by the way.
2 MR. SUMMY: I'm not sure --
3 THE COURT: I had no doubt where that came from.
4 MR. SUMMY: Yeah, you had no doubt where that
5 came from. I think what they're saying is is that they
6 think because of the settlement and they think that what
7 should happen is that folks should stop their litigations
8 where they're at and have time to consider --
9 THE COURT: We're not talking about here.
10 MR. SUMMY: I understand.
11 THE COURT: I know there are cases. Obviously,
12 the proposed class is broader than the MDL. Am I correct?
13 MR. SUMMY: That's correct. And I think that's
14 their basis is because, you know, the class is all public
15 water systems across America that have a detection or are
16 required to test --
17 THE COURT: Right.
18 MR. SUMMY: -- in the next few years. So I
19 believe their argument would be that, you know, that does
20 include folks that are litigating elsewhere are class
21 members.
22 THE COURT: How many are we talking about? I
23 mean, what kind of litigation are we doing elsewhere? You
24 know, I get periodically other state litigation. I don't
25 go look at those cases.

1 MR. SUMMY: Right.

2 THE COURT: What are we talking about?

3 MR. SUMMY: That's a good question that I don't

4 know if I know.

5 Do you?

6 THE COURT: Maybe Dupont counsel, does Dupont

7 know? And you don't have to distinguish which one of

8 those entities you represent.

9 MR. DWERLKOTTE: Your Honor, Brent Dwerlkotte on

10 behalf of Dupont. I can say the settlement is objective.

11 But I do not --

12 THE COURT: I don't think Dupont would have

13 agreed otherwise.

14 MR. DWERLKOTTE: But I am not prepared, Your

15 Honor, to speak on the contents of the settlement. I

16 apologize.

17 THE COURT: Okay.

18 Well, I do think that's something I'd like to

19 know. Y'all need to let me know what kind of cases we're

20 talking about. I, frankly, think there is a lot of wisdom

21 to an All Writs Act situation here. It's not something I

22 would casually do. And if it's a limited number of

23 courts, I would probably call the judges before I did it,

24 you know. If it's a large number, that may not be

25 practical. But I think there is some wisdom in sort of

1 freezing this thing in place and let's get -- stop
2 everything and see if this is going to work. If it's not
3 going to work, fine. If it's going to work, then we don't
4 need to be litigating other things.
5 And it's not part of the 3M. Mr. Summy, is
6 there likely to be any objection if I also enter it in 3M?
7 MR. SUMMY: It's not part of 3M. It's not
8 something they requested, although they may wish they
9 would have requested it.
10 THE COURT: Well, this Court makes the final
11 decision what's in an order.
12 MR. SUMMY: That's right. But the Court,
13 obviously, could do it on its own.
14 THE COURT: Correct. I don't need 3M's
15 blessing.
16 MR. SUMMY: That's correct.
17 THE COURT: I just sort of see, as I understand
18 it, if I read the clause right in the -- the section right
19 in the Dupont settlement, if somebody opts out, then
20 they're out, right?
21 MR. SUMMY: That's correct.
22 THE COURT: So we're talking about people who
23 have not yet opted out.
24 MR. SUMMY: That is correct.
25 THE COURT: And it just strikes me that it just

1 makes sense. The whole concept of the MDL, of course, is
2 to consolidate everything. Sometimes that doesn't happen.
3 MR. SUMMY: Right.
4 THE COURT: But, you know, when we get to a
5 settlement class, I start even having broader reach when
6 we're now talking -- how many water districts in this
7 case? Three, 400, something like that?
8 MR. SUMMY: There's about 300 I think filed
9 cases. But the settlement is going to reach to 6 to 7,000
10 water systems.
11 THE COURT: My point is it's a far broader
12 reach. But these water districts need to know what's in
13 it for them.
14 MR. SUMMY: Absolutely.
15 THE COURT: You know, that just seems to me, you
16 know, a selling point that, you know, that plaintiff's
17 counsel needs to make.
18 MR. SUMMY: Correct.
19 THE COURT: Because if I were in their shoes, I
20 would say, listen, I've got a client who is looking at
21 this big number on addressing PFAS. And, you know, it
22 needs to be adequate, it needs to be fair to us.
23 MR. SUMMY: Correct.
24 THE COURT: Do you have -- how much knowledge is
25 there among water districts is your impression, Mr. Summy,

1 about this government -- the process of getting government
2 grants?
3 **MR. SUMMY:** I think that among the larger water
4 districts who are more, you know, sophisticated because
5 they have large staffs, I think they're very knowledgeable
6 about it. I think that there's been some effort on the
7 federal government's part to try to, you know, educate
8 people.
9 **THE COURT:** May I suggest that -- I'm giving you
10 lots of more things to do. I think you should have a team
11 of your counsel who are tasked with educating their
12 colleagues in the individual districts about the
13 government grant system.
14 **MR. SUMMY:** Okay.
15 **THE COURT:** I think it would be good to have
16 maybe a pamphlet prepared of where to go, who to contact.
17 Just give them Ms. Falk's cell number. (Laughter)
18 **MR. SUMMY:** She's going to be busy.
19 **THE COURT:** And I just think that, you know, I
20 don't know how you evaluate your situation without knowing
21 all your resources.
22 **MR. SUMMY:** Right. I think that's a good idea,
23 Your Honor. One of the things you also mentioned was, you
24 know, if you opt out, the timing it could take you. And
25 one of the good things about this settlement, you know, is

1 that this is coming at a time where if the federal
2 government ends up taking the proposed MCL and making it
3 final, the water districts across America will have three
4 years to get into compliance.
5 **THE COURT:** So they'll have to put out their own
6 dime.
7 **MR. SUMMY:** They could. But the nice thing
8 about this settlement is that it's occurring right during
9 this time, this three years prior to them having to get
10 into compliance. And this is occurring at the exact right
11 time.
12 **THE COURT:** But if -- my point is, if in fact
13 they elect, as they have every right to do, they're going
14 to have to front the money.
15 **MR. SUMMY:** They'll have to front the money
16 before they can litigate it, yes.
17 **THE COURT:** And with the risk, it may not work
18 out or work out at the level they could have gotten.
19 **MR. SUMMY:** That is correct. And at the same
20 time I think if there's too many that opt out --
21 **THE COURT:** The whole thing collapses.
22 **MR. SUMMY:** -- this settlement won't go through.
23 And at some point we could be looking at bankruptcy court
24 in that situation. And it's just the reality of the
25 situation. Look, these were discussions we had frankly

1 with 3M in these settlement meetings.
2 THE COURT: And I know part of your settlement
3 was trying to build in the best protections for the
4 plaintiffs.
5 MR. SUMMY: That is correct and I talked about
6 that yesterday at length. We hired specialized bankruptcy
7 counsel to help us because it's a risk. And we have to be
8 careful. And we fought very hard for adequate bankruptcy
9 protections in the agreement in the event that that
10 occurs. But it is certainly out there and it's something
11 we all have to be aware of.
12 And my own personal feeling is that, you know,
13 if the settlement collapses, that's where we may all be
14 headed if they've got to litigate all these cases
15 individually.
16 THE COURT: I don't know how anybody could
17 litigate 4,000 cases affordably.
18 MR. SUMMY: Right.
19 THE COURT: So, you know, again, the enemy of
20 the good is perfect. Right?
21 MR. SUMMY: Right.
22 THE COURT: And I will tell you, people like
23 saying when they read, they say they read history and
24 said, well, you know, a certain person we've admired has
25 flaws. And I say if you want a perfect person, read

1 fiction.
2 MR. SUMMY: That's exactly right.
3 THE COURT: Everybody's flawed. We're all
4 flawed. Right? And every settlement is imperfect.
5 MR. SUMMY: That is correct.
6 THE COURT: And there is no perfect solution
7 here. And I think the effort of these defendants to try
8 to address this within their own capacities is a very good
9 thing.
10 MR. SUMMY: I agree with that.
11 THE COURT: It's a good thing. And I -- you
12 know, obviously, the attention is on the 3M settlement
13 because of the very size of it. But, you know, 3M is
14 addressing a large amount of its net worth to paying these
15 claims.
16 MR. SUMMY: Your Honor, you're exactly right and
17 this is one of the things we talked about yesterday. And
18 people -- I think a lot of folks weren't aware of this.
19 But -- and just to be frank, 3M has a market cap of
20 $53 billion.
21 THE COURT: Yes.
22 MR. SUMMY: Okay? When you take 12.5 billion
23 here for the water providers, they're still facing --
24 there were claims that were carved out of the release
25 here, they could be facing those claims. They're still

1 facing the personal injury. They'll still facing the
2 public and private property damages. They're still facing
3 the attorney generals.
4 THE COURT: All which we're working on.
5 MR. SUMMY: All which is in this court. We're
6 working on it. But these are additional liabilities that
7 they also have to deal with. And at the same time --
8 THE COURT: They've got a case in Florida.
9 MR. SUMMY: They've got a case in Florida on the
10 earplug litigation which they're trying to deal with. So
11 we all here have to be realistic about what this company
12 can do and they can only do so much.
13 THE COURT: And, you know, let me say, I've
14 watched cases that end up in bankruptcy. It isn't pretty,
15 isn't pretty for anybody. It's terrible for the company
16 and it's terrible for the plaintiffs.
17 MR. SUMMY: It's terrible. It is incredibly
18 frustrating. And I mean, if you -- if you think this
19 settlement's bad, I mean, I'm just telling you, bankruptcy
20 court would not be a good option for these water
21 districts. It would be terrible.
22 THE COURT: And I take it that that was always a
23 restraint on y'all in terms of what you were demanding
24 because you realized at some point 3M is left with no
25 option.

1 **MR. SUMMY:** That is correct. And, you know,
2 it's like when you do one of these settlements you end up
3 having to team up with the defendant because you want them
4 to do well so that they can pay your clients.
5 **THE COURT:** And let me say this. This is a lot
6 better than opioids where the plaintiffs were keeping the
7 opioid manufacturers in business. 3M is an iconic
8 company. It's done many great things. This is a bad
9 stain on it. But, you know, you don't want to put them
10 out of business.
11 **MR. SUMMY:** No, I think that would be a terrible
12 thing for all the plaintiffs.
13 **THE COURT:** Okay. So right now, I think I have
14 on any objections to the preliminary comes in on the 17th,
15 is due by the 17th, any objections that is on 3M. Any
16 objections to Dupont arises -- is due on the 24th of July.
17 And what I intend to do is, if I have objections, I don't
18 think there are any on the record right this moment, but
19 if there are any, I'm going to direct the parties to reply
20 quickly, five days or so, just quickly respond to
21 preliminary objections.
22 Again, for those who may anticipate that, I just
23 need to alert you that the standard, the threshold, you
24 read the standard is pretty low. It's in the range of a
25 reasonable settlement. It's a pretty low threshold. The

1 more substantive one, of course, is during the objection
2 period.
3 But we will try to quickly address this because
4 my goal is to -- assuming that I'm in a position to grant
5 the motion for a preliminary approval, is I'm going to
6 60 -- shortly after the 60-day period, I'm going to want
7 to have a fairness hearing. So I want to move this along.
8 I don't think time's our friend.
9 Yes, Mr. London?
10 **MR. LONDON:** Your Honor, in terms of the
11 preliminary approval response deadline, which I'll address
12 for 3M first, the plaintiff committee, and I believe 3M as
13 well, this is with respect to 3M only, received a request
14 from the State of California through its Attorney
15 General's Office for an additional 14 days to submit a
16 response presumably in opposition or to consider it
17 longer. The plaintiff's position was this is a
18 preliminary approval, as Your Honor indicated, and not the
19 objection of the opt-out period. We tried to identify and
20 address their concerns, many of which we -- the Court's
21 already addressed today, not enough money,
22 ascertainability, objections to the payment terms over
23 time, inclusion of some state-owned entities, which we
24 highlighted in Section 5.2. There's a mechanism for them
25 to be removed if they were inadvertently included. So our

1 position is that additional time to oppose preliminary
2 approval --
3 **THE COURT:** Has the State of California made a
4 motion to me?
5 **MR. LONDON:** No, they likely would make such a
6 motion. We presume they couldn't be here. They let us
7 know the other night they would presumably make that
8 motion on Monday.
9 **THE COURT:** Well, they're welcome to do it. And
10 like any other, I'm going to shorten the time to five days
11 for a response and I will address that.
12 **MR. LONDON:** And likewise, Your Honor, last
13 night we received a request from the State of Minnesota
14 through their Attorney General's Office for an additional
15 14 days to respond to the motion for preliminary approval.
16 And they had requested that we notify the Court that the
17 State of Minnesota would like to be afforded that time.
18 **THE COURT:** Tell me this, is there any value in
19 taking -- for me to adopt it to give the plaintiff's
20 counsel and defense counsel a chance to communicate with
21 these AGs?
22 **MR. LONDON:** Your Honor, there have been
23 communication efforts. I believe 3M has communicated with
24 them. I believe that the period and under the preliminary
25 approval guidelines, it's in our brief, and Your Honor's

1 well aware of it, this is not the period to raise the
2 objections. And obviously --
3 **THE COURT:** To be honest, I'm trying to make
4 that point that these are the issues regarding is it
5 enough, is the schedule too long, all those issues are
6 appropriate issues in which a party may assert objection
7 and why we do a fairness hearing.
8 **MR. LONDON:** And that's exactly right.
9 Assessing their objections, their purported objections
10 because they are not their official objections at this
11 time, did not seem like these were the -- that this would
12 be assisted in extending the period to object to
13 preliminary approval. And, obviously, I think the most
14 important one was that a system may have been
15 inadvertently included. That is a fair point. But,
16 again, 5.2 of the master settlement agreement, at least
17 for 3M, allows this opportunity to provide written notice.
18 **THE COURT:** Well, you need to -- in a response
19 you'll need to point that out, those are issues. But, you
20 know, I want to give anyone who may wish to file an
21 objection every right to fully assert and then have me vet
22 these issues after hearing from the parties on the
23 settlement because I've got to ultimately make a
24 determination that it is a fair and reasonable settlement.
25 And, you know, I can't make that until I hear not just

1 the -- see the proposal, which I have reviewed, but hear
2 the objections and the responses to that.
3 **MR. LONDON:** That's right. And Mr. Bulger,
4 counsel for 3M, has been in communication with Minnesota.
5 California, we've been in communication by email, but they
6 are represented also by private counsel. So we will keep
7 the lines of communication open. And if they file their
8 motions, I guess they'll file their motions.
9 **THE COURT:** Now, how does the settlement -- I
10 know there are efforts with the AGs, how do the separate
11 efforts with the AGs overlap with this proposed
12 settlement?
13 **MR. LONDON:** Your Honor, the state systems --
14 the states are excluded under the terms of the settlement,
15 state-owned systems. That's probably a better question
16 for 3M and their counsel, how they're addressing
17 discussions with the states --
18 **THE COURT:** First of all, under the proposed
19 settlement with the water districts, are the states
20 included?
21 **MR. LONDON:** No, they're not.
22 **THE COURT:** So why would they object? Why do
23 they need to?
24 **MR. SUMMY:** Your Honor, so the way it works is
25 we try to be very, very careful in not encroaching upon

1 the Attorney General's jurisdiction and discretion over
2 their -- what they hold discretion over and jurisdiction
3 over. So the way that settlement works is, the state and
4 federal-owned systems are excluded unless, unless, and
5 this is both settlements, unless there are systems that
6 where the state has ceded the right to sue and be sued to
7 that entity. Okay? And, for example, a good example of
8 that is a water provider that I represent that's near here
9 called Santee Cooper.
10 THE COURT: I know Santee Cooper.
11 MR. SUMMY: Yes. So Santee Cooper, the state
12 has ceded legislatively authority to Santee Cooper to sue
13 and be sued in their own right. And so entities like that
14 are included in this settlement.
15 THE COURT: That's fairly unusual in South
16 Carolina, I know at least, is that type of authority.
17 MR. SUMMY: Correct. It's unusual.
18 THE COURT: I've had cases involving Santee
19 Cooper. It came up in other settings and it was almost
20 unique in South Carolina.
21 MR. SUMMY: That's correct. And there's other
22 entities like that across the country where when those
23 folks have their own right to operate on their own, then
24 they are included in the settlement.
25 THE COURT: So your impression is with these

1 sort of outlier situations, by and large, California and
2 Minnesota wouldn't be a part of this settlement?
3 MR. SUMMY: The idea behind all of it was and
4 including the release -- when you look at the release
5 language, I talked about this yesterday, the defendants
6 wanted the water systems to, for example, they wanted them
7 to release like if you pulled water out of a river, okay,
8 they wanted you to release claims related to the river.
9 We said no, no, no. Those aren't our claims to release.
10 We can release what's -- once the waters in our piping, we
11 can release that. That river belongs to the state.
12 THE COURT: And the state, you know, hasn't
13 reached a settlement on that yet.
14 MR. SUMMY: That is correct. So we were very
15 careful to not encroach upon the state jurisdictions
16 because they still have their claims.
17 THE COURT: Well, would the AGs respond that
18 they're acting on behalf of their individual water
19 districts?
20 MR. SUMMY: Well, what's interesting is
21 California, when they sent us the objection letter, they
22 said that there were some of the systems that may be able
23 to sue and sue in their own right, that they had taken
24 over administratorship of because maybe they were in
25 financial ruin or financial trouble. So they were sort of

1 stepping in those shoes and objecting. So there could be
2 some of that. But the reason that this 5.2 paragraph
3 exists is it's possible when we made all of our lists, all
4 the lawyers for 3M, Dupont, and us, that maybe we got some
5 of the names wrong. In other words, maybe some of
6 these --
7 **THE COURT:** That's why you have an objection
8 period and dialogue because --
9 **MR. SUMMY:** That is correct.
10 **THE COURT:** Let me say, y'all made some
11 mistakes. Okay? Let's go ahead and --
12 **MR. SUMMY:** I'm sure we did.
13 **THE COURT:** Just nobody's perfect.
14 **MR. SUMMY:** That's correct.
15 **THE COURT:** And that's why we have this period.
16 **MR. SUMMY:** That is correct.
17 **THE COURT:** And y'all will be able to dialogue
18 with these states and try to clarify these things. And if
19 some additional clarification, perhaps in an order from me
20 would be helpful, we can talk about that.
21 **MR. SUMMY:** I think that's exactly right. And
22 look, there may be some mistakes there. And if we've got
23 somebody on a list wrong, we will work with all the
24 states, anyone who has an issue who raises it with us,
25 total open dialogue. We will fix it and work together to

1 fix it to get it right. Because we were -- our intent was
2 not to encroach upon the state's claims.
3 **THE COURT:** Okay.
4 I had some report that somebody wanted to speak?
5 I didn't know if it was about the proposed settlement.
6 Was there an attorney wanting to speak? Yes, sir?
7 **MR. RIGANO:** James Rigano, Rigano LLC, yes, Your
8 Honor, I wanted to speak to you.
9 **THE COURT:** Just step forward, if you would.
10 Yes, sir?
11 **MR. RIGANO:** Thank you, Your Honor, for the
12 opportunity to present to the Court. I am James Rigano
13 with Rigano LLC representing the Towns of East Hampton,
14 Islip, and Harriettstown. And the settlement agreement as
15 we all know is subject to water providers. Water
16 providers are remediating subject to very severe, serious
17 environmental standards.
18 My clients, the three towns, have PFAS, serious
19 PFAS contamination and are also going to be remediating
20 subject to very similar standards under the oversight in
21 our case of the New York State Department of Environmental
22 Conservation. Just like the water districts are
23 remediating subject to standards, we're remediating
24 subject to standards. Difference is we are cleaning up
25 soil and groundwater and we are not remediating a public

1 water source.
2 THE COURT: So let me understand. East Hampton,
3 these are towns?
4 MR. RIGANO: Yes, they are towns in New York
5 State.
6 THE COURT: Okay. And so they wouldn't be part
7 of this settlement, would they?
8 MR. RIGANO: That's right. Presently they're
9 not.
10 THE COURT: Okay. So do you have an objection?
11 MR. RIGANO: I do have an objection. We're
12 subject to severe prejudice as described --
13 THE COURT: Because you're not included.
14 MR. RIGANO: Because we're not included, yes.
15 On Page 1, Paragraph 1 of the 3M settlement, it
16 refers to the Safe Drinking Water Act and how the water
17 providers are subject to the Safe Drinking Water Act.
18 Similarly, the environmental standards that we have to
19 clean up to very much emanate from the Safe Drinking Water
20 Act. We're essentially subject to the same federal law.
21 We, my clients, are severely prejudiced here because we
22 are not part of the settlement agreement. It would -- our
23 participation would really not impinge very much on the
24 costs associated.
25 THE COURT: Let me ask you this. Mr. Summy, are

1 there other towns or governmental districts similar to
2 Mr. Rigano's situation? Are you familiar?
3 **MR. SUMMY:** Well, clearly, there are towns, for
4 example, who own airports that are contaminated. And
5 there's a lot of those cases in the MDL. And one of the
6 things that we don't believe his client is prejudiced
7 because his claims have not been released. They've not
8 been waived. They've not been impacted by this.
9 **THE COURT:** The great majority of plaintiffs are
10 not in this first round of settlements?
11 **MR. SUMMY:** That's correct.
12 **THE COURT:** It's just not, it's 300 out of 4,000
13 cases.
14 **MR. SUMMY:** That's correct.
15 **THE COURT:** And at some point -- so the
16 situation here, Mr. Rigano, help me with this. Did the
17 PFAS, in your view, come from the airports or the fire
18 departments? Do you have any idea where it may have come
19 from?
20 **MR. RIGANO:** It absolutely came from fire
21 fighting foam used at the airports.
22 **THE COURT:** Okay. And so I know there are a
23 number of airport situations.
24 How many have we got like that, Mr. Summy?
25 **MR. SUMMY:** I think there's about 78 or 80 that

1 are in the MDL, and I suspect there will be more. And,
2 look, a lot of the water systems that are in the
3 settlement also own airports.
4 THE COURT: Yes.
5 MR. SUMMY: And those claims have not been --
6 they are not part of the settlement. They've been
7 excluded. Those claims have not been waived in the
8 release. Careful consideration was taken in negotiating
9 those release provisions to not waive any of those claims
10 for anybody so that no one's soil, groundwater
11 contamination claims are prejudiced.
12 THE COURT: You know, Mr. Rigano, I would think
13 that the same criticism could come from the states that
14 say you haven't addressed ours, or the people that claim
15 they got cancer, they're not included. People who have
16 contaminated wells in their property have been damaged are
17 not included. People who fear they may develop
18 complications haven't been included. In fact, less than
19 ten percent of the plaintiffs are included in this
20 settlement. It's not the only settlement.
21 It's -- I mean, people have come to me and
22 they've said, boy, I guess your case is about over. I've
23 said, oh, no, it's not over. Okay? This is just a small
24 piece.
25 And the reason we picked the water districts

1 first was my notion that if the plaintiffs couldn't carry
2 their burden in the water districts, they couldn't win
3 anything. But just because they have prevailed here
4 doesn't mean they're not going to -- that they don't have
5 any other claims. They definitely have claims and there's
6 a lot of work still to be done. So I hear you loud and
7 clear.
8 MR. RIGANO: Your Honor --
9 THE COURT: I represented cities. And let me
10 say, if I were in your shoes, I would say, well, what
11 about me? Right? I mean, that's what you're saying. But
12 if you try to swallow the whole elephant at one time,
13 you'll never succeed.
14 MR. RIGANO: Well, Your Honor, the central point
15 why we're so prejudiced is there has been no discussion,
16 zero discussion, zero, nothing on when this -- when our
17 matters might come up in terms of either mediation or
18 discussion with the parties. And we are just left in the
19 dark in that regard.
20 THE COURT: One reason I'm delighted that you're
21 standing at this podium is raising, hearing, asserting the
22 claims on behalf of these towns that have this situation,
23 I think that's a good thing. But, you know, I had this a
24 lot where people were saying to me, what about my case?
25 And if I try to deal with 4,000 cases at one time, we

1 become paralyzed. We just cannot do it.
2 We spent a lot of time focusing on the water
3 districts. You'll hear in just a few minutes, I'm going
4 to get into other -- bellwethers in other areas that we're
5 planning. We're trying to keep this thing moving.
6 And, you know, I would just urge you to keep
7 asserting these claims and the need to address your
8 claims. I don't have any problem, heart burn about you
9 doing it. But I don't think the answer that we should
10 reject this settlement because it will undo everything
11 because -- you're absolutely right. This doesn't do
12 everything.
13 And in a perfect world we get it all done at
14 once. But we're just doing one step at a time. It's the
15 only way I know how to manage this. I just couldn't do it
16 all at one time as much as I'd like to. 4,000 cases,
17 20,000 plaintiff fact sheets, 37 million documents. I
18 mean, you know, you've just got to have bite-sized issues
19 to address. You can't do it all.
20 So thank you, sir, for addressing it. Go back
21 and tell the folks in New York that you got up here and
22 you fought for them. And I'm hoping that these lawyers on
23 both sides are listening to you.
24 MR. RIGANO: Thank you for the opportunity, Your
25 Honor.

1 **THE COURT:** Thank you, sir.
2 **MR. RIGANO:** Thank you.
3 **THE COURT:** We discussed -- you know, let's give
4 a little history here. The original City of Stuart case
5 had a number of defendants, not just 3M and not just
6 Dupont. We had Kidde. For those thinking about opting
7 out, where is Kidde now?
8 Mr. Summy, where's Kidde?
9 **MR. SUMMY:** Unfortunately, Kidde and National
10 Foam and Carrier and that whole group is sitting in
11 bankruptcy court in Delaware.
12 **THE COURT:** And I believe they have represented
13 to the Court they intend to liquidate and give you all
14 their money; isn't that right?
15 **MR. SUMMY:** Well, you know, they clearly what
16 they're trying to do is create a sale where they can
17 generate funds. And, you know, they're going to use those
18 funds to try and resolve the cases in this MDL I believe.
19 **THE COURT:** Not an ideal situation.
20 **MR. SUMMY:** Not an ideal situation.
21 Obviously --
22 **THE COURT:** I saw that coming a long time ago
23 with them.
24 **MR. SUMMY:** I know. And honestly, you know,
25 they have a fairly significant market share, it could be

1 in the neighborhood of ten percent or more. And we're
2 not -- water districts and all the plaintiffs were not
3 going to do very well there.
4 **THE COURT:** Yeah. And we -- and one of the
5 defendants was Tyco. And the evidence as discovery
6 developed, there was some real doubt about proving Tyco
7 was actually present in the City of Stuart. There was a
8 debate about it. The evidence was somewhat marginal. And
9 the plaintiffs elected, as I understand it, to dismiss
10 them from City of Stuart and ended up just with 3M. In
11 the end, it was 3M, but it was 3M and Dupont.
12 Am I right, Mr. Summy, on that?
13 **MR. SUMMY:** You're correct, Your Honor.
14 **THE COURT:** Okay. So one of the things I'd like
15 to do is I want to get a CMO for the telomer, remaining
16 telomer defendants. I want an idea about what kind of
17 discovery period -- we've, obviously, done a lot of
18 discovery already. But we need to have sufficient
19 discovery to develop a pool, and then to eventually we're
20 going to get to a bellwether trial.
21 And give me an idea of, if we issued an order
22 next week, what kind of time do we need to get from here
23 to a trial date for the telomer defendants?
24 Mr. Petrosinelli, what are your thoughts?
25 **MR. PETROSINELLI:** Good morning, Your Honor.

1 Joe Petrosinelli, one of the co-leads for the defendants
2 but, of course, I'm counsel for Tyco. It sounded like
3 they already got enough money, they don't need us.
4 **THE COURT:** Yeah, right. (Laughter) Dreaming.
5 You hear Mr. Rigano? He's waiting, too.
6 **MR. PETROSINELLI:** I think we've been talking to
7 the plaintiffs about the timing of this. And I think that
8 it depends on whether we would select as the next
9 bellwether one of the original cases we had selected where
10 there's already been some discovery done, or whether we
11 started from scratch and picked one of the other couple
12 hundred cases in the pool. And so I think what we've
13 talked about is, you know, we want to do this in the
14 spring-ish of 2024.
15 **THE COURT:** I would like a spring of 2024 trial.
16 **MR. PETROSINELLI:** I think that if it were a
17 case where there's already been some discovery, there's no
18 doubt that would be doable. I think I'd ask the Court to
19 allow us to talk to the plaintiffs because we want to pick
20 a representative case.
21 **THE COURT:** Well, I mean, I think the lesson on
22 the City of Stuart, despite everybody's best efforts, it
23 ended up there just wasn't good evidence on Tyco. Nobody
24 knew it until we got down the road a good bit. I think
25 you knew it early, Mr. Petrosinelli, but you kept your

1 powder dry. But we -- you know, Tyco is a player and we
2 need to have cases in which Tyco and other telomer
3 defendants, which are significant.
4 Folks, let me just raise this. There are a lot
5 of parties in this case, probably more than need to be.
6 And at some point the plaintiffs need to take a deep
7 breath and say, is sometimes more a less? Y'all have a
8 good feel of how complicated one of these trials will be.
9 At some point you're going to have all these parties, I've
10 got to put them in a trial. And I just think y'all need
11 to really think through how broad you go out. Obviously,
12 responsibility, knowledge gets harder to prove as you go
13 out from the product itself, the manufacturing itself. So
14 I'm just saying to you, y'all think about that.
15 Let me suggest this. I'd like to hear a status
16 report in 30 days. And the idea would be a proposed CMO.
17 If not, y'all tell me your respective positions. And I
18 might have a telephone conference to talk about it or work
19 it through. I want to get us moving.
20 Obviously, it would be ideal to use some --
21 nobody wants to repeat and start over again. But it may
22 well be those in the pool aren't adequate. It just
23 doesn't -- the reason we have multiple ones in the pool is
24 that what looks good when you start sometimes isn't so
25 good by the end. So let's -- in 30 days let's get on a

1 schedule to try to get a CMO with an idea of a spring 2024
2 bellwether.
3 I recently had filed before me a declaratory
4 judgment action brought by Tyco against some carriers. My
5 plan is to as quickly as reasonable -- and nobody's
6 answered yet or otherwise pled -- is to try to address
7 these issues in advance of that spring 2024 trial.
8 Obviously, we've got a good bit of background in this MDL.
9 And I intend to move expeditiously to address coverage
10 issues. I think that is a potential issue that may help
11 facilitate resolution. I have no idea the merits of these
12 claims and defenses. We'll learn about that. But I think
13 whatever the answer is, it's important for Tyco to know
14 the answer.
15 Do you agree, Mr. Petrosinelli?
16 **MR. PETROSINELLI:** Absolutely, Your Honor.
17 Thank you.
18 **THE COURT:** Okay. So we -- when we get
19 responses to the filing on the Tyco declaratory judgment
20 action, I will probably put us on a fairly expedited
21 schedule to address issues in the hope that over the fall
22 and winter we can address and dispose of those issues.
23 We had talked about -- y'all have been working
24 on a personal injury bellwether. Where are we on all that
25 right now? Mr. London?

1 MR. LONDON: Judge, on the personal injury
2 bellwether, we've got CMO 26 is in place.
3 THE COURT: Correct.
4 MR. LONDON: The parties have agreed.
5 THE COURT: Didn't I see something, y'all wanted
6 some additional time or something?
7 MR. LONDON: Yeah, I think there was some issues
8 going back and forth with respect to medical records and
9 authorizations for the collection of those records. The
10 parties have agreed to extend the selection deadline from
11 July 28th 60 days to September 28th.
12 THE COURT: I'm fine. The things y'all tend to
13 work out together, it seems reasonable to me. I don't
14 want to get in the middle of it. Y'all know your cases.
15 I questioned early on, you know, you all's pursuit of all
16 those medical records.
17 Was it 1800, Mr. Petrosinelli, or something like
18 that?
19 MR. PETROSINELLI: It was almost that, Your
20 Honor, yes.
21 THE COURT: And I was told, well, that might
22 screen out some cases. So I respect that. Okay?
23 And I've had this come up before. You know,
24 lead counsel, they're -- they don't know about whether
25 these cases are real, substantive, meritorious, not

1 meritorious. Y'all don't know. And the last thing y'all
2 want to do is expend your time on things that don't have
3 merit, right? Y'all have got plenty on your table that's
4 meritorious. So I think, frankly, sorting that out is in
5 everybody's interest so that we -- so I kind of got as
6 soon as Mr. Petrosinelli said it to me the -- during our
7 telephone conference, I got why he wanted it and I think
8 it makes a lot of sense. Those changes are fine.
9 And how are we doing on our jurisdictional
10 discovery on the governmental immunity issues? How are we
11 doing on that?
12 Ms. Falk?
13 **MS. FALK:** Your Honor, actually, about a week
14 ago, Mr. Napoli and I had, if you remember, the Cannon Air
15 Force Base was going to be the focus that they selected.
16 **THE COURT:** Yes.
17 **MS. FALK:** And those are Mr. Napoli's cases and
18 we actually had a conversation. We seem to be moving
19 along. We don't have open discovery on that until the
20 fall.
21 **THE COURT:** Okay.
22 **MS. FALK:** That was the original plan, but we're
23 already talking.
24 **THE COURT:** Good. I thought the Government has
25 been incredibly cooperative. And I promised you I would

1 get to it. Like a lot of other people, it wasn't as quick
2 as you'd like. But I want to keep my word to you and, you
3 know, get the jurisdictional discovery done, address those
4 issues. Again, I have no idea what it's going to show us,
5 but I want to get to it and through it one way or the
6 other.
7 Is there other -- are we still pursuing other US
8 Government discovery or is that pretty much done?
9 **MS. FALK:** I would like to think it's done, Your
10 Honor. (Laughter)
11 **THE COURT:** Good. You were, like, nervous, oh,
12 my God, the judge is raising, oh, no, I've got one more
13 thing for you.
14 Let's talk about future status conferences.
15 Everybody's working me. I just gave you this whole list
16 of things, right? I mean, multiple bellwether trials
17 we're working towards, and governmental immunity briefing
18 and all that. And I would propose, unless there's a need
19 to get together more frequently, I would like the next
20 in-person status conference to be at the time we do a
21 fairness hearing. I mean, that would -- and with the
22 caveat that, if in the interim issues arise that I need to
23 address promptly, that y'all get me on the telephone and
24 we do that. And if we have to do an in person with that,
25 I'm fine with that.

1 But the question is -- we never have done
2 August. The question is September. Do we need to do
3 something in September? You know, I'm a little unclear.
4 We don't know when the 60-day period is going to start for
5 the comment period, assuming that we give preliminary
6 approval.
7 But whenever that is, 60 days later, shortly
8 after that, I would schedule the fairness hearing. I
9 mean, literally maybe a matter of days.
10 So, Mr. London, what's your thought about doing
11 something in the interim or just waiting?
12 **MR. LONDON:** I think, Your Honor, that probably
13 works. I think using that math, we probably, assuming if
14 the preliminary approval would be granted, that would
15 bring us into a fairness hearing in mid-October, early
16 November-ish, just sort of ball-parking it. So I think --
17 **THE COURT:** Maybe earlier.
18 **MR. LONDON:** Possibly earlier. So I think that
19 works. We've got a lot of work ahead of us. We're
20 certainly tiering up the bellwether process for water
21 providers -- maybe not as a bellwether, but it's the next
22 round, the personal injury cases, as well as some of the
23 homework assignments Your Honor doled out today for us to
24 continue to work on. There's enough to do.
25 **THE COURT:** But I'm available. I mean, you

1 know, to the extent we've got something that I'm stopping
2 the process, let's just address it. We'll address it in
3 the interim. I don't have a problem with that.
4 Mr. Petrosinelli, what are you thoughts?
5 **MR. PETROSINELLI:** I think that would be fine
6 with us, Your Honor.
7 **THE COURT:** Okay.
8 And, you know, my goal is to do this as soon as
9 we can. I mean, all this process moving towards a
10 fairness hearing, I want -- if we get -- assuming we get
11 the preliminary approval, we're going to get that 60 days.
12 And then very shortly after that, I just want to move on
13 that issue so everybody knows where they stand. Okay?
14 And whether we've got a settlement or not. Okay?
15 Are there other matters to be addressed by the
16 Court?
17 **MR. LONDON:** Nothing from the plaintiffs, Your
18 Honor.
19 **THE COURT:** From the defense?
20 **MR. PETROSINELLI:** No, Your Honor. Thank you.
21 **THE COURT:** I'm going to ask, I just want a
22 meeting with 3M counsel and the PEC Co-Leads. And I don't
23 want a delegation. I don't know how many folks are from
24 3M, but say just two on each side. I just want to have a
25 conversation about some of the aspects of that particular

1 matter. And I'd ask for you to come to my chambers in
2 just a moment.
3 Anything else further for anyone else that needs
4 to raise with the Court?
5 (There was no response.)
6 **THE COURT:** With that, the status conference is
7 adjourned. Thank you.
8 (WHEREUPON, court was adjourned at 10:15 AM.)
9 ***
10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.
12 s/Karen E. Martin 7/15/2023
13 Karen E. Martin, RMR, CRR Date
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EXHIBIT 2

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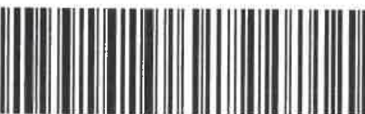

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2315

NOTICE OF DUPONT CLASS ACTION SETTLEMENT

IN RE: AQUEOUS FILM FORMING FOAMS
PRODUCT LIABILITY LITIGATION
United States District Court, District of South Carolina – Charleston Division
MDL No. 2:18-mn-2873
Case No. 2:23-cv-03230

PLEASE NOTE, the enclosed correspondence relates to the Settlement with The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (each a "Settling Defendant").

YOU MAY RECEIVE ADDITIONAL CORRESPONDENCE RELATING TO ADDITIONAL SETTLEMENTS WITH OR JUDGMENTS INVOLVING OTHER DEFENDANT(S).

Please be aware that documents associated with one Settling Defendant may appear similar to documents associated with another Settling Defendant. However, **each Settlement has its own specific terms and conditions, and each set of documents should be carefully reviewed with this in mind.** Please visit www.PFASWaterSettlement.com for more information and to review settlement-related documents.

SETTLEMENT WEBSITE FOR FILING YOUR CLAIM FOR SETTLEMENT PAYMENT

WWW.PFASWATERSETTLEMENT.COM

NOTICE ID: KLV-233193

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION **This document relates to** *City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG	**MDL No. 2:18-mn-02873**

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND COURT APPROVAL HEARING

TO: All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before June 30, 2023, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level; and

All Public Water Systems in the United States of America that, as of June 30, 2023, are (i) subject to the monitoring rules set forth in UCMR 5 (i.e., "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.

All capitalized terms not otherwise defined herein shall have the meanings set forth in the Settlement Agreement and the Allocation Procedures, available for review at **www.PFASWaterSettlement.com**.

A FEDERAL COURT APPROVED THIS NOTICE. PLEASE READ THIS NOTICE CAREFULLY, AS THE PROPOSED SETTLEMENT DESCRIBED BELOW MAY AFFECT YOUR LEGAL RIGHTS AND PROVIDE YOU WITH POTENTIAL BENEFITS. THIS IS *NOT* A NOTICE OF A LAWSUIT AGAINST YOU OR A SOLICITATION FROM A LAWYER.

I. WHAT IS THE PURPOSE OF THIS NOTICE?

The purpose of this Notice is (i) to advise you that a proposed settlement (referred to as the "Settlement") has been reached with the defendants The Chemours Company, The Chemours Company FC, LLC, DuPont de Nemours, Inc., Corteva, Inc., and E.I. DuPont de Nemours and Company n/k/a EIDP, Inc. (each, a "Settling Defendant" and collectively, "Settling Defendants") in the above-captioned lawsuit (the "Action") pending in the United States District Court for the District of South Carolina (the "Court"); (ii) to summarize your rights in connection with the Settlement; and (iii) to inform you of a Court hearing to consider whether to grant final approval of the Settlement, to be held on December 14, 2023 at 10:00 a.m. EST, before the Honorable Richard M. Gergel, United States District Judge of the United States District Court for the District of South Carolina, located at 85 Broad Street, Charleston, South Carolina 29401.

If you received this Notice about the proposed Settlement in the mail, then you have been identified as a potential Settlement Class Member according to the Parties' records. Please read this Notice carefully.

II. WHAT IS THE ACTION ABOUT?

Class Representatives are Public Water Systems that have filed actions against Settling Defendants and other defendants, which actions are currently pending in the above- captioned multi-district litigation, In Re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18-mn-2873 (D.S.C.) (the "MDL").

Class Representatives have alleged that they have suffered harm resulting from the presence of PFAS in Drinking Water and/or are required to monitor for the presence of PFAS in Drinking Water and that Settling Defendants are liable for damages and other forms of relief to compensate for such harm and costs.

In addition to the MDL, certain other cases are pending against Settling Defendants asserting Released Claims (collectively with the MDL, all pending litigation brought by or on behalf of a Releasing Person against a Released Person involved Released Claims shall be referred to as the "Litigation").

There are numerous defendants in addition to Settling Defendants in the MDL and the cases comprising the Litigation. Those other defendants are not part of this Settlement Agreement. The Class Representatives and Settlement Class Members will remain able to seek separate and additional PFAS-related recoveries from those other defendants in addition to the Settlement Amount here. The Parties agree, and Class Counsel have a reasonable basis to believe, that the Settling Defendants collectively comprise a very small share of MDL defendants' total alleged PFAS-related liabilities, on the order of approximately 3-7% or less.

The Settling Defendants deny the allegations in the Litigation and all other allegations relating to the Released Claims and deny that they have any liability to Class Representatives, the Settlement Class, or any Settlement Class Member for any Claims of any kind, and would assert a number of legal and factual defenses against such Claims if they were litigated to conclusion (including against certification of any purported class for litigation purposes).

This Notice should not be understood as an expression of any opinion by the Court as to the merits of the Class Representatives' claims or the Settling Defendants' defenses.

III. WHO IS PART OF THE PROPOSED SETTLEMENT?

The Class Representatives and Settling Defendants have entered into the Settlement Agreement to resolve Claims relating to PFAS contamination of Public Water Systems. The Court has preliminarily approved the Settlement Agreement as fair, reasonable, and adequate. The Court will hold a Final Fairness Hearing, as described below, to consider whether to make the Settlement final.

The Settlement Class consists of each of the following:

(a) All Public Water Systems in the United States of America that draw or otherwise collect from any Water Source that, on or before June 30, 2023, was tested or otherwise analyzed for PFAS and found to contain any PFAS at any level;

AND

(b) All Public Water Systems in the United States of America that, as of June 30, 2023, are (i) subject to the monitoring rules set forth in UCMR 5 (i.e., "large" systems serving more than 10,000 people and "small" systems serving between 3,300 and 10,000 people), or (ii) required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline.

Not all Public Water Systems are potential Settlement Class Members: specifically, Public Water Systems that are owned and operated by a State or the federal government, and cannot sue or be sued in their own name, as well as certain other systems set forth below, are expressly **excluded** from the Settlement Class. In addition, Public Water Systems that do not fall within the Settlement Class definition set forth above are not Settlement Class Members.

The following are excluded from the Settlement Class:

a) Any Public Water System that is located in Bladen, Brunswick, Columbus, Cumberland, New Hanover, Pender, or Robeson counties in North Carolina; provided, however, that any such system will be included within the Settlement Class if it so requests.

b) Any Public Water System that is owned and operated by a State government and cannot sue or be sued in its own name, as listed in Exhibit I to the Settlement Agreement.

c) Any Public Water System that is owned and operated by the federal government and cannot sue or be sued in its own name, as listed in Exhibit J to the Settlement Agreement.

d) Any privately owned well or surface water system that is not owned by, used by, or otherwise part of, and does not draw water from, a Public Water System within the Settlement Class.

"UCMR 5" means the United States Environmental Protection Agency's ("U.S. EPA") fifth Unregulated Contaminant Monitoring Rule, published at 86 Fed. Reg. 73131.

"UCMR 5 Deadline" means (i) December 31, 2025, or (ii) such later date to which the deadline for completion of sample collection under UCMR 5 may be extended by the U.S. EPA.

"Water Source" means any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water, including water it provides or collects, treats or stores for distribution to customers or users.[1]

IV. WHAT ARE THE KEY TERMS OF THE PROPOSED SETTLEMENT?

The key terms of the proposed Settlement are as follows.

1. *Settlement Amount*. Settling Defendants have agreed to pay the total and maximum dollar amount of one billion one hundred eighty-five million dollars ($1,185,000,000) (the "Settlement Amount"), subject to final approval of the Settlement by the Court and certain other conditions specified in the Settlement Agreement. In no event shall the Settling Defendants be required under the Settlement Agreement to pay any amounts above the Settlement Amount. Any fees, costs, expenses, or incentive awards payable under the Settlement Agreement shall be paid out of, and shall not be in addition to, the Settlement Amount.

2. *Settlement Benefit*. Each Settlement Class Member who has not excluded itself from the Settlement Class will be eligible to receive a settlement check(s) from the Claims Administrator based on the Allocation Procedures developed by Class Counsel, which are subject to final approval by the Court as fair and reasonable. Each Settlement Class Member's settlement amount will be based on information submitted by Settlement Class Members in their Claims Forms and will depend on each Impacted Water Source's flow rate and level of concentration as compared to all other Settlement Class Members' Impacted Water Sources. The allocation process is described below. Precisely how much each Settlement Class Member will receive is unknown at this time because it depends on all the information submitted by all Settlement Class Members.

3. *Settlement Administration*. The Court has appointed a Special Master and Claims Administrator pursuant to Rule 53 of the Federal Rules of Civil Procedure (FRCP) to oversee the allocation of the Settlement Funds. They will adhere to their duties set forth herein and in the Settlement Agreement. The Special Master will generally oversee the Claims Administrator and make any final decision(s) related to any appeals by Qualifying Settlement Class Members and any ultimate decision(s) presented by the Claims Administrator. The Claims Administrator will perform the actual modeling, allocation and payment distribution functions. The Claims Administrator will seek assistance from the Special Master when needed. The Claims Administrator may seek the assistance of the Plaintiffs' Executive Committee ("PEC") consultants who assisted in providing guidance in designing the Allocation Procedures.

[1] Other capitalized terms have the meaning given those terms in the Settlement Agreement.

Allocation Procedures Overview

The Allocation Procedures were designed to fairly and equitably allocate the Settlement Funds among Qualifying Set- tlement Class Members to resolve PFAS contamination of Public Water Systems in such a way that reflects factors used i designing a water treatment system in connection with such contamination. Both the volume of contaminated water and th degree of contamination are the main factors in calculating the cost of treating PFAS contamination; the Allocation Procedure use scientific and EPA- derived formulas to arrive at Allocated Amounts that proportionally compensate Qualifying Settlemen Class Members for PFAS-related treatment. The Allocation Procedures are appended as Exhibit C to the Settlement Agreemen

1. ***Claims Form Process***. The Claims Administrator will verify that each Entity that submits a Claims Form is a Quali- fying Settlement Class Member and will confirm the category into which the Settlement Class Member falls.

- Settlement Class Members fall into one of two categories: Phase One Qualifying Settlement Class Members o Phase Two Qualifying Settlement Class Members. Phase One Qualifying Settlement Class Members will b allocated 55% of the Settlement Funds and Phase Two Qualifying Class Members will be allocated 45% of th Settlement Funds.[2]
  - o A Phase One Qualifying Settlement Class Member is a Public Water System that draws or otherwise collec from any Water Source that tested or otherwise analyzed on or before June 30, 2023 and found to contain a PFAS at any level. The Claims Administrator will establish five separate payment sources from which Pha One Qualifying Settlement Class Members may receive Settlement Funds. Such Settlement Class Membe will be eligible for compensation from at least one and potentially more of the payment sources. The sources, and the criteria the Claims Administrator will use to determine the amount each Phase On Qualifying Settlement Class Member will receive from them, are described below and fully in the Allocation Procedures.
  - o A Phase Two Qualifying Settlement Class Member is a Public Water System that is not a Phase O Qualifying Settlement Class Member and is subject to the monitoring rules set forth in UCMR 5 or oth applicable state or federal law. The Claims Administrator will establish five separate payment sourc from which Phase Two Qualifying Settlement Class Members may receive Settlement Funds. Su Settlement Class Members will be eligible for compensation from at least one and potentially more these payment sources, one of which will be to offset the costs of PFAS testing. These sources, and criteria the Claims Administrator will use to determine the amount each Phase Two Qualifying Settlem Class Member will receive from them, are described below and fully in the Allocation Procedures.

The initial step for establishing Settlement Class Membership and eligibility for compensation from any of Settlement Funds is the completion of the Claimant Information Form. After a Person completes the Public Water Syst Settlement Claims Form, the Settlement Class Member will be provided with additional relevant Claims Form(s) for payment sources for which the Settlement Class Member may be eligible. The term "Claims Form" may refer to any seven separate forms:

1. Phase One Public Water System Claims Form;
2. Phase One Supplemental Fund Claims Form;
3. Phase One Special Needs Fund Claims Form;
4. Phase Two Testing Claims Form;
5. Phase Two Public Water System Claims Form;
6. Phase Two Supplemental Fund Claims Form; and
7. Phase Two Special Needs Fund Claims Form.

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[2] This allocation between Phase One and Phase Two is subject to adjustment by the Court.

These Claims Forms will be available online and can be submitted to the Claims Administrator electronically or on paper. The Claims Forms will vary depending on the applicable Settlement Class Membership category (Phase One or Phase Two) and on the specific sources from which compensation is sought. The Claims Forms are appended as Exhibit D to the Settlement Agreement.

The Claims Administrator will review each Claims Form, verify the completeness of the data it contains, and follow up as appropriate, including to notify Settlement Class Members of the need to cure deficiencies in their submission(s), if any. Based on this data, the Claims Administrator will then confirm whether each Settlement Class Member is a Phase One Qualifying Settlement Class Member or Phase Two Qualifying Settlement Class Member and determine the amount each Settlement Class Member is owed from each payment source from which the Settlement Class Member seeks compensation. Should any portion of the Settlement Funds remain following the completion of the Claims process, they will be distributed to certain Qualifying Settlement Class Members in a pro rata fashion in proportion to their respective Allocated Amounts. None of any such remaining Settlement Funds shall be returned to the Settling Defendants.

4. *Payment of Settlement Amount*. Within ten (10) Business Days after Preliminary Approval, Settling Defendants shall pay or cause to be paid the Settlement Amount in full, in accordance with the payment terms set forth in the Settlement Agreement. If the Settlement does not become final, Settling Defendants are entitled to a refund of the unused Settlement Funds, and no distribution to Settlement Class Members will occur.

5. *Release*. All Settlement Class Members who have not excluded themselves from the Settlement Class will release certain Claims against the Settling Defendants, their affiliates, certain predecessors and successors, and other persons as set forth in the Settlement Agreement. This is referred to as the "Release." Generally speaking, the Release will prevent any Settlement Class Member from bringing any lawsuit against the Settling Defendants or making any claims resolved by the Settlement Agreement.

The Release, as set forth in Paragraphs 12.1 through 12.9 of the Settlement Agreement, will be effective as to every Settlement Class Member who has not excluded itself from the Settlement Class, regardless of whether or not that Settlement Class Member files a Claims Form or receives any distribution from the Settlement.

6. *Attorney Fee/Litigation Cost and Class Representative Awards*. The Court will determine the amounts of attorneys' fees and expenses to award to Class Counsel from the Settlement Amount for investigating the facts and law in the Action, the massive amount of litigation surrounding the Action, the trial preparations, and negotiating the proposed Settlement. Class Counsel will request an award of all attorneys' fees and expenses in the amounts due under the Holdback Provisions set forth in CMO No. 3. Class Counsel will make their request in a motion for attorneys' fees and costs in accordance with Section 11.2 of the Settlement Agreement. Class Counsel intend to file a motion for an award of attorneys' fees and costs that will request that amounts due under the Holdback Provisions set forth in Case Management Order No. 3, private attorney/client contracts, and fees of Class Counsel all be paid from the Qualified Settlement Fund. Class Counsel intend to file such motion with the Court no later than October 15, 2023 as ordered by the Court. After the motion for attorneys' fees and costs is filed, copies will be available from Class Counsel, the Settlement website (www.PFASWaterSettlement.com), or from the Court docket for *City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG.

Any attorneys' fees, costs, and expenses approved by the Court will be paid from the Settlement Amount.

7. *Settlement Administration*. All fees, costs, and expenses incurred in the administration and/or work by the Notice Administrator, including fees, costs, and expenses of the Notice Administrator, as well as the costs of distributing the Notice, shall be paid from the Settlement Amount. All fees, costs, and expenses incurred in the administration and/or work by the Claims Administrator, including fees, costs, and expenses of the Claims Administrator, shall be paid from the Settlement Amount. All fees, costs, and expenses incurred in the administration and/or work by the Special Master, including fees, costs, and expenses of the Special Master, shall be paid from the Settlement Amount. Settling Defendants shall have no obligation to pay any such fees, costs, and expenses other than the Settlement Amount.

8. *Dismissal of the Litigation*. If the Settlement is approved by the Court and becomes final, all pending Litigation will be dismissed with prejudice to the extent it contains Released Claims. If the Settlement is not approved by the Court or does not become final for any reason, the Litigation will continue, and Class Members will not be entitled to receive any Settlement Benefit.

THE PARAGRAPHS ABOVE PROVIDE ONLY A GENERAL SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT. YOU CAN REVIEW THE SETTLEMENT AGREEMENT ITSELF FOR MORE INFORMATION ABOUT THE EXACT TERMS OF THE SETTLEMENT. THE SETTLEMENT AGREEMENT IS AVAILABLE AT WWW.PFASWATERSETTLEMENT.COM.

V. HOW WILL SETTLEMENT FUNDS BE DIVIDED AMONG CLASS MEMBERS?

1. _Baseline Testing_. Phase One and Phase Two Settlement Class Members must perform "Baseline Testing" – tha is, Settlement Class Members must test every Water Source they own for PFAS. By performing Baseline Testing to determin which Water Sources have current PFAS detections, each Settlement Class Member will be able to submit Claims Forms, hav its Water Sources scored, and receive Allocated Awards based on those scores.

Baseline Testing requires that each Water Source be analyzed for at least the 29 PFAS chemicals required under UCMR 5, using a methodology consistent with the requirements of UCMR 5 or applicable State requirements (if stricter). Any Wate Source tested before December 7, 2021 that did not result in a PFAS detection must retest. Any Water Source that tested befor June 30, 2023 that did result in a PFAS detection does NOT need to retest. However, you would still be required to test any othe Water Sources that have not previously had a detection.

Baseline Testing is different from what the EPA requires for UCMR 5. Under UCMR 5, a Public Water System is required to test for PFAS only at the entry points to its distribution system, but Baseline Testing requires Settlement Class Members to test every Water Source. Because Baseline Testing requires more testing than UCMR 5, Phase Two Settlement Class Members will be compensated out of the Settlement Funds for the costs of testing each Water Source to meet Baseline Testing requirements. **Baseline Testing Claims Forms for Phase Two Settlement Class Members must be received by no later than January 1, 2026.**

Baseline Testing may be performed by any laboratory accredited by a state government or federal regulatory agency for PFAS analysis that uses any state- or federal agency-approved PFAS analytical method that is consistent with (or stricter) than the requirements of UCMR 5.

Class Counsel has arranged for discounted testing with the following laboratory to assist Settlement Class Members with Baseline Testing. The listed laboratory will forward the test results to the Claims Administrator. There is no requirement to use the listed laboratories.

Eurofins
Telephone Number: 916-374-4499
Website: https://www.eurofinsus.com/environment-testing/pfas-testing/pfas-water- provider-settlement/

2. _Base Scores for Water Sources_. The Allocation Procedures are designed to allocate money based on factors that dictate the costs of water treatment. It is well documented in the scientific literature and well known throughout the public water industry that the costs associated with water treatment consist of 1) capital costs and 2) operation and maintenance costs. Capital costs are mainly driven by the Impacted Water Source's flow rate. Operation and maintenance costs are mainly driven by the levels of PFAS in the water. The Allocation Procedures utilize capital costs and operation and maintenance costs to generate a score for each Impacted Water Source. The Claims Administrator will input the flow rates and PFAS concentrations from the Claims Forms into an EPA-derived formula that calculates a Base Score for each Impacted Water Source.

3. _Adjusted Base Scores_. Certain Class Members will be eligible for increased scores. Based on the Claims Forms submitted, the Claims Administrator will determine if a Settlement Class Member is eligible for three available enhancements to the score: the Litigation Bump, the Bellwether Bump, and the Regulatory Bump. A Settlement Class Member may qualify for none, one, or multiple bumps.

The Litigation Bump will apply to Settlement Class Members with a pending lawsuit against the Settling Defendants alleging PFAS contaminated Drinking Water. The Bellwether Bump will apply to the ten Settlement Class Members that served as the Public Water Provider Bellwether plaintiffs. The Regulatory Bump will apply when an Impacted Water Source exceeds an applicable state Maximum Contaminant Level (MCL) or the proposed federal MCL as of March 14, 2023.

After the Claims Administrator applies the appropriate bumps to each Impacted Water Source, the Claims Administrator will use the new Adjusted Base Scores to determine how much of the Settlement Funds each Impacted Water Source will receive.

4. *Very Small Public Water System Payments*. All Phase One and Phase Two Settlement Class Members that are listed in the Safe Drinking Water Information System (SDWIS) as Transient Non-Community Water Systems (TNCWS) and Non-Transient Non- Community Water Systems (NTNCWS) serving less than 3,300 people may apply for Phase One or Phase Two Very Small Public Water System Payments. Phase One Public Water System Claims Forms for Very Small Public Water Systems are due no later than 60 days after the Effective Date, and Phase Two Public Water System Claims Forms for Very Small Public Water Systems are due by June 30, 2026. The Claims Administrator will issue a payment of $1,250 to the TNCWS and $1,750 to the NTNCWS serving less than 3,300 people.

5. *Allocated Amounts*. The information required to calculate Allocated Amounts is not publicly available and is only obtainable through the Claims Forms submitted by Settlement Class Members. Thus, the Allocated Amount that each Settlement Class Member will receive is not determinable until the Claims Administrator analyzes all the Claims Forms submitted by the Claims Form deadlines.

6. *Special Needs Funds*. Special Needs Funds will be established by the Claims Administrator for Phase One and Phase Two Settlement Class Members that have expended monetary resources on extraordinary efforts to address PFAS contamination in their Impacted Water Sources. Settlement Class Members can file a Special Needs Fund Claims Form to be considered for reimbursement of these expenditures.

7. *Supplemental Funds*. The Claims Administrator will also establish Phase One and Phase Two Supplemental Funds so that Settlement Class Members who did not initially exceed a state or federal MCL when it submitted its Claims Form can request additional funds if it later exceeds a state or federal MCL.

VI. WHO REPRESENTS THE SETTLEMENT CLASS?

The Court has appointed the attorneys from the following law firms to act as counsel for the Class (referred to as "Class Counsel" or "Plaintiffs' Counsel") for purposes of the proposed Settlement:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907

Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

VII. WHAT ARE THE REASONS FOR THE PROPOSED SETTLEMENT?

Class Counsel, Class Representatives, and Settling Defendants have engaged in extensive, arm's-length negotiations, including negotiations facilitated by a Court-appointed mediator, and have, subject to the Preliminary and Final Approval of the Court, reached an agreement to settle and release all Released Claims, on the terms and conditions set forth in the Settlement Agreement.

Class Representatives and Class Counsel have concluded, after a thorough investigation and after carefully considering the relevant circumstances, including the Claims asserted, the legal and factual defenses thereto, the applicable law, the burdens, risks, uncertainties, and expense of litigation, as well as the fair, cost-effective, and assured method of resolving the Claims, that it would be in the best interests of Settlement Class Members to participate in the Settlement in order to avoid the uncertainties of litigation and to assure that the benefits reflected herein are obtained for Settlement Class Members. Further, Class Representatives and Class Counsel consider the Settlement set forth herein to be fair, reasonable, and adequate and in the best interests of Settlement Class Members.

The Settling Defendants, while continuing to deny any violation, wrongdoing, or liability with respect to any and all Claims asserted in the Litigation and all other Released Claims, either on their part or on the part of any of the Released Persons, entered into the Settlement Agreement to avoid the expense, inconvenience, and distraction of further litigation.

VIII. WHAT DO YOU NEED TO DO NOW?

YOU CAN PARTICIPATE IN THE SETTLEMENT. You must file a Claims Form to be eligible to receive a payment under the Settlement Agreement. You can submit your Claims Form online at www.PFASWaterSettlement.com, or you can download, complete and mail your Claims Form to the Claims Administrator at AFFF Public Water System Claims, PO Box 4466, Baton Rouge, Louisiana 70821. The deadline for a Phase One Settlement Class Member to submit a Phase One Public Water System Claims Form is 60 days following the Effective Date, and the deadline for a Phase Two Settlement Class Member to submit a Phase Two Public Water System Claims Form is June 30, 2026.

Regardless of whether you file a Claims Form or receive any distribution under the Settlement, unless you timely opt out as described below, you will be bound by any judgment or other final disposition of the Settlement, including the Release set forth in the Settlement Agreement, and will be precluded from pursuing claims against the Settling Defendants separately if those Claims are within the scope of the Release.

YOU CAN OPT OUT OF THE SETTLEMENT. If you do not wish to be a Settlement Class Member, and do not want to participate in the Settlement and receive a Settlement Benefit Check, you may exclude yourself from the Settlement Class by completing and mailing a notice of intention to opt-out (referred to as an "Opt-Out"). Any Person within the Settlement Class who wishes to opt out of the Settlement Class and Settlement must file a written and signed statement entitled "Request for Exclusion" with the Notice Administrator and provide service on all Parties in accordance with Federal Rule of Civil Procedure 5.

To be treated as valid, the Request for Exclusion must be sent via certified or first- class mail to the Notice Administrator, Counsel for the Settling Defendants, and Class Counsel at the addresses below.

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

Class Counsel:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907

Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

Notice Administrator:

In re: Aqueous Film-Forming Foams Products Liability Litigation c/o Notice Administrator 1650 Arch Street, Suite 2210 Philadelphia, PA 19103

The Request for Exclusion must be received by the Notice Administrator no later than December 4, 2023.

The Request for Exclusion must certify, under penalty of perjury in accordance with 28 U.S.C. § 1746, that the filer has been legally authorized to exclude the Person from the Settlement and must provide:

- an affidavit or other proof of the Settlement Class Member's standing;
- the filer's name, address, telephone, facsimile number and email address (if available);
- the name, address, telephone number, and e-mail address (if available) of the Person whose exclusion is requested; and

The Request for Exclusion must be received by the Notice Administrator no later than December 4, 2023.

Any Person that submits a timely and valid Request for Exclusion shall not (i) be bound by any orders or judgments effecting the Settlement; (ii) be entitled to any of the relief or other benefits provided under this Settlement Agreement; (iii) gain any rights by virtue of this Settlement Agreement; or (iv) be entitled to submit an Objection.

If you own or operate more than one Public Water System and are authorized to determine whether to submit Requests for Exclusion on those Public Water Systems' behalf, you may submit a Request for Exclusion on behalf of some of those Public Water Systems but not the other(s). You must submit a Request for an Exclusion on behalf of each such Public Water System that you wish to opt out of the Settlement Class. Any Public Water System that is not specifically identified in a Request for Exclusion will remain in the Settlement Class.

Any Settlement Class Member that does not submit a timely and valid Request for Exclusion submits to the jurisdiction of the Court and, unless the Settlement Class Member submits an Objection that complies with the provisions of the Settlement Agreement, shall waive and forfeit any and all objections the Settlement Class Member may have asserted.

YOU CAN OBJECT OR TAKE OTHER ACTIONS. Any Settlement Class Member who has not successfully excluded itself ("opted out") may object to the Settlement. Any Settlement Class Member who wishes to object to the Settlement or to an award of fees or expenses to Class Counsel must file a written and signed statement designated "Objection" with the Clerk of the Court and provide service on Counsel for the Settling Defendants and Class Counsel at the addresses below in accordance with Federal Rule of Civil Procedure 5. Objections submitted by any Settlement Class Member to incorrect locations shall not be valid.

Clerk of the Court:

Clerk, United States District Court for the District of South Carolina 85 Broad Street Charleston, SC 29401

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

Class Counsel:

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Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464

All Objections must certify, under penalty of perjury in accordance with 28 U.S.C. § 1746, that the filer has been legally authorized to object on behalf of the Settlement Class Member and must provide:

- an affidavit or other proof of the Settlement Class Member's standing;
- the filer's name, address, telephone, facsimile number and email address (if available);
- the name, address, telephone, facsimile number and email address (if available) of the Person whose Objection is submitted;
- all objections asserted by the Settlement Class Member and the specific reason(s) for each objection, including all legal support and evidence the Settlement Class Member wishes to bring to the Court's attention;
- an indication as to whether the Settlement Class Member wishes to appear at the Final Fairness Hearing; and
- the identity of all witnesses the Settlement Class Member may call to testify. The deadline to submit an Objection is November 4, 2023.

Settlement Class Members may object either on their own or through any attorney hired at their own expense. If a Settlement Class Member is represented by counsel, the attorney must file a notice of appearance with the Clerk of Court no later than November 4, 2023, the date ordered by the Court for the filing of Objections, and serve such notice on all Parties in accordance with Federal Rule of Civil Procedure 5 within the same time period.

Any Settlement Class Member who fully complies with the provisions for objecting may, at the Court's discretion, appear at the Final Fairness Hearing to object to the Settlement or to the award of fees and costs to Class Counsel. Any Settlement Class Member who fails to comply with the provisions of the Settlement Agreement for objecting shall waive and forfeit any and all objections the Settlement Class Member may have asserted.

IX. WHAT WILL HAPPEN AT THE FINAL FAIRNESS HEARING?

Before deciding whether to grant final approval to the Settlement, the Court will hold the Final Fairness Hearing in Hon. Sol Blatt, Jr., Courtroom of the U.S. Courthouse, 85 Broad Street, Charleston, South Carolina 29401, on December 14, 2023, at 10:00 a.m. EST. At that time, the Court will determine, among other things, (i) whether the Settlement should be granted final approval as fair, reasonable, and adequate, (ii) whether the Released Claims should be dismissed with prejudice pursuant to the terms of the Settlement Agreement, (iii) whether the Settlement Class should be conclusively certified, (iv) whether Settlement Class Members should be bound by the Release set forth in the Settlement Agreement, (v) the amount of attorneys' fees and costs to be awarded to Class Counsel, if any, and (vi) the amount of the award to be made to the Class Representatives for their services, if any. The Final Fairness Hearing may be postponed, adjourned, or continued by Order of the Court without further notice to the Class.

X. HOW CAN YOU GET ADDITIONAL INFORMATION ABOUT THE ACTION, THE PROPOSED SETTLEMENT, THE SETTLEMENT AGREEMENT, OR THE NOTICE?

The descriptions of the Action, the Settlement, and the Settlement Agreement in this Notice are only a general summary. In the event of a conflict between this Notice and the Settlement Agreement, the terms of the Settlement Agreement control. All papers filed in this case, including the full Settlement Agreement, are available for you to inspect and copy (at your cost) at the office of the Clerk of Court, the Settlement website, or online through PACER. A copy of the Settlement Agreement may also be obtained from Class Counsel by contacting them at the addresses or telephone numbers set forth above. Any questions concerning this Notice, the Settlement Agreement, or the Settlement may be directed to Class Counsel. You may also seek the advice and counsel of your own attorney, at your own expense, if you desire.

DO NOT WRITE OR TELEPHONE THE COURT, THE CLERK'S OFFICE, OR DEFENDANT WITH ANY QUESTIONS ABOUT THIS NOTICE, THE SETTLEMENT, OR THE SETTLEMENT AGREEMENT.

XI. WHAT ARE THE ADDRESSES YOU MAY NEED?

Counsel for the Settling Defendants:

Jeffrey M. Wintner Graham W. Meli **Wachtell, Lipton, Rosen & Katz** 51 West 52nd Street New York, NY 10019	Kevin T. Van Wart **Kirkland & Ellis LLP** 300 North LaSalle Chicago, IL 60654	Michael T. Reynolds **Cravath, Swaine & Moore LLP** 825 Eighth Avenue New York, NY 10019

If to the Class Representatives, Class Counsel, or Settlement Class Members:

Scott Summy **Baron & Budd, P.C.** 3102 Oak Lawn Ave., Ste. 1100 Dallas, Texas 75219	Michael A. London **Douglas & London** 59 Maiden Lane, 6th Floor New York, NY 10038	Paul J. Napoli **Napoli Shkolnik** 1302 Av. Ponce de Leon San Juan, Puerto Rico 00907
Elizabeth A. Fegan **Fegan Scott LLC** 150 S. Wacker Drive, 24th Floor Chicago, IL 60606	Joseph F. Rice **Motley Rice** 28 Bridgeside Blvd. Mount Pleasant, SC 29464	

If to the Notice Administrator:

In re: Aqueous Film-Forming Foams Products Liability Litigation c/o Notice Administrator 1650 Arch Street, Suite 2210 Philadelphia, PA 19103

If to the Claims Administrator:

AFFF Public Water System Claims PO Box 4466 Baton Rouge, Louisiana 70821

XII. WHAT YOU MUST INCLUDE IN ANY DOCUMENT YOU SEND REGARDING THE ACTION.

In sending any document to the Notice Administrator, Claims Administrator, the Court, Class Counsel, or Settling Defendants' Counsel, you must include the following case name and identifying number on any documents and on the outside of the envelope:

In re: Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2:18- mn-2873 (D.S.C.), this document relates to: City of Camden, et al., v. E.I. DuPont de Nemours and Company, et al., No. 2:23-cv-03230-RMG.

You must also include your full name, address, email address, and a telephone number where you can be reached.

XIII. WHAT IMPORTANT DEADLINES YOU NEED TO KNOW.

Deadline Description	Deadline Date
Deadline to submit Objections	11/4/2023
Deadline to submit Requests for Exclusion	12/4/2023
Court's Final Fairness Hearing	12/14/2023 at 10:00 AM EST
Phase One Public Water System Claims Form	60 Days after the Effective Date
Phase One Special Needs Claims Form	45 Days after the Phase One Public Water System Claims Form Deadline
Phase Two Testing Claims Form	1/1/2026
Phase Two Public Water System Claims Form	6/30/2026
Phase Two Special Needs Claims Form	8/1/2026
Phase One Supplemental Fund Claims Form	12/31/2030
Phase Two Supplemental Fund Claims Form	12/31/2030

EXHIBIT 3

2:18-mn-02873-RMG Date Filed 11/21/23 Entry Number 4089-3 Page 123 of 2033

Site Characterization Report

East Hampton Airport
Wainscott, Suffolk County, New York

New York State Department of Environmental Conservation
Division of Environmental Remediation

November 30, 2018

Quality information

Prepared by	Checked by	Verified by	Approved by
Alexandra Golden and Caroline Bardwell, CPG, CHMM	Lindsay Mitchell, P.E. Project Manager	Daniel Servetas, P.E. Certifying Engineer	Lindsay Mitchell, P.E. Project Manager

Revision History

Revision	Revision date	Details	Authorized	Name	Position
1	12/11/2018	Appendix C – Soil Boring Logs only	12/11/2018	Lindsay Mitchell	AECOM Project Manager

Distribution List

# Hard Copies	PDF Required	Association / Company Name

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Appendix F Suffolk County Groundwater PFAS Data

List of Acronyms and Abbreviations

AFFF	aqueous film-forming foam
AOC	Area of Concern
ARFF	Aircraft Rescue and Firefighting
bgs	below ground surface
COC	chain of custody
DER	Division of Environmental Remediation
DUSR	Data Usability Summary Report
ft.	foot/feet
GPR	ground penetrating radar
HAL	US EPA Health Advisory Level
I.D.	inside diameter
IDW	investigation-derived waste
MS/MSD	matrix spike/matrix spike duplicate
MW	monitoring well
ng/g	nanograms per gram
ng/L	nanograms per liter (parts per trillion)
NYCRR	New York Codes, Rules and Regulations
NYSDEC	New York State Department of Environmental Conservation
NYSDOH	New York State Department of Health
PFAS	per- and polyfluoroalkyl substances
PFC	perfluorinated compound
PFOA	perfluorooctanoic acid
PFOS	perfluorooctane sulfonate
PVC	polyvinyl chloride
QA/QC	quality assurance/quality control
SC	site characterization
SCDHS	Suffolk County Department of Health Services
SCR	Site Characterization Report
SOW	scope of work
US EPA	United States Environmental Protection Agency
VOC	volatile organic compound

Site Characterization Report Certification

I, Daniel Servetas, certify that I am currently a NYS registered professional engineer as defined in 6 NYCRR Part 375 and that this Site Characterization Report was prepared in accordance with all applicable statutes and regulations and in substantial conformance with the Division of Environmental Remediation Technical Guidance for Site Investigation and Remediation (DER-10) and that all activities were performed in full accordance with the DER-approved work plan and any DER-approved modifications.

Respectfully submitted,
AECOM Technical Services Northeast, Inc.

STATE OF NEW YORK DANIEL T. SERVETAS 079068 LICENSED PROFESSIONAL ENGINEER

November 30, 2018

Daniel Servetas
Registered Professional Engineer
New York License No. 079068

Date

WARNING: It is in violation of New York State Education Law, Article 145, Section 7209, Special Provision 2, for any person unless he is acting under the direction of a Licensed Professional Engineer or Land Surveyor to alter an item in any way. If an item bearing the seal of an Engineer or Land Surveyor is altered, the altering Engineer or Land Surveyor shall affix to the item his/her seal and notation "Altered By" followed by his/her signature and date of such alteration, and a specific description of the alteration.

1. Introduction

This Site Characterization Report (SCR) documents the findings of the 2018 site characterization (SC) completed by AECOM USA, Inc. at the East Hampton Airport in Long Island, New York on behalf of the New York State Department of Environmental Conservation (NYSDEC). The purpose of the SC was to identify the presence or absence of per- and polyfluoroalkyl substances (PFAS) contamination so that a determination could be made as to whether the site poses a significant threat to public health and/or the environment that warrants further investigation or remedial action. As a group, PFAS are chemicals with broad application, primarily in the manufacture of commercial products that resist heat or chemical reactions and repel oil, stains, grease and water. Perfluorooctanoic acid (PFOA) is a specific PFAS compound found in various industrial products (aerospace, automotive, building, and electronics industries) that is commonly used in nonstick cookware, stain-resistant carpeting and fabrics, and paper and cardboard. PFOA was also used in some formulations of aqueous film-forming foam (AFFF), a common and effective firefighting agent. Perfluorooctane sulfonic acid (PFOS) is the primary PFAS compound used in firefighting foam. This SC was undertaken due to the documented presence of AFFF at the East Hampton Airport for firefighting and fire training activities, either currently or historically, and the associated potential for chemical discharge at concentrations that could present a risk for public health or the environment. Site characterization activities were performed between April and September 2018. The remainder of this section outlines the Site Description, Site Background, SC Objectives, Scope of Work, Report Organization and Regulatory Framework.

1.1 Site Location

The approximately 610-acre Site (Draft Master Plan Report, Savik & Murray, LLP, April 2007) is located at 200 Daniels Hole Road in the hamlet of Wainscott in Suffolk County, New York (**Figure 1**), approximately 3.4 miles west of the Village of East Hampton on the South Fork of Long Island. The Site, owned by the Town of East Hampton, includes the airport and the East Hampton Industrial Park at the southern end of the airport along Industrial Road. Various commercial/industrial businesses lease the buildings from the owner. Coordinates for the approximate center of the Site are 40°57'37.2" N, 72°15'03.7" W. The nearest residential properties are located south of the Site beyond the railroad tracks and there are additional residential parcels to the west on Town Line Road. At the time of the SC field activities, a majority of the nearby residences obtained their potable water from private groundwater wells. The public water supply network is currently being expanded to service these homes.

The Atlantic Ocean lies to the south of Wainscott; the Village of Sagaponack is located to the west; and the Village of East Hampton is to the east. Other communities that border Wainscott are East Hampton and Northwest Harbor to the northeast, the village of Sag Harbor to the north, and Noyack and Bridgehampton to the west (north of Sagaponack).

The airport property is zoned Commercial/Industrial according to the Town zoning map. Surrounding properties are used for residential and commercial purposes with areas of open, unoccupied land.

1.2 Site Background

Originally built in the late 1930s, the airport is capable of handling small general aviation aircraft. The site property consists of a public use airport with a parking lot, airport terminal and various support buildings. Additionally, several parcels to the south of the airfield are leased for commercial/industrial and public service tenants. The public service tenants include the East Hampton Fire District Training Facility, the Aircraft Rescue and Firefighting (ARFF) facility, and the East Hampton Police.

In the fall of 2017, the Suffolk County Water Authority initiated a drinking water investigation for PFAS, which included sampling private water supply wells and the installation of monitoring wells. Several residences in East Hampton had detectable levels of PFAS contaminants in their well water, with the highest concentrations exhibited at houses situated in close proximity (south/southwest) to the airport property. The Site has not previously been investigated for the presence of PFAS.

1.3 Site Characterization Objectives

The objective of the SC was to determine if the Site has the potential to be a significant threat to public health and/or the environment. The findings of this investigation are necessary to evaluate the need for further action or investigation.

1.4 Scope of Work

In general, the final scope of work (SOW) for SC included the following tasks:

- Site Review: Identify potential historical events with AFFF use, such as training events, plane/car crashes on airport property where AFFF was applied, as well as current/former AFFF storage areas. Select proposed sample locations with final placement to be established during site visits
- Preliminary Activities: Attend on-site meeting with NYSDEC personnel to discuss proposed sampling locations based on research findings. Solicit subcontractor bids, formalize budget, and prepare health and safety plan
- Mobilization/Utility Clearance: Mark proposed temporary monitoring well (MW) locations on-site; conduct public and private utility markout of proposed locations and adjust as necessary
- Drinking Water Screening: Collect tap water samples at hangar spaces leased by the airport to private tenants and submit for PFAS laboratory analysis
- Drilling Program (two phases): Advancement and continuous sampling of soil borings, collection and analysis of soil samples near ground surface and above the water table, placement of polyvinyl chloride (PVC) well screen in temporary MWs for future sampling
- Groundwater Monitoring Program (two phases): Gauge water level at all temporary MWs and piezometers to calculate groundwater elevation, collect groundwater samples for PFAS laboratory analysis at temporary wells and Suffolk County Water Authority well MW-10
- Surface water/Sediment Sampling: Collect surface water sample at a catch basin near EH-A and corresponding sediment sample, if possible
- Survey: Oversee land survey activities

1.5 Report Organization

This SCR is organized into the following Sections, followed by Figures, Tables, and Appendices:

- Section 1: includes background information and a synopsis of Site characteristics and the SOW.
- Section 2: includes a description of activities that occurred during each phase of the SC fieldwork.
- Section 3: includes a description of the subsurface conditions at the Site.
- Section 4: includes a description and summary of the analytical results for samples collected during SC activities.
- Section 5: describes the SC findings, presents conclusions, and summarizes recommendations for further action, if proposed.

1.6 Regulatory Framework

PFAS are not currently regulated at the federal level and are not regulated in soil and groundwater in New York. Effective March 3, 2017, the NYSDEC added PFOA and PFOS to New York State's 6 New York Codes, Rules and Regulations (NYCRR) Part 597 List of Hazardous Substances. While the Final Rule lists PFOS and PFOA as hazardous substances, no screening or clean-up criteria are provided.

The United States Environmental Protection Agency (US EPA) has established a lifetime Health Advisory Level (HAL) of 70 nanograms per liter (ng/L) for PFOS and PFOA, individually or combined, to protect against potential risk from

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exposure to drinking water contaminated by these compounds. There are no regulatory criteria for the other 19 PFAS compounds analyzed for in this SC; therefore, report discussion focuses primarily on PFOA and PFOS.

2. Field Activities

Field activities for the SC were performed between February 19, 2018 and August 10, 2018, during multiple site mobilizations. This Section provides detail on the investigation tasks completed during that timeframe. The following subcontractors provided services during the SC:

- Drilling **-** Cascade Drilling Company (Cascade), AECOM Subcontractor
- Ground Penetrating Radar (GPR) **-** Advanced Geological Services (AGS), AECOM Subcontractor
- Surveying **-** C.T. Male Associates (CT Male), AECOM Subcontractor
- Chemical Laboratory Analyses **-** ALS Environmental, Inc. (ALS), NYSDEC call-out contractor

All field activities were performed or supervised by an AECOM geologist. Photographs of field activities are included in **Appendix A** and daily reports are provided in **Appendix B**.

2.1 Site Review

Based on information gathered by the NYSDEC, Town of East Hampton officials, and AECOM regarding recorded and other potential uses of AFFF on Site property, temporary MW locations were selected for the purpose of site characterization. Potential well locations were sited based on historical information provided by site contacts and municipal officials, including, for example, historical photographs of crash sites (**Appendix A**). Existing geological and hydrogeological information (e.g., groundwater flow direction, depth to groundwater), including data collected from the Suffolk County Water Authority, was utilized to guide the development of the SC SOW.

Temporary MW locations were finalized and marked in the field by an AECOM geologist on-site on August 6, 2018. All prospective MW locations were evaluated for the presence of subsurface utilities by Advanced Geological Services. Any conflicts and MW locations were adjusted accordingly. These activities were overseen by an AECOM geologist.

Using information provided by local, county, and state contacts along with available topographic and geologic mapping, AECOM staff identified several target areas that warranted subsurface investigation, including known areas of AFFF discharge. Additional locations were selected for a second phase of investigation after initial results were reviewed. The following table presents the justification behind each soil boring, piezometer, temporary well location, and water supply well sample.

Target Area	Location ID	Justification	Drilling Phase
North Field (Area E and Area B)	EH-E	Location of a plane that crash landed	Initial Phase
	EH-B	Fire Department mass casualty exercise using AFFF and small bus	Initial Phase
	EH-E1	Upgradient of EH-E	Second Phase
	EH-B1	Downgradient of EH-B	Second Phase
Airport Parking Lot (Parcel 16)	EH-16	Fire Department training exercise location with AFFF and a large bus	Initial Phase
	EH-161	Upgradient of EH-16	Second Phase
	EH-162	Downgradient of EH-16	Second Phase
Northeast Woods (Area C)	EH-C	Historical vehicle incident where car left road and entered the woods, marked by a break in the fence. The Fire Department had been called as a precautionary measure	Initial Phase
Aircraft/Helicopter Taxiway (Area A)	EH-A	Previous car fire with documented AFFF discharge (Area A). The potential runoff of AFFF off of the tarmac into nearby grass warranted placement of 3 additional soil borings (SB-1, SB-2 and SB-3)	Initial Phase

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Target Area	Location ID	Justification	Drilling Phase
ARFF (Parcel 19)	EH-19A	Located near the Fire Department garage where AFFF and fire trucks are stored	Initial Phase
	EH-19B	Located near the Fire Department garage where AFFF and fire trucks are stored	Initial Phase
	EH-19A1	Upgradient of EH-19A	Second Phase
	EH-19A2	Downgradient of EH-19A	Second Phase
	EH-19B1	Downgradient of Parcel 19 and upgradient of Parcel 1. On East Hampton Fire District Training Facility parcel	Second Phase
East Hampton Police Dept. (Parcel 1)	EH-1	Fire training structure where AFFF may have been discharged.	Initial Phase
Local Television Inc. (Parcel 10)	EH-10	This location was sampled to investigate potential impacts from AFFF runoff from the historical use at fire garage. The temporary well is located downgradient of the fire garage.	Initial Phase
East End Hangars (Parcel 18)	EH-18	Downgradient of hangar buildings	Initial Phase
Upgradient of Water Supply well	EH-SAS	Upgradient of drinking water supply well associated with tap sample SAS-1	Second Phase
Piezometers	EH-P1, EH-P2, EH-P3	Installed across the site to supplement groundwater elevation data collected during the SC	Initial Phase
Soil Borings	EH-A1, EH-A2, EH-A3	Evaluate runoff from Area A (Taxiway) where a historical car fire occurred	Initial Phase
Storm Drain Sample	Catch Basin	Evaluate runoff from Area A (Taxiway) where a historical car fire occurred	Initial Phase
Supply Well Tap Samples	HH-20/21, HH-18, SAS-1, SAS-2, SAS-3, EH-1	At least one sample was collected from each of six drinking water supply wells that service leased hangar spaces at Parcel 16 and Parcel 18. Taps located at Hangars 7, 8 and 18 (HH-7/8 and EH-18) were inaccessible during sampling activities.	Initial Phase/ Second Phase
Existing County Well	MW-10	To supplement SC water quality and elevation data with permanent off-site well location	Initial Phase

For the initial phase of investigation, prospective boring locations were flagged and marked by AECOM personnel while escorted by East Hampton Airport Staff. The following day all prospective locations were checked for subsurface utility interference by AGS. Any conflicts resulted in adjustment of the location to a more favorable position. These activities were overseen by an AECOM geologist. The final temporary well locations are depicted on **Figure 2**.

2.2 Mobilization/Utility Clearance

During the investigation, extensive precautions were used to eliminate the potential for cross-contamination from PFAS-containing materials. This preparation included ensuring field staff used perfluorinated compound (PFC)-free clothing, equipment, and supplies during SC activities and using certified PFC-free water during drilling and sampling (supplied by Cascade).

Prior to commencing any intrusive activities, AECOM arranged for utility mark-outs through Dig Safely New York, Inc. and a subcontractor, Advanced Geological Services. The locations for some of the temporary MW locations were adjusted after GPR results indicated they may be situated too close to an underground utility.

2.3 Drinking Water Tap Sampling

Several hangars on the airport property are leased to private tenants and some of them have installed potable water supply wells. As an initial screening measure, AECOM collected samples from tap locations at six spaces, to avoid any unnecessary disruption of tenant operations.

On April 25, 2018, the tap water samples were collected by an AECOM Geologist from Sound Aircraft Services (SAS-1, SAS-2, SAS-3), Hampton Hangars (HH-20/21 and HH-18), and East Hampton Hangars (EH-1). Sample locations are shown on **Figure 2**. An East Hampton Airport employee escorted AECOM personnel throughout the process. The tap was purged for a brief period to ensure sampled water was coming from the well and not the piping. The samples were preserved on ice, packaged, and submitted under standard chain of custody (COC) to ALS Environmental for PFAS analyses. On August 7, 2018, tap location SAS-1 was resampled by AECOM based on the initial analytical results, which showed higher concentrations than other samples.

2.4 Drilling Program

2.4.1 Soil Sampling

Between April 30, 2018 and May 4, 2018, soil borings were advanced to depths ranging from 25 to 45 feet below ground surface (bgs) by Cascade using a track-mounted Geoprobe® unit equipped with a macrocore sampler. Continuous soil samples were collected in acetate liners in 5-foot intervals during the drilling of temporary MWs and piezometers for the initial phase. Two soil samples were collected for each of the initial ten borings, with an additional sample collected at EH-B. An AECOM field geologist logged soil descriptions and screened soil for the presence of volatile organic compounds (VOC) using a Photoionization Detector. Soil samples were collected in laboratory-supplied bottleware, placed on ice, and submitted to ALS for laboratory analysis under standard COC protocols. Investigation-derived waste (IDW) was placed in a labeled drum for later characterization and off-site disposal. Soil boring logs are presented in **Appendix C** and well locations are provided on **Figure 2**.

After reviewing analytical results from the initial phase of drilling, AECOM coordinated with the NYSDEC to identify target areas where elevated concentrations of PFAS were reported. At each of these areas, one upgradient and one downgradient temporary well were installed during a second phase of investigation on August 8 and 9, 2018. This exercise resulted in advancement of eight additional temporary MWs. Soil sampling was not completed at these additional borings, with the exception of EH-19B1. Additionally, EH-SAS was installed upgradient of the water supply well for tap sample SAS-1; however, no downgradient well was installed.

2.4.2 Temporary MW Installation

After the depth to groundwater was confirmed at each of the 18 borings, a 1.75-inch inside diameter (I.D.) PVC well screen was placed in the borehole to act as a temporary MW to keep the borehole open and facilitate groundwater sampling. Each MW was constructed with 10-ft. length sections of 0.010-inch slot well screen and capped with a 4-inch steel protective casing, with locking cap secured in place. Field observations, measurements, and well construction timetables were recorded in the Daily Notes in **Appendix B**.

Once the depth to groundwater was determined for each soil boring, Cascade set a 10 ft. PVC screen, the depth of which was recorded by an AECOM geologist. Each monitoring well was constructed with 10-ft. length sections of 0.010-inch slot, Schedule 40 well screen with the exception of EH-19B1, which had a 15-ft. screen. Each well was capped with a 4-inch steel protective casing with a locking cap secured in place.

The three piezometers for groundwater monitoring (EH-P1, EH-P2 and EH-P3) were placed so that they transect the site perpendicular to the flow of groundwater. **Figure 3** displays a cross-section of the groundwater present between the piezometers.

2.5 Groundwater Monitoring Program

Groundwater elevation measurements were collected and recorded prior to groundwater sampling activities in May and August 2018, which are presented in **Table 1**. Water levels were determined using an electronic water level meter, which was decontaminated before proceeding to the next well location. Measurements were referenced to the top of each PVC well riser.

Groundwater sampling was performed using a 1-inch bailer with high density polyethylene PFC-free tubing, PFC-free twine, a YSI 556 multi-meter, and a HACH 2100 turbidity meter. AECOM Standard Operating Procedures for Sampling PFAS were followed by all field staff during the SC activities. The groundwater samples were transported under standard COC procedures to ALS Environmental and analyzed for the list of 21 PFAS compounds shown in **Table 1**. Groundwater sampling logs are presented in **Appendix D**.

2.6 Quality Assurance/Quality Control

Field duplicates, matrix spikes/matrix spike duplicates (MS/MSD), equipment blanks, and trip blanks were collected and analyzed as appropriate for quality assurance/quality control (QA/QC) purposes. Duplicate soil samples were collected from EH-1 both from the 0-1 foot bgs interval (DUP-1) and 32-33 feet bgs interval (DUP-2). Two MS/MSD samples were collected for QA/QC purposes. MS/MSD-1 was collected from EH-A1 at a depth of 23-24 feet bgs. MS/MSD-2 was collected from EH-A3 at a depth of 0-1 foot bgs. During the second drilling phase, duplicate soil samples were also collected from EH-161 at a depth of 0-1 foot bgs. Two sets of MS/MSD samples were collected from EH-E for QA/QC purposes, from depths of 0-1 foot bgs and 26-27 feet bgs. For groundwater monitoring, duplicate samples were also collected from MW-10, and MS/MSD samples were collected from EH-A. In August 2018, AECOM also collected duplicate aqueous samples from EH-19A2 and MS/MSD samples from EH-19A1.

2.7 Site Survey

At the conclusion of the field activities described above, C.T. Male Associates completed a survey of all temporary MWs including the sampled Suffolk County-installed MW (MW-10).

3. Physical Setting

3.1 Site Topography and Drainage

Ground elevations on-site range between 30 and 55 feet above Mean Sea Level, based on data collected during the monitoring well survey. Some areas of higher elevation exist to the west and south. The airport property is developed with numerous buildings and includes large expanses of paved (impermeable) surfaces. The remainder of the property is characterized by open fields and wooded areas.

3.2 Site Geology and Hydrogeology

The Site geologic setting consists of a glacial outwash plain that slopes south from the Ronkonkoma Moraine to bays and barrier islands, which form the southern boundary of Long Island. Shallow soils are generally comprised of glacial outwash sands with intermittent non-continuous silt and clay lenses that originated from the receding Wisconsin ice sheets at the end of the Pleistocene epoch.

A geologic cross-section of the soils encountered during the installation of the SC soil borings is provided on **Figure 3** and soil boring logs are included in this report as **Appendix C**.

Groundwater beneath the airport is found within three different aquifers:

1. Lloyd Aquifer: the deepest aquifer, providing a reliable source of drinking water unimpacted by the salt water intrusion that commonly affects shallow aquifers on Long Island;
2. Magothy: a good source of drinking water; and
3. Upper Glacial: the unconfined, shallow surficial aquifer, which is the major source of potable water in the area. This unconfined aquifer consists of very porous and highly permeable coarse sands and gravels, and can yield large quantities of water.

Depth to groundwater on-site varies from 15 feet bgs in the northern portion of the site to 30 feet bgs at the industrial park. Groundwater flows from northwest to southeast across the Site with a gradient of 4.0×10^{-4} ft./ft. A groundwater contour map is included as **Figure 4**.

4. Analytical Results

The following sections present the laboratory results for samples collected during the SC activities. All samples were analyzed for 21 PFAS compounds via US EPA Method 537.

4.1 Drinking Water

During the SC investigation, six tap water samples were collected from leased aircraft hangars located on airport property. These results are listed in **Table 2** and presented on **Figure 5**. Although PFOA and PFOS were not detected above the HAL of 70 ng/L, either individually or combined, trace to low levels of the compounds were identified. Sample location SAS-1 exhibited the highest concentration of PFOA, with 22 ng/L in May 2018. SAS-1 was subsequently resampled in August 2018 to verify this detection. The initial detection of PFOA was confirmed, but at a lower concentration of 11 ng/L. No PFOS was reported in the well. Other water supply wells exhibited PFOS concentrations ranging from non-detect to 8.9 ng/L and PFOA concentrations ranging from non-detect to 2.1 ng/L. Other PFAS compounds were detected in tap water samples; however, there are no current state or federal advisory levels for PFAS compounds other than PFOS and PFOA for comparison purposes.

4.2 Soil

A total of 41 soil samples were collected and analyzed during the SC's two drilling phases at a total of 21 boring/well locations. In general, one shallow soil sample (0-1 ft. bgs) and one deep soil sample (greater than 20 ft. bgs) were collected at each temporary well location. The soil analytical results are presented in **Table 3** and on **Figure 6**.

PFOA and PFOS were not detected above the PFOS/PFOA HAL of 70 ng/g (either individually or combined) in any of the soil samples. Of the 41 samples collected, 16 exhibited detectable concentrations of PFOS, ranging from 0.19 J ng/g to 12 ng/g, and seven samples exhibited detectable concentrations of PFOA, ranging from 0.2 ng/g to 3.8 ng/g. Trace to low levels of other unregulated PFAS compounds in the 21-compound analyte list were also detected in soil samples.

4.3 Groundwater

During SC field activities in May and August 2018, AECOM collected groundwater samples from 18 temporary wells, three piezometers, and Suffolk County monitoring well MW-10. An aqueous storm drain sample (Catch Basin) is also included in the groundwater results, which are presented in **Table 1** and portrayed on **Figure 7**.

Of the 25 sample locations, the HAL of 70 ng/L was exceeded at a total of six wells, including EH-1, EH-19A, EH-19B, EH-19A2, EH-B1, and EH-162. At these locations, the combined PFOS/PFOA concentrations ranging from 145 ng/L to 299.3 ng/L. Trace to low levels of PFOS and PFOA were reported in several other locations at concentrations below the HAL.

As previously stated, there are no current state or federal advisory levels for PFAS compounds other than PFOS and PFOA for comparison purposes. Each of the remaining 19 PFAS analytes was identified in at least one groundwater sample at varying concentrations. In addition to elevated PFOS/PFOA impacts, samples from wells in Parcel 19 exhibited concentrations of other perfluoroalkyl carboxylic acids that were one to two orders of magnitude higher than wells for other target areas.

4.4 Data Quality

Data Usability Summary Reports (DUSRs) were prepared by EDS, which included review of full Category B analytical packages. Data qualifiers were modified, as appropriate, and final values are presented in the tables, figures and appendices attached to this report. All data was deemed usable by the data validator and DUSRs are provided in **Appendix E**.

4.5 Electronic Data Deliverables

All laboratory data was received in a format compatible for submission to NYSDEC's centralized database. A separate electronic data deliverable submission will be made to NYSDEC, which will include validated analytical data from the DUSR process and survey data.

5. Conclusions and Recommendations

The following conclusions and recommendations can be made based on the SC findings for the East Hampton Airport PFAS assessment. As additional information for this site becomes available, it will be reviewed by NYSDEC and NYSDOH officials and incorporated into the site conceptual model to determine whether site contamination presents public health exposure concerns.

5.1 Conclusions

- Drinking Water: Samples were collected from several private water supply wells that service leased hangar spaces. Samples were collected from sink taps located within each space. Trace to low levels of PFOS and PFOA were detected in each of the tap samples, with PFOS concentrations ranging from 1.2 to 8.9 ng/L and PFOA reported at 1.4 to 22 ng/L. No detections were reported above the 70 ng/L HAL.
- Soil: The presence of PFAS compounds in soil above laboratory reporting limits indicate that release(s) have occurred on-site. To date no regulatory guidelines have been established to determine soil cleanup objectives or protection of groundwater standards for PFAS in soil. The highest reported concentration of PFAS compounds were from boring EH-19B1, with 12 ng/g of PFOS and 3.8 ng/g of PFOA.
- Groundwater: Investigation findings show that the historic use and/or storage of AFFF have impacted Site groundwater quality. In particular, PFOS and PFOA have been identified in Site groundwater at concentrations above the US EPA HAL of 70 ng/L. Analytical results from upgradient and downgradient wells indicate that there are four distinct areas of concern (AOCs, as shown on **Figure 8**), including:
  - **AOC-1**: Groundwater beneath Areas B and E located north of the airfield, where firefighting foam was historically used for crash response and training. PFOS (270 ng/L) and PFOA (17 ng/L) are present in temporary well EH-B1.
  - **AOC-2**: Groundwater beneath Area 16, where AFFF was deployed during a mass casualty training exercise, is impacted by PFOS above the HAL. PFOS was reported at 290 ng/L in the groundwater sample from downgradient temporary well EH-162, with lower levels of PFOA (9.3 ng/L).
  - **AOC-3**: Groundwater beneath Parcel 19, where the ARFF station is located, has been impacted by both PFOS and PFOA above the HAL. Although no documented discharge of AFFF could be confirmed, AFFF is stored in the station. Analytical results for three temporary wells (EH-19A, EH-19A2, and EH-19B) exhibited one or more exceedances of the HAL, with a maximum reported concentration of 174 ng/L for combined PFOS/PFOA.
  - **AOC-4**: Groundwater beneath Parcel 1, occupied by the East Hampton Police Department, has been impacted with PFOA above the HAL. Temporary well EH-1, located adjacent to the burn training structure, exhibited PFOA at 160 ng/L. Groundwater quality in upgradient well EH-19B1 indicates that the contamination originated on the parcel.

5.2 Recommendations

AECOM offers the following recommendations based on the data collected to date:

- Due to the presence of PFAS contamination at concentrations above the federal HAL, a supplemental investigation is recommended for the four identified AOCs to delineate the nature and extent of impacts. The investigation should include the following:
  - Collection of additional soil samples to evaluate whether an ongoing source of PFAS contamination to groundwater is present in Site soils at each AOC.
  - Expansion of the on-site monitoring well network, including conversion of key temporary wells into permanent wells and new monitoring well locations. Implement a groundwater sampling program to complete horizontal and vertical delineation of the PFAS impacts to groundwater. Include vertical profile sampling since the SC was limited to the evaluation of shallow groundwater impacts and well usage in the area may have drawn impacts to greater depth.

– Install off-site monitoring wells to determine whether Site groundwater quality has been impacted by upgradient sources and better understand whether PFAS-impacted groundwater from the East Hampton Airport Site has migrated off-site. If appropriate, this off-site evaluation should include sampling of monitoring wells installed by the Suffolk County Department of Health Services (SCDHS). **Appendix F** contains water level information and PFAS groundwater data collected by Suffolk County from public wells during 2018, as well as a figure of the monitoring well locations.

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Table 2
Tap Water Sample Data

East Hampton Airport
200 Daniels Hole Rd
Wainscott, New York

Analytes	Health Advisory Water Quality Standards[1]	Area	Hampton Hangars		Sound Aircraft Services				East Hampton Hangars	QA/QC SAMPLES		
		Sample ID	**HH-20/21**	**HH-18**	**SAS-1**		**SAS-2**	**SAS-3**	**EH-1**	**DUP**	**FIELD BLANK**	**MS/MSD**
		Date	**4/25/2018**	**4/25/2018**	**4/25/2018**	**8/7/2018**	**4/25/2018**	**4/25/2018**	**4/25/2018**	**4/25/2018**	**4/25/2018**	**4/25/2018**
Perfluoralkane Sulfonic Acids												
Perfluorobutane sulfonic acid (PFBS)	NS		.90 U	.90 U	**29**	**8.7**	.90 U	.90 U	.90 U	.90 U	.90 U	.90 U
Perfluorohexane sulfonic acid (PFHxS)	NS		**5.8**	**6.6**	**160**	**78**	**1.6 J**	**3.8 J**	**1.0 J**	**1.3 J**	.94 U	.94 U
Perfluoroheptane sulfonic acid (PFHpS)	NS		.88 U	.88 U	.88 U	.88 U	.88 U	.88 U	.88 U	.88 U	.88 U	.88 U
Perfluorooctane sulfonic acid (PFOS)	70		**1.2 J**	**8.9**	1.0 U	1.0 U	1.0 U	**3.5**	1.0 U	1.0 U	1.0 U	1.0 U
Perfluorodecane sulfonic acid (PFDS)	NS		1.3 U	1.3 U	1.3 U	1.3 U	1.3 U	1.3 U	1.3 U	1.3 U	1.3 U	1.3 U
Perfluroralkane Carboxylic Acids												
Perfluorobutanoic acid (PFBA)	NS		2.7 U	2.7 U	**3.4 J**	**2.8 J**	**4.1 J**	2.7 U	2.7 U	**3.3 J**	2.7 U	2.7 U
Perfluoropentanoic acid (PFPeA)	NS		1.1 U	1.1 U	**8.9**	**3.1 J**	**4.2 J**	1.1 U	1.1 U	**3.8 J**	1.1 U	1.1 U
Perfluorohexanoic acid (PFHxA)	NS		**1.2 J**	.92 U	**22**	**12**	**4.1 J**	.92 U	.92 U	**3.9 J**	.92 U	.92 U
Perfluoroheptanoic acid (PFHpA)	NS		**1.6 J**	**2.0 J**	**7.3**	**2.5 J**	**1.7 J**	**1.7 J**	1.2 U	**1.7 J**	1.2 U	1.2 U
Perfluorooctanoic acid (PFOA)	70		**1.4 J**	**2.1**	**22**	**11**	**.73 J**	**1.7**	.46 U	**.71 J**	.46 U	.46 U
Perfluorononanoic acid (PFNA)	NS		.94 U	**1.2 J**	**1.0 J**	.94 U	.94 U	**1.0 J**	.94 U	**.99 J**	.94 U	.94 U
Perfluorodecanoic acid (PFDA)	NS		1.0 U	.99 U	.86 U	.52 U	.87 U	.82 U	.81 U	.58 U	.84 U	**.92 J**
Perfluoroundecanoic acid (PFUnDA)	NS		.90 U	1.0 U	1.1 U	.31 U	.79 U	1.1 U	1.2 U	.88 U	.96 U	**1.1 J**
Perfluorododecanoic acid (PFDoDA)	NS		.58 U	.52 U	.83 U	.46 U	.70 U	.46 U	.68 U	.46 U	.76 U	**.74 J**
Perfluorotridecanoic acid (PFTrDA)	NS		.75 U	.75 U	.75 U	.75 U	.92 U	.75 U	.75 U	.75 U	.75 U	**.92 J**
Perfluorotetradecanoic acid (PFTeDA)	NS		1.2 U	1.2 U	**1.4 J**	1.2 U	**1.6 J**	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U
Perfluoroalkyl Sulfonamides												
Perfluorooctane sulfonamide (FOSA)	NS		**.37 J**	.35 U	.35 U	.35 U	.35 U	.35 U	.35 U	.35 U	.35 U	.35 U
N-Methyl perfluorooctane sulfonamidoacetic acid	NS		4.2 U	4.2 U	4.2 U	4.2 UJ	4.2 U	4.2 U	4.2 U	4.2 U	4.2 U	4.2 U
N-Ethyl perfluorooctane sulfonamidoacetic acid	NS		0.83 UJ	0.83 UJ	0.83 UJ	.83 U	0.83 UJ	0.83 UJ	0.83 UJ	0.83 UJ	0.83 UJ	.83 U
(n:2) Fluorotelomer Sulfonic Acids												
6:2 Fluorotelomer sulfonic acid (6:2 FTS)	NS		1.2 U	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U	1.2 U
8:2 Fluorotelomer sulfonic acid (8:2 FTS)	NS		.65 U	.65 U	.65 U	.65 U	.65 U	.65 U	.65 U	.65 U	.65 U	.65 U

Notes:
NS - No standard exists
Detected concentrations are in bold font.
J - The analyte is an estimated quantity. The associated numerical value is the approximate concentration of the analyte in the sample.
U - The analyte was analyzed for, but was not detected above the level of the reported sample quantitation limit.
UJ - The analyte was analyzed for but was not detected. The reported quantitation limit is approximate and may be inaccurate or imprecise.
Units are in ng/L (nanograms/liter)
1 - United States Environmental Protection Agency-established Drinking Water Health Advisory Level

EXHIBIT 4

AGREEMENT

AGREEMENT made this 9 day of July, 2018, by and between the Town of East Hampton, a municipal corporation, having its principal office at 159 Pantigo Road, East Hampton, New York (hereinafter also referred to as "Town"), and the Suffolk County Water Authority, a public benefit corporation, having its principal office at 4060 Sunrise Highway, Oakdale, New York 11769 (hereinafter also referred to as "SCWA").

WITNESSETH:

WHEREAS, the Town has identified certain properties with private wells, as indicated on a Map attached hereto, that have become contaminated or may become contaminated with pollutants in concentrations greater than recommended by drinking water guidelines; and

WHEREAS, the Town desires to have the SCWA provide hookups to public water supply for such properties by extending existing SCWA water mains, installing meters, curb stops and meter vaults and by engaging a contractor to install private services and retire private wells (hereinafter sometimes the "Water Improvement") as provided for herein; and

WHEREAS, the Town has undertaken proceedings pursuant to section 209-q of the Town Law to establish the "Wainscott Water Supply Area" to facilitate the provision of safe drinking water; and

WHEREAS, the parties represent that they have the power and authority pursuant to law to bind themselves to the provisions hereof;

NOW THEREFORE, it is mutually agreed as follows:

1. The SCWA shall install water mains and appurtenances in the Hamlet of Wainscott substantially as described in Exhibit 1 to serve the Wainscott Water Supply Area. The SCWA will provide a curb stop, meter, meter vault and a service line from the water main to the edge of the property line in the Wainscott Water Supply Area. For the installation of the water main, curb stop, meter, meter vault and service line from the water main to the edge of the property in the Wainscott Water Supply Area, the SCWA will charge a main surcharge and tap fee for the Wainscott Water Supply Area as indicated on Schedule 1 attached hereto and made a part hereof. The water main, curb stop, meter, meter vault and service line from the water main to the edge of the property line shall be and remain the property of the SCWA.

2. For each of the identified properties for which the SCWA provides access to public water in accordance with paragraph 1, the Town shall pay to the SCWA the tap fee and main surcharge as set forth on the Schedule 1. The SCWA shall deliver an invoice, voucher or other document to the Town for amounts due and payable upon completion of work in the Wainscott Water Supply Area. The Town shall pay such amount to the SCWA within 90 days of the receipt of such invoice, voucher or other document.

3. The SCWA will engage the services of a contractor in accordance with terms and conditions of "SCWA Contract No. 7485 - Installation of Water Service Lines - Wainscott"

(hereinafter "Contract No. 7485") that was let in accordance the requirements of Public Authorities Law Section 1088, a copy of which is attached hereto and made a part hereof. The SCWA will cause the contractor to install service lines from the meter vault to the internal plumbing of each of the identified properties, sweat and cut in adapters and fittings, install brass (no lead) ball shutoff valves, hang copper tubing, disconnect and cap existing wells/pumps and reconnect electrical grounds, all in accordance with the terms and conditions of Contract No. 7485 for each of the identified properties. The service line from the meter vault to the internal plumbing, adapters and fittings, brass (no lead) ball shutoff valves, copper tubing, and all other items installed in accordance with Contract No. 7485 shall be and remain the property of the respective owners in the Wainscott Water Supply Area, provided that, in furtherance of the Town purpose of providing safe drinking water to the residents of the Wainscott Water Supply Area, the owners of property in the Wainscott Water Supply Area shall agree in writing to maintain the service lines from the meter vault to the internal plumbing of their property in good working order for at least as long as any bonds or notes issued by the Town of East Hampton to finance the Water Improvement in the Wainscott Water Supply Area remain outstanding.

4. For each of the identified properties for which the SCWA causes the services to be performed in accordance with paragraph 3, the Town shall pay to the SCWA all amounts paid to the contractor in accordance with the terms, conditions and amounts set forth in Contract No. 7485 and as set forth on Schedule 1. The SCWA shall deliver an invoice, voucher or other document to the Town for amounts due and payable upon completion of the work for each identified property. The Town shall pay such to the SCWA within 90 days of the receipt of such invoice, voucher or other document.

5. The Wainscott Water Supply Area, for which the SCWA shall install water mains and provide public water service in accordance with the terms and conditions of this Agreement, shall include the following properties identified on the Map and Schedule 1 attached hereto.

6. After the Wainscott Water Supply Area has been connected to public water in accordance with the above provisions, the SCWA shall provide water service to the connected properties in accordance with its established rates, charges, rules and regulations as the SCWA may change from time to time. The SCWA agrees to maintain the water mains and appurtenances and the curb stops, meters, meter vaults and service lines from the water main to the edges of the property lines in the Wainscott Water Supply Area in good working order for at least as long as any bonds or notes issued by the Town of East Hampton to finance the Water Improvement in the Wainscott Water Supply Area remain outstanding.

7. This Agreement shall continue for at least as long as any bonds or notes issued by the Town of East Hampton to finance the Water Improvement in the Wainscott Water Supply Area remain outstanding.

8. Each party hereto shall defend, indemnify and save harmless, to the extent permitted by law, the other party, its respective officers, agents, servants, employees, contractors and representatives against and from all suits, losses, demands, payments, actions, recoveries, judgments and costs of every kind and description and from all damages to which the other party or any of its officers, agents, servants, employees and representatives may be subjected by reason of injury to person or property of others resulting from the implementation of this

Agreement by the other party. The aforesaid indemnification shall not be applicable to any liability caused by the acts, omissions, faults or negligence of the party seeking indemnification.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and to be effective as of the day and year first above written.

SUFFOLK COUNTY WATER AUTHORITY

By: Jeffrey W. Szabo

TOWN OF EAST HAMPTON

By: Peter Van Scoyoc

STATE OF NEW YORK}
ss.:
COUNTY OF SUFFOLK}

On the 9th day of July, in the year 2018, before me, the undersigned, a Notary Public in and for said state, personally appeared Peter Van Scoyoc personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Maura S. Gledhill, Notary Public

MAURA S. GLEDHILL
Notary Public, State of New York
No. 01GL6167419
Qualified in Suffolk County
Commission Expires May 29, 2019

STATE OF NEW YORK}
ss.:
COUNTY OF SUFFOLK}

On the 16th day of July, in the year 2018, before me, the undersigned, a Notary Public in and for said state, personally appeared Jeffrey W. Szabo personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Timothy J. Hopkins, Notary Public

Timothy J. Hopkins
Notary Public, State of New York
No. 02HO6040236
Term Expires April 17, 2022
Qualified in Suffolk County

<u>EXHIBIT 5</u>

Office of Financial Services
Elizabeth K. Vassallo

PO Box 38
Oakdale NY 11769
Phone (631) 589-5200
Fax (631) 218-1150

INVOICE

June 26, 2020

Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

Invoice No.: 90035296

Customer No.: 5000001200

Costs associated with the installation of water mains and appurtenances, including access to public water and contractor services for installing private service lines in the Wainscott Water Supply District.

Total Town of East Hampton costs according to the attached cost summary: **$7,591,425.93** ✓

Thank You.

Elizabeth Vassallo

Elizabeth Vassallo
Chief Financial Officer

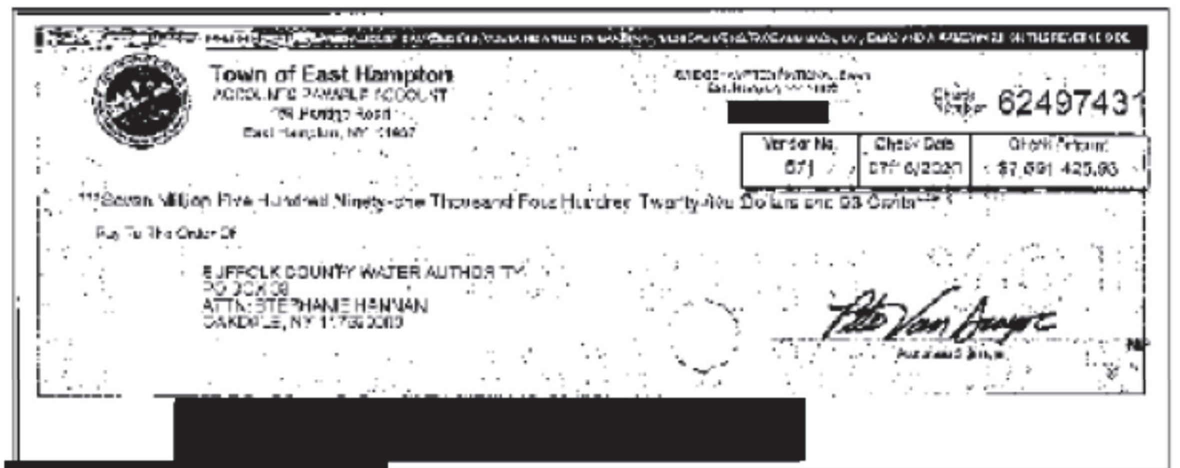
Remit to:
Suffolk County Water Authority
P.O. Box 38
Oakdale, New York 11769
Attn: Stephanie Hannan

Attachment

Suffolk County Water Authority
Town of East Hampton - Project 18558
Wainscott - Cost Summary
Invoice no. 90035296
Invoice Date: June 12, 2020

		Actual Costs
Service Lines - Tap fees (030-19-00-0006)		1,182,450.00
Service Lines - Surcharges		1,017,111.00
Private Service Lines (500-19-00-0002)		439,282.50
	Subtotal -Services	**$ 2,638,843.50**
WBS 190-19-00-0002 - Water Mains		
Restoration - Wtr Main		2,182,084.74
Material - Wtr Main-incl mtl OH		176,221.10
Miscellaneous		2,100.00
Roadwork Wtr Main Construcion Costs		5,342,084.78
PS & A- Wages & Benefits Overhead		1,917,976.70
	Subtotal 190-19-00-0002	**$ 9,620,467.32**
Existing Main Extension-005-18-00-0053 & 0058 (Foxcroft & Ardsley)		351,745.61
	Total Water Main installation	**$ 9,972,212.93**
	Total Project Costs	**$ 12,611,056.43**
	EFC IMG Grant	5,044,423.00
	Total EFC Grant funds	**$ 5,044,423.00**
	Muncipal Contribution Schedule C-1 EFC 18558	**$ 7,566,633.43**
Additional Expenditures		
	Private Service Lines for [redacted] Esterbrook & [redacted] Clyden - June 2020	26,642.50
	Less: Tap fee-# [redacted] Wainscott Stone Rd-vacant lot	(1,850.00)
	Town of East Hampton Invoice	**$ 7,591,425.93**

$ 7,125,500.93
$ 465,925.00
$ 7,591,425.93



Town of East Hampton
ACCOUNTS PAYABLE ACCOUNT
East Hampton, NY 11937

Check Number 6249743

Vendor No.	Check Date	Check Amount
671	07/16/2020	$7,591,425.93

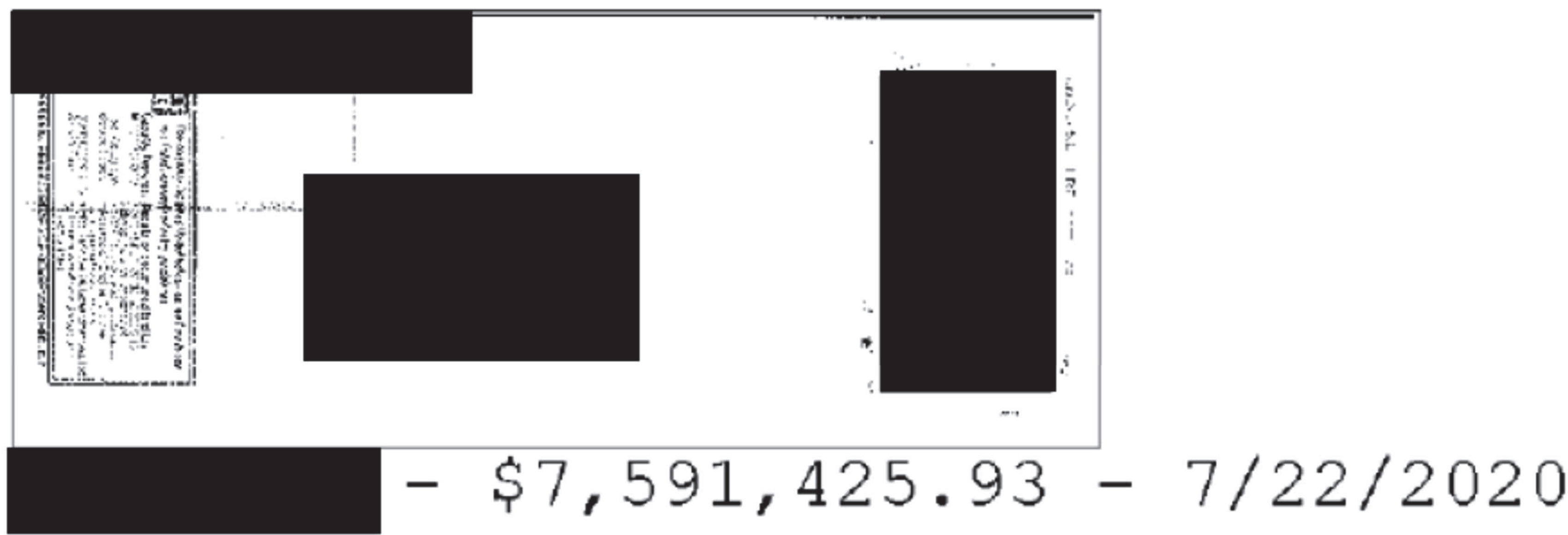
Seven Million Five Hundred Ninety-one Thousand Four Hundred Twenty-five Dollars and 93 Cents

Pay To The Order Of

SUFFOLK COUNTY WATER AUTHORITY
PO BOX 38
ATTN: STEPHANIE HANNAN
OAKDALE, NY 11769

Authorized Signature

- $7,591,425.93 - 7/22/2020



- $7,591,425.93 - 7/22/2020

EXHIBIT 6

From: Scharf, Steven (DEC) <steven.scharf@dec.ny.gov>
Sent: Thursday, August 26, 2021 9:15 AM
To: Davis, Stephanie <s.davis@fpm-group.com>
Cc: Mustico, Richard X (DEC) <richard.mustico@dec.ny.gov>; Swartwout, John (DEC) <john.swartwout@dec.ny.gov>; Engelhardt, Chris A. (DEC) <chris.engelhardt@dec.ny.gov>; Bethoney, Charlotte M (HEALTH) <charlotte.bethoney@health.ny.gov>; Selmer, Stephanie L (HEALTH) <stephanie.selmer@health.ny.gov>; Wagh, Sarita S (HEALTH) <Sarita.Wagh@health.ny.gov>; jason.hime@suffolkcountyny.gov; Dawydiak, Walter <Walter.Dawydiak@suffolkcountyny.gov>; Andrew Rapiejko <andrew.rapiejko@suffolkcountyny.gov>; Karol Sarian <Karol.Sarian@suffolkcountyny.gov>; Cancemi, Ben <b.cancemi@fpm-group.com>
Subject: RE: East Hampton Airport 152250 Highway Diner and Wainscott Inn

Stephanie,

This email follows our recent discussion regarding two transient non-community public water suppliers on Montauk Highway south of the East Hampton Airport. A more detailed discussion is as follows:

The Wainscott Diner and Bar, a transient non-community public water supplier, was originally sampled back on July 3, 2017 as part of the Wainscott Survey (SCDHS Survey# SV0317). The Suffolk county Department of Health Services (SCDHS) hydrogeologists evaluated this location back then as being in a location that may be impacted from possible contamination from the East Hampton Airport. In 2017 sampling by SCDHS, Highway Restaurant had PFOS and PFOA concentrations of 20.5 ppt and 13.9 ppt, respectively. so the Health Advisory Level (HAL) of 70 ppt was used as a trigger by New York State Department of Health (NYSDOH) for supplying alternate water. Recently SCDHS collected samples at the Highway Restaurant again as part of the public water supply PFAS monitoring and surveillance program. On April 22, 2021, SCDHS collected split samples for PFAS analyses by both the Stony Brook University Center for Clean Water Technology Laboratory (SBU) and the Suffolk County Water Authority Laboratory (SCWA). The SBU results were 14.1 ppt for PFOS and 9.88 ppt for PFOA. The SCWA results were 23.1 ppt for PFOS and 10.7 ppt for PFOA. Based upon recent NYSDOH Bureau of Water Supply Protection, an MCL violation was issued by the SCDHS.

Similar to the Highway Diner and Bar, **the Wainscott Inn,** also a transient non-community public water supplier serviced by two wells, was originally sampled back on June 26, 2018 as part of the Wainscott Survey (SCDHS Survey# SV0317). The SCDHS hydrogeologists also evaluated this location back then as being in a location that may be impacted from possible contamination from the East Hampton Airport. In 2018 sampling by SCDHS, Wainscott Inn had PFOS and PFOA concentrations of <1.91 ppt and 13.5 ppt, respectively From Well 4 and non-detects from Well 3. As previously stated, at that time there was no specific MCL for PFOS/PFOA, so the HAL of 70 ppt was used as a trigger by New York State for alternate water. Recently SCDHS collected samples at the Wainscott Inn again as part of the public water supply PFAS monitoring and surveillance program. On May 26, 2021, samples for PFAS analyses were collected using the SCWA laboratory and had results of <2.0 ppt for PFOS and 17.1 ppt for PFOA at the Well #4 Ground Water Tap and <2.0 for PFOS and 22.1 ppt for PFOA in the Well #4 Office while Well 3 samples were non-detect for PFOS and PFOA. Confirmation samples were collected on June 21, 2021 and had results of <2.0 ppt for PFOS and 19.4 ppt for PFOA at the Well #4 Ground Water Tap and <2.0 for PFOS and 16.8 ppt for PFOA in the Well #4 Office. Based upon recent NYSDOH Bureau of Water Supply Protection, an MCL violation was also issued by the SCDHS.

In conclusion, the NYSDEC has, given the location of these facilities, determined that the nearby East Hampton Airport is most likely the source (see attached maps). Since the Wainscott Inn and the Highway Diner and Bar were included in the potable well assessment area for this Superfund site, and are located hydraulically downgradient of the airport, it is evident that the PFAS concentrations exceeding the MCL at the Wainscott Inn and the Highway Diner and Bar are most likely linked to the East Hampton Airport Superfund site. The NYSDEC is requesting the Town of East Hampton offer to provide connections to the SCWA system as the water mains run right in front of these locations and based upon the PFAS MCL exceedances at these two facilities

Please contact me direct to discuss this further once you have had a chance to review this with the Town of East Hampton.

Thanks,

Steve

Steven M. Scharf, P.E.
Project Engineer, Division of Environmental Remediation
New York State Dept of Environmental Conservation
Remedial Bureau A
625 Broadway 12th Floor
Albany, NY 12233-7015
518-402-9620
www.dec.ny.gov | | |

EXHIBIT U

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	))))))))	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** *City of Camden, et al. v. E.I. DuPont de Nemours and Company, et al.*, No. 2:23-cv-03230-RMG

<u>OBJECTION OF WIDEFIELD WATER AND SANITATION DISTRICT</u>

COMES NOW, Widefield Water and Sanitation District ("Widefield"), through undersigned counsel, and respectfully submits this objection pursuant to F.R.C.P. 23(e)(5). As established in its Affidavit, attached at **Exhibit 1**, Widefield is a Settlement Class Member.

INTRODUCTION

Widefield is a Public Water System ("PWS") that provides water and wastewater service to residential and commercial customers in El Paso County, Colorado. As a public utility, Widefield's mission is to provide clean, safe drinking water to the public. Since 2016, Widefield's aquifer has been contaminated by aqueous film-forming foams ("AFFF"), the very subject of the Settlement Agreement entered into by and among the Class Representatives and Settling Defendants, as amended, on August 7, 2023 ("Settlement").

Widefield objects to the Settlement as neither fair, reasonable, nor adequate. Although the Settlement itself aims to address PFAS-related harm to drinking water and the financial burdens associated with monitoring, treating, and remediating such water, the Settlement will not

adequately address such harm. *See Settlement*, ¶ 1.2. As detailed below, the Settlement only contemplates payment for two PFAS compounds out of more than 4,000 such compounds. Yet the Settlement releases the Class Members from ever raising claims against the Settling Defendants for *any other PFAS*, although the harm and costs of monitoring, treating, and remediating the impact for the other 4,000 compounds are not yet known. It is the belief of Widefield, and its proposed expert Dr. Chowdhury, that the Settlement will fall far short of addressing the true extent of harm caused by PFAS. Widefield informs the Court that it wishes to participate in the Final Fairness Hearing on December 14. Accordingly, Widefield objects to the proposed Settlement as neither fair, reasonable, nor adequate, and respectfully asks the Court to reject the Settlement.

PARTY AND FILER INFORMATION

Pursuant to Section 9.6.1 of the Settlement, Widefield provides the following information:

1. Widefield is a Settlement Class Member under the Settlement's terms, and its affidavit proving standing is attached as **Exhibit 1.**

2. Widefield's contact information is as follows:

   a. Lucas Hale, District Manager, Widefield Water and Sanitation District

      8495 Fontaine Blvd., Colorado Springs, CO 80925

      Phone: 719-390-7111

      Facsimile: 719-390-1409

      E-mail address: lucas@wwsdonline.com

3. Howard Kenison, Alexandra Lisowski, Jones & Keller, P.C., are the filers of this Objection and counsel representing the Settlement Class Member. Attorney Kenison's and Lisowski's contact information is as follows:

   a. Howard Kenison, Shareholder, Jones & Keller, P.C.

      Alexandra Lisowski, Jones & Keller, P.C.

      1675 Broadway, 26th Floor, Denver, CO 80202

      Phone: 303-573-1600

      Facsimile: 303-573-8133

      E-mail addresses: hkenison@joneskeller.com;

      olisowski@joneskeller.com

4. The objections asserted and the specific reasons for each objection are listed below, in Widefield's Statement of Facts and Law.

5. Widefield wishes to participate in the Final Fairness Hearing.

6. Widefield wishes to call Dr. Chowdhury as an expert witness to testify in this matter.

STATEMENT OF LAW

Class action settlements are governed by Federal Rule of Civil Procedure 23. Fed. R. Civ. Pro. 23. Pursuant to F.R.C.P. 23(e)(2), the Court must determine whether a proposed settlement agreement is "fair, reasonable, and adequate." Fed. R. Civ. Pro. 23(e)(2); *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1062 (C.D. Cal. 2010). In conducting this inquiry, the Court must consider several factors, including the amount offered in settlement, the extent of discovery completed, and the reaction of class members to the proposed settlement. *See Staton*, 327 F.3d at 959.

STATEMENT OF FACTS

7. The Settlement defines PFAS as any per-or poly-fluoroalkyl substance that contains at least one fully fluorinated methyl or methylene carbon atom (without any hydrogen, chlorine, bromine, or iodine atom attached to it).

8. The calculation for allocation of payment and the corresponding claim forms only factor perfluorooctanic acid ("PFOA"), and perfluorooctane sulfonate ("PFOS"), which are only two PFAS compounds of a list of over 4,000 in known existence.

9. Exhibit Q of the Settlement, titled "Allocation Procedures," describes in detail the allocation of payment of claims which is based almost exclusively upon PFOA and PFOS. The Allocation Procedures are also based upon operation and maintenance costs assumptions for varying levels of PFOA and PFOS in each public water supply system.

10. Widefield has been dealing with AFFF aquifer contamination, which has been known since 2016.

11. Widefield was the first utility in the nation to install full scale ion-exchange treatment for PFOA and PFOS.

12. Widefield has extensive knowledge and experience in treating the two aforementioned PFAS compounds, PFOA and PFOS. Widefield has test results showing measurable quantities of 11 out of the 29 PFAS compounds included by the Environmental Protection Agency ("EPA") in its Unregulated Contaminant Monitoring Rule published on December 27, 2021 ("UCMR5").

13. Widefield has extensive knowledge and experience evaluating the treatment options, costs, and feasibility of such options with respect to the PFAS compounds included in UCMR5. This knowledge and experience provide Widefield a unique perspective and understanding of the Settlement.

14. According to the EPA's Water Treatability Database ("TDB"), which is attached as **Exhibit 2**, treatment technologies are known for only 38 PFAS compounds.

ARGUMENT

1. **The Settlement is fundamentally not fair, adequate, nor reasonable.**

A class action settlement must be fair, adequate, and reasonable. Fed. R. Civ. Pro. 23 (e)(2). Where significant uncertainty exists as to the benefits proposed by a proposed settlement, the Court must examine factors including "the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement." *Staton*, 327 F.3d at 959. Here, the amount offered in settlement and extent of discovery completed render the Settlement neither fair, nor adequate, nor reasonable.

It is not reasonable to release the defendants from all liability for all PFAS compounds when the proposed Settlement includes compensation from defendants based upon only the *two* PFAS compounds associated with AFFF—PFOS and PFOA. Out of the thousands of PFAS compounds in known existence, only 6, from the March 14, 2023 proposed EPA's maximum contaminant limit ("MCL") for PFAS compounds, are known and reasonably understood by the EPA. In effect, the Settlement contemplates releasing the defendants of *all* liability for *all* PFAS compounds when many of the human impacts of PFAS compounds via drinking water routes are still being studied and are not well understood. Upon information and belief, the Settling Defendants manufactured PFAS compounds other than PFOS and PFOA which could be equally harmful and costly to remediate. The Settlement is speculative in nature as it is asking the class

participants to release the defendants of future unknown liability for thousands of PFAS compounds that have not been effectively studied and understood based upon compensation for only a limited subset of PFAS compounds which have known treatment costs. It asks the class participants to release all liability for thousands of PFAS compounds based upon testing and costs associated with two PFAS compounds, PFOA and PFOS.

Further, Section 12.1.1 of the Settlement provides for the Release of specified types of claims by Qualified Class Members. Clauses (i), (iii), (iv), and (v) of Section 12.1.1 identify very specific types of claims, presumably limiting the scope of the Release (PFAS in Drinking Water or Public Water Systems, disposal of PFAS-containing waste, representations about PFAS, punitive or exemplary damages claims, respectively). However, clause (ii) is extremely broad and renders all the other narrow releases moot. Clause (ii) releases claims that arise out of or relate to "the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS alone or in products that contain PFAS as an active ingredient, by product, or degradation product, including AFFF". Settling Defendants are developers, manufacturers, formulators, distributors, and sellers of PFAS. Exposure to and remediation of PFAS results from its use. Thus, any claim against the Settling Defendants will arise out of, relate to, or involve the development, manufacture, formulation, distribution, sale, and use of PFAS. As a result, clause (ii) effectively extinguishes the narrow releases specified in clauses (i), (iii), (iv), and (v). This broad release extends impermissibly beyond the scope of alleged claims, which are limited to PFAS in Drinking Water and Public Water Systems. *See Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015).

In an analogous case, a California federal court denied a proposed settlement that did not reasonably protect the interests of Roundup users who had not been diagnosed with Non-

Hodgkins lymphoma ("NHL"). *In re Roundup Prod. Liab. Litig.*, 543 F. Supp. 3d 1004, 1009 (N.D. Cal. 2021). While class members who had been diagnosed with NHL could recover from the compensation fund, members who had not yet been diagnosed could not recover after the fund's four-year duration ended. *In re Roundup Prod. Liab. Litig.*, 543 F. Supp. 3d at 1006-07. The court found that class members could not assume that any recovery would be available after four years. *Id.* at 1007.

A similar situation exists here. The Settlement offers compensation for remediation of two PFAS compounds, but no other compounds. Yet it demands that Settlement Class Members release the Settling Defendants from any and all claims for *any other* PFAS compound, even when the costs to remediate damages caused by thousands of other compounds are unknown. Just as the *Roundup* court denied the proposed settlement as unfair, unreasonable, and inadequate, the Court here should do the same.

2. The Settlement can be transformed to be fair, adequate, and reasonable.

As a Settlement Class Member in the Settlement, Widefield objects to releasing the defendant from liability for all PFAS compounds. Widefield proposes to restrict the Settlement to only those PFAS compounds associated with AFFF, that is, PFOS and PFOA, by modification of the definition of "PFAS" in paragraph 2.38 of the Settlement to the following:

> "PFAS" means, solely for purposes of this Agreement, PFOA and PFOS. "PFOA" means Chemical Abstracts Service registry number 45285–51–6 or 335–67–1, chemical formula C8F15CO2, perfluorooctanoate, along with its conjugate acid and any salts, isomers, or combinations thereof. "PFOS" means Chemical Abstracts Service registry number 45298–90–6 or 1763–23–1, chemical formula C8F17SO3, perfluorooctanesulfonate, along with its conjugate acid and any salts, isomers, or combinations thereof.

In the alternative, Widefield proposes restricting the Settlement to only those 6 PFAS compounds that are reasonably known to PWS as of the March 14, 2023 EPA proposed MCL.

Treatments costs and liability for the thousands of other PFAS compounds not covered by the proposed MCL is unknown and cannot be known at this point. Even the concentration of these thousands of other PFAS compounds within each water source of public water systems because no testing has occurred. Therefore, it is unreasonable for the class participants to release all liability for thousands of PFAS compounds where their existence or impact is unknown, and the costs or feasibility of treatment is unknown. Under this alternative, Widefield proposes restricting the settlement to only those PFAS compounds that are currently identified by the EPA and known to class participants as follows:

> "PFAS" means, solely for purposes of this Agreement, any per- or poly-fluoroalkyl substance listed in the United States Environmental Protection Agency Proposed Federal PFAS MCL as defined in this Settlement Agreement.

WHEREFORE, Widefield requests that the Court reject the Settlement.

Respectfully submitted this 10th day of November 2023.

Howard Kenison, Colo. Regis. No. 477
Alexandra Lisowski, Colo. Regis. No. 57880
JONES & KELLER, P.C.
1675 Broadway, 26th Floor
Denver, CO 80202
Phone: 303-573-1600
Email: hkenison@joneskeller.com;
olisowski@joneskeller.com

DECLARATION PURSUANT TO 28 U.S.C. § 1746

I, the undersigned filer, have been legally authorized to object on behalf of the Settlement Class Member. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 10, 2023.

Howard Kenison, Colo. Regis. No. 477
Alexandra Lisowski, Colo. Regis. No. 57880
JONES & KELLER, P.C.
1675 Broadway, 26th Floor
Denver, CO 80202
Phone: 303-573-1600
Email: hkenison@joneskeller.com;
olisowski@joneskeller.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2023, I filed a true and correct copy of the foregoing via email to: filingdocs_ecf_chas@scd.uscourts.gov, and served via US mail, postage paid, upon the following:

Kevin H. Rhodes
Executive Vice President and Chief Legal Affairs Officer
Legal Affairs Department 3M Company
3M Center, 220-9E-01
St. Paul, MN 55144-1000

Thomas J. Perrelli
Jenner & Block LLP
1099 New York Avenue, N.W., Suite 900
Washington, DC 20001-4412

Richard F. Bulger
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

Scott Summy
Baron & Budd, P.C.
3102 Oak Lawn Ave., Ste. 1100
Dallas, Texas 75219

Michael A. London
Douglas & London
59 Maiden Lane, 6th Floor
New York, NY 10038

Paul J. Napoli
Napoli Shkolnik
1302 Av. Ponce de Leon
San Juan, Puerto Rico 00907

Elizabeth A. Fegan
Fegan Scott LLC
150 S. Wacker Drive, 24th Floor
Chicago, IL 60606

Joseph F. Rice
Motley Rice LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Jeffrey M. Wintner
Graham W. Meli
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Kevin T. Van Wart
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

s/ *Emily Morse-Lee*
Emily Morse-Lee

EXHIBIT 1

AFFIDAVIT OF LUCAS HALE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQEUOUS FILM-FORMING FOAMS PRODUCT LIABILITY LITIGATION	Master Docket No.: 2:18-mn-2873-RMG
CITY OF CAMDEN, et al., *Plaintiffs*, *-vs-* E.I. DUPONT DE NEMOURS AND COMPANY, et al., *Defendants*.	This Document relates to: Civil Action No.: 2:23-cv-3230-RMG

EXHIBIT 1 TO CLASS MEMBER OBJECTION PURSUANT TO F.R.C.P. 23 (e)(5): AFFIDAVIT OF LUCAS HALE

I, Lucas Hale, having been duly sworn, state the following, all of which is within my own personal knowledge:

1. I am over the age of eighteen.
2. I am currently employed by Widefield Water and Sanitation District ("Widefield") as District Manager.
3. Widefield is a quasi-municipal corporation and independent governmental entity organized and operating pursuant to Title 23 of the Colorado Revised Statutes.
4. Widefield operates an active municipal public water collection, treatment, and distribution system serving areas located in El Paso County, Colorado.
5. Widefield is an active "Public Water System" as defined by the proposed Settlement Agreement and by the Safe Drinking Water Act, administered by the U.S. Environmental Protection Agency ("EPA"), and the Colorado Department of Health and Environment ("CDPHE") for Public Water Systems located in the State of Colorado.
6. Widefield is registered (and was registered as of June 30, 2023) as an active Public Water System with CDPHE under Public Water System ID CO0121900.
7. Widefield's Public Water System serves a population of approximately 27,053 people.
8. Widefield's Public Water System is therefore considered a "large" system subject to the monitoring rules set forth in the EPA's fifth Unregulated Contaminant Monitoring Rule, published at 86 Fed. Reg. 73131 ("UCMR 5").
9. Widefield's has numerous water sources that supply water for Widefield's Public Water System, including both surface water and groundwater sources.

10. On or before June 30, 2023, at least 13 groundwater wells which supply Widefield Public Water System have tested positive for at least 11 out of the 29 PFAS compounds identified in UCMR 5 and 5 of the 6 PFAS compounds in the EPA's proposed maximum limit as of March 14, 2023.

11. For the reasons stated above, Widefield qualifies as a "Settlement Class Member" as defined in the proposed Settlement Agreement.

12. Widefield is not excluded from the Settlement Class because Widefield is not located in Bladen, Brunswick, Columbus, Cumberland, New Hanover, Pender, or Robeson counties in North Carolina.

13. Widefield is not excluded from the Settlement Class because Widefield is not owned and operated by a State government or by the federal government. Widefield has the independent authority to sue and be sued pursuant to C.R.S. § 32-1-1001(1)(c).

14. Widefield is not excluded from the Settlement Class because Widefield is not a privately owned well or surface water system, it is a Public Water System as described above.

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

Executed this 9th day of November 2023

Lucas Hale

The above and foregoing Affidavit was subscribed and sworn to or affirmed before me this 9th day of November, 2023, by Lucas Hale.

SEAL

CARMEN ELAINE SLAGLE
Notary Public
State of Colorado
Notary ID # 20144027041
My Commission Expires 07-09-2026

Notary Public

EXHIBIT 2

Water Treatability Database

Per- and Polyfluoroalkyl Substances

Informational Links

Chemicals Dashboard | Analytical Method | EPA Health Advisories | UCMR5

PFAS Explained

Contaminant Navigation

Overview | Treatment Processes | Properties | Fate and Transport | References

Treatment Processes

The following processes were found to be effective for the removal of PFASs: granular activated carbon (GAC) (up to > 99 percent), membrane separation (up to > 99 percent), and ion exchange (up to > 99 percent). Various types of novel adsorptive media have also been found to effectively remove PFASs (up to > 99 percent removal), but results for these media published to date have been limited to bench scale. These results cover the removal of specific PFASs including PFTetA, PFTriA, PFDoA, PFUnA, PFDA, PFNA, PFHpA, PFHxA, PFPeA, PFBA, PFDS, PFNS, PFHpS, PFHxS, PFPeS, PFBS, PFPrS, PFOSA, PFHxSA, PFBSA, 6:2 CI-PFESA, 8:2 CI-PFESA, PFMOBA, PFMOPrA, PFMOAA, PFO4DA, PFO3OA, PFO2HxA, FtS 8:2, FtS 6:2, FtS 4:2, 6:6 PFPiA, 6:8 PFPiA, N-EtFOSAA, N-MeFOSAA, ADONA, PFECHS, F35-B, Nafion BP2, GenX, HFPO-TA, and HFPO-TeA. For results on the removal of PFOS and PFOA, see the separate treatability database entries for those specific contaminants.

Studies were identified evaluating the following treatment technologies for the removal of PFASs:

Adsorptive Media

Bench-scale studies tested adsorption of PFASs using novel media including: magnetic nanoparticles with different polymer coatings [2535], functionalized and hybrid hydrogel sorbents [2617, 2606], swellable modified silica with an entrapped cationic polymer [2633], hemp protein powder [2636], modified bentonite [2641], amine-functionalized covalent organic frameworks [2618], cationic covalent organic frameworks [2670] mixed mineral and graphene/carbon-based materials [2622, 2656], zinc-aluminum and magnesium-aluminum layered double hydroxides [2654], zirconium-based metal organic frameworks [2661], amidoxime surface-functionalized electrospun polyacrylonitrile nanofibrous adsorbent [2664], biochar materials [2663, 2669], clay-based adsorbents [2665], cyclodextrin polymers [2638], nonionic resin adsorbents [2677], and two dimensional titanium metal carbides [2677]. One bench-scale study found that amyloid fibril membranes had the capacity to remove certain PFAS, although they generally required low pH levels to achieve high removal efficiency. The study concluded that PFAS removal was due to adsorption (as opposed to size exclusion, which would otherwise categorize the technology as membrane filtration or separation) [2657].

Some of these media achieved moderate to high removals in naturally occurring surface water or groundwater [2636, 2641, 2606, 2622, 2638, 2656, 2657, 2661, 2665, 2669, 2670, 2675]; others were tested only in spiked ultrapure water.

For specific PFASs, results for the best performing of these media include: * Up to 99.9 percent removal of perfluorotetradecanoic acid (PFTetA) * Up to 99.8 percent removal of perfluorotridecanoic acid (PFTriA) * Up to 99 percent removal of perfluorododecanoic acid (PFDoA) * Up to 99.2 percent removal of perfluoroundecanoic acid (PFUnA) * Up to greater than 99 percent removal of perfluorodecanoic acid (PFDA) * Up to greater than 99 percent removal of perfluorononanoic acid (PFNA) * Up to greater than 99 percent removal of perfluoroheptanoic acid (PFHpA) * Up to greater than 99 percent removal of perfluorohexanoic acid (PFHxA) * Up to 97 percent removal of perfluoropentanoic acid (PFPeA) * Up to greater than 99 percent removal of perfluorobutanoic acid (PFBA) * Up to 98.1 percent removal perfluorodecyl sulfonate (PFDS) * Up to greater than 99 percent removal of perfluorononane sulfonate (PFNS) * Up to greater than 99 percent removal of perfluoroheptyl sulfonate (PFHpS) * Up to greater than 99 percent removal of perfluorohexyl sulfonate (PFHxS) * Up to greater than 99 percent removal of perfluoropentanesulfonic acid (PFPeS) * Up to greater than 99 percent removal of perfluorobutyl sulfonate (PFBS) * Up to greater than 99 percent removal of perfluorooctanesulfonamide (PFOSA) * 79 percent removal of perfluorohexanesulfonamide (PFHxSA) * 33 percent removal of perfluorobutylsulfonamide (PFBSA) * Up to 98.9 percent removal 6:2 chlorinated perfluoroether sulfonic acid (6:2 Cl-PFESA) * Up to 98.3 percent removal 8:2 chlorinated perfluoroether sulfonic acid (8:2 Cl-PFESA) * Up to greater than 99 percent removal of fluorotelomer sulfonate 8:2 (FtS 8:2) * Up to 99 percent removal of fluorotelomer sulfonate 6:2 (FtS 6:2) * Up to 87 percent removal of fluorotelomer sulfonate 4:2 (FtS 4:2) * Up to 99.6 percent removal 6:6 perfluorophosphinic acid (6:6 PFPiA) * Up to 99.9 percent removal 6:8 perfluorophosphinic acid (6:8 PFPiA) * Up to 83 percent removal of ammonium 4,8-dioxa-3H-perfluorononanoate (ADONA) * Up to 97 percent removal of perfluoro-4-(perfluoroethyl)cyclohexylsulfonate (PFECHS) * Up to 98 percent removal of F-53B * Up to 99 percent removal of GenX * Up to greater than 99 percent removal of hexafluoropropylene oxide trimer acid (HFPO-TA) * Up to 99.8 percent removal of hexafluoropropylene oxide tetramer acid (HFPO-TeA) * Up to 82 percent removal of 6:2 Fluorotelomer sulfonamidopropyl betaine (6:2 FTAB) * Up to 86 percent removal of 8:2 Fluorotelomer sulfonamidopropyl betaine (8:2 FTAB) * Up to 89 percent removal of 10:2 Fluorotelomer sulfonamidopropyl betaine (10:2 FTAB) * Up to 85 percent removal of 5:1:2 Fluorotelomer betaine (5:1:2 FTB) * Up to 78 percent removal of 7:1:2 Fluorotelomer betaine (7:1:2 FTB) * Up to 81 percent removal of 9:1:2 Fluorotelomer betaine (9:1:2 FTB) * Up to 87 percent removal of 11:1:2 Fluorotelomer betaine (11:1:2 FTB) * Up to 79 percent removal of 5:3 Fluorotelomer betaine (5:3 FTB) * Up to 91 percent removal of 7:3 Fluorotelomer betaine (7:3 FTB) * Up to 86 percent removal of 7:3 Fluorotelomer betaine (9:3 FTB) * Up to 87 percent removal of 11:3 Fluorotelomer betaine (11:3 FTB)

Although results varied depending on the specific media tested, many of these studies show that perfluorinated sulfonates are more readily adsorbed than perfluoroalkyl acids and longer chain PFASs are more readily adsorbed than shorter chain compounds [2535, 2617, 2636, 2641, 2622, 2638, 2654, 2657, 2663, 2670].

See less

At a full-scale site, packed tower aeration was not effective for removing PFASs [2441].

Aeration and Air Stripping See less

Biological Filtration

A full-scale study [2175] of a plant treating reclaimed domestic wastewater found biological filtration to be ineffective for removing per- and polyfluoroalkyl substances.Moderate removal (57 percent) of perfluorodecanoic acid (PFDA) was observed in the biological filtration step at a pilot-scale potable reuse facility, but removal of shorter chain PFAS compounds was much lower (-59 to 25 percent). Removal of perfluorononanoic acid (PFNA) in a full-scale, biologically active carbon filter treating surface water was inconsistent, with some samples showing reductions of PFOS, but others showing increases [2668].

See less

Biological Treatment

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One bench-scale study [2161] examined removal of various PFAS using supernatant from a domestic wastewater activated sludge process as a microbial source in both aerobic and anaerobic test conditions. Although decreases in some of the PFAS tested were observed, concentrations of these PFAS also decreased in the controls. Therefore, the authors concluded that there was no evidence supporting biodegradation for any of the PFAS tested.

See less

Chlorine
Chlorination was ineffective for removing PFASs at full-scale sites [2441, 2619].

See more

Chlorine dioxide was ineffective for removing per- and polyfluoroalkyl substances at a full-scale site [2441].

Chlorine Dioxide See less

Conventional Treatment
Sampling at full scale [2174, 2175, 2441, 2508, 2518, 2619, 2645, 2668] and pilot [2518] drinking water treatment facilities observed either no removal or inconsistent removal of per- and polyfluoroalkyl substances by conventional treatment.

See less

GAC Isotherm
Isotherm data are available for adsorption onto various types of granular activated carbon and onto other media, powdered activated carbon [2637], including anion exchange resin [2426, 2611, 2621, 2637] and novel adsorbents [2522].

See less

Granular Activated Carbon

Removal of per- and polyfluoroalkyl substances (PFASs) by granular activated carbon (GAC) has been examined in a number of bench and pilot studies and in full scale application. For some of these studies, the primary focus was optimizing the removal of perfluorooctane sulfonate (PFOS) and/or perfluorooctanoic acid (PFOA). Other studies reported on full-scale GAC installations whose objective was treating conventional, as opposed to trace, contaminants. As a result, GAC's performance for the removal of other PFASs was highly variable. In the best cases, however, GAC can be quite effective for many PFAS compounds, with removals of up to greater than 99 percent at bench [2423, 2510, 2511, 2515, 2534, 2561, 2567, 2575, 2626, 2643, 2620, 2638, 2646, 2647, 2663, 2665, 2667], pilot [2559, 2560, 2574, 2616, 2628, 2651, 2652, 2658, 2659], and full-scale [2424, 2441, 2505, 2513, 2564, 2572, 2609, 2616]. Point-of-use GAC devices and pitcher filters are capable of high removals (up to greater than 99 percent) [2430, 2655].

For specific PFASs, results include:

- 90 percent removal of perfluoropropane sulfonate (PFPrS)
- Up to greater than 99 percent removal of perfluorobutanoic acid (PFBA)
- Up to greater than 99 percent removal of perfluorobutyl sulfonate (PFBS)
- Up to 90 percent removal of perfluoropentanoic acid (PFPeA)
- Greater than 99 percent removal of perfluoropentyl sulfonate (PFPeS)
- Up to greater than 99 percent removal of perfluorohexanoic acid (PFHxA)
- Up to greater than 99 percent removal of perfluorohexyl sulfonate (PFHxS)
- Up to greater than 99 percent removal of perfluoroheptanoic acid (PFHpA)
- Up to greater than 99 percent removal of perfluoroheptyl sulfonate (PFHpS)
- Up to greater than 99 percent removal of perfluorononanoic acid (PFNA)
- 96 percent removal of perfluorononane sulfonate (PFNS)
- Up to 99 percent removal of perfluorodecanoic acid (PFDA)
- Up to 90 percent removal of perfluoroundecanoic acid (PFUnA)
- Up to 99 percent removal of perfluorododecanoic acid (PFDoA)
- 90 percent removal of perfluorotridecanoic acid (PFTriA)
- Up to 56 percent removal of perfluorobutylsulfonamide (PFBSA)
- Up to 59 percent removal of perfluorohexanesulfonamide (PFHxSA)
- Up to 95 percent removal of perfluorooctanesulfonamide (PFOSA)
- Up to 70 percent removal of perfluoro-2-methoxyacetic acid (PFMOAA)
- 90 percent removal of perfluoro-3,5-dioxahexanoic acid (PFO2HxA)
- 90 percent removal of perfluoro-3,5,7-trioxaoctanoic acid (PFO3OA)
- 90 percent removal of perfluoro-3,5,7,9-butaoxadecanoic acid (PFO4DA)
- To below detection for fluorotelomer sulfonate 4:2 (FtS 4:2)
- Up to greater than 88 percent removal of fluorotelomer sulfonate 6:2 (FtS 6:2)
- 88 percent removal of fluorotelomer sulfonate 8:2 (FtS 8:2)
- Up to 65 percent removal of perfluoro-4-(perfluoroethyl)cyclohexylsulfonate (PFECHS)
- Up to greater than 99 percent removal of Nafion BP2
- Up to 93 percent removal of GenX

The literature generally shows that perfluorinated sulfonates are more readily adsorbed than perfluoroalkyl acids and longer chain PFASs are more readily adsorbed than shorter chain compounds [2423, 2424, 2515, 2532, 2540, 2577, 2609, 2620, 2626, 2643, 2638, 2663]. The presence of organic matter can have a negative effect on performance, particularly for shorter chain PFASs [2577].

See less

Hydrogen Peroxide See less

Ion Exchange

Removal of per- and polyfluoroalkyl substances (PFASs) using anion exchange resins can be effective. Bench- and pilot-scale studies found removals up to greater than 99 percent [2427, 2503, 2504, 2515, 2523, 2534, 2535, 2538, 2559, 2560, 2563, 2564, 2571, 2576, 2612, 2613, 2616, 2620, 2621, 2627, 2638, 2641, 2643, 2671]. Full-scale applications varied in their results, often depending on whether the treatment process was designed with the objective of removing the specific PFASs measured. The full-scale results showed removals from less than zero to greater than 99 percent [2424, 2441, 2504, 2568]. Among the resins that showed effectiveness were those designed for perchlorate removal, as well as purpose-designed PFAS-selective resins [2504, 2523, 2534, 2538, 2559, 2560, 2564, 2638, 2641, 2643].

For specific PFASs, results include:

- Up to greater than 99 percent removal of perfluorobutanoic acid (PFBA)
- Up to greater than 99 percent removal of perfluorobutyl sulfonate (PFBS)
- Up to greater than 95 percent removal of perfluoropentanoic acid (PFPeA)
- Up to 74 percent removal of perfluoropentyl sulfonate (PFPeS)
- Up to greater than 99 percent removal of perfluorohexyl sulfonate (PFHxS)
- Up to greater than 97 percent removal of perfluorohexanoic acid (PFHxA)
- Up to 99 percent removal of perfluoroheptanoic acid (PFHpA)
- Up to 93 percent removal of perfluoroheptyl sulfonate (PFHpS)
- Up to greater than 99 percent removal of perfluorononanoic acid (PFNA)
- 55 percent removal of perfluorononane sulfonate (PFNS)
- Up to greater than 99 percent removal of perfluorodecanoic acid (PFDA)
- 90 percent removal of perfluoroundecanoic acid (PFUnA)
- Up to greater than 99 percent removal of perfluorododecanoic acid (PFDoA)
- 90 percent removal of perfluorotridecanoic acid (PFTriA)
- 98 percent removal of perfluorobutylsulfonamide (PFBSA)
- 99 percent removal of of perfluorohexanesulfonamide (PFHxSA)
- Up to 98 percent removal of perfluorooctanesulfonamide (PFOSA)
- Greater than 99 percent removal of perfluoro-3-methoxypropanoic acid (PFMOPrA)
- Greater than 99 percent removal of perfluoro-4-methoxybutanoic acid (PFMOBA)
- Up to greater than 99 percent removal of fluorotelomer sulfonate 6:2 (FtS 6:2)
- Up to greater than 99 percent removal for fluorotelomer sulfonate 8:2 (FtS 8:2)
- 97 percent removal of perfluoro-4-(perfluoroethyl)cyclohexylsulfonate (PFECHS)
- Up to greater than 99 percent removal of GenX
- Ineffective (less than 0 percent removal) for 2-(N-Ethyl-perfluorooctanesulfonamido)acetate and 2-(N-Methylperfluorooctanesulfonamido)acetate (N-EtFOSAA and N-MeFOSAA)

The literature also generally shows that ion exchange removes perfluoronated sulfonates more easily than perfluoroalkyl acids and longer chain PFASs more easily than shorter chain compounds [2424, 2515, 2523, 2538, 2540, 2577, 2621, 2627]. The presence of organic matter can have a negative effect on performance, particularly for shorter chain PFASs [2577].

See less

Membrane Filtration

A single bench scale study [2524] observed moderate to high (69 to 84 percent) removal of perfluorohexanoic acid (PFHxA) from spiked lab water by ultrafiltration membranes. Sampling at full scale [2175, 2441] drinking water treatment facilities and a pilot-scale potable reuse facility [2659], however, observed either no removal or inconsistent removal of per- and polyfluoroalkyl substances including PFHxA by ultrafiltration or microfiltration.

See less

Membrane Separation

Removal of per- and polyfluoroalkyl substances (PFASs) from water using membrane separation was found to be quite effective. Bench [2423, 2514, 2524, 2530, 2547, 2647], pilot [2569, 2571, 2573, 2649, 2651, 2658], and full-scale [2175, 2424, 2428, 2441] studies evaluating several types of nanofiltration (NF) and reverse osmosis (RO) membranes achieved PFAS removals of up to greater than 99 percent. Point-of-use RO devices also obtained high removals [2430, 2567].

For specific PFASs, results include:

- Up to 99.9 percent removal of perfluorobutanoic acid (PFBA)
- Up to 99.8 percent removal of perfluorobutyl sulfonate (PFBS)
- Up to greater than 99 percent removal of perfluoropentanoic acid (PFPeA)
- Greater than 97.5 percent removal of perfluoropentanesulfonic acid (PFPeS)
- Up to greater than 99 percent removal of perfluorohexanoic acid (PFHxA)
- Up to greater than 99 percent removal of perfluorohexyl sulfonate (PFHxS)
- Up to 99 percent removal of perfluoroheptanoic acid (PFHpA)
- Up to 99 percent removal of perfluorononanoic acid (PFNA)
- Up to greater than 99 percent removal of perfluorodecanoic acid (PFDA)
- Up to 99 percent removal of perfluorodecyl sulfonate (PFDS)
- Up to 99 percent removal of perfluoroundecanoic acid (PFUnA)
- Up to greater than 87 percent removal of perfluorododecanoic acid (PFDoA)
- Up to greater than 80 percent removal of perfluoro-3,5-dioxahexanoic acid (PFO2HxA)
- From low influent levels to below limits of quantitation for perfluoro-3,5,7-trioxaoctanoic acid (PFO3OA)
- Up to 98.5 percent removal of perfluorooctanesulfonamide (PFOSA)
- Up to 98.5 percent removal of difluoro(perfluoromethoxy)acetic acid, also known as perfluoro-2-methoxyacetic acid (PFMOAA)
- Up to greater than 99 percent removal of fluorotelomer sulfonate 6:2 (FtS 6:2)
- Up to greater than 83 percent removal and to below limits of quantitation for GenX
- From very low influent levels to below limits of quantitation for 2-(N-Ethyl-perfluorooctanesulfonamido)acetate (N-EtFOSAA)
- Up to greater than 84 percent removal for 2-(N-Methylperfluorooctanesulfonamido)acetate (N-MeFOSAA)

See less

Other Treatment

Other processes that have been evaluated for the treatment of PFASs in groundwater or at environmentally relevant concentrations (e.g., 1 milligram per liter or less) include electrochemical treatment [2630], electrocoagulation [2608], and plasma treatment [2634]. These studies were conducted at the bench scale and did not evaluate the treatment processes for practical use in larger-scale drinking water applications. In one of the groundwaters tested, the electrochemical process [2630] achieved 57 to 89 removal of the PFAS compounds present, which included perfluorobutanoic acid (PFBA), perfluoropentanoic acid (PFPeA), perfluorohexanoic acid (PFHxA), perfluoroheptanoic acid (PFHpA), perfluorobutyl sulfonate (PFBS), perfluorohexyl sulfonate (PFHxS), and perfluoroheptyl sulfonate (PFHpS). In the other groundwater, the process removed 45 to 87 percent of PFHpA, PFBS, and PFHxS. Concentrations of PFBA, PFPeA, PFHxA, however, increased due to the transformation of precursors.

Electrocoagulation [2608] achieved 59 to 87 percent removal of PFBS and 68 to 96 percent removal of PFHxS. Plasma treatment [2634] achieved 70 percent removal or destruction of PFHxS.

See less

Ozone

Bench- [2647], pilot [2659, 2668], and full-scale studies [2174, 2175, 2441, 2508, 2509, 2518, 2645] found conventional ozonation ineffective for removal of per- and polyfluoroalkyl substances (PFAS). A demonstration study of a patented ozofractionation process, which used ozone gas to separate PFAS into a foam residual, found greater than 98 percent removal of total PFAS, including greater than 82 percent removal of PFPeA, greater than 96 percent removal of PFHxA, and greater than 99 percent removal of 6:2 FtS [2573].

See less

Ozone and Hydrogen Peroxide

A bench-scale study [2635] using ozone, followed by increasing pH to 11, followed by hydrogen peroxide addition consistently achieved reductions (14 percent to greater than 92 percent) of PFASs including perfluorobutanoic acid (PFBA), perfluoronon...

See more

Powdered Activated Carbon

Bench [2158, 2521, 2542, 2544] and pilot scale [2518] tests have shown that PAC can be effective for removal of some per- and polyfluoroalkyl substances. Removal depends on factors including PAC dosage, PAC particle size, contact time, and influent water organic carbon. The literature consistently shows that perfluoronated sulfonates are more readily adsorbed than perfluoroalkyl acids and longer chain PFASs are more readily adsorbed than shorter chain compounds. Specific results include:

- Less than 10 percent removal of perfluorobutanoic acid (PFBA)
- Up to greater than 90 percent removal of perfluorobutyl sulfonate (PFBS)
- Up to 40 percent removal of perfluoropentanoic acid (PFPeA)
- Up to 99 percent removal of perfluorohexyl sulfonate (PFHxS)
- Up to greater than 90 percent removal of perfluorohexanoic acid (PFHxA)
- Up to greater than 90 percent removal of perfluoroheptanoic acid (PFHpA)
- Up to 98 percent removal of perfluorononanoic acid (PFNA)
- Up to greater than 90 percent removal of perfluorodecanoic acid (PFDA)

See less

Precipitative Softening See less

Ultraviolet Irradiation

A full-scale study showed ultraviolet irradiation to be ineffective for removing most of the PFASs sampled. Partial removals (32 to 56 percent) were observed in a few samples, however, for perfluorohexylsulfonate (PFHxS) and fluorotelomer sulfonate 6:2 (FtS 6;2) [2441].

- A bench-scale study found that UV degradation of various PFAS compounds can be enhanced (achieving up to 99 percent removal, depending on the specific PFAS) with the addition of sulfite using a contact time of 30 minutes. The study suggested this approach would be promising at scale in groundwater remediation but did not evaluate whether it would be practical for use in drinking water applications [2644].

See less

Ultraviolet Irradiation and Hydrogen Peroxide

In pilot [2659] and full-scale [2441] studies, advanced oxidation with ultraviolet irradiation and hydrogen peroxide was ineffective for removing any of the PFASs sampled.

See less

LAST UPDATED ON {MONTH DAY, YYYY}

EXHIBIT V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	Master Docket No. 2:18-mn-2873-RMG
	This document relates to: *City of Camden et al v. 3M Company et al*; Case No: 2:23-cv-03147-RMG *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), DuPont de Nemours Inc., The Chemours Company, The Chemours Company FC LLC, and Corteva, Inc.* Case No. 2:23-cv-03230-RMG

CITY OF LA CROSSE'S OBJECTION TO THE 3M AND DUPONT SETTLEMENTS

The City of La Crosse (the "City"), a class member and eligible claimant in the 3M and DuPont settlements (the "Settlements"), objects to the Settlement Agreements (the "Agreements").[1] The City faces potentially tens of millions of dollars of liability from non-City residents whose private wells were contaminated by Defendants' AFFF products that the City used at its airport. Currently, the City is providing these individuals with bottled water, individuals have filed notices of claims against the City totaling over $42 million, and residents in the surrounding area have started filing lawsuits against the City. The City faces further

[1] The City has standing to object. *See* 2:23-cv-03147, ECF No. 10-3, at Amended Exhibit E (PageID 250); *see also* Declaration of Krista Gallager, attached hereto as Exhibit 3.

liability—also potentially in the millions of dollars—to remediate AFFF contamination at the City's airport and firefighting training facility.

These AFFF-related liabilities from third-party claims are likely typical of many other class members, yet neither Settlement specifically addresses these issues. Rather, the Settlements provide broad releases ("the Releases") that are general in nature and exceptions to the Releases that are insufficiently specific and ambiguous. Both Settlements fail to provide the City, or any other class member, with the information necessary to determine what claims they are releasing, specifically whether the Releases would bar claims for contribution or indemnity in the event class members like the City are held responsible for Defendants' conduct. Without clarity on these points, class members who are facing massive liabilities cannot make fully informed decisions on Settlement participation and may be forced to opt out of settlements that could have provided real benefits to their communities. Moreover, to the extent that the Releases ***do*** bar class members from seeking contribution or indemnity from Defendants, they are fundamentally unfair and unreasonable in that government entities who were unaware of the dangers of Defendants' products should not be made to bear the cost of Defendants' conduct.

At a minimum, therefore, the Releases must be modified to make clear that class members do not release claims for indemnification or contribution, or similar claims, for liability they face from third-party claims related to the class member's AFFF use. As reflected by the City's experience, third parties whose private wells are impacted by AFFF are suing a variety of entities associated with AFFF—from the PFAS manufacturer to the end user—in both state and federal courts. If these third parties obtain a judgment or settlement of their claims against the end users (in this case, the City), nothing requires them to continue pursuing their claims against the

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Defendants, if they even initially sued those entities. Yet under the Settlements and Releases, the City and similarly situated class members may have no right to pursue any claims against 3M or DuPont to recoup these monies, turning the Releases into hidden indemnification clauses. The Releases could even be read to bar class members like the City from obtaining indemnification or contribution from 3M or DuPont in third-party suits where landowners have been injured by PFAS contamination in their wells due to AFFF usage at airports or training facilities.

For the reasons stated herein, the City objects to the language of the Releases and asks that the Court require clarification and modification to address a major issue that impacts all class members.

1. BACKGROUND.

a. The City.

The City is a public water supplier of drinking water to its residents. It also operates an airport. The airport was required to, and did, use firefighting foam that contained PFAS. That AFFF allegedly contaminated the private wells and real property of neighboring communities, and the affected residents sued the City. Those residents allege their real property and private wells are contaminated, and that they are at risk for personal injury. *See e.g.* La Crosse County Case Nos. 2023CV000480 and 2023CV000481 (attached hereto as **Exhibits 1** and **2**). Those claimants also sued Defendants in the Western District of Wisconsin, Case Nos. 3:23-cv-00706-wmc and 3:23-cv-00707-wmc. The City faces liability of over $42 million.

But when the City evaluated the Agreements to determine whether, if it participated in the Settlements, it could seek indemnification or contribution from 3M and DuPont for that potential liability, the Agreements provided no clear answer.

b. 3M Release

The 3M Release, § 11.1.1, provides that, "Releasing Parties shall … release … the Released Parties from each and every one of the following Claims … : (i) any Claim [relating to] PFAS that has entered or may reasonably be expected to enter Drinking Water or any Releasing Party's Public Water System; (ii) any Claim [relating to] the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS or any product (including AFFF) manufactured with or containing PFAS (to the extent such Claim relates to, arises out of, or involves PFAS); (iii) any Claim [relating to] any Releasing Party's transport, disposal, or arrangement for disposal of PFAS-containing waste or PFAS-containing wastewater, or any Releasing Party's use of PFAS-containing water for irrigation or manufacturing … " The Release also states that "It is the intention of this Agreement that the definitions of "Release" and "Released Claims" be as broad, expansive, and inclusive as possible." 3M § 11.1.1(v).

Exceptions to the release are detailed in §§ 11.1.2.1 and 11.1.2.2, which carve out certain claims for "remediation, testing, monitoring, or treatment of real property to remove or remediate PFAS" (3M § 11.1.2.1) and claims related to "the discharge, remediation, testing, monitoring, treatment, or processing of stormwater or wastewater to remove or remediate PFAS at its permitted stormwater system or permitted wastewater facility… " (3M § 11.1.2.2).

While a previous provision granting 3M indemnity from future liability was removed from the Settlements after states and sovereigns objected (see e.g. ECF No. 3462), the broad language of the release appears to offer 3M the same indemnity through the use of its Release.

c. DuPont Release

The DuPont Release, § 12.1.1, provides that, “Releasing Persons shall … release[] … the Released Persons from any and all Claims … (i) that arise from or relate to PFAS that entered Drinking Water of a Public Water System within the Settlement Class, its Water Sources, its facilities or real property, or any of its Test Sites at any time before the Settlement Date (as set forth in Paragraph 12.6); (ii) that arise from or relate to the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS alone or in products that contain PFAS as an active ingredient, byproduct, or degradation product, including AFFF… ” And the exceptions in § 12.1.2 are limited to certain claims related to “the discharge, remediation, testing, monitoring, treatment or processing of stormwater or wastewater … ” As with 3M, the Release’s broad language appears to cut off class members’ ability to seek contribution or indemnity from Dupont but does not specifically address this point and is unclear.

2. OBJECTION.

Rule 23 permits a class member to object to a proposed settlement, and the class member must state with specificity the grounds for its objection. Fed. R. Civ. P. 23(e)(5)(A). This specificity standard means an objector must provide sufficient detail “to allow the parties to respond and the Court to evaluate the issues at hand.” *1988 Trust for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022).

Here, the Releases do not address whether, by staying in the Settlements, class members forego their ability to seek contribution or indemnity from Defendants if class members are sued by residents or other non-class members alleging AFFF-related personal injuries, contamination of private wells, remediation of private wells, medical monitoring, and other injuries. Public

entities like the City that were unaware of AFFF's dangers and that were required to use AFFF should not have to bear the cost of Defendants' wrongful conduct by releasing their ability to seek contribution or indemnity from Defendants in order to participate in the Settlements. Such a result would be fundamentally unfair and unreasonable. Yet, the Releases are ambiguous on this point, and do not clearly disclose whether they bar indemnification or contribution and improperly shift the burden of bearing the costs of such lawsuits to class members.

Amending the Releases to adequately inform class members regarding the claims they are releasing is critical to the City's and other class members' ability to participate in the Settlements. Without this clarity, if the City is made to assume the risk of that exposure, those potential liabilities could dwarf the Settlement amounts the City and/or other class members would recover. It is critical to the City's decision regarding settlement participation to understand whether the Releases will bar the City from seeking contribution or indemnity from Defendants for these and any future lawsuits. Other government entities certainly face, or soon will face, similar exposure and neither the City nor any class member should be required to make an uninformed decision of this magnitude. Because the Agreements as written are ambiguous on this point, the City must object.

The issues raised in this objection cannot be solved by simply opting out of the class, but class members may be forced to opt out if the Releases are not amended. Indeed, the Releases' ambiguity may preclude numerous class members from participating in Settlements that they would otherwise take advantage of, because the uncertain risks of bearing the liability for third party injuries overwhelms the financial benefits of the Settlements. Avoidable and costly litigation

against Defendants would continue. This should be avoided if at all possible, particularly when it can easily fixed by removing the ambiguity from the Releases.

4. CONCLUSION.

The Settlements' Releases are too vague and too broad to allow the City or any similarly situated class member to make an informed decision about whether each can participate in the Settlements. Further, if the Releases bar claims for contribution and indemnity against Defendants, they are fundamentally unreasonable and unfair to class members. Therefore, the City objects to the Settlements, and requests the Agreements be modified to clarify that claims for indemnification or contribution from third party lawsuits are not waived.

The City does not intend to appear at the Final Fairness Hearing, but is willing to do so if the Court would find it helpful. The City does not intend to call any witness to testify.

The signatory below hereby certifies, under penalty of perjury in accordance with 28 U.S.C. § 1746, that she has been legally authorized to file this objection on behalf of Settlement Class Member the City of La Crosse.

DATED: this 10th day of November 2022.

Respectfully submitted,

CRUEGER DICKINSON, LLC

/s/ Erin Dickinson
Charles J. Crueger, Esq. (SBN: 1029825)
Erin K. Dickinson, Esq. (SBN: 1036707)
Benjamin A. Kaplan, Esq. (SBN: 1082802)
4532 N. Oakland Ave,
Whitefish Bay, WI 53211
(414) 210-3868
cjc@cruegerdickinson.com
ekd@cruegerdickinson.com
bak@cruegerdickinson.com
Counsel for Objecting Settlement Class Member

Objector
City of La Crosse, WI
c/o Stephen Matty
City Attorney's Office
400 La Crosse Street, 6th Floor
La Crosse, WI 54601
Phone: 608.789.7511
Fax: 608.789.7390

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with the Preliminary Approval Order for Settlement Between Public Water Systems and 3M Company (ECF No. 3626), the Preliminary Approval Order of the Settlement Agreement regarding The Chemours Company, *et al.* (Dkt. No. 3603), and Fed. R. Civ. P. 5.

Dated: November 10, 2023.

<u>/s/ Ben Kaplan</u>
Charles J. Crueger, Esq. (SBN: 1029825)
Erin K. Dickinson, Esq. (SBN: 1036707)
Benjamin A. Kaplan, Esq. (SBN: 1082802)
CRUEGER DICKINSON, LLC
4532 N. Oakland Ave,
Whitefish Bay, WI 53211
(414) 210-3868
cjc@cruegerdickinson.com
ekd@cruegerdickinson.com
bak@cruegerdickinson.com
Counsel for Objecting Settlement Class Member, the City of La Crosse

EXHIBIT 1

FILED
10-12-2023
Clerk of Circuit Court
La Crosse County WI
2023CV000480
Honorable Gloria L. Doyle
Branch 5

STATE OF WISCONSIN   CIRCUIT COURT   LA CROSSE COUNTY

DALE WETTERLING and MARY WETTERLING,
2700 Del Ray Ave.
La Crosse, WI 54603,

and

RONALD MARTENS and JOY MARTENS,
2555 Bainbridge St.
La Crosse, WI 54603,

Plaintiffs,

SUMMONS

vs.

Case No. 23-CV-___

CITY OF LA CROSSE, a municipal corporation,
400 La Crosse St.
La Crosse, WI 54601,

Case Codes: 30201, 30106

WISCONSIN MUNICIPAL MUTUAL
INSURANCE COMPANY,
4781 Hayes Road, Suite 201
Madison, WI 53704,

and

ABC INSURANCE COMPANY,

Defendants.

THE STATE OF WISCONSIN, to each person named above as a defendant:

You are hereby notified that the plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer

must be sent or delivered to the Court whose address is Clerk of Circuit Court, La Crosse County Courthouse, 333 Vine Street, La Crosse, WI 54601, and to FITZPATRICK, SKEMP & BUTLER, LLC, plaintiffs' attorneys whose address is 1123 Riders Club Road, Onalaska, WI 54650. You may have an attorney help or represent you.

If you do not provide a proper Answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may be enforced by garnishment or seizure of property.

FITZPATRICK, SKEMP & BUTLER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Timothy S. Jacobson
Timothy S. Jacobson, WI Bar No. 1018162
1123 Riders Club Rd
Onalaska, WI 54650
608.784.4370
tim@fitzpatrickskemp.com

SINGLETON SCHREIBER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Kevin S. Hannon
Kevin S. Hannon, WI Bar No. 1034348
Joseph A. Welsh (*Pending Pro Hac Vice*)
1641 Downing Street
Denver, CO 80218
720.704.6028
khannon@singletonschreiber.com

Paul Starita (*Pending Pro Hac Vice*)
SINGLETON SCHREIBER, LLC
591 Camino de la Reina #1025
San Diego, CA 92108
720.704.6028
pstarita@singletonschreiber.com

FILED
10-12-2023
Clerk of Circuit Court
La Crosse County WI
2023CV000480
Honorable Gloria L. Doyle
Branch 5

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

DALE WETTERLING and MARY WETTERLING,
2700 Del Ray Ave.
La Crosse, WI 54603,

and

RONALD MARTENS and JOY MARTENS,
2555 Bainbridge St.
La Crosse, WI 54603,

Plaintiffs,

vs.

CITY OF LA CROSSE, a municipal corporation,
400 La Crosse St.
La Crosse, WI 54601,

WISCONSIN MUNICIPAL MUTUAL
INSURANCE COMPANY,
4781 Hayes Road, Suite 201
Madison, WI 53704,

and

ABC INSURANCE COMPANY,

Defendants.

COMPLAINT

Case No. 23-CV-___

Case Codes: 30201, 30106

SUMMARY OF CLAIMS

1. Plaintiffs, Dale Wetterling and Mary Wetterling, and Ronald Martens and Joy Martens, by their attorneys, Fitzpatrick, Skemp & Butler, LLC and Singleton Schreiber, LLP, file this action against the Defendants, City of La Crosse ("City") and Wisconsin Municipal Mutual Insurance Company ("Wisconsin Municipal"), and allege as follows:

2. Plaintiffs and Class Members are owners or former owners of residential real property in the Town of Campbell, Wisconsin (hereinafter the "Town") in which the aquifer supplying water to private wells has been rendered unsafe to drink due to the presence of chemicals used by the City of La Crosse. The City has contaminated Plaintiffs' and Class Members' (defined below) private water wells with AFFF, and its toxic PFAS components.

3. Plaintiffs and Class Members seek to be made whole for their property related harms and losses because their water supplies and residential real property have been contaminated by toxic per- and polyfluoroalkyl substances (hereinafter "PFAS") components of aqueous film forming foam (hereinafter "AFFF") used by the City with knowledge of and with inadequate warnings of the toxic effects of PFAS would cause if they contaminated the environment. The City's conduct was without regard to Plaintiffs and Class Members whose property and property rights would foreseeably be invaded by toxic PFAS components once they infiltrated the environment, including groundwater and private wells.

4. For decades the City used AFFF, and/or its toxic PFAS components, a firefighting suppressant, at and in the vicinity of the La Crosse Regional Airport (hereinafter "LSE"), in La Crosse, Wisconsin, including using AFFF within, and outside, City boundaries, including directly on one or more properties within the Town. LSE is situated directly adjacent to the Town surrounding its boundaries to the west and south, with the Black River to its east.

5. Properties in the Class Geographic Area (hereinafter the "Class Area") have obtained their household water supplies from groundwater pumped by private wells accessing an aquifer contaminated with toxic PFAS components. Plaintiffs' and Class Members' water supply, water systems, piping, soil, vegetation, and other property are contaminated by AFFF, and its toxic PFAS components, including perfluorooctane sulfonate (hereinafter "PFOS"),

perfluorooctanoic acid (hereinafter "PFOA"), perfluoroheptanoic acid (hereinafter “PFHpA”), and other species of PFAS used by the City. When consumed, the toxic PFAS components in AFFF can cause numerous serious health impacts. The presence of toxic PFAS components from AFFF contaminates household water in residential homes and interferes with property rights. PFAS contamination has occurred in the past, is ongoing, and will continue well into the future.

6. The City used AFFF and/or its toxic PFAS components, including fluorochemical surfactants, PFOS, PFOA, and/or certain other PFAS that degrade into PFOS or PFOA. The City knew or should have known significantly prior to the City’s public disclosure of PFAS contamination on French Island that the use of AFFF on French Island presented an unreasonable risk to human health and the environment. The City also knew or should have known that toxic PFAS components are highly soluble in water, and highly mobile and persistent in the environment, and highly likely to contaminate residential real property water supplies in the Class Area and soil if released to the environment.

7. Nonetheless, the City used AFFF products with knowledge that large quantities of AFFF, and its toxic PFAS components, would be used in fire training exercises and in emergency situations at LSE in such a manner that toxic PFAS components would be released into the environment. The City knew or should have known that even when used as intended by the products’ design, discharge of AFFF containing toxic PFAS components into the environment would cause environmental and health hazards.

8. Plaintiffs’ and Class Members’ residential real properties have been contaminated for years, if not decades, by toxic PFAS components including at concentrations hazardous to human health.

9. Residential properties in the Class Area have been contaminated with toxic PFAS components.

10. For decades, the City routinely used AFFF products in fire training exercises, fire suppression, annual testing, and for other purposes and, on one or more occasions, accidentally spilled AFFF. As a result, toxic PFAS components used in AFFF migrated into the groundwater surrounding LSE, contaminating private wells used to provide household water supplies to properties in the Class Area.

11. Sampling and testing in the Class Area have detected toxic PFAS components from AFFF used at LSE.

12. Plaintiffs and the Class Members seek compensation for: decrease in the value and marketability of the property and property rights of Plaintiffs and Class Members which have been and will continue to be diminished; the need for and the cost of remediation of class properties and/or mitigation systems for those properties; the costs incurred for alternative water supplies; the loss of use of their properties; loss of use and enjoyment of their properties; and their annoyance, discomfort, and inconvenience caused by the contamination of their properties by AFFF and toxic PFAS components.

13. Plaintiffs bring this suit on behalf of themselves and all residential real property owners and former owners of residential property in the Class Area to recover property-related losses and harms related to the interference with property rights caused by AFFF and its toxic PFAS components and the City's tortious conduct.

PARTIES

14. Plaintiffs and Class Members are individuals, all of whom, at all relevant times to this action owned residential real property within the Class Area which was exposed to and

contaminated by the City's release of PFAS-based AFFF from and in the vicinity of LSE.

15. Plaintiffs, Dale Wetterling and Mary Wetterling, at all relevant times to this action, were and are adult residents of the Town who own residential real property within the Class Area in the County of La Crosse, Wisconsin, and at all times relevant hereto have been husband and wife and joint owners and occupiers of that property and home located thereon at 2700 Del Ray Ave., La Crosse, Wisconsin.

16. Plaintiffs, Ronald Martens and Joy Martens, at all relevant times to this action, were and are adult residents of the Town who own residential real property within the Class Area in the County of La Crosse, Wisconsin, and at all times relevant hereto have been husband and wife and joint owners and occupiers of that property and home located thereon at 2555 Bainbridge St., La Crosse, Wisconsin.

17. Plaintiffs and their fellow Class Members all individually served Notices of Circumstances of Claim and Itemized Claims on the City pursuant to §893.80(1d) (a) and (b), Stats., and their claims have been denied by the City.

18. Upon information and belief, the City of La Crosse ("City") is a municipal corporation with its principal place of business at 400 La Crosse Street, in the City and County of La Crosse, Wisconsin.

19. The City owns and operates the La Crosse Regional Airport (the "Airport"), a public airport located in the City of La Crosse, La Crosse County, Wisconsin, which occupies a northern area of French Island, next to the Mississippi and Black Rivers and adjacent to hundreds of private residences, as well as private businesses and nonprofit organizations, the majority of which are serviced by private drinking water wells.

20. The City also operates the La Crosse Fire Department which responds to calls for fire suppression and conducts fire response training for its firefighters.

21. Upon information and belief, the Defendant, Wisconsin Municipal Mutual Insurance Company ("Wisconsin Municipal"), is a domestic insurance corporation with offices located at 4781 Hayes Road, Suite 201, Madison, WI 53704, and is engaged in and is authorized to conduct the business of selling and administering policies of liability insurance in the State of Wisconsin.

22. Upon information and belief, on a date prior to the events and injuries hereinafter alleged, the Defendant, Wisconsin Municipal, issued and delivered to the Defendant, the City, its policies of liability and/or excess and/or umbrella insurance under and by virtue of the terms of which it agreed to pay on behalf of the City any and all sums which the City should become legally obligated to pay by reason of liability imposed upon it arising out of its tortious actions.

23. By virtue of the terms and conditions of said City's insurance policies and the statutes of the State of Wisconsin, the Defendant Wisconsin Municipal is directly liable to the Plaintiffs and Class Members for any injuries or damages sustained by them as hereinafter alleged.

24. Upon information and belief, the Defendant, ABC Insurance Company, is a corporation doing business in the State of Wisconsin, and the Defendant ABC Insurance Company is a fictitious name for the actual Defendant whose name is unknown to the Plaintiffs but is made a party to this action pursuant to §807.12, Stats., and by virtue of having provided liability insurance to the City at all times relevant hereto.

25. Upon information and belief, on a date prior to the events and injuries hereinafter alleged, the Defendant, ABC Insurance Company issued and delivered to the Defendant City of

La Crosse its policy of liability insurance under and by virtue of the terms of which it agreed to pay on behalf of the City any and all sums which the City should become legally obligated to pay by reason of liability imposed upon it arising out of its tortious actions.

26. By virtue of the terms and conditions of said City's insurance policy and the statutes of the State of Wisconsin, the Defendant ABC Insurance Company is directly liable to the Plaintiffs and Class Members for any injuries or damages sustained by them as hereinafter alleged.

GENERAL ALLEGATIONS

27. PFAS are manmade chemicals that do not exist in nature. The City used toxic AFFF and/or its PFAS components at LSE.

28. PFAS are persistent in the environment. Due to the strength of multiple carbon-fluorine bonds, PFAS break down slowly in the environment, are chemically biologically stable, resistant to environmental degradation, and can persist in the environment for decades. PFAS are also water soluble, making them mobile in groundwater and the environment.

29. Toxicology studies show that PFAS are readily absorbed after oral exposure and accumulate in the human body.

30. There are numerous health risks associated with exposure to PFAS. For example, PFOS and PFOA exposure are associated with increased risk in humans of testicular cancer and kidney cancer, disorders such as thyroid disease, high cholesterol, ulcerative colitis, and pregnancy-induced hypertension, as well as other conditions.[1] The United States Environmental

[1] www.epa.gov/sites/production/files/201605/documents/drinkingwaterhealthadvisories_pfoa_pfos_5_19_16.final_.1.pdf

Protection Agency (hereinafter "EPA") has also advised that exposure to PFAS may result in developmental effects to fetuses during pregnancy or to breast-fed infants.[2]

31. AFFF, and its toxic PFAS components, released at LSE migrated, and are migrating, from areas of release at or around LSE to the wells throughout the Town and have entered and contaminated Plaintiffs' and Class Members' residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property.

32. AFFF use for fire suppression and other activities at LSE dates from the 1970s through at least 2020. Storage of AFFF persists at LSE.

33. Toxic PFAS components from AFFF released at LSE have migrated, and continue to migrate, to areas of release on LSE to wells throughout the Class Area and have entered and contaminated Plaintiffs' and Class Members' residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property.

34. Groundwater and surface water released from, and in connection with, LSE flows to the wells throughout the Class Area.

35. Plaintiffs and Class Members owned and/or resided in residential real properties with private household wells within the Class Area.

36. Concentrations of toxic PFAS components found in the private wells serving Plaintiffs' and Class Members' water supplies have been caused by releases of AFFF, and its toxic components, on and around LSE property. As was reasonably foreseeable by the City, AFFF containing toxic PFAS components was discharged onto open ground and surface waters during fire training, fire suppression, and other exercises. As was reasonably foreseeable by the City, AFFF, and its toxic PFAS components, migrated into and through the soil in and around LSE to

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[2] *Id.*

the groundwater under LSE. From there, AFFF, and its toxic PFAS components, migrated to Plaintiffs' and Class Members' private groundwater wells in the Class Area. The Class Area's PFAS contamination is directly and proximately linked to the City's use of AFFF.

37. Because of the City's tortious conduct in use of AFFF containing toxic PFAS components and the City's failure to warn Plaintiffs and Class Members of groundwater contamination with PFAS, Plaintiffs and Class Members have been forced to cease use of their private household wells because PFAS have contaminated their water supply.

38. Plaintiffs and Class Members took, and continue to take, delivery of a substitute water supply out of necessity to avoid consumption of PFAS contaminated water caused by AFFF.

39. Thus, the City, through use of AFFF, and its toxic PFAS components; by its tortious conduct proximately caused Plaintiffs' and Class Members' harms and losses by contaminating the groundwater.

PFAS ARE USED IN AQUEOUS FILM FORMING FOAM

40. PFAS are synthetic carbon chain compounds that are not naturally occurring and contain large amounts of the element fluorine. As used in this Complaint, the term "PFAS" includes all PFAS and their precursors, derivatives, and/or salts used in the AFFF released at LSE which contaminated Plaintiffs' and Class Members' water supplies and property, including inter alia, PFOA, PFOS, PFBA, PFBS, PFHxA, PFHxS, PFPeA, PFHpA, PFNA, PFDA, PFDS, PFUnA, PFDoA, and PFTrA.

41. PFAS are used in firefighting foam known as "aqueous film forming foam" ("AFFF").

42. AFFF is used to extinguish fires that involve petroleum or other flammable liquid because PFAS are resistant to heat, oil, grease, and water.

43. 3M AFFF is produced through a 3M process called electrochemical fluorination, or ECF, contained PFAS including PFOS. Tyco and other manufacturers' AFFF are synthesized through telomerization and contain PFAS including PFOA. Both processes include formulations containing chemicals that can break down into other toxic PFAS components.

44. The City chose to use toxic AFFF despite the availability of other technologically feasible, practical, and effective alternatives that would have reduced or mitigated Plaintiffs' and Class Members' exposure to toxic PFAS.

45. The City knew or should have known that the AFFF, and its toxic PFAS components, would be released into the environment and contaminate groundwater and household water supplied, including Plaintiffs' and Class Members' household water supplies.

46. The City knew or should have known that harmful and defective products, AFFF containing toxic PFAS components, would be used for various purposes at LSE including, but not limited to, training for firefighting, testing firefighting equipment, actual firefighting, and use in hangar sprinkler fire suppressant systems, which would cause the AFFF to drain into the ground and contaminate the groundwater beneath the airport and eventually migrate into Plaintiffs' and Class Members' household water supplies.

PFAS Including PFOA and PFOS Threaten Human Health

47. PFAS are extremely persistent and bioaccumulate[3] in the human body. Even short-term exposure results in a body burden that persists for years and can increase and

[3] Bioaccumulation is a process which occurs when an organism absorbs a substance at a rate faster than the rate at which the substance is lost by metabolism or excretion.

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biomagnify[4] with continued exposure. When consumed PFAS accumulate primarily in the bloodstream, kidneys, and liver. Humans absorb toxic PFAS components from AFFF when they consume AFFF contaminated household water.

48. The EPA projects that PFOS has a half-life of 5.3 years, PFOA has a half-life of 2.3-3.8 years, and PFHxS has a half-life of 8.5 years, in humans.[5] Because of these extended half-lives, the EPA expects that "it can reasonably be anticipated that continued exposure could increase body burden to levels that would result in adverse outcomes."[6]

49. EPA Health Advisories have identified numerous health risks associated with exposure to toxic PFAS components. Studies show association between increased PFOA and PFOS levels in blood and increased risk of several adverse health effects, including high cholesterol levels, changes in thyroid hormone, ulcerative colitis (autoimmune disease), pre-eclampsia (a complication of pregnancy that includes high blood pressure), and kidney and testicular cancer.

50. The EPA classified PFOA and PFOS as having suggestive evidence of carcinogenic potential in humans.[7]

51. The EPA cited reports from the Organization for Economic Co-operation and Development (*hereinafter* "OECD") in the May 2016 Health Advisories. The OECD is an

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[4] Biomagnification is a process which occurs when concentration of a substance in organism's tissue increases as the substance travels up the food chain.
[5] A half-life is the amount of time it takes for fifty percent of a contaminant to leave the body.
[6] EPA, Long-Chain Perfluorinated Chemicals (PFCs) Action Plan, pp. 1, 8-9, December 30, 2009.
[7] EPA, Health Effects Support Document for Perfluorooctanoic Acid (PFOA), p. 3-159, May 2016; EPA, Health Effects Support Document for Perfluorooctane Sulfonate (PFOS), p. 3-114, May 2016.

international intergovernmental organization that meets, discusses issues of concern, and works to respond to international problems.

52. According to a published OECD Report, for mammalian species, PFOA and its salts have caused cancer in rats and adverse effects on the immune system in mice. In addition, PFOA and its salts can display reproductive or developmental toxicity in rodents at moderate levels of exposure, and moderate to high systemic toxicity in rodents and monkeys following long-term exposure by the oral route.[8] The OECD also concluded in a Hazard Assessment that PFOS is persistent, bioaccumulative, and toxic to mammalian species.[9]

53. The EPA also cited findings from a C-8 Science Panel and Health Project in the May 2016 Health Advisory for PFOA. The C-8 Science Panel was formed out of a class action settlement related to PFOA contamination of groundwater from a manufacturing facility in West Virginia. The C-8 Health Project is the largest study evaluating human exposure and health endpoints for PFOA; the study included more than 65,000 people in Mid-Ohio Valley communities who were exposed to PFOA for longer than 1 year. The C-8 Science Panel consisted of three epidemiologists and its goal was to assess the links between PFOA and numerous diseases. The C-8 Science Panel carried out studies of exposure and health studies between 2005 and 2013; information was gathered through questionnaires and blood samples from the individuals who had PFOA contaminated drinking water and previously published studies.

[8] OECD, Report of an OECD Workshop on Perfluorocarboxylic Acids (PFCAs) and Precursors, p. 21, June 18, 2007.
[9] OECD, Hazard Assessment of Perfluorooctane Sulfonate (PFOS) and Its Salts, p. 5, November 21, 2002.

54. The C-8 Science Panel released reports which found probable links between exposure to PFOA and six diseases: high cholesterol, ulcerative colitis, thyroid disease, testicular cancer, kidney cancer, and pregnancy-induced hypertension.

55. The U.S. Agency for Toxic Substances and Disease Registry (*hereinafter* "ATSDR") stated in its 2018 draft Toxicological Profile that studies suggest associations between PFOA and PFOS exposure and liver damage, pregnancy-induced hypertension, increased cholesterol, increased risk of thyroid disease, increased risk of asthma, increased risk of decreased fertility, low birth weight, and increases in testicular and kidney cancers.

56. In February 2018, WDNR stated that PFAS compounds meet the definition of hazardous and/or environmental pollution under Wis. Stat. §292.01. Three years later, prevalence of PFAS contamination in the Class Area led WDHS to declare an emergency water advisory for the area.

57. The City knew or reasonably should have known about the environmental and health effects from toxic PFAS components, discussed above, at times they used AFFF containing toxic PFAS components at and around LSE.

PFAS, Including PFOA and PFOS, Pose a Threat to the Private Household Wells Relied on by Plaintiffs and Class Members

58. PFAS are extremely persistent in the environment because they are chemically and biologically stable and are resistant to environmental degradation. The EPA projects that PFOS has an environmental half-life in water of over 41 years, and PFOA has an environmental half-life in water of over 92 years. PFOA and PFOS are also considered to be resistant to degradation in soil. EPA, Long-Chain Perfluorinated Chemicals (PFCs) Action Plan, p. 1, December 30, 2009.

59. PFAS also are particularly mobile in soil and water, readily absorbed into groundwater, and can migrate across long distances.

60. Additionally, non-human receptors exposed to the contaminated environment are at significant risk of harm. PFOA is persistent and can cause adverse effects in laboratory animals, and humans, including cancer and developmental and systemic toxicity. PFOS is persistent, bioaccumulative, and toxic to mammalian species. PFOS is linked to developmental, reproductive, and systemic toxicity.

61. PFOA is also readily absorbed by plants, including wild plants as well as crops grown on contaminated soil and bioaccumulates in the food chain.

62. These effects impair use of Plaintiffs' and Class Members' household water and other property throughout the Class Area.

63. Upon information and belief, the City knew or should reasonably have known about the environmental effects from toxic PFAS components, discussed above, at times it used AFFF, and its toxic PFAS components.

The Use, Storage, Release, Discharge, and Disposal of PFAS from AFFF at LSE Has Contaminated Plaintiffs' and Class Members' Water Supply, and Properties

64. Upon information and belief, La Crosse began purchasing and using AFFF containing toxic PFAS components at LSE in about 1970.

65. Over the following fifty years LSE discharged and disposed of AFFF containing toxic PFAS components in and around the airport. LSE's discharge and disposal of AFFF, and its toxic PFAS components, has included, but is not limited to, releases and discharges into soil and water pathways that connect to property, groundwater, household water supplies, household water systems within the Class Area. Such AFFF discharges containing toxic PFAS components have resulted in infiltration of soil and migrated into groundwater and water supply throughout

the Class Area.

66. For instance, testing, training, exercises, and fire response activities occurred on and around LSE, causing AFFF waste containing toxic PFAS components to drain into soil, groundwater, surface waters, wetlands, ponds, and ditches. Toxic PFAS components, discharged to soil, surface waters, wetlands, and ponds have migrated into groundwater and contaminated the groundwater throughout the Class Area where Plaintiffs and Class Members wells are located, contaminating Plaintiffs' and Class Members' property and water supply.

67. As of January 12, 2021, La Crosse reported to the public that it had completed PFAS testing of well water samples from 109 private wells, with 108 of said wells testing positive for PFAS.

68. Months later, proof of French Island's pervasive contamination was reinforced. As of June 2021, 538 private wells on French Island tested positive for PFAS contamination.

69. The widespread contamination led WDHS to declare an emergency water advisory for the area in March 2021. Levels of PFOA and PFOS in household water wells on French Island had, at that time, been detected and reported at concentrations as high as 3,200 ppt.

Specific Release, Discharge, Disposal, and Storage of PFAS-Based AFFF at LSE

70. Studies have preliminarily identified groundwater, surface water, and soil pathways where toxic PFAS components in AFFF used on and around LSE has been, and is, migrating to the Plaintiffs' and Class Members' groundwater and household water wells.

71. Initial Site Investigation Work Plan submitted by La Crosse to WDNR identified five potential source areas of PFAS contamination on French Island originating on LSE property: (1) Former Test Burn Pits: (2) a 1997 Fuel Spill, where AFFF was applied over the spilled jet fuel; (3) AFFF Test Area, where AFFF was discharged while annually collecting FAA-required

sampled from firefighting equipment; (4) Former Fire Station, where AFFF was stored and transferred into firefighting equipment; and (5) 2001 Crash site, where AFFF was applied to wreckage. While these were the preliminarily identified sites, subsequent information indicates additional releases and discharges of AFFF occurred in LSE operations.

72. Upon information and belief, the City began using AFFF in the 1970s. Shortly thereafter, La Crosse and/or LSE created test burn pits in an area northwest of what is presently designated runway 22, east of runway 18, and north of runway 31. Firefighting training using AFFF was conducted at test burn pits at the airport from the 1970s through approximately 1988.

73. In or about January 1997, a jet fuel spill occurred near an LSE terminal, and LSE firefighters applied AFFF to the spilled jet fuel.

74. Over an approximately twenty-year period La Crosse and/or LSE conducted nozzle testing using AFFF in a test area northwest of the LSE fire station.

75. For years, AFFF was stored in the former LSE fire station, where firefighters transported AFFF from the fire station into their equipment.

76. In June 2001, a jet aircraft crash at LSE resulted in a fire. Upon information and belief, the Airport Fire Department owned and operated by La Crosse responded to the crash and sprayed AFFF at the crash site.

77. An April 2021 Interim Site Investigation Report revised the above list to include a December 1, 2020, event when an AFFF solution was released from emergency response equipment by LSE personnel on or around a terminal apron.

78. The Interim Site Investigation listed the above "confirmed sources" along with several "potential sources." Including:

(a) Practice burn activities near Fisherman Road (just outside the airport) reported by citizens during the 1970s.

(b) An aircraft crash on or about November 9, 1970, at 609 Dakota Street, northwest of the airport, across Lakeshore Drive. A La Crosse Tribune article, dated 11/10/1970, states, "Kenneth Kearns, La Crosse assistant fire chief, said two engines, a foam truck, a water wagon and a rescue unit answered the call." Additionally, the article states, "Dried foam covered plane wreckage like a snowy mist. Kearns said firemen didn't notice any flames, but put the foam on as a precautionary measure." A photo caption accompanying the article states, "Foam Sprayed on Wreckage By La Crosse Fire Department To Prevent Fire" and depicts firefighting foam on the wreckage and on the ground.

(c) A de-icing truck caught fire on January 3, 2014, at the terminal apron and airport fire responders and LCFD responded to the fire. Extinguishing agents used were described as “75 gallons of AFFF used and about 700 gallons of water” in the “ARFF [Aircraft Rescue and Fire Fighting] Run Report.”

79. La Crosse and/or LSE used AFFF, and its toxic PFAS components, for approximately fifty years. Throughout that period, the toxic PFAs components contained in AFFF have been released into the environment in significant quantities and migrated into household water supplies throughout the Class Area. As a result, Plaintiffs’ and Class members residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property have been contaminated by toxic PFAS.

80. State and Local entities have not yet analyzed the extent of PFAS contamination at numerous other locations where AFFF was used and escaped into the environment, including,

but not limited to, neighborhoods along the surface and groundwater pathways from LSE to the Town, including the Class Area.

Release, Discharge, and Disposal of PFAS Contaminated Groundwater in the Class Area

81. Plaintiffs' and Class Members' private wells and groundwater is contaminated with numerous types of toxic PFAS components as a direct and proximate result of LSE's use of AFFF.

82. Samples taken from neighborhoods throughout French Island, including the Class Area, discovered PFOS, PFOA, and other toxic PFAS components from AFFF pervade the water supply.

83. Since the EPA's UCMR3 sampling in 2014, PFAS from AFFF have continuously and increasingly been detected in French Island wells, including the Plaintiffs' and Class Members' wells, above recommended levels for public safety and welfare. June 2021 tests confirmed and expanded these results. In the June 2021 round of testing, 538 private wells on French Island tested positive for PFAS.

City Knew of PFAS Groundwater Contamination on French Island and AFFF Toxicity but Failed to Provide Notice

84. A 1997 MSDS for a non-AFFF product made by 3M listed its ingredients as water, PFOA, and other perfluoroalkyl substances and warned that the product includes "a chemical which can cause cancer." The MSDS cited "1983 and 1993 studies conducted jointly by 3M and DuPont" as support for this statement.

85. Under pressure from the EPA, on May 16, 2000, 3M announced it would phase out production of two synthetic chemicals, PFOS and PFOA, that it had developed more than fifty years earlier. 3M press release, "3M Phasing Out Some of Its Specialty Materials", May 16, 2000.

86. 3M, the predominant manufacturer of AFFF, ceased production of PFOS based AFFF in 2002.

87. An EPA memo on the day of 3M's phase-out announcement stated: "3M data supplied to EPA indicated that these chemicals are very persistent in the environment, have a strong tendency to accumulate in human and animal tissues and could potentially pose a risk to human health and the environment over the long term. [PFOS] appears to combine Persistence, Bioaccumulation, and Toxicity properties to an extraordinary degree." EPA memo, "Phaseout of PFOS," May 16, 2000.

88. Because of its toxicity, eight major PFOA manufacturers agreed in 2006 to participate in the U.S. Environmental Protection Agency's PFOA Stewardship Program. The participating companies made voluntary commitments to reduce product content and facility emissions of PFOA and related chemicals by 95%, no later than 2010.

89. Many parties have studied PFOA, also known as C8, including a Science Panel formed out of a class action settlement arising from contamination from DuPont's Washington Works located in Wood County, West Virginia.

90. The C8 panel consisted of three independent epidemiologists specifically tasked with determining whether there was a probable link between PFOA exposure and human diseases. In 2012, the panel found probable links between PFOA and kidney cancer, testicular cancer, thyroid cancer, ulcerative colitis, thyroid disease, pregnancy induced hypertension (including preeclampsia), and hypercholesterolemia.

91. The La Crosse Water Utility (LCWU) was a participant in US Environmental Protection Agency's third round of its Unregulated Contaminant Monitoring Rule (UCMR3) program. The EPA published in 2012 the list of unregulated contaminants to be sampled by

selected water utilities throughout the country. La Crosse was included in this list of utilities. UCMR3 included sampling and testing for Perflourinated Alkyl Acids (PFAS). Perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) were detected above recommended levels in the UCMR3 water samples collected for La Crosse Well 23H during 2014 and 2016.

92. In the May 2015 "Madrid Statement on Poly- and Perfluoroalkyl Substances (PFASs)," scientists and other professionals from a variety of disciplines, concerned about the production and release into the environment of PFOA, called for greater regulation, restrictions, limits on the manufacture and handling of any PFOA containing product, and to develop safe nonfluorinated alternatives to these products to avoid long-term harm to human health and the environment.

93. The EPA's Lifetime Health Advisory and Health Effects of 70 ppt set in May 2016 was an attempt to identify 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.

94. Many states have regulatory limits. For example, Vermont has set a combined level of 20 ppt for PFOA and PFOS, and New Jersey set a maximum contaminant level (MCL) of 13 ppt for PFOS and 14 ppt for PFOA. In April 2019, the State of Minnesota adopted advisory drinking water limits of 15 ppt for PFOS and 27 ppt for PFOA. The State of California adopted drinking water limits of 40 ppt for PFOS and 10 ppt for PFOA in February 2020. In July 2020, New York adopted a limit of 10 ppt for both chemicals. In August 2020, Michigan adopted limits of 16 ppt for PFOS and 8 ppt for PFOA.

95. The Agency for Toxic Substances and Disease Registry ("ATSDR") proposed minimum risk levels (MRLs) translating to 7 ppt for PFOS and 11 ppt for PFOA.

96. The United States Senate and House of Representatives passed the National Defense Authorization Act in November 2017, which included $42 Million to remediate PFAS contamination from military bases, as well as devoting $7 Million toward the Investing in Testing Act, which authorizes the Center for Disease Control and Prevention ("CDC") to conduct a study into the long-term health effects of PFOA and PFOS exposure.

97. In February 2018, the Wisconsin Department of Natural Resources ("WDNR") stated that PFAS compounds meet the definition of hazardous substance and/or environment pollution under Wis. Stat. §292.01. Therefore, persons responsible for the discharge of PFAS to waters of the State of Wisconsin were required to immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards and perform the necessary response actions. Wis. Admin. Code chaps. NR 700-754. The non-industrial direct contact soil residual contaminant levels (RCLs) for both PFOA and PFOS is 1.26 mg/kg. The industrial direct contact RCL for both PFOA and PFOS is 16.4 mg/kg.

98. The EPA made a Preliminary Determination that PFAS, specifically PFOA and PFOS, meet the statutory criteria to regulate under section 1412(b)(1)(A) of the Safe Drinking Water Act (SDWA); namely, (1) the chemicals "may have an adverse effect on the health of persons," (2) the chemicals are "known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern," and (3) regulating these chemicals "presents a meaningful opportunity for health risk reduction for persons served by public water systems."

99. On April 18, 2019, the Remediation and Redevelopment program of the Wisconsin Department of Natural Resources (WDNR) was made aware that Polyfluoroalkyl Substances (PFAS) had been routinely detected in municipal well 23, located on the east side of

French Island. WDNR determined that contamination on or from the above-described site poses a threat to public health, safety, welfare or the environment.

100. WDNR determined, by letter dated May 10, 2019 to the City , that as owner of the property where the residual contamination is found, and the entity that caused the discharge of the hazardous substance, the City , is responsible for restoring the environment at the above-described site under s. 292.11, Wis. Stats., known as the hazardous substances spills law.

101. In August 2019, the Wisconsin Governor signed Executive Order No. 40, which directed the WDNR to take additional steps to address PFAS in coordination with the state's Department of Health Services and the Department of Agriculture, Trade and Consumer Protection. These steps include establishing a PFAS Coordinating Council and providing public information sites to inform the public on the matter of PFAS and the risk these chemicals pose to public health and Wisconsin's natural resources. In February 2022, the Wisconsin Natural Resources Board approved a drinking water standard of 70 ppt for PFOA and PFOS individually and combined.

102. The Wisconsin Department of Health Services (Wisconsin DHS) developed recommended health-based groundwater standards for PFOA and PFOS in 2019. Wisconsin DHS determined that a groundwater standard of a combined concentration of 20 ppt was necessary to protect the health of sensitive populations and to account for immunotoxicity effects. Wisconsin DHS based this recommendation on modeling and studies published after the 2016 HESDs. In January 2020, Wisconsin's Department of Natural Resources was authorized to proceed with establishing environmental standards for PFOA and PFOS in groundwater, surface water, and public drinking water. WDNR has recommended a PFOS and PFOA enforcement standard (ES) of 20 parts per trillion (ppt) and a preventive action limit (PAL) of 2 ppt.

103. On or about May 14, 2020, while residents of French Island, including the Plaintiffs and Class Members, continued to unknowingly consume drinking water contaminated with PFAS, the City requested from WDNR a relaxation of the schedule for the site investigation being conducted under the requirements of the hazardous substances spills law, §292.11, Stats, and the NR 700 series of administrative code.

104. As of September 1, 2020, per 2019 Wisconsin Act 101 and Wis. Stat. §299.48, training with AFFF was prohibited in Wisconsin, and testing of AFFF requires the facility to use appropriate treatment, containment, storage and disposal measures to prevent the discharge of foam to the environment.

105. Despite these numerous public warnings about the ability of PFAS to migrate through groundwater and to cause human health issues, and despite the City being aware that PFAS chemicals had migrated into City wells by at least 2014, the City failed, and continued to fail for a period of years, to warn private well users in the Town, including Plaintiffs and Class Members, that it was reasonably likely their wells were contaminated as a result of the City's half-century of use of AFFF at and around LSE.

The Threats to Plaintiffs', Class Members', and their Visitors' Health, Safety, and Property Caused by AFFF are Ongoing

106. The PFAS contamination caused by AFFF is not contained and continues to spread into Plaintiffs' and Class Members' property and household water supplies. As result, Plaintiffs' and Class Members' have suffered the annoyance, inconvenience, and discomfort of knowing that for years their health along with their family, friends, and visitors' health was compromised by exposure to toxic PFAS components.

107. If Plaintiffs' and Class Members' residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property are not remediated, PFAS

contamination will continue to impact Plaintiffs' and Class Members' property and household water far into the future because toxic PFAS components resist degradation and are persistent and mobile in water and soil.

Plaintiffs and Class Members Have Been Harmed by the City's Actions

108. Private wells on Plaintiffs' and Class Members' property have been contaminated by toxic PFAS components contained in AFFF.

109. Because of the City's use of AFFF, and its toxic PFAS components, Plaintiffs and Class Members properties have been and are being invaded by toxic PFAS components released on and around LSE.

110. As a direct and proximate result of the contaminated groundwater near LSE, the Plaintiffs and Class Members have suffered, and will continue to suffer, harms and losses.

111. AFFF, and its toxic PFAS components, used by the City was released onto and around LSE property. Thereafter toxic PFAS components in AFFF migrated into surrounding groundwater and physically intruded onto, and contaminated, Plaintiffs' and Class Members' properties, including residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property in the Class Area. PFAS contamination of Plaintiffs' and Class Members' household water supplies, caused by AFFF, has further migrated through soils into groundwater, physically contaminating and interfering with Plaintiffs' and Class Members' right to use their household water supplies.

112. It was reasonably foreseeable that releases of AFFF, and its toxic PFAS components, would migrate to Plaintiffs' and Class Members' properties in the Class Area and physically intrude onto, harm, and contaminate those properties including Plaintiffs' and Class Members' residential real property, water supplies, water systems, wells, piping, soil, vegetation,

and other property owned and used by Plaintiffs and Class Members. Releases of AFFF, and its toxic PFAS components, has invaded and interfered with Plaintiffs' and Class Members' possessory interest in the use of their properties and household water supplies.

113. Upon information and belief, the City knew or reasonably should have known of the aforementioned environmental and health risks associated with AFFF containing toxic PFAS components years prior to the first time Plaintiffs and Class Members were informed of PFAS contamination.

114. Widespread PFAS have since been detected in private wells in the Class Area used by the Plaintiffs and Class Members. The impact of this widespread contamination caused by the City's tortious conduct has had, and will continue to have, a detrimental impact on the Plaintiffs' and Class Members' property.

115. Initial testing shows PFAS contamination is widespread.

116. In March 2021, five months after Plaintiffs and Class Members began to receive information about PFAS contamination, WDHS declared an emergency water advisory in the Class Area.

117. Plaintiffs' and Class Members' household properties and water supplies have been and are being exposed to PFAS introduced into their residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property because of the City's AFFF, and its toxic PFAS components, released into the environment at and near LSE. As a direct and proximate result of these releases, Plaintiffs and Class Members have suffered harms and losses including, but not limited to, those identified below.

118. Plaintiffs and Class Members have lost the use and use and enjoyment of their property as a direct result of the contamination of their private wells.

119. Plaintiffs and Class Members have suffered annoyance and inconvenience as a direct result of the City's contamination of their property including, but not limited to, using bottled water and alternative water sources as a direct result of the contamination of their private wells and avoiding consumption of their household water supply.

120. As a direct result of the contamination and of Plaintiffs' and Private Property Owner Class Members' property in the Class Area, Plaintiffs and Class Members have suffered harms and losses. The use, value, and marketability of Plaintiffs' and Private Property Owner Class Members' property has been and will continue to be substantially and adversely harmed and diminished, including their ability to use and enjoy their property. Plaintiffs' and Class Members' residential real properties have suffered the need for and the cost of remediation of the PFAS contamination of their properties water supplies, water systems, wells, piping, soil, vegetation, and other property. Plaintiffs and Class Members have suffered and will continue to suffer the cost of mitigating the PFAS contamination, caused by the City's use of AFFF, including the cost of obtaining water filters and/or alternative water supplies, and the cost of restoring, using, and maintaining an uncontaminated water supply and/or the increased cost of water supplies.

121. PFAS have harmed Plaintiffs and Class Members and will continue cause them to suffer harms and losses because the PFAS contamination on their property, caused by the City's use of AFFF, will persist for decades in water and soil and will bioaccumulate in plants and other organisms that exist in the Class Area.

122. Since Plaintiffs and Class Members learned of the PFAS contamination crisis, they have been and will continue to be forced to suffer lost time as they direct their efforts, energy, resources, and money toward ensuring they have an alternative water supply and are not

needlessly exposed to toxic PFAS components from AFFF. Plaintiffs and Class Members have incurred past and present costs directed toward securing alternative water supplies for protection from exposure to toxic PFAS components.

123. Plaintiffs and Class Members seek compensation for the loss of use, loss of use and enjoyment of their properties, and annoyance, discomfort, and inconvenience caused by the contamination of their properties by AFFF containing toxic PFAS components.

124. Toxic PFAS contamination of the Class Area has caused Plaintiffs and Class Members many forms of annoyance and discomfort, including, but not limited to, concern over reduction in the value of their property and investment value of their property. Plaintiffs and Class Members have also experienced serious concerns over, how and where to obtain sufficient alternative water supplies, how and where to store sufficient water supplies, and whether their families', friends', and visitors' health and safety have been compromised from exposure to PFAS contaminated water in their homes.

125. PFAS contamination prevents Plaintiffs and Class Members from fully using their property, including private wells.

126. It was reasonably foreseeable to the City that Plaintiffs and Class Members, as owners and occupants of residential real property and users of groundwater that supplied their household water, would consume groundwater contaminated by toxic PFAS components contained in AFFF released from on and around LSE.

DEFINITION OF THE CLASS

127. This action is brought by the Plaintiffs individually on their own behalf and by the Representative Plaintiffs as representatives of the class defined, as follows: All owners of residential real property in the Class Geographic Area with a private well as of October 20, 2020,

and who served a notice of circumstances of claim and itemized claim on the City pursuant to §893.80(1d) (a) and (b), Stats.

128. The Class Geographic Area is defined as the Town of Campbell, Wisconsin.

129. Excluded from the Class are: (a) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (b) the Judge to whom this case is assigned and the Judge's staff; (c) any class counsel or their immediate family members; and (d) any State or any of its agencies.

COMPLIANCE WITH WIS. STAT. §803.08 (FED. R. CIV. P. 23) REQUIREMENTS

130. The Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Wisconsin Statute §803.08(1) and (2)(c) (Fed. R. Civ. P. 23).

(I) Numerosity

131. The members of the Class are so numerous that joinder of all members is impracticable. The number of owned and/or formerly owned properties is in the hundreds, and there are nearly one thousand members of the Class who have been exposed to toxic PFAS components released on or around LSE as described herein and who have served a claim upon the City, pursuant to §893.80(1d) (a) and (b), Stats. Members can be easily identified as those individuals who have served claims upon the City, pursuant to §893.80(1d) (a) and (b), Stats.

(II) Typicality

132. The Representative Plaintiffs claims are typical of the claims of the members of the Class since the members of the Classes' household water from private wells in the Class Area have been contaminated by toxic PFAS components of AFFF released by the City's tortious conduct resulting in harms and losses to all members of the Class.

(III) Adequate Representation

133. The Representative Plaintiffs will fairly and adequately protect the interests of members of the Class and have retained counsel competent and experienced in tort, class action and environmental litigation.

134. The Representative Plaintiffs and their counsel are committed, and have the resources, to vigorously prosecuting this action on behalf of the Class.

135. Neither Plaintiffs nor their counsel have interests adverse to any of the other Plaintiffs or the other members of the Class.

(IV) Predominance of Common Questions

136. Plaintiffs and Class Members bring this action under Wis. Stat. §803.08(2)(c) (FRCP 23(b)(3)) because numerous questions of law and fact common to Class Members predominate over any question affecting only individual members. The answers to these common questions will advance resolution of the litigation as to all Class Members. These common legal and factual issues include:

(a) the type or kinds of toxic PFAS components from AFFF that have been and are being released from LSE;

(b) the activities of the City that have resulted in the contamination of the household water supplies and other properties of the Plaintiffs and the Class Members by AFFF and its toxic PFAS components;

(c) the nature and toxicity of the toxic PFAS components from AFFF released from LSE;

(d) whether the value and marketability of the property and property rights of Plaintiffs and the Class Member property owners have been and will continue to be diminished

by the interference with property rights caused by the contamination as a result of the City's release of AFFF containing toxic PFAS components;

(e) whether the Plaintiffs and Class Member property owners have suffered the need for and the cost of mitigation at and remediation of their properties;

(f) whether the City owed a duty to Plaintiffs and Class Members;

(g) whether the City breached a duty owed to Plaintiffs and Class Members;

(h) whether the PFAS contamination of Plaintiffs' properties by the City's actions was reasonably foreseeable;

(i) whether the City knew or should have known that their use of AFFF, and its toxic PFAS components, was unreasonably dangerous;

(j) Whether the City knew of should have known that their AFFF containing toxic PFAS components were and are persistent, stable, mobile, and likely to contaminate household water;

(k) whether the City was negligent in its use of AFFF, and its toxic PFAS components, at LSE;

(l) whether the City failed to sufficiently warn residents of French Island of the potential for harm that resulted from its use of AFFF containing toxic PFAS components;

(m) whether the City's actions constitute a trespass;

(n) whether the City's actions constitute a nuisance;

(o) whether the City became aware of the health and environmental harm caused by toxic PFAS components in the AFFF used by the City and failed to warn Plaintiffs and Class Members of the same;

(p) whether Plaintiffs and Class Members have been significantly exposed to toxic PFAS components as a result of the City's use of AFFF.

(V) <u>Superiority</u>

137. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable.

138. The City has acted on grounds generally applicable to the Class, thereby making appropriate final legal and/or equitable relief with respect to the Class as a whole.

139. Furthermore, the expense and burden of individual litigation outweighs the individual harms and losses suffered by individual Class Members, making it impossible for members of the Class to individually redress the wrongs done to them.

140. Class treatment of common questions of law and fact will conserve the resources of the courts and the litigants and will promote consistency and efficiency of adjudication.

141. There will be no difficulty in the management of this action as a class action.

CLAIMS FOR RELIEF

CLAIM I
NEGLIGENCE AND NEGLIGENCE *PER SE*

As for their first claim for relief, the Plaintiffs and Class Members allege:

142. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

143. At all times relevant hereto, the City owed Plaintiffs and Class Members a duty to act with reasonable care, so as to avoid contamination of the environment and of household drinking water supplies with known hazardous substances and to avoid harm to those who would foreseeably consume water and be exposed to the toxic PFAS components of AFFF used by the City and to not jeopardize Plaintiffs' and Class Members' health and welfare and cause them to

suffer a loss of the use of their private drinking water wells and/or to incur water replacement costs.

144. The City further knew or should have known that it was unsafe, unreasonably dangerous, and/or hazardous to use AFFF with toxic PFAS components because it was highly probable that toxic PFAS components would migrate into the environment surrounding LSE, and contaminate the groundwater used to supply household water.

145. Given the likelihood that French Island would become contaminated with toxic PFAS components resulting from the City's half-century of use of AFFF on and around LSE, the City had a duty to investigate the extent to which the toxic PFAS components in AFFF released on French Island were likely to migrate through surface water and/or groundwater and contaminate Plaintiffs' and Class Members' properties and household water supplies.

146. The City knew or should have known that the use of AFFF containing toxic PFAS components was hazardous to human health and the environment.

147. Knowing of the dangerous and hazardous properties of AFFF, the City had a duty to warn of the presence of PFAS in groundwater and the hazards of ingesting water containing toxic PFAS components.

148. Upon information and belief, the City breached its duty of care by creating and/or failing to mitigate the creation of water pollution (both surface and groundwater) and reduction of property values. The City also breached its duty of care to the Plaintiffs and Class Members by failing to adequately supervise and train employees. The City has failed to properly train and supervise employees and contractors performing ultra-hazardous activities while working at the facility; failed to exercise reasonable care to contain toxic PFAS once the City knew it had polluted a large area in and about Plaintiffs' and Class Members' property and knew the harmful

PFAS which permeated groundwater, and/or soil in and about of the area of Plaintiffs' and Class Members' property, created a substantial health risk to Plaintiffs and Class Members and others; failed to timely warn the residents of the neighborhood, including the Plaintiffs and Class Members, of health hazards associated with the PFAS, and failed to take appropriate measures to prevent the spread of PFAS; failed to notify authorities in a timely fashion of the full gravity and nature of the ground and surface water contamination; failed to prevent or mitigate health hazards and damage to the value of the property in and about the neighborhood, including the real property owned by Plaintiffs and Class Members; failed to timely and effectively remediate the spills of AFFF; and failed to comply with applicable industry standards, internal safety rules, and state and federal safety laws, rules, regulations and standards.

149. The acts of the City constitute negligence and negligence *per se* as a result of the City's violations of state, federal and local rules, regulations, statutes and ordinances. The City's negligent acts are a substantial factor in causing Plaintiffs and Class Members to suffer harms and losses, as set forth more particularly below, including without limitation, actual or imminent damage to their residential and/or business water supplies, permanent severe diminution of property values, the need for modifications to the quiet and peaceful use and enjoyment of their homes and property, annoyance, inconvenience and discomfort and harm to their residential property, persons, and livestock or pet(s). The negligently created environmental harms and property value reductions have been a substantial factor in creating personal fear, worry, anxiety, marital discord, inconvenience, discomfort, harassment, and harm and destruction of Plaintiffs' and Class Members' right to enjoy their properties in a reasonably quiet and peaceful manner and further forcing Plaintiffs and Class Members to incur expenses for monitoring the supply and control of water, and expert consultants' fees, all to Plaintiffs' and Class Members' damage.

150. Upon information and belief, as a direct and proximate result of the foregoing acts and/or failures to act of the City, the Plaintiffs and Class Members have been damaged as a result of a decrease in the value of their properties and through a loss of enjoyment of their properties due to the nuisances and water pollution set forth above, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further harms and losses as the evidence may establish.

151. The multiple injuries that the Plaintiffs and Class Members have sustained are permanent in nature, thereby causing them to suffer a loss of property value, loss of use of their private drinking water well, and personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness in the future.

152. As direct and proximate result of the aforementioned negligent conduct of the City, Plaintiffs and Class Members have been damaged due to the loss of society, companionship and services of each other.

CLAIM II
PUBLIC NUISANCE

As and for their second claim for relief, the Plaintiffs and Class Members allege:

153. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

154. Plaintiffs and Class Members are members of the public and the community surrounding LSE. Plaintiffs and Class Members use and benefit from public waterways and groundwater in the vicinity of LSE.

155. The conduct and activities of the City constitute a public nuisance in that such activities substantially or unduly interfere with the use of public places, public waterways, and the groundwater in common use by the Plaintiffs and Class Members.

156. The activities of the City further substantially or unduly interferes with the activities of the entire community, and are specially injurious to the health and offensive to the senses of Plaintiffs and Class Members and specially interferes with and disturbs their comfortable enjoyment of their life and of their property, which is different in kind from the injury suffered by the general public.

157. As a direct and proximate result of the public nuisance created and perpetuated by City's tortious conduct, Plaintiffs and Class Members have suffered, and will in the future continue to suffer, interference with their use and enjoyment of public places, including public waterways and groundwater, and their own private property, diminution in property value, present and future remediation costs, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further harms and losses as the evidence may establish.

158. Unless the public nuisance caused by the tortious conduct of the City is abated, the use and enjoyment of public spaces, including public waterways and groundwater, and Plaintiffs' and Class Members' property and rights of enjoyment therein will be progressively diminished in value and their health will be further jeopardized.

159. As a direct and proximate result of the public nuisance caused by the City as alleged herein, Plaintiffs and Class Members were injured and suffered harms and losses as more fully described below.

CLAIM III
PRIVATE NUISANCE

As and for their third claim for relief, the Plaintiffs and Class Members allege:

160. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

161. Plaintiffs and Class Members have proprietary interests in certain real and personal property in the areas adversely affected by City's Airport operations. Plaintiffs also have the right to the exclusive use and quiet enjoyment of their property.

162. The tortious conduct of the City constitutes a private nuisance in that it has caused substantial injury and significant harm to, invasion and/or interference with, the comfortable enjoyment and private use by Plaintiffs and Class Members of their private real and personal property, and their rights to use in the customary manner their property and residences without being exposed to the dangers of water pollution and diminution/damage to property values.

163. The interference and invasion by the City exposing the Plaintiffs and Class Members to the aforementioned dangers is substantially offensive and intolerable.

164. The aforementioned conduct by the City causing said interference and invasion has occurred because said City has been and continues to be negligent and has failed to exercise ordinary care to prevent its activities from causing significant harm to the Plaintiffs' and Class Members' rights and interests in the private use and enjoyment of their property.

165. Unless the nuisance is abated, Plaintiffs' and Class Members' property and their right to enjoy their property will be progressively further diminished in value and their health will be further jeopardized.

166. As a direct and proximate result of the nuisance created by the City, Plaintiffs and Class Members have suffered, and continue to suffer, substantial interference with their normal use and enjoyment of their own private property and rights incidental thereto, diminution in property value, present and future remediation costs, severe emotional distress, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further harms and losses as the evidence may establish.

CLAIM IV
TRESPASS

As and for their fourth claim for relief, the Plaintiffs and Class Members allege:

167. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

168. At all times relevant hereto, landowner and/or lessee Plaintiffs and Class Members were in lawful possession of certain real and personal property in the areas affected by the City's Airport operations, as set forth above.

169. The City intentionally and/or recklessly committed the wrongful act of trespass by causing hazardous PFAS chemicals and/or other hazardous substances or toxins to invade the real and personal property of the landowner and/or lessee Plaintiffs and Class Members through the groundwater, surface water, and/or soil.

170. Upon information and belief, the Plaintiffs' and Class Members' well water was and remains contaminated with unacceptable levels of PFAS due to the trespassory actions of the City.

171. As a direct and proximate result of the City's acts of trespass, landowner and lessee Plaintiffs were injured, and continue to be injured, in that they suffered damage to their real and/or personal property and to their health and wellbeing, including hazardous PFAS chemicals leaving the LSE property or otherwise being deposited on the ground by City employees which was, and is, deposited on Plaintiffs' and Class Members' property, along with contamination of groundwater and/or surface water moving from LSE onto Plaintiffs' property, and such actions constitute a trespass on property owned or lawfully possessed by Plaintiffs and Class Members, and has been and still is a substantial factor in causing past and future harms and losses to the Plaintiffs and Class Members.

CLAIM V
INJUNCTIVE AND/OR DECLARATORY RELIEF

As and for their fifth claim for relief, the Plaintiffs and Class Members allege:

172. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

173. As a direct and proximate result of the above-described conduct of the City, and the injuries, harms and losses described herein, Plaintiffs and Class Members intend to seek the following equitable relief:

A. That a judicial determination and declaration be made of the rights of the Plaintiffs and Class Members and the responsibilities of the City with regard to the injuries, harms and losses caused by said the City to the fullest extent allowed by law;

B. That the City be required, to the fullest extent allowed by law, to restore Plaintiffs' and Class Members' property and LSE property to the condition it was in prior to being contaminated by PFAS and/or other contaminants.

WHEREFORE, Plaintiffs and the Class Members demand judgment as follows:

A. For an order certifying the Class under Wisconsin Statute §803.08(1) and (2)(c) (FRCP 23) appointing Plaintiffs as Class Representatives and the undersigned and Class Counsel;

B. Compensatory damages against the Defendants in a sum to be determined by verdict, together with interest on said sum;

C. For their costs and disbursements;

D. Equitable and injunctive relief specified herein; and

E. Such other and further relief as this Court deems just and equitable.

FITZPATRICK, SKEMP & BUTLER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

<u>*Electronically signed by Timothy S. Jacobson*</u>
Timothy S. Jacobson, WI Bar No. 1018162
1123 Riders Club Rd
Onalaska, WI 54650
608.784.4370
tim@fitzpatrickskemp.com

SINGLETON SCHREIBER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

<u>*Electronically signed by Kevin S. Hannon*</u>
Kevin S. Hannon, WI Bar No. 1034348
Joseph A. Welsh (*Pending Pro Hac Vice*)
1641 Downing Street
Denver, CO 80218
Ph: (720)704-6028
khannon@singletonschreiber.com

Paul Starita (*Pending Pro Hac Vice*)
SINGLETON SCHREIBER, LLC
591 Camino de la Reina #1025
San Diego, CA 92108
Ph: (720)704-6028
pstarita@singletonschreiber.com

PLAINTIFFS HEREBY DEMAND TRIAL BY A JURY OF TWELVE (12).

EXHIBIT 2

FILED
10-12-2023
Clerk of Circuit Court
La Crosse County WI
2023CV000481
Honorable Gloria L. Doyle
Branch 5

STATE OF WISCONSIN CIRCUIT COURT LA CROSSE COUNTY

DALE WETTERLING and MARY WETTERLING,
2700 Del Ray Ave.
La Crosse, WI 54603,

and

RONALD MARTENS and JOY MARTENS,
2555 Bainbridge St.
La Crosse, WI 54603,

Plaintiffs,

vs.

CITY OF LA CROSSE, a municipal corporation,
400 La Crosse St.
La Crosse, WI 54601,

WISCONSIN MUNICIPAL MUTUAL
INSURANCE COMPANY,
4781 Hayes Road, Suite 201
Madison, WI 53704,

and

ABC INSURANCE COMPANY,

Defendants.

SUMMONS

Case No. 23-CV-___

Case Codes: 30106, 30704

THE STATE OF WISCONSIN, to each person named above as a defendant:

You are hereby notified that the plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the statutes. The Answer

must be sent or delivered to the Court whose address is Clerk of Circuit Court, La Crosse County Courthouse, 333 Vine Street, La Crosse, WI 54601, and to FITZPATRICK, SKEMP & BUTLER, LLC, plaintiffs' attorneys whose address is 1123 Riders Club Road, Onalaska, WI 54650. You may have an attorney help or represent you.

If you do not provide a proper Answer within 45 days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may be enforced by garnishment or seizure of property.

FITZPATRICK, SKEMP & BUTLER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Timothy S. Jacobson
Timothy S. Jacobson, WI Bar No. 1018162
1123 Riders Club Rd
Onalaska, WI 54650
608.784.4370
tim@fitzpatrickskemp.com

SINGLETON SCHREIBER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Kevin S. Hannon
Kevin S. Hannon, WI Bar No. 1034348
Joseph A. Welsh (*Pending Pro Hac Vice*)
1641 Downing Street
Denver, CO 80218
720.704.6028
khannon@singletonschreiber.com

Paul Starita (*Pending Pro Hac Vice*)
SINGLETON SCHREIBER, LLC
591 Camino de la Reina #1025
San Diego, CA 92108
720.704.6028
pstarita@singletonschreiber.com

FILED
10-12-2023
Clerk of Circuit Court
La Crosse County WI
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2700 Del Ray Ave.
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INSURANCE COMPANY,
4781 Hayes Road, Suite 201
Madison, WI 53704,

and

ABC INSURANCE COMPANY,

Defendants.

COMPLAINT

Case No. 23-CV-___

Case Codes: 30106, 30704

SUMMARY OF CLAIMS

1. Plaintiffs, Dale Wetterling and Mary Wetterling, and Ronald Martens and Joy Martens, by their attorneys, Fitzpatrick, Skemp & Butler, LLC and Singleton Schreiber, LLP, file this action against the Defendants, City of La Crosse ("City") and Wisconsin Municipal Mutual Insurance Company ("Wisconsin Municipal"), and allege as follows:

2. Plaintiffs and Class Members are residents or former residents of the Town of Campbell, Wisconsin (hereinafter the "Town"). The aquifer which supplies water to Plaintiffs' and Class Members' private household wells within the Town has been contaminated by the presence of chemicals used by the City.

3. Plaintiffs and Class Members bring this class action against Defendants for injuries suffered by persons who at relevant time occupied residential real property in the Class Geographic Area (hereinafter the "Class Area"), and were injured due to significant exposure to per- and polyfluoroalkyl substances (hereinafter "PFAS") contained in aqueous film forming foam (hereinafter "AFFF"), a fire suppressant used by the City.

4. For decades the City used AFFF, and/or its toxic PFAS components, a firefighting suppressant, at and in the vicinity of the La Crosse Regional Airport (hereinafter "LSE"), in La Crosse, Wisconsin, including using AFFF within, and outside, City boundaries, including directly on one or more properties within the Town. LSE is situated directly adjacent to the Town surrounding its boundaries to the west and south, with the Black River to its east.

5. Over the course of five decades, releases of AFFF containing toxic PFAS components from LSE migrated into groundwater and private household wells in the Class Area. Without knowledge of this toxic PFAS contamination, Plaintiffs and Class Members have been exposed to and ingested toxic PFAS components from AFFF used by the City and released at and around LSE by the City.

6. Residents in the Class Area have obtained their drinking water from groundwater pumped by private wells. For decades, Plaintiffs' and Class Members' household water has been contaminated by toxic PFAS components of AFFF, which include perfluorooctane sulfonate (hereinafter "PFOS"), perfluorooctanoic acid (hereinafter "PFOA"), perfluoroheptanoic acid

(hereinafter PFHpA), and other species of PFAS. Plaintiffs' and Class Members' exposure to and consumption of known toxic PFAS components from AFFF has increased, and continues to increase, the likelihood they will develop an illness, disease, or disease process that they otherwise would not without such significant exposure.

7. PFAS are known hazardous chemicals and substances. When PFAS from AFFF are ingested and absorbed into a person's bloodstream and tissue, they bioaccumulate, biomagnify, and remain in their bodies for years. As a result, consumption of toxic PFAS components from AFFF are known to alter the structure of persons' bodies and cause an increased risk of illness, disease, and disease process, including but not limited to thyroid disease, testicular cancer, and kidney cancer.

8. As a result of the City's releases of AFFF, and its toxic PFAS components, throughout the Class Area, in 2021 Wisconsin Department of Health Services (hereinafter "WDHS") advised residents in the Class Area not to use or drink their water due to the PFAS contamination.

9. The risks of illness, disease, and disease process from significant exposure to toxic PFAS components from AFFF has plagued, and will continue to plague, Plaintiffs and Class Members. As a result, Plaintiffs and Class Members have been injured by the acts and/or omissions of the City that caused toxic PFAS components in AFFF to contaminate household water supplies throughout the Class Area which they then used and consumed water.

10. The City used AFFF and/or its toxic PFAS components, including fluorochemical surfactants, PFOS, PFOA, and/or certain other PFAS that degrade into PFOS or PFOA. The City knew or should have known significantly prior to the City's public disclosure of PFAS contamination on French Island that the use of AFFF on French Island presented an unreasonable

risk to human health and the environment. The City also knew or should have known that toxic PFAS components are highly soluble in water, and highly mobile and persistent in the environment, and highly likely to contaminate residential real property water supplies and soil if released to the environment.

11. Nonetheless, the City used AFFF products with knowledge that large quantities of AFFF, and its toxic PFAS components, would be used in fire training exercises and in emergency situations at LSE in such a manner that toxic PFAS components would be released into the environment. The City knew or should have known that even when used as intended by the products' design, discharge of toxic PFAS components into the environment would cause environmental and health hazards.

12. Plaintiffs and Class Members have been contaminated for years, if not decades, by toxic PFAS components including at concentrations hazardous to human health.

13. For decades, La Crosse and LSE routinely used AFFF products in fire training exercises, fire suppression, in annual testing, and for other purposes and, on one or more occasions, accidentally spilled AFFF. As a result, toxic PFAS components used in AFFF migrated into the groundwater surrounding LSE, contaminating private wells used to provide household water to properties in the Class Area.

14. Sampling and testing in the Class Area have detected PFAS at levels hazardous to human health.

15. Plaintiffs and Class Members ingested PFAS contaminated water because of Defendants' tortious conduct in using and spilling AFFF. Plaintiffs and Class Members absorbed PFAS-contaminated water into their body tissue and bloodstream, altering their bodies'

biochemical processes, structure, and/or function in a way that leads to latent illness, disease, or disease process.

16. Plaintiffs' and Class Members' significant exposure to toxic PFAS components in AFFF have caused them bodily harm in the form of detrimental alteration of the structure and/or function of their bodies, and therefore past, present, and future injury.

17. As a result of Plaintiffs' and Class Members' significant exposure to PFAS from AFFF, they have suffered past, present, and future increased risk of PFAS related illness, disease, and disease processes. PFAS related illness, disease, and disease processes are often latent or misidentified, making specialized diagnostic testing for early detection of PFAS related illness, disease, or disease processes medically reasonably necessary and beneficial. Because of Plaintiffs' and Class Members' significant exposure to toxic PFAS components from AFFF they have incurred the pecuniary loss and injury of the costs associated with such medically necessary diagnostic testing and medical tests.

18. As a result of the contamination, Plaintiffs and Class Members presently require and, in the future will require, diagnostic testing to ensure early detection of illness, disease, and disease process caused by exposure to toxic PFAS components in AFFF. It is well-known that many of the serious illness, disease, and disease process caused by toxic PFAS exposure can be asymptomatic in the patient prior to the manifestation of significant and sometimes fatal illness or disease.

19. Toxic PFAS components contained in AFFF have created an increased risk of illness, disease, and disease processes for Plaintiffs and Class Members using private groundwater wells within the Class Area.

20. It is beneficial to Plaintiffs and Class Members to know of any latent illness, disease, and disease processes from their exposure to PFAS contaminated water because of use of AFFF at and around LSE. Therefore, Plaintiffs' and Class Members' injuries make it reasonably necessary that Plaintiffs and Class Members incur the costs of present and future medical monitoring. Notice and diagnostic plans described herein will equip Plaintiffs, Class Members, and their doctors with the requisite knowledge to take appropriate steps to protect themselves from latent illness, disease, and disease process.

21. Defendants' tortious conduct constitutes an invasion of Plaintiffs' and Class Members' legally protected interests in the form of past, present, and future increased risk of illness, disease, and disease process from their significant exposure to toxic PFAS components from AFFF.

22. The City's tortious conduct constitutes an invasion of Plaintiffs' and Class Members' legally protected interests in the form of past, present, and future injury of pecuniary loss of the cost of medically necessary diagnostic testing for the early detection of illness, disease, and disease process caused by their significant exposure to toxic PFAS components from AFFF and their consequent increased risk of illness, disease, and disease process.

23. The Plaintiffs and Class Members bring this suit on behalf of themselves and all those similarly situated to recover costs of medical monitoring for the early detection of illness, disease, and disease process caused by the PFAS water contamination crisis in the Town and Plaintiffs' and Class Members' private household wells caused by the tthe City's tortious conduct.

PARTIES

24. Plaintiffs are individuals, all of whom, at all relevant times to this action, owned, occupied, and/or used private drinking wells within the Class Area, and were exposed to and ingested toxic PFAS components for at least one year over the past five decades of the City's use of AFFF.

25. Plaintiffs, Dale Wetterling and Mary Wetterling, at all relevant times to this action, were and are adult residents of the Town who own residential real property within the Class Area in the County of La Crosse, Wisconsin, and at all times relevant hereto have been husband and wife and joint owners and occupiers of that property and home located thereon at 2700 Del Ray Ave., La Crosse, Wisconsin.

26. Plaintiffs, Ronald Martens and Joy Martens, at all relevant times to this action, were and are adult residents of the Town who own residential real property within the Class Area in the County of La Crosse, Wisconsin, and at all times relevant hereto have been husband and wife and joint owners and occupiers of that property and home located thereon at 2555 Bainbridge St., La Crosse, Wisconsin.

27. Plaintiffs and their fellow Class Members all individually served Notices of Circumstances of Claim and Itemized Claims on the City pursuant to §893.80(1d) (a) and (b), Stats., and their claims have been denied by the City.

28. Upon information and belief, the City of La Crosse ("City") is a municipal corporation with its principal place of business at 400 La Crosse Street, in the City and County of La Crosse, Wisconsin.

29. The City owns and operates the La Crosse Regional Airport (the "Airport"), a public airport located in the City of La Crosse, La Crosse County, Wisconsin, which occupies a

northern area of French Island, next to the Mississippi and Black Rivers and adjacent to hundreds of private residences, as well as private businesses and nonprofit organizations, the majority of which are serviced by private drinking water wells.

30. The City also operates the La Crosse Fire Department which responds to calls for fire suppression and conducts fire response training for its firefighters.

31. Upon information and belief, the Defendant, Wisconsin Municipal Mutual Insurance Company ("Wisconsin Municipal"), is a domestic insurance corporation with offices located at 4781 Hayes Road, Suite 201, Madison, WI 53704, and is engaged in and is authorized to conduct the business of selling and administering policies of liability insurance in the State of Wisconsin.

32. Upon information and belief, on a date prior to the events and injuries hereinafter alleged, the Defendant, Wisconsin Municipal, issued and delivered to the Defendant, the City, its policies of liability and/or excess and/or umbrella insurance under and by virtue of the terms of which it agreed to pay on behalf of the City any and all sums which the City should become legally obligated to pay by reason of liability imposed upon it arising out of its tortious actions.

33. By virtue of the terms and conditions of said City's insurance policies and the statutes of the State of Wisconsin, the Defendant Wisconsin Municipal is directly liable to the Plaintiffs and Class Members for any injuries or damages sustained by them as hereinafter alleged.

34. Upon information and belief, the Defendant, ABC Insurance Company, is a corporation doing business in the State of Wisconsin, and the Defendant ABC Insurance Company is a fictitious name for the actual Defendant whose name is unknown to the Plaintiffs

but is made a party to this action pursuant to §807.12, Stats., and by virtue of having provided liability insurance to the City at all times relevant hereto.

35. Upon information and belief, on a date prior to the events and injuries hereinafter alleged, the Defendant, ABC Insurance Company issued and delivered to the Defendant City of La Crosse its policy of liability insurance under and by virtue of the terms of which it agreed to pay on behalf of the City any and all sums which the City should become legally obligated to pay by reason of liability imposed upon it arising out of its tortious actions.

36. By virtue of the terms and conditions of said City's insurance policy and the statutes of the State of Wisconsin, the Defendant ABC Insurance Company is directly liable to the Plaintiffs and Class Members for any injuries or damages sustained by them as hereinafter alleged.

GENERAL ALLEGATIONS

37. PFAS are manmade chemicals that do not exist in nature. The City used toxic AFFF and/or its PFAS components at, and in the vicinity of, LSE.

38. PFAS are persistent in the environment. Due to the strength of multiple carbon-fluorine bonds, PFAS break down slowly in the environment, are chemically biologically stable, resistant to environmental degradation, and can persist in the environment for decades. PFAS are also water soluble, making them mobile in groundwater and the environment.

39. Toxicology studies show that PFAS are readily absorbed after oral exposure and accumulate in the human body.

40. There are numerous health risks associated with exposure to PFAS. For example, PFOS and PFOA exposure is associated with increased risk in humans of testicular cancer and kidney cancer, disorders such as thyroid disease, high cholesterol, ulcerative colitis, and

pregnancy-induced hypertension, as well as other conditions.[1] The EPA has also advised that exposure to PFAS may result in developmental effects to fetuses during pregnancy or to breast-fed infants.[2]

41. AFFF, and its toxic PFAS components, released at LSE migrated, and are migrating, from areas of release at or around LSE to the wells throughout the Town and have entered and contaminated Plaintiffs' and Class Members' real property, water rights, wells and water systems, including household piping.

42. AFFF use for fire suppression and other activities at LSE dates from the 1970s through at least 2020. Storage of AFFF persists at LSE.

43. Toxic PFAS components from AFFF released at LSE have migrated, and continue to migrate, to areas of release on LSE to wells throughout the Class Area and have entered and contaminated Plaintiffs' and Class Members' real property, water rights, wells and water systems, including household piping.

44. Groundwater and surface water released from, and in connection with, LSE flows to the wells throughout the Class Area.

45. Plaintiffs and Class Members resided in residential real properties with private wells within the Class Area.

46. Concentrations of toxic PFAS components found in the private wells serving Plaintiffs' and Class Members' water supplies have been caused by releases of AFFF, and its toxic components, on and around LSE property. As was reasonably foreseeable by the City, AFFF containing toxic PFAS components was discharged onto open ground and surface waters during

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[1] ww.epa.gov/sites/production/files/201605/documents/drinkingwaterhealthadvisories_pfoa_pfos_5_19_16.final_.1.pdf
[2] *Id.*

fire training, fire suppression, and other exercises. As was reasonably foreseeable by the City, AFFF, and its toxic PFAS components, migrated into and through the soil in and around LSE to the groundwater under LSE. From there, AFFF, and its toxic PFAS components, migrated to Plaintiffs' and Class Members' private groundwater wells in the Class Area. The Class Area's PFAS contamination is directly and proximately linked to the City's use of AFFF.

47. Because of the City's tortious conduct in use of AFFF containing toxic PFAS components and the City's failure to warn Plaintiffs and Class Members of groundwater contamination with PFAS, Plaintiffs and Class Members have been forced to cease use of their private household wells because PFAS have contaminated their water supply.

48. Plaintiffs and Class Members took, and continue to take, delivery of a substitute water supply out of necessity to avoid consumption of PFAS contaminated water caused by AFFF.

49. Thus, the City, through use of AFFF, and its toxic PFAS components; by its tortious conduct proximately caused Plaintiffs' and Class Members' injuries by contaminating the groundwater.

PFAS ARE USED IN AQUEOUS FILM FORMING FOAM

50. PFAS are synthetic carbon chain compounds that are not naturally occurring and contain large amounts of the element fluorine. As used in this Complaint, the term "PFAS" includes all PFAS and their precursors, derivatives, and/or salts used in the AFFF released at LSE which contaminated Plaintiffs' and Class Members' water supplies and property, including inter alia, PFOA, PFOS, PFBA, PFBS, PFHxA, PFHxS, PFPeA, PFHpA, PFNA, PFDA, PFDS, PFUnA, PFDoA, and PFTrA.

51. PFAS are used in firefighting foam known as "aqueous film forming foam" ("AFFF").

52. AFFF is used to extinguish fires that involve petroleum or other flammable liquid because PFAS are resistant to heat, oil, grease, and water.

53. 3M AFFF is produced through a 3M process called electrochemical fluorination, or ECF, contained PFAS including PFOS. Tyco and other manufacturers' AFFF are synthesized through telomerization and contain PFAS including PFOA. Both processes include formulations containing chemicals that can break down into other toxic PFAS components.

54. The City chose to use toxic AFFF despite the availability of other technologically feasible, practical, and effective alternatives that would have reduced or mitigated Plaintiffs' and Class Members' exposure to toxic PFAS.

55. The City knew or should have known that the AFFF, and its toxic PFAS components, would be released into the environment and contaminate groundwater and household water supplied, including Plaintiffs' and Class Members' household water supplies.

56. The City knew or should have known that harmful and defective products, AFFF containing toxic PFAS components, would be used for various purposes at LSE including, but not limited to, training for firefighting, testing firefighting equipment, actual firefighting, and use in hangar sprinkler fire suppressant systems, which would cause the AFFF to drain into the ground and pollute or contaminate the groundwater beneath the airport and eventually migrate into Plaintiffs' and Class Members' household water supplies.

PFAS Including PFOA and PFOS Threaten Human Health

57. PFAS are extremely persistent and bioaccumulate[3] in the human body. Even

[3] Bioaccumulation is a process which occurs when an organism absorbs a substance at a rate

short-term exposure results in a body burden that persists for years and can increase and biomagnify[4] with continued exposure. When consumed PFAS accumulate primarily in the bloodstream, kidneys, and liver. Humans absorb toxic PFAS components from AFFF when they consume AFFF contaminated household water.

58. The EPA projects that PFOS has a half-life of 5.3 years, PFOA has a half-life of 2.3-3.8 years, and PFHxS has a half-life of 8.5 years, in humans.[5] Because of these extended half-lives, the EPA expects that "it can reasonably be anticipated that continued exposure could increase body burden to level that would result in adverse outcomes."[6]

59. EPA Health Advisories have identified numerous health risks associated with exposure to toxic PFAS components. Studies show association between increased PFOA and PFOS levels in blood and increased risk of several adverse health effects, including high cholesterol levels, changes in thyroid hormone, ulcerative colitis (autoimmune disease), pre-eclampsia (a complication of pregnancy that includes high blood pressure), and kidney and testicular cancer.

60. The EPA classified PFOA and PFOS as having suggestive evidence of carcinogenic potential in humans.[7]

61. The EPA cited reports from the Organization for Economic Co-operation and Development (*hereinafter* "OECD") in the May 2016 Health Advisories. The OECD is an

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faster than the rate at which the substance is lost by metabolism or excretion.

[4] Biomagnification is a process which occurs when concentration of a substance in organism's tissue increases as the substance travels up the food chain.

[5] A half-life is the amount of time it takes for fifty percent of a contaminant to leave the body.

[6] EPA, Long-Chain Perfluorinated Chemicals (PFCs) Action Plan, pp. 1, 8-9, December 30, 2009.

[7] EPA, Health Effects Support Document for Perfluorooctanoic Acid (PFOA), p. 3-159, May 2016; EPA, Health Effects Support Document for Perfluorooctane Sulfonate (PFOS), p. 3-114, May 2016.

international intergovernmental organization that meets, discusses issues of concern, and works to respond to international problems.

62. According to a published OECD Report, for mammalian species, PFOA and its salts have caused cancer in rats and adverse effects on the immune system in mice. In addition, PFOA and its salts can display reproductive or developmental toxicity in rodents at moderate levels of exposure, and moderate to high systemic toxicity in rodents and monkeys following long-term exposure by the oral route.[8] The OECD also concluded in a Hazard Assessment that PFOS is persistent, bioaccumulative, and toxic to mammalian species.[9]

63. The EPA also cited findings from a C-8 Science Panel and Health Project in the May 2016 Health Advisory for PFOA. The C-8 Science Panel was formed out of a class action settlement related to PFOA contamination of groundwater from a manufacturing facility in West Virginia. The C-8 Health Project is the largest study evaluating human exposure and health endpoints for PFOA; the study included more than 65,000 people in Mid-Ohio Valley communities who were exposed to PFOA for longer than 1 year. The C-8 Science Panel consisted of three epidemiologists and its goal was to assess the links between PFOA and numerous diseases. The C-8 Science Panel carried out studies of exposure and health studies between 2005 and 2013; information was gathered through questionnaires and blood samples from the individuals who had PFOA contaminated drinking water and previously published studies.

64. The C-8 Science Panel released reports which found probable links between exposure to PFOA and six diseases: high cholesterol, ulcerative colitis, thyroid disease, testicular

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[8] OECD, Report of an OECD Workshop on Perfluorocarboxylic Acids (PFCAs) and Precursors, p. 21, June 18, 2007.
[9] OECD, Hazard Assessment of Perfluorooctane Sulfonate (PFOS) and Its Salts, p. 5, November 21, 2002.

cancer, kidney cancer, and pregnancy-induced hypertension.

65. The U.S. Agency for Toxic Substances and Disease Registry (*hereinafter* "ATSDR") stated in its 2018 draft Toxicological Profile that studies suggest associations between PFOA and PFOS exposure and liver damage, pregnancy-induced hypertension, increased cholesterol, increased risk of thyroid disease, increased risk of asthma, increased risk of decreased fertility, low birth weight, and increases in testicular and kidney cancers.

66. In February 2018, WDNR stated that PFAS compounds meet the definition of hazardous and/or environmental pollution under Wis. Stat. §292.01. Three years later, prevalence of PFAS contamination in the Class Area led WDHS to declare an emergency water advisory for the area.

67. The City knew or reasonably should have known about the environmental and health effects from toxic PFAS components, discussed above, at times they used AFFF containing toxic PFAS components at and around LSE.

PFAS, Including PFOA and PFOS, Pose a Threat to the Private Household Wells Relied on by Plaintiffs and Class Members

68. PFAS are extremely persistent in the environment because they are chemically and biologically stable and are resistant to environmental degradation. The EPA projects that PFOS has an environmental half-life in water of over 41 years, and PFOA has an environmental half-life in water of over 92 years. PFOA and PFOS are also considered to be resistant to degradation in soil. EPA, Long-Chain Perfluorinated Chemicals (PFCs) Action Plan, p. 1, December 30, 2009.

69. PFAS also are particularly mobile in soil and water, readily absorbed into groundwater, and can migrate across long distances.

70. Additionally, non-human receptors exposed to the contaminated environment are at significant risk of harm. PFOA is persistent and can cause adverse effects in laboratory animals, and humans, including cancer and developmental and systemic toxicity. PFOS is persistent, bioaccumulative, and toxic to mammalian species. PFOS is linked to developmental, reproductive, and systemic toxicity.

71. PFOA is also readily absorbed by plants, including wild plants as well as crops grown on contaminated soil and bioaccumulates in the food chain.

72. These effects impair use of Plaintiffs' and Class Members' household water and other property throughout the Class Area.

73. Upon information and belief, the City knew or should reasonably have known about the environmental effects from toxic PFAS components, discussed above, at times it used AFFF, and its toxic PFAS components.

The City's Use, Storage, Release, Discharge, and Disposal of PFAS from AFFF at and around LSE Has Contaminated Plaintiffs' and Class Members' Household Water

74. Upon information and belief, La Crosse began purchasing and using AFFF containing toxic PFAS components at LSE in about 1970.

75. Over the following fifty years LSE discharged and disposed of AFFF containing toxic PFAS components in and around the airport. LSE's discharge and disposal of AFFF, and its toxic PFAS components, has included, but is not limited to, releases and discharges into soil and water pathways that connect to property, groundwater, household water supplies, household water systems within the Class Area. Such AFFF discharges containing toxic PFAS components have resulted in infiltration of soil and migrated into groundwater and water supply throughout the Class Area.

76. For instance, testing, training, exercises, and fire response activities occurred on and around LSE, causing AFFF waste containing toxic PFAS components to drain into soil, groundwater, surface waters, wetlands, ponds, and ditches. Toxic PFAS components, discharged to soil, surface waters, wetlands, and ponds have migrated into groundwater and contaminated the groundwater throughout the Class Area where Plaintiffs and Class Members wells are located, contaminating Plaintiffs' and Class Members' property and water supply.

77. As of January 12, 2021, La Crosse reported to the public that it had completed PFAS testing of well water samples from 109 private wells, with 108 of said wells testing positive for PFAS.

78. Months later, proof of French Island's pervasive contamination was reinforced. As of June 2021, 538 private wells on French Island tested positive for PFAS contamination.

79. The widespread contamination led WDHS to declare an emergency water advisory for the area in March 2021. Levels of PFOA and PFOS in household water wells on French Island had, at that time, been detected and reported at concentrations as high as 3,200 ppt.

Specific Release, Discharge, Disposal, and Storage of PFAS-Based AFFF at LSE

80. Studies have preliminarily identified groundwater, surface water, and soil pathways where toxic PFAS components in AFFF used on and around LSE has been, and is, migrating to the Plaintiffs' and Class Members' groundwater and household water wells.

81. Initial Site Investigation Work Plan submitted by La Crosse to WDNR identified five potential source areas of PFAS contamination on French Island originating on LSE property: (1) Former Test Burn Pits: (2) a 1997 Fuel Spill, where AFFF was applied over the spilled jet fuel; (3) AFFF Test Area, where AFFF was discharged while annually collecting FAA-required sampled from firefighting equipment; (4) Former Fire Station, where AFFF was stored and

transferred into firefighting equipment; and (5) 2001 Crash site, where AFFF was applied to wreckage. While these were the preliminarily identified sites, subsequent information indicates additional releases and discharges of AFFF occurred in LSE operations.

82. Upon information and belief, the City began using AFFF in the 1970s. Shortly thereafter, La Crosse and/or LSE created test burn pits in an area northwest of what is presently designated runway 22, east of runway 18, and north of runway 31. Firefighting training using AFFF was conducted at test burn pits at the airport from the 1970s through approximately 1988.

83. In or about January 1997, a jet fuel spill occurred near an LSE terminal, and LSE firefighters applied AFFF to the spilled jet fuel.

84. Over an approximately twenty-year period La Crosse and/or LSE conducted nozzle testing using AFFF in a test area northwest of the LSE fire station.

85. For years, AFFF was stored in the former LSE fire station, where firefighters transported AFFF from the fire station into their equipment.

86. In June 2001, a jet aircraft crash at LSE resulted in a fire. Upon information and belief, the Airport Fire Department owned and operated by La Crosse responded to the crash and sprayed AFFF at the crash site.

87. An April 2021 Interim Site Investigation Report revised the above list to include a December 1, 2020, event when an AFFF solution was released from emergency response equipment by LSE personnel on or around a terminal apron.

88. The Interim Site Investigation listed the above “confirmed sources” along with several “potential sources.” Including:

(a) Practice burn activities near Fisherman Road (just outside the airport) reported by citizens during the 1970s.

(b) An aircraft crash on or about November 9, 1970, at 609 Dakota Street, northwest of the airport, across Lakeshore Drive. A La Crosse Tribune article, dated 11/10/1970, states, "Kenneth Kearns, La Crosse assistant fire chief, said two engines, a foam truck, a water wagon and a rescue unit answered the call." Additionally, the article states, "Dried foam covered plane wreckage like a snowy mist. Kearns said firemen didn't notice any flames, but put the foam on as a precautionary measure." A photo caption accompanying the article states, "Foam Sprayed on Wreckage By La Crosse Fire Department To Prevent Fire" and depicts firefighting foam on the wreckage and on the ground.

(c) A de-icing truck caught fire on January 3, 2014, at the terminal apron and airport fire responders and LCFD responded to the fire. Extinguishing agents used were described as "75 gallons of AFFF used and about 700 gallons of water" in the "ARFF [Aircraft Rescue and Fire Fighting] Run Report."

89. The City used AFFF, and its toxic PFAS components, for approximately fifty years. Throughout that period, the toxic PFAs components contained in AFFF have been released into the environment in significant quantities and migrated into household water supplies throughout the Class Area. As a result, Plaintiffs' and Class Members' water supplies have been contaminated by toxic PFAS.

90. State and Local entities have not yet analyzed the extent of PFAS contamination at numerous other locations where AFFF was used and escaped into the environment, including, but not limited to, neighborhoods along the surface and groundwater pathways from LSE to the Town, including the Class Area.

City Knew of PFAS Groundwater Contamination on French Island and AFFF Toxicity but Failed to Provide Notice

91. A 1997 MSDS for a non-AFFF product made by 3M listed its ingredients as water, PFOA, and other perfluoroalkyl substances and warned that the product includes "a chemical which can cause cancer." The MSDS cited "1983 and 1993 studies conducted jointly by 3M and DuPont" as support for this statement.

92. Under pressure from the EPA, on May 16, 2000, 3M announced it would phase out production of two synthetic chemicals, PFOS and PFOA, that it had developed more than fifty years earlier. 3M press release, "3M Phasing Out Some of Its Specialty Materials", May 16, 2000.

93. 3M, the predominant manufacturer of AFFF, ceased production of PFOS based AFFF in 2002.

94. An EPA memo on the day of 3M's phase-out announcement stated: "3M data supplied to EPA indicated that these chemicals are very persistent in the environment, have a strong tendency to accumulate in human and animal tissues and could potentially pose a risk to human health and the environment over the long term. [PFOS] appears to combine Persistence, Bioaccumulation, and Toxicity properties to an extraordinary degree." EPA memo, "Phaseout of PFOS," May 16, 2000.

95. Because of its toxicity, eight major PFOA manufacturers agreed in 2006 to participate in the U.S. Environmental Protection Agency's PFOA Stewardship Program. The participating companies made voluntary commitments to reduce product content and facility emissions of PFOA and related chemicals by 95%, no later than 2010.

96. Many parties have studied PFOA, also known as C8, including a Science Panel formed out of a class action settlement arising from contamination from DuPont's Washington Works located in Wood County, West Virginia.

97. The C8 panel consisted of three independent epidemiologists specifically tasked with determining whether there was a probable link between PFOA exposure and human diseases. In 2012, the panel found probable links between PFOA and kidney cancer, testicular cancer, thyroid cancer, ulcerative colitis, thyroid disease, pregnancy induced hypertension (including preeclampsia), and hypercholesterolemia.

98. The La Crosse Water Utility (LCWU) was a participant in US Environmental Protection Agency's third round of its Unregulated Contaminant Monitoring Rule (UCMR3) program. US EPA published in 2012 the list of unregulated contaminants to be sampled by selected water utilities throughout the country. La Crosse was included in this list of utilities. UCMR3 included sampling and testing for Perflourinated Alkyl Acids (PFAS). Perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) were detected above recommended levels in the UCMR3 water samples collected for La Crosse Well 23H during 2014 and 2016.

99. In the May 2015 "Madrid Statement on Poly- and Perfluoroalkyl Substances (PFASs)," scientists and other professionals from a variety of disciplines, concerned about the production and release into the environment of PFOA, called for greater regulation, restrictions, limits on the manufacture and handling of any PFOA containing product, and to develop safe nonfluorinated alternatives to these products to avoid long-term harm to human health and the environment.

100. The USEPA's Lifetime Health Advisory and Health Effects of 70 ppt set in May 2016 was an attempt to identify 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.

101. Many states have regulatory limits. For example, Vermont has set a combined level of 20 ppt for PFOA and PFOS, and New Jersey set a maximum contaminant level (MCL) of 13 ppt for PFOS and 14 ppt for PFOA. In April 2019, the State of Minnesota adopted advisory drinking water limits of 15 ppt for PFOS and 27 ppt for PFOA. The State of California adopted drinking water limits of 40 ppt for PFOS and 10 ppt for PFOA in February 2020. In July 2020, New York adopted a limit of 10 ppt for both chemicals. In August 2020, Michigan adopted limits of 16 ppt for PFOS and 8 ppt for PFOA.

102. The Agency for Toxic Substances and Disease Registry ("ATSDR") proposed minimum risk levels (MRLs) translating to 7 ppt for PFOS and 11 ppt for PFOA.

103. The United States Senate and House of Representatives passed the National Defense Authorization Act in November 2017, which included $42 Million to remediate PFAS contamination from military bases, as well as devoting $7 Million toward the Investing in Testing Act, which authorizes the Center for Disease Control and Prevention ("CDC") to conduct a study into the long-term health effects of PFOA and PFOS exposure.

104. In February 2018, the Wisconsin Department of Natural Resources ("WDNR") stated that PFAS compounds meet the definition of hazardous substance and/or environment pollution under Wis. Stat. §292.01. Therefore, persons responsible for the discharge of PFAS to waters of the State of Wisconsin were required to immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards and perform the necessary response actions. Wis. Admin. Code chaps. NR 700-754. The non-industrial direct contact soil residual

contaminant levels (RCLs) for both PFOA and PFOS is 1.26 mg/kg. The industrial direct contact RCL for both PFOA and PFOS is 16.4 mg/kg.

105. USEPA made a Preliminary Determination that PFAS, specifically PFOA and PFOS, meet the statutory criteria to regulate under section 1412(b)(1)(A) of the Safe Drinking Water Act (SDWA); namely, (1) the chemicals "may have an adverse effect on the health of persons," (2) the chemicals are "known to occur or there is a substantial likelihood that the contaminant will occur in public water systems with a frequency and at levels of public health concern," and (3) regulating these chemicals "presents a meaningful opportunity for health risk reduction for persons served by public water systems."

106. On April 18, 2019, the Remediation and Redevelopment program of the Wisconsin Department of Natural Resources (WDNR) was made aware that Polyfluoroalkyl Substances (PFAS) had been routinely detected in municipal well 23, located on the east side of French Island. WDNR determined that contamination on or from the above-described site poses a threat to public health, safety, welfare or the environment.

107. WDNR determined, by letter dated May 10, 2019 to the City, that as owner of the property where the residual contamination is found, and the entity that caused the discharge of the hazardous substance, the City is responsible for restoring the environment at the above-described site under s. 292.11, Wis. Stats., known as the hazardous substances spills law.

108. In August 2019, the Wisconsin Governor signed Executive Order No. 40, which directed the WDNR to take additional steps to address PFAS in coordination with the state's Department of Health Services and the Department of Agriculture, Trade and Consumer Protection. These steps include establishing a PFAS Coordinating Council and providing public information sites to inform the public on the matter of PFAS and the risk these chemicals pose to

public health and Wisconsin's natural resources. In February 2022, the Wisconsin Natural Resources Board approved a drinking water standard of 70 ppt for PFOA and PFOS individually and combined.

109. The Wisconsin Department of Health Services (Wisconsin DHS) developed recommended health-based groundwater standards for PFOA and PFOS in 2019. Wisconsin DHS determined that a groundwater standard of a combined concentration of 20 ppt was necessary to protect the health of sensitive populations and to account for immunotoxicity effects. Wisconsin DHS based this recommendation on modeling and studies published after the 2016 HESDs. In January 2020, Wisconsin's Department of Natural Resources was authorized to proceed with establishing environmental standards for PFOA and PFOS in groundwater, surface water, and public drinking water. WDNR has recommended a PFOS and PFOA enforcement standard (ES) of 20 parts per trillion (ppt) and a preventive action limit (PAL) of 2 ppt.

110. On or about May 14, 2020, while residents of French Island, including the Plaintiffs and Class Members, continued to unknowingly consume drinking water contaminated with PFAS, the City requested from WDNR a relaxation of the schedule for the site investigation being conducted under the requirements of the hazardous substances spills law, §292.11, Stats, and the NR 700 series of administrative code.

111. As of September 1, 2020, per 2019 Wisconsin Act 101 and Wis. Stat. §299.48, training with AFFF was prohibited in Wisconsin, and testing of AFFF requires the facility to use appropriate treatment, containment, storage and disposal measures to prevent the discharge of foam to the environment.

112. Despite these numerous public warnings about the ability of PFAS to migrate through groundwater and to cause human health issues, and despite the City being aware that

PFAS chemicals had migrated into City wells by at least 2014, the City failed, and continued to fail for a period of years, to warn private well users in the Town, including Plaintiffs and Class Members, that it was reasonably likely their wells were contaminated as a result of the City's half-century of use of AFFF at and around LSE.

The Threats to Plaintiffs', Class Members', and their Visitors' Health, Safety, and Property Caused by AFFF are Ongoing

113. The PFAS contamination caused by AFFF is not contained and continues to spread into Plaintiffs' and Class Members' property and household water supplies. As result, Plaintiffs' and Class Members' have suffered the annoyance, inconvenience, and discomfort of knowing that for years their health along with their family, friends, and visitors' health was compromised by exposure to toxic PFAS components.

114. If Plaintiffs' and Class Members' residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property are not remediated, PFAS contamination will continue to impact Plaintiffs' and Class Members' property and household water far into the future because toxic PFAS components resist degradation and are persistent and mobile in water and soil.

Plaintiffs and Class Members Have Been Harmed by the City's Actions

115. Because of the City's use of AFFF, and its toxic PFAS components, Plaintiffs and Class Members private wells and properties have been and are being invaded and contaminated by toxic PFAS components released on and in the vicinity of LSE.

116. AFFF, and its toxic PFAS components, used by the City was released onto and in the vicinity of LSE property. Thereafter toxic PFAS components in AFFF migrated into surrounding groundwater and physically intruded onto, and contaminated, properties occupied by Plaintiffs and Class Members, including residential real property, water supplies, water systems,

wells, piping, soil, vegetation, and other property in the Class Area. PFAS contamination of Plaintiffs' and Class Members' household water supplies, caused by AFFF, has further migrated through soils into groundwater, physically contaminating and interfering with Plaintiffs' and Class Members' right to use their household water supplies.

117. It was reasonably foreseeable that releases of AFFF, and its toxic PFAS components, would migrate to properties occupied by Plaintiffs and Class Members in the Class Area and physically intrude onto, harm, and contaminate those properties including properties occupied by Plaintiffs and Class Members, water supplies, water systems, wells, piping, soil, vegetation, and other property owned and used by Plaintiffs and Class Members. Releases of AFFF, and its toxic PFAS components, has invaded and interfered with Plaintiffs' and Class Members' possessory interest in the use of their properties and household water supplies.

118. Upon information and belief, the City knew or reasonably should have known of the aforementioned environmental and health risks associated with AFFF containing toxic PFAS components years prior to the first time Plaintiffs and Class Members were informed of PFAS contamination of groundwater on French Island.

119. Widespread PFAS have since been detected in private wells throughout the Class Area used by the Plaintiffs and Class Members. The impact of this widespread contamination caused by the City's tortious conduct has had, and will continue to have, a detrimental impact on properties occupied by Plaintiffs and Class Members.

120. In March 2021, five months after Plaintiffs and Class Members began to receive information about PFAS contamination, WDHS declared an emergency water advisory in the Class Area.

121. Properties occupied by Plaintiffs and Class Members and water supplies have been and are being exposed to PFAS introduced into their residential real property, water supplies, water systems, wells, piping, soil, vegetation, and other property because of the City's AFFF, and its toxic PFAS components, released by the City into the environment at and near LSE.

122. As a result of Defendants' tortious conduct and the resulting contamination, Plaintiffs and Class Members consumed PFAS contaminated household water which has caused them to suffer an increased risk of illness, disease, disease processes because of such exposure. To appropriately address such increased risk, Plaintiffs and Class Members require an award of the cost of a program for medical monitoring for early detection and/or identification of such illness, disease, or disease processes. Early detection of such illness, disease, and/or disease processes will benefit Plaintiffs and Class Members.

123. Plaintiffs and Class Members were significantly exposed to PFAS, increasing their risk of illness, disease, and disease process, and causing the medical necessity of diagnostic testing for the early detection of latent or misidentified illness, disease, and disease process, and the resulting pecuniary loss of the costs of that testing, proximately caused by Defendants' tortious conduct.

124. Accordingly, Plaintiffs and Class Members seek compensation for the costs of medical monitoring for early detection of illness, disease, and disease processes beneficial to Plaintiffs and Class Members, and the costs of administration of that testing, or in the alternative the award of reasonable and necessary costs of the establishment of a court-supervised program of medical monitoring and diagnostic testing through equitable and/or injunctive relief.

PLAINTIFFS AND CLASS MEMBERS HAVE SUFFERED PAST AND PRESENT INJURY FOR WHICH THEY NEED DIAGNOSTIC TESTING DUE TO THEIR

INCREASED RISK OF DISEASE CAUSED BY EXPOSURE TO TOXIC PFAS COMPONENTS CONTAINED IN AFFF USED BY THE CITY

125. Plaintiffs and Class Members have suffered past, present, and future injury as a result of their significant exposure to and consumption of household water contaminated with toxic PFAS components contained in AFFF used and released by the City at and around LSE. Plaintiffs and Class Members have ingested PFAS-contaminated water which was absorbed into their tissue and bloodstream. Because of their past significant exposure, Plaintiffs and Class Members have suffered past, present, and future increased risk of illness, disease, or disease processes, including cancer, making it presently medically necessary that they undergo diagnostic testing for early detection of illness, disease, and disease processes.

126. PFAS are toxic and carcinogenic to humans. For decades, the manufacturers' memoranda, outside scientific literature, and regulatory agencies have made clear that exposure to PFAS causes various adverse health effects, including cancer.

127. Studies have made clear that exposure to PFAS bioaccumulates and results in toxic invasion and persistence in human tissue and bloodstreams, including Plaintiffs' and Class Members' tissue and bloodstreams, and altering the structure of their bodies.

128. Moreover, based on available scientific literature, exposure to toxic PFAS components places Plaintiffs and Class Members at increased risk of developing several serious illnesses, diseases, and disease processes.

129. With early detection and identification, Plaintiffs and Class Members can seek early treatment and prepare their lives accordingly for the toxic consequences of significant exposure to toxic PFAS components.

130. The City did not seek or obtain permission or consent from Plaintiffs or Class Members before engaging in tortious acts and/or omissions that caused, allowed, and/or resulted

in their significant exposure to the known toxic PFAS components contained in the City's release of AFFF from and around LSE.

131. As a proximate result of the City's tortious conduct, Plaintiffs and Class Members have been, are presently, and will continue to be at a significantly increased risk of illness, disease, or disease processes, including cancer. Plaintiffs' and Class Members increased risk of illness, disease, and disease process makes it reasonably medically necessary to incur, both now and in the future, the cost of diagnostic testing for the early detection of illness, disease, and disease processes arising from their exposure to toxic PFAS components.

132. Plaintiffs and Class Members have legally protected interests in not being exposed to harmful levels of toxic PFAS components contained in AFFF which significantly increase their risk of illness, disease, and disease processes. Plaintiffs and Class Members also have legally protected interests in avoiding the past, present, and future medical need for expensive diagnostic tests and the pecuniary injury of the costs of medically necessary diagnostic tests.

133. Plaintiffs and Class Members have been exposed to toxic PFAS components of AFFF. As a result of the City's releases of AFFF, and its toxic PFAS components, Plaintiffs' and Class Members' household water supply has been contaminated. Plaintiffs and Class Members relied on that water supply and therefore ingested and absorbed toxic PFAS components into their bloodstream and tissue. As a direct and proximate result of these releases, Plaintiffs and Class Members have suffered the past, present, and future need for diagnostic testing for the early detection and identification of PFAS-related illness, disease, and disease process.

134. Defendants' tortious conduct constitutes an invasion of legally protected interests of Plaintiffs and Class Members and has injured Plaintiffs and Class Members. Plaintiffs and

Class Members would not have suffered an increased risk of illness, disease, or disease process nor the consequent ongoing pecuniary injury of the need to incur costs of medically necessary diagnostic testing to identify the presence of illness, disease, or disease processes arising from their exposure to toxic PFAS components, but for the past and ongoing exposure they suffer as a proximate result of Defendants' tortious conduct.

135. But for Defendants' tortious conduct, Plaintiffs and Class Members would not have suffered significant exposure to toxic PFAS components from Defendants' AFFF. Such exposure has made it medically reasonably necessary for Plaintiffs and Class Members to engage in diagnostic testing to monitor and identify latent illness, disease, and disease processes. Diagnostic testing necessary to monitor and identify such illness, disease, and disease processes requires Plaintiffs and Class Members to suffer pecuniary injury of the cost of such diagnostic testing.

136. Medical monitoring is recognized as beneficial for early detection where there is an increased risk of disease from exposure to hazardous substances.[10] The purpose of medical monitoring in the form of diagnostic testing is the benefit of early identification of latent or unrecognized illness, disease, or disease process. Early detection is beneficial because treatment can then be given to reduce the impacts of the toxic exposure.[11] Medical monitoring is widely accepted as prudent response to toxic exposure.[12]

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[10] ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA, 60 F.R. 38841, July 28, 1995.
[11] *Id.*
[12] See www.c-8medicalmonitoringprogram.com/docs/med_panel_education_doc.pdf (last accessed Sept. 19, 2023); Dept. of Enviro. Health, *Ferland Medical Monitoring Program*, UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE, https://med.uc.edu/eh/research/projects/fcc/fmmp-history (last accessed Sept. 19, 2023); Enviro Health & Safety, *Pesticide Users Medical Monitoring Program*, UNIVERSITY OF FLORIDA (revised Jan. 21, 2014) www.ehs.ufl.edu/pgorams/ih/pesticide/ (last accessed Sept. 19, 2023);

137. Diagnostic testing procedures exist that make early detection the toxic effects of PFAS possible. These programs will benefit Plaintiffs and Class Members because they will allow for the early detection of latent or unrecognized disease associated with PFAS. Identifying cancer and other serious illness, disease, and disease process early allows greater treatment options, improves patient prognoses, and avoids more invasive, risky, and expensive medical interventions after an inaccurate diagnosis. Plaintiffs' and Class Members' overall medical outlook depends on early diagnosis: the sooner a person is checked, the better the ultimate outcome.[13]

138. Periodic diagnostic testing for the early detection of illness, disease, and disease process conforms to standards of medical care and are reasonably necessary to ensure that illness, disease, and disease processes can be identified early and treated aggressively. Effective diagnostic tests exist for reliable early detection. Early detection combined with effective treatment significantly decrease the severity of the illness, disease, disease process, or injury.[14] The present value of costs of such tests is calculable, and Plaintiffs and Class Members will prove such costs at trial.

139. For example, Plaintiffs and Class Members exposed to PFAS from AFFF have been significantly exposed to PFOA, a known toxic substance.

140. Plaintiffs' and Class Members' exposure to PFOA has caused them to suffer an increased risk of thyroid disease. Monitoring procedures exist for early detection of thyroid disease through thyroid screening, including blood samples to measure thyroid stimulating

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World trade Center Health Program, *About the Program*, CENTERS FOR 379.

[13] www.cancer.org/content/dam/CRC/PDF/Public/8671.00.pdf (last accessed Sept. 19, 2023).

[14] DISEASE CONTROL AND PREVENTION, www.cdc.gov/wtc/about.html (last updated Dec. 15, 2017).

hormone, and monitoring strategies to assess the progression of the disease.

141. Plaintiffs' and Class Members' exposure to PFOA has caused them to suffer an increased risk of testicular cancer. Monitoring procedures exist for early detection of testicular cancer through use of testicular examinations and ultrasound procedures.

142. Plaintiffs' and Class Members' exposure to PFOA has caused them to suffer an increased risk of kidney cancer. Monitoring procedures exist for early detection of kidney cancer through use of screening for its presence by medical questionnaires, abdominal examinations, and urine tests. Additional testing mechanisms including MRIs, CT scans, and ultrasounds allow for detection of disease symptoms.

143. These monitoring procedures are different in type, timing, frequency and/or scope from what would normally be recommended in the absence of exposure to toxic PFAS components. The general unexposed population does not receive procedures of the type, timing, frequency, and/or scope necessitated by significant exposure to toxic PFAS components from AFFF because these tests are designed to detect specific illnesses, diseases, and disease processes known to be associated with exposure to toxic PFAS components.

144. Because of their exposure to toxic PFAS components contained in AFFF, Plaintiffs and Class Members require medically necessary diagnostic testing to diagnose the warnings signs of PFAS-related illness, disease, and/or disease processes. Early detection of illness, disease, and disease processes caused by exposure to toxic PFAS components allows Plaintiffs and Class Members more treatment options, reduces treatment costs, and increases their chances of an improved outcome. The progression from subcellular and/or other latent alterations in the structure and function of Plaintiffs' and Class Members' bodies to the outward manifestation of serious disease can be delayed for years. If such illness, disease, or disease

process is permitted to develop until it becomes obvious, patent, or recognized, Plaintiffs and Class Members will have lost valuable time and disease progress and will likely suffer more severe or long-term health effects and require more costly interventions.

145. As a direct and proximate result of Defendants' tortious conduct Plaintiffs and Class Members suffered significant exposure to toxic PFAS components of Defendants' AFFF which significantly increased their risk of illness, disease, and disease, process. Therefore, Plaintiffs' and Class Members' have in the past and presently need to incur the cost diagnostic testing to monitor and identify latent illness, disease, and disease process.

DEFINITION OF THE CLASS

146. This action is brought by the Plaintiffs individually on their own behalf and as representatives of the class defined below seek to certify and maintain this matter as a class action pursuant to Wisconsin Statute §803.08(1) and (2)(c), (2)(b), or alternatively (6) (FRCP 23(b)(1), (b)(2), (b)(3), or alternatively (c)(4)).

147. The Members of the Medical Monitoring class are defined as:

> All persons who on or after January 1, 1970, occupied residential real property with private wells within the Class Area which obtained household water from those wells, and who:
>
> > during the period from birth up to their 20th birthday, consumed household water containing 20 ppt of PFOA or greater or were breastfed by a mother who consumed household water containing 20 ppt of PFOA or greater during breastfeeding at their residential real property for a cumulate time period of one year or more, or who
> >
> > during the period from their 20th birthday or after, consumed household water at the residential real property they occupied for the number of days of consumption at specified PFOA water concentrations in Appendix A, or greater,
> >
> > and who
> >
> > served a notice of circumstances of claim and itemized claim on the City pursuant to §893.80(1d) (a) and (b), Stats.

148. The Private Well Class Geographic Area is defined as the Town of Campbell, Wisconsin.

149. Excluded from the Class are: (a) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (b) the Judge to whom this case is assigned and the Judge's staff; (c) any class counsel or their immediate family members; and (d) any State or any of its agencies.

COMPLIANCE WITH WIS. STAT. §803.08 (FED. R. CIV. P. 23) REQUIREMENTS

150. Plaintiffs and Class Members bring this action pursuant to Wisconsin Statute §803.08(1) and (2)(c) (FRCP 23(a) and (b)(3)), on behalf of themselves and all other persons similarly situated for the direct, proximate, and foreseeable injuries caused by exposure to and ingestion of toxic PFAS components in household water contaminated by AFFF released at LSE and designed, manufactured, sold, and/or distributed by Defendants. The Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Wisconsin Statute §803.08(1) and (2)(c) (Fed. R. Civ. P. 23 (a) and (b)(3)).

(I) Numerosity

151. The members of the Class are so numerous that joinder of all members is impracticable. The number of owned and/or formerly owned properties is in the hundreds, and there are nearly one thousand members of the Class who have been exposed to toxic PFAS components released on or around LSE as described herein and who have served a claim upon the City, pursuant to §893.80(1d) (a) and (b), Stats. Members can be easily identified as those individuals who have served claims upon the City, pursuant to §893.80(1d) (a) and (b), Stats.

(II) Typicality

152. The Representative Plaintiffs' claims are typical of the claims of the members of the Classes since the members of the Classes consumed household water from private wells in the Class Area at levels and frequencies defined above resulting in injury to all members of the Classes. Plaintiffs and Class Members were and are similarly or identically harmed and their claims arise from the same actions and/or inactions of the City. Plaintiffs and all Class Members were exposed to toxic PFAS components from AFFF used by the City. As a result, each Plaintiff and Class Member reasonably requires present and future medical monitoring to ensure early detection of illness, disease, and disease process caused by exposure to PFAS.

(III) Adequate Representation

153. The Representative Plaintiffs will fairly and adequately protect the interests of members of the Class Members and have retained counsel competent and experienced in tort, class action and environmental litigation.

154. The Representative Plaintiffs and their counsel are committed, and have the resources, to vigorously prosecute this action on behalf of the Class.

155. There are no material conflicts between the claims and the Representative Plaintiffs and Class Members that would make class certification inappropriate.

156. Neither Plaintiffs nor their counsel have interests adverse to any of the other Plaintiffs or the other members of the Class.

(IV) Predominance of Common Questions

157. Plaintiffs and Class Members bring this action under Wis. Stat. §803.08(2)(c) (FRCP 23(b)(3)) because numerous questions of law and fact common to Class Members predominate over any question affecting only individual members. The answers to these

common questions will advance resolution of the litigation as to all Class Members. These common legal and factual issues include:

(a) the type or kinds of toxic PFAS components from AFFF that have been and are being released from LSE;

(b) the activities of the City that have resulted in the contamination of the household water supplies and other properties of the Plaintiffs and the Class Members by AFFF and its toxic PFAS components;

(c) the nature and toxicity of the toxic PFAS components from AFFF released from LSE;

(d) whether the property rights of Plaintiffs and the Class Member property owners have been and will continue to be diminished by the interference with property rights caused by the contamination as a result of the City's release of AFFF containing toxic PFAS components;

(e) whether the Plaintiffs and Class Member property owners have suffered the need for and the cost of mitigation at and remediation of their properties;

(f) whether the City owed a duty to Plaintiffs and Class Members;

(g) whether the City breached a duty owed to Plaintiffs and Class Members;

(h) whether the PFAS contamination of Plaintiffs' properties by the City's actions was reasonably foreseeable;

(i) whether the City knew or should have known that their use of AFFF, and its toxic PFAS components, was unreasonably dangerous;

(j) Whether the City knew of should have known that their AFFF containing toxic PFAS components were and are persistent, stable, mobile, and likely to contaminate household water;

(k) whether the City was negligent in its use of AFFF, and its toxic PFAS components, at LSE;

(l) whether the City failed to sufficiently warn residents of French Island of the potential for harm that resulted from its use of AFFF containing toxic PFAS components;

(m) whether the City's actions constitute a trespass;

(n) whether the City's actions constitute a nuisance;

(o) whether the City became aware of the health and environmental harm caused by toxic PFAS components in the AFFF used by the City and failed to warn Plaintiffs and Class Members of the same;

(p) whether Plaintiffs and Class Members have been significantly exposed to toxic PFAS components as a result of the City's use of AFFF.

(V) Superiority

158. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable.

159. The City has acted on grounds generally applicable to the Class, thereby making appropriate final legal and/or equitable relief with respect to the Class as a whole.

160. Furthermore, the expense and burden of individual litigation outweighs the individual injuries suffered by individual Class Members, making it impossible for members of the Class to individually redress the wrongs done to them.

161. Class treatment of common questions of law and fact will conserve the resources of the courts and the litigants and will promote consistency and efficiency of adjudication.

162. There will be no difficulty in the management of this action as a class action.

WIS. STAT. §803.08(2)(b) (FRCP 23(b)(2)) EQUITABLE RELIEF REQUIREMENTS

163. In addition to, or in the alternative to, the above, Plaintiffs and Class Members bring this class action under Wis. Stat. §803.08(2)(b) (FRCP 23(b)(2)) because Defendants have acted or refused to act on grounds that apply generally to the Class Members as a whole, such that final equitable relief is appropriate respecting the class as a whole.

164. Defendants have acted and/or refused to act on grounds applicable generally to the Class Members as a whole. The City's use of AFFF, and its toxic PFAS components, resulted in releases into the environment, including at and around LSE, which they knew or should have known would occur through the ordinary and intended uses of the AFFF.

165. The City's decision to not make known for years the presence and migration of PFAS in the groundwater on French Island and the toxic characteristics of PFAS components contained in AFFF when they knew or should have known that PFAS are highly toxic, mobile, and persistent in the environment resulted in the continued release and migration of the product into Plaintiffs and Class Members' household water supplies. Accordingly, the City's acts and/or refusal to act have similarly affected Plaintiffs and Class Members as a whole because it has resulted in contamination of their household water supplies, exposure to and/or ingestion of PFAS, and an increased risk of illness, disease, and disease process.

166. Equitable relief sought by Plaintiffs and Class Members includes, but is not limited to, the implementation and funding of a medical monitoring program for the Plaintiffs and Class Members sufficient to monitor the health of the Plaintiffs and Class Members to ensure the beneficial early detection of illness, disease, and disease process caused by exposure to toxic PFAS components of AFFF. Court supervised programs such as medical monitoring are paradigmatic of equitable relief intended to mitigate or prevent the risk of illness, disease, and

disease process caused by the City's acts and omissions. Therefore, Plaintiffs and Class Members seek establishment of a common program of diagnostic testing because of common conduct that will benefit the class as a whole.

167. Plaintiffs and Class Members present a cohesive class because each of the members have been significantly exposed to toxic PFAS components contained in AFFF which presents an increased risk of illness, disease, and disease process to the class as a whole. Further, medical monitoring and diagnosis programs exist to which benefit Plaintiffs and Class Members because they will not be forced to allow latent illness, disease, or disease process to become manifest.

WIS. STAT. §803.08(6) (FRCP 23(C)(4)) REQUIREMENTS

168. In the alternative, this case is properly maintained as a class action with respect to the following issues under §803.08(6) (FRCP 23(C)(4)):

(a) The liability of the City and others under Plaintiffs' and Class Members' claims for relief resulting from of the City's releases AFFF containing toxic PFAS components designed, manufactured, sold, and/or distributed by Defendants;

(b) The liability of the City for Plaintiffs' and Class Members' exposure to toxic PFAS components, including under legal theories of nuisance, negligence, failure to warn, and battery;

(c) Whether Plaintiffs and Class Members have been exposed to toxic PFAS components contained in AFFF;

(d) The nature and types of toxic PFAS components which are contained in AFFF used by the City;

(e) The nature and toxicity of the PFAS components contained in AFFF used by the City;

(f) Whether the City knew or should have known of the nature and toxicity of the PFAS components in AFFF they used;

(g) Whether the City negligent and/or tortious conduct caused Plaintiffs' and Class Members' significant exposure to toxic PFAS components contained in AFFF;

(h) Whether the City knew or should have known that use of AFFF containing toxic PFAS components would contaminate Plaintiffs' and Class Members' properties and household water supplies;

(i) Whether, as a result of exposure to toxic PFAS components contained in AFFF, Plaintiffs and Class Members suffer an increased risk of contracting serious latent illness, disease, and disease process;

(j) Whether exposure to toxic PFAS components contained in AFFF caused Plaintiffs' and Class Members' medical need for diagnostic testing for early detection of illness, disease, and disease process;

(k) Whether diagnostic testing exist for the beneficial early detection of illness, disease, or disease process caused by PFAS;

(l) Whether the reasonably medically necessary diagnostic testing is different from medical procedures normally recommended in the absence of exposure; and

(m) Whether Plaintiffs' and Class Members' exposure to toxic PFAS components from AFFF has made a program of medical monitoring, including diagnostic testing for early detection of illness, disease, or disease process, reasonably necessary.

169. The above referenced issues would materially advance the present claims for relief as required pursuant to §803.08(6) (FRCP 23(c)(4)). Therefore, the above referenced issues are of the type for which certification pursuant §803.08(6) (FRCP 23(c)(4)) is appropriate.

CLAIM I
NEGLIGENCE AND NEGLIGENCE *PER SE*

As for their first claim for relief, the Plaintiffs and Class Members allege:

170. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

171. At all times relevant hereto, the City owed Plaintiffs and Class Members a duty to act with reasonable care, so as to avoid contamination of the environment and of household drinking water supplies with known hazardous substances and to avoid harm to those who would foreseeably consume water and be exposed to the toxic PFAS components used by the City and to not jeopardize Plaintiffs' and Class Members' health and welfare and cause them to suffer a loss of the use of their private drinking water wells and/or to incur water replacement costs, and/or medical diagnostic expenses.

172. The City further knew or should have known that it was unsafe, unreasonably dangerous, and/or hazardous to use AFFF with toxic PFAS components because it was highly probable that toxic PFAS components would migrate into the environment surrounding LSE, and contaminate the groundwater used to supply household water.

173. Given the likelihood that French Island would become contaminated with toxic PFAS components resulting from the City's half-century of use of AFFF on and around LSE, the City had a duty to investigate the extent to which the toxic PFAS components in AFFF released on French Island were likely to migrate through surface water and/or groundwater and contaminate Plaintiffs' and Class Members' properties and household water supplies.

174. The City knew or should have known that the use of AFFF containing toxic PFAS components was hazardous to human health and the environment.

175. Knowing of the dangerous and hazardous properties of AFFF, the City had a duty to warn of the presence of PFAS in groundwater and the hazards of ingesting water containing toxic PFAS components.

176. Upon information and belief, the City breached its duty of care by creating and/or failing to mitigate the creation of water pollution (both surface and groundwater). The City also breached its duty of care to the Plaintiffs and Class Members by failing to adequately supervise and train employees. The City has failed to properly train and supervise employees and contractors performing ultra-hazardous activities while working at the LSE facility; failed to exercise reasonable care to contain toxic PFAS once the City knew it had polluted a large area in and about Plaintiffs' and Class Members' property and knew the harmful PFAS which permeated groundwater, and/or soil in and about of the area of Plaintiffs' and Class Members' property, created a substantial health risk to Plaintiffs and Class Members and others; failed to timely warn the residents of the neighborhood, including the Plaintiffs and Class Members, of the presence and migration of PFAS in groundwater on French Island and the health hazards associated with the PFAS, and failed to take appropriate measures to prevent the spread of PFAS; failed to notify authorities in a timely fashion of the full gravity and nature of the ground and surface water contamination; failed to prevent or mitigate health hazards and damage to the value of the property in and about the neighborhood, including the real property occupied by Plaintiffs and Class Members; failed to timely and effectively remediate the spills of AFFF; and failed to comply with applicable industry standards, internal safety rules, and state and federal safety laws, rules, regulations and standards.

177. The acts of the City constitute negligence and negligence *per se* as a result of the City's violations of state, federal and local rules, regulations, statutes and ordinances. The City's

negligent acts are a substantial factor in causing Plaintiffs and Class Members to suffer injuries, as set forth herein, including without limitation, past and ongoing increased risk of illness, disease, and disease processes, actual or imminent damage to their residential water supplies, and discomfort and harm to property occupied by them, persons, and livestock or pet(s). The negligently created environmental harms have been a substantial factor in creating personal fear, worry, anxiety, marital discord, inconvenience, discomfort, and harm, and further forcing Plaintiffs and Class Members to incur expenses for monitoring the supply and control of water, and expert consultants' fees, all to Plaintiffs' and Class Members' damage.

178. Upon information and belief, as a direct and proximate result of the foregoing acts and/or failures to act of the City, the Plaintiffs and Class Members have been damaged as a result of significant exposure to toxic PFAS components resulting in past and ongoing increased risk of illness, disease, and disease processes and a loss of enjoyment of properties occupied by them due to the nuisances and water pollution set forth above, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further injuries as the evidence may establish.

179. The multiple injuries that the Plaintiffs and Class Members have sustained are permanent in nature, thereby causing them to suffer ongoing increased risk of illness, disease, and disease processes, loss of use of their private drinking water well, and personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of disease or illness in the future.

180. As direct and proximate result of the aforementioned negligent conduct of the City, Plaintiffs and Class Members have been damaged due to the loss of society, companionship and services of each other.

CLAIM II
PUBLIC NUISANCE

As and for their second claim for relief, the Plaintiffs and Class Members allege:

181. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

182. Plaintiffs and Class Members are members of the public and the community surrounding LSE. Plaintiffs and Class Members use and benefit from public waterways and groundwater in the vicinity of LSE.

183. The conduct and activities of the City in its use of AFFF on and in the vicinity of LSE constitute a public nuisance in that such activities substantially or unduly interfere with the use of public places, public waterways, and the groundwater in common use by the Plaintiffs and Class Members.

184. The activities of the City further substantially or unduly interferes with the activities of the entire community, and are specially injurious to the health and offensive to the senses of Plaintiffs and Class Members and specially interferes with and disturbs their comfortable enjoyment of their life and of their property, which is different in kind from the injury suffered by the general public.

185. As a direct and proximate result of the public nuisance created and perpetuated by City's tortious conduct, Plaintiffs and Class Members have suffered, and will in the future continue to suffer, interference with their use and enjoyment of public places, including public waterways and groundwater, and their own private property, diminution in property value, present and future remediation costs, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further injuries as the evidence may establish.

186. Unless the public nuisance caused by the tortious conduct of the City is abated, the use and enjoyment of public spaces, including public waterways and groundwater, and Plaintiffs' and Class Members' property and rights of enjoyment therein will be progressively diminished in value and their health will be further jeopardized.

187. As a direct and proximate result of the public nuisance caused by the City as alleged herein, Plaintiffs and Class Members were injured and suffered injuries as described herein.

CLAIM III
PRIVATE NUISANCE

As and for their third claim for relief, the Plaintiffs and Class Members allege:

188. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

189. Plaintiffs and Class Members have proprietary interests in certain real and personal property in the areas adversely affected by City's Airport operations. Plaintiffs also have the right to the exclusive use and quiet enjoyment of their property.

190. The tortious conduct of the City constitutes a private nuisance in that it has caused substantial injury and significant harm to, invasion and/or interference with, the comfortable enjoyment and private use by Plaintiffs and Class Members of their private real and personal property, and their rights to use in the customary manner their property and residences without being exposed to the dangers of water pollution.

191. The interference and invasion by the City exposing the Plaintiffs and Class Members to the aforementioned dangers is substantially offensive and intolerable.

192. The aforementioned conduct by the City causing said interference and invasion has occurred because said City has been and continues to be negligent and has failed to exercise

ordinary care to prevent its activities from causing significant harm to the Plaintiffs' and Class Members' rights and interests in the private use and enjoyment of property occupied by them.

193. Unless the nuisance is abated, property occupied by Plaintiffs and Class Members and their right to enjoy such property will be progressively further interfered with and diminished in value and their health will be further jeopardized.

194. As a direct and proximate result of the nuisance created by the City, Plaintiffs and Class Members have suffered, and continue to suffer, substantial interference with their normal use and enjoyment of property occupied by them and rights incidental thereto, present and future remediation costs, severe emotional distress, personal fear, anxiety, inconvenience and discomfort, and/or an unreasonable risk of future disease or illness, and other and further injuries as the evidence may establish.

CLAIM IV
TRESPASS

As and for their fourth claim for relief, the Plaintiffs and Class Members allege:

195. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

196. At all times relevant hereto, landowner and/or lessee Plaintiffs and Class Members were in lawful possession of certain real and personal property in the areas affected by the City's use of AFFF on and around LSE, as set forth above.

197. The City intentionally and/or recklessly committed the wrongful act of trespass by causing hazardous PFAS chemicals and/or other hazardous substances or toxins to invade the real and personal property of the landowner and/or lessee Plaintiffs and Class Members through the groundwater, surface water, and/or soil.

198. Upon information and belief, the Plaintiffs' and Class Members' well water was and remains contaminated with unacceptable levels of PFAS due to the trespassory actions of the City.

199. Plaintiffs and Class Members in no way consented or provided permission to the City's conduct which inevitably resulted in AFFF containing toxic PFAS components entry onto and contamination of Plaintiffs' and Class Members' residential real property. As a result, Plaintiffs and Class Members were exposed to and consumed toxic PFAS components which have invaded their bodies, bloodstream, and tissue. These trespasses occurred in the past, are occurring, and will continue to occur.

200. As a direct and proximate result of the City's acts of trespass, landowner and lessee Plaintiffs and Class Members were injured, and continue to be injured, in that they suffered damage to their real and/or personal property and to their health and wellbeing, including hazardous PFAS chemicals leaving the LSE property or otherwise being deposited on the ground by City employees which was, and is, deposited on Plaintiffs' and Class Members' property, along with contamination of groundwater and/or surface water moving from LSE and other areas where the City used AFFF onto Plaintiffs' and Class Members' property, and such actions constitute a trespass on property owned or lawfully possessed by Plaintiffs and Class Members, and has been and still is a substantial factor in causing past and future injuries to the Plaintiffs and Class Members.

CLAIM V
BATTERY

As and for their fifth claim for relief, the Plaintiffs and Class Members allege:

201. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

202. The City's intentional tortious conduct has caused, is causing, and will continue to cause harmful and offensive contact with Plaintiffs and Class Members.

203. As a result of the City's tortious conduct, releases of toxic PFAS components in AFFF into ground and household water supplies have foreseeably migrated into the Class Area and exposed Plaintiffs and Class Members to household water which contained toxic PFAS components. Toxic PFAS components consumed by Plaintiffs and Class Members were absorbed into their bloodstream and body tissues and continue to alter their bodies' structures which constitutes harmful and offensive contact.

204. The City's intentional tortious conduct caused bodily harm to the Plaintiffs and Class Members in a way not justified by Plaintiffs' and Class Members' apparent wishes or by any privilege, and the contact was in fact harmful and/or against Plaintiffs' and Class Members will.

205. The City's intentional tortious conduct included:

(a) the use and spilling of AFFF containing toxic PFAS components to be used, as intended, in a manner that would inevitably cause contamination of household water which would be consumed by persons using that household water including Plaintiffs and Class Members.

(b) concealment by the City of its knowledge that AFFF and its toxic PFAS components had entered the groundwater on French Island and had migrated through the groundwater, and concealment by the City of its knowledge that AFFF and its toxic PFAS components' chemical characteristics made them substantially certain to harm Plaintiffs and Class Members who were exposed to, and contacted by, PFAS unknowingly, without permission, and against their will.

206. The City lacked any privilege or consent to cause harmful and offensive contact with Plaintiffs and Class Members by the toxic PFAS components of AFFF they knew had been released into the environment and contaminated water supplies, and exposed Plaintiffs and Class Members to PFAS contaminated water supplies without their consent.

207. The City's contact was harmful because it altered the structure, form, and/or physical condition of Plaintiffs' and Class Members' bodies and increased their risk of suffering illness, disease, or disease process.

208. The City's contact with Plaintiffs and Class Members was offensive in that contact with PFAS-contaminated water is offensive to a person with reasonable sense of personal dignity. Such contact would offend the ordinary person and not one unduly sensitive as to his personal dignity. The City's contact was therefore unwarranted by the social usages prevalent at the time and place at which it was inflicted.

209. The City's actions constituted constructive intent to injury; their intent to injure may be inferred from their conduct which was likely to threaten the safety of others and was so reckless or manifestly indifferent to the consequences Defendants were practically certain their acts and omissions would cause harmful and offensive contact.

210. As set forth above, The City's conduct was intentional, malicious, and in complete disregard of Plaintiffs' and Class Members' rights.

211. As a result of the City's tortious conduct, Plaintiffs and Class Members suffered bodily harm in the form of alteration of the physical condition, structure, and/or function of their bodies, resulting from their significant exposure to PFAS-contaminated water supplies.

212. As a direct result of the City's conduct and resulting contamination of Plaintiffs' and Class Members' household water supply, water systems, private wells, and other property,

by the toxic PFAS components of the AFFF, the Plaintiffs and Class Members have incurred and will incur the injuries identified herein.

CLAIM VI
INJUNCTIVE AND/OR DECLARATORY RELIEF

As and for their sixth claim for relief, the Plaintiffs and Class Members allege:

213. Re-allege and incorporate by reference as if fully set forth herein all of the preceding allegations.

214. As a direct and proximate result of the above-described conduct of the City, and the injuries described herein, Plaintiffs and Class Members intend to seek the following equitable relief:

A. That a judicial determination and declaration be made of the rights of the Plaintiffs and Class Members and the responsibilities of the City with regard to the injuries caused by said the City to the fullest extent allowed by law;

B. That the City be required, to the fullest extent allowed by law, to restore Plaintiffs' and Class Members' property and LSE property to the condition it was in prior to being contaminated by PFAS and/or other contaminants.

DAMAGES SOUGHT BY THE CLASS

215. Plaintiffs and Class Members incorporate by reference the allegations contained in the proceeding paragraphs as if they were fully set forth herein.

216. Plaintiffs and Class Members seek an award of the costs of a program of medically necessary diagnostic testing for the early identification and detection of illness, disease, and/or disease process associated with significant exposure to chemical components of AFFF containing toxic PFAS components.

WHEREFORE, Plaintiffs and the Class Members demand judgment as follows:

A. For an order certifying the Class under Wisconsin Statute §803.08(1) and (2)(c) (FRCP 23(a) and (b)(3)) appointing Plaintiffs as Class Representatives and the undersigned and Class Counsel;

B. Alternatively, for an order certifying the Class under Wisconsin Statute §803.08(1) and (2)(b) (FRCP 23(a) and (b)(2));

C. Alternatively, for an order certifying the Class issues under Wisconsin Statute §803.08(1) and (6) (FRCP 23(a) and (c)(4));

D. Compensatory damages against the Defendants in a sum to be determined by verdict, together with interest on said sum;

E. For their costs and disbursements;

F. Equitable and injunctive relief specified herein; and

G. Such other and further relief as this Court deems just and equitable.

FITZPATRICK, SKEMP & BUTLER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Timothy S. Jacobson
Timothy S. Jacobson, WI Bar No. 1018162
1123 Riders Club Rd
Onalaska, WI 54650
608.784.4370
tim@fitzpatrickskemp.com

SINGLETON SCHREIBER, LLC
Attorneys for Plaintiffs and Class Members

Dated: October 12, 2023.

Electronically signed by Kevin S. Hannon
Kevin S. Hannon, WI Bar No. 1034348
Joseph A. Welsh (*Pending Pro Hac Vice*)
1641 Downing Street
Denver, CO 80218
720.704.6028
khannon@singletonschreiber.com

Paul Starita (*Pending Pro Hac Vice*)
SINGLETON SCHREIBER, LLC
591 Camino de la Reina #1025
San Diego, CA 92108
720.704.6028
pstarita@singletonschreiber.com

PLAINTIFFS HEREBY DEMAND TRIAL BY A JURY OF TWELVE (12).

APPENDIX A

Exposure Characteristics Expected to Cause Significant Increases in Peak or Cumulative Serum PFOA Concentrations and Health Risks

Water PFOA Concentration (ppt)	Cumulative Days of Consumption
20	2650
21	2263
22	1994
23	1791
24	1631
25	1501
26	1392
27	1299
28	1218
29	1148
30	1086
31	1031
32	981
33	936
34	895
35	858
36	824
37	792
38	763
39	736
40	711
41	688
42	666
43	646
44	626
45	608

46	591
47	575
48	560
49	546
50	532
51	519
52	506
53	495
54	483
55	473
56	462
57	453
58	443
59	434
60	425
61	417
62	409
63	401
64	394
65	387
66	380
67	373
68	367
69	361
70	355

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION

Master Docket No. 2:18-mn-2873-RMG

This document relates to:

City of Camden et al v. 3M Company et al;
Case No: 2:23-cv-03147-RMG

City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), DuPont de Nemours Inc., The Chemours Company, The Chemours Company FC LLC, and Corteva, Inc.
Case No. 2:23-cv-03230-RMG

AFFIDAVIT OF KRISTA GALLAGER

I, Krista Gallager, hereby declare that the following is true and correct:

1. I am the Deputy City Attorney for the City of La Crosse (the "City"), and I submit this declaration in support of the City's objection to the proposed Settlements. The following is based on my personal knowledge, and if called to testify, I would competently testify thereto.

2. The City is a Class Member to both the 3M and DuPont class action settlements.

3. The City is an active Public Water System under both the 3M and DuPont class action settlements.

4. The City has had one or more Impacted Water Sources, and has multiple wells with detected PFAS prior to the Settlement Date.

I declare under penalty of perjury, per 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed this 10th day of November, 2023, in La Crosse County, WI.

/s/ *Krista Gallager*

Krista Gallager

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2023, I filed and served a true and correct copy of the foregoing via UPS upon the following counsel and the Court. I further certify that on the 11th day of November, 2023, I served a true and correct copy of the foregoing via email on the following counsel and the Court. The Clerk of Court confirmed that the foregoing was received via email by the Court on November 11, 2023 and requested an updated header which is reflected in the filing.

Due to Veteran's Day observance on November 10, and Veteran's Day on Saturday, November 11, falling on the Court deadline, filing credentials were delayed and were not available until today. As a result, the foregoing was added to the electronic docket on November 15, 2023. Also on November 15, 2023, the Case Administrator for the Hon. Richard M. Gergel confirmed via email that a case filing date of November 10, 2023 would be honored by the Court.

Clerk, United States District Court
gergel_ecf@scd.uscourts.gov
DISTRICT OF SOUTH CAROLINA
85 Broad Street
Charleston, SC 29401

Kevin H. Rhodes, Legal Affairs
krhodes@mmm.com
3M COMPANY
3M Center
220-9e-01
Saint Paul, MN 55144

Thomas J. Perrelli
tperrelli@jenner.com
JENNER & BLOCK LLP
1099 New York Avenue Northwest
Suite 900
Washington, DC 20001

Joseph F. Rice
jrice@motleyrice.com
MOTLEY RICE
28 Bridgeside Boulevard
Mount Pleasant, SC 29464

Richard F. Bulger
rbulger@mayerbrown.com
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606

Paul Napoli
pnapoli@nsprlaw.com
NAPOLI SHKOLNIK
1302 Avenue Ponce de Leon
San Juan, San Juan 00907

Michael A. London
mlondon@douglasandlondon.com
DOUGLAS & LONDON
59 Maiden Lane
6th Floor
New York, NY 10038

Elizabeth A. Fegan
beth@feganscott.com
FEGAN SCOTT LLC
150 S. Wacker Drive
24th Floor
Chicago, IL 60606

Michael T. Reynolds
mreynolds@cravath.com
CRAVATH, SWAINE & MOORE LLP
825 8th Avenue
New York, NY 10019

Scott Summy
ssummy@baronbudd.com
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219

Jeffrey M. Wintner
jmwintner@wlrk.com
gwmeli@wlrk.com
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019

Kevin T. Van Wart
kevin.vanwart@kirkland.com
KIRKLAND & ELLIS LLP
300 North La Salle
Chicago, IL 60654

EXHIBIT W

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2-18-mn-2873-RMG This Document Relates to: *City of Camden, et al. v. 3M Company,* Case No. 2:23-cv-03147-RMG; *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), DuPont de Nemours Inc., The Chemours Company, The Chemours Company FC LLC, and Corteva, Inc.* Case No. 2:23-cv-03230-RMG

LEECH LAKE BAND OF OJIBWE'S NOTICE OF MOTION AND MOTION FOR CLARIFICATION OF SETTLEMENT AGREEMENTS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Leech Lake Band of Ojibwe (the "Band"), by and through its counsel, will and hereby do move this Court, for the reasons set forth in its Memorandum of Law in Support of this Motion, for leave to seek clarification from the parties of the 3M and DuPont Settlement Agreements pursuant to Federal Rule of Civil Procedure 23.

Specifically, the Band seeks clarification from the parties as to whether federally recognized Tribes are within the settlement class definitions, and if so, what consideration is being offered to them in exchange for the release, and how the indemnity provisions effect Tribes.

The grounds for this motion are as follows:

1. Federal Rule of Civil Procedure 23(c)(2)(B) "specifies information that must be included in a notice, such as the nature of the action, the definition of the class, and the claims, issues, and defenses . . . . The rule requires that notices state essential terms 'concisely and clearly . . . in plain, easily understood language." *Manual for Complex Litigation (Fourth)* §21.31 (2004); Fed. R. Civ. P. 23(c) (amended 2018).
2. A settlement agreement must identify the settlement class and the claims intended to be released with specificity. "Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by final judgment, and (3) entitled under Rule 23(c)(2) to the 'best notice practicable' in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable." *Manual for Complex Litigation (Fourth)* §21.222 (2004).
3. Ambiguities as to whether federally recognized Indian Tribes are included in either settlement class, whether natural resource damages claims are included in the releases, and

how the indemnity provisions impact Tribes. Until these ambiguities are resolved, the Leech Lake Band of Ojibwe, as well as over 500 federally recognized Tribes, cannot make informed decisions whether to opt out, remain in, or object to either settlement.

Respectfully submitted,

Dated: November 3, 2023

/s/ Eric B. Fastiff
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Elizabeth J. Cabraser
Eric B. Fastiff
Dan Drachler
Robert J. Nelson
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
ecabraser@lchb.com
efastiff@lchb.com
ddrachler@lchb.com
rnelson@lchb.com

Emily N. Harwell
250 Hudson Street, 8th Floor
New York City, NY 10013
Telephone: (212) 355-9500
eharwell@lchb.com

SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY LLP
Frank S. Holleman, IV
145 Willow Street
Suite 200
Bonita, CA 91902-1349
Telephone: (619) 267-1306
fholleman@sonosky.com

K. Amanda Saunders
510 L Street
Suite 310
Anchorage, AK 99501
Telephone: (907) 258-6377
amandas@sonosky.net

LEECH LAKE BAND OF OJIBWE
Christopher Murray
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 335-3673
christopher.murray@llojibwe.net

Ralph Overholt
Tribal Attorney
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 407-7229
ralph.overholt@llojibwe.net

Attorneys for LEECH LAKE BAND OF OJIBWE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 3rd day of November, 2023 and was thus served electronically upon counsel of record.

Dated: November 3, 2023

/s/ Eric B. Fastiff
Eric B. Fastiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2-18:mn-2873-RMG This Document Relates to: *City of Camden, et al. v. 3M Company,* Case No. 2:23-cv-03147-RMG; *City of Camden, et al. v. E.I. DuPont de Nemours and Company (n/k/a EIDP, Inc.), DuPont de Nemours Inc., The Chemours Company, The Chemours Company FC LLC, and Corteva, Inc.* Case No. 2:23-cv-03230-RMG

MEMORANDUM OF LAW IN SUPPORT OF LEECH LAKE BAND OF OJIBWE'S MOTION FOR CLARIFICATION OF SETTLEMENT AGREEMENTS

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I. INTRODUCTION

The Leech Lake Band of Ojibwe (the "Band") seeks to clarify the settlement class definitions and terms in the pending 3M and DuPont Settlement Agreements (Dkt. Nos. 3620-1, 3393-2) regarding their impact on federally recognized Tribes, including whether Tribes are included in the Settlement Classes, whether natural resource damages claims are included in the Releases, and how the indemnification provisions impact Tribes. In addition, the Band requests that a corrected or clarifying notice be disseminated. Until these ambiguities are resolved, the Leech Lake Band of Ojibwe, as well as over 500 federally recognized Tribes, cannot make informed decisions whether to opt out, remain in, or object to either settlement.

Here is an example of the Band's uncertainty. The Band has eleven water systems. The water that supplies one of the Band's schools tested positive for PFAS contamination, but the other ten systems have not tested positive. The Band's right to a remedy under the 3M Settlement is unclear, because the school water system does not supply enough people to qualify for the 3M Class. Of the Band's other ten water systems, several would qualify for the 3M Class by number of users, but have not tested positive and are not required to test for PFAS under UCMR-5. In sum, it appears that one of the Band's water systems has PFAS contamination, and the Band has incurred substantial costs, but it has no remedy under the settlement because none of the Band's water systems appear to qualify for the 3M Class.

Under the DuPont Settlement, the Band's contaminated water system supplying the school—which does appear to be within the DuPont Class—is only eligible for a one-time payment of $1,750. But it is unclear that if the Band accepts the DuPont Settlement for that one water system whether it releases claims the Band may have for costs associated with adverse health effects for the hundreds of students and staff that have for years been drinking contaminated water at the school. As a result of PFAS contamination in this system, the Band has been forced to

provide bottled water to its students and staff and seeks certainty regarding the cost of accepting the DuPont Settlement and releasing claims. In addition, if it accepts the $1,750 settlement, does the Band also release natural resource claims (for fish, game, wild rice, and soil contamination)?

Specifically, the Band seeks clarification of these issues that impact Tribes:

1. Are federally recognized Tribes, and Public Water Systems owned by Tribes, included in the Settlement Classes? (States and the federal government, which like Indian Tribes are sovereigns, are excluded from the Settlement Classes, but the Settlement Class definitions do not expressly address Tribes.).

2. If yes, are the Class Members Public Water Systems, or the owners of Public Water Systems? (Specifically, is a federally recognized Tribe the Class Member, or is the individual Public Water System that the Tribe owns the Class Member? Whether a sovereign tribal nation that owns multiple Public Water Systems is the Class Member significantly affects the legal implications of opting out of or remaining in the settlement classes.).

3. Can a Tribe that owns multiple Public Water Systems opt out some Systems but have others remain in the Class without releasing the claims of the Systems that opt out?

4. Are future claims of a tribal-owned Public Water System that is not a Class Member released if that same Tribe owns a Public Water System that is a Class Member and that remains in the Class?

5. Are claims for remediation and/or damages resulting from PFAS contaminated natural resources, such as fish, game, and crops (including wild rice) covered by the Releases and Covenants Not to Sue?

6. If a Tribe opts out some Public Water Systems but has others remain in the Class, does the Tribe release all the Tribe's claims for fish, game, crop, and soil remediation and/or damages?

7. Do the release provisions excluding real property claims also exclude release natural resource claims in connection with real property?

8. If a Tribe files an action against 3M or DuPont related to contaminated natural resources, and the source of contamination is a non-tribal Class Member's contaminated water source, would the Class Member (*e.g.*, a city, county, or water district) be liable for the contamination rather than 3M or DuPont?

9. Are claims seeking remediation, monitoring, and/or damages related to costs, such as supplying bottled water, incurred by Tribes and Tribal Health Organizations as a result of PFAS contamination in a Public Water System covered by the Releases and Covenants Not to Sue?

10. How do the indemnity and claims-over provisions of each Settlement impact Tribal Class members? (As sovereign nations, federally recognized Tribes are more akin to states or the federal government than to cities, counties, or water districts. Sovereign nations have different responsibilities, needs, and concerns than a city, county, or water district. If a Tribe remains in a settlement class, it is unclear whether the indemnity provisions shift liability from 3M and DuPont onto the Tribe.).

II. STATEMENT OF FACTS

The Leech Lake Band of Ojibwe is a federally recognized Indian tribe, 88 Fed. Reg. 2112 (Jan. 12, 2023), residing on the Leech Lake Indian Reservation near Cass Lake, Minnesota. The Reservation was established through a series of treaties with the United States and presidential executive orders. *See* Treaties of February 22, 1855 (10 Stat. 1165) & March 19, 1867 (Article I, 16 Stat. 719); Executive Orders of October 29, 1873, November 4, 1873, & May 26, 1874. These

treaties and executive orders promised to make the Reservation the "permanent home" for the Leech Lake people. There are approximately 10,000 enrolled Band members.

Tribes are sovereign nations which existed before the establishment of the United States and continue to exercise sovereignty "over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (citation omitted); *see also Williams v. Lee*, 358 U.S. 217, 218 (1959). Within their territory, which includes Indian reservations, Tribes maintain traditional ways of life that depend on their natural resources, *see Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), and also develop their lands and resources under the "firm federal policy of promoting tribal self-sufficiency and economic development," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). To meet their obligations, Tribes operate modern and dynamic governments, which provide infrastructure and government services that promote autonomy and the health and welfare of tribal members and the communities in which they live, and regulate the health of the natural environment that supports their communities' livelihoods. Tribal infrastructure and services include water systems that Indian tribes—like Plaintiff Water Providers in the Settlement Classes—own and operate and that continue to be affected by the actions of 3M and DuPont.

A. The Band's School's Water System Has PFAS Contamination

The Leech Lake Band of Ojibwe owns and operates eleven water systems on the Reservation, including seven Community Water Systems and four Non-Transient Non-Community Water Systems. In late 2022, the Band received a grant from the Bureau of Indian Affairs that funded PFAS sampling of the Band's water systems. Testing identified detectable levels of PFAS in the Band's Non-Transient Non-Community Water System that provides water to the Band's Bug-O-Nay-Ge-Shig School. In April 2023, the Band notified its citizens of the

PFAS contamination, ceased use of the contaminated water system, and began providing bottled water to students and staff.

As a water provider that identified PFAS in its systems prior to the settlement dates, the Band's School's water system should be included the Settlement Agreements. And while the School's water system appears to qualify for the DuPont class, it serves too few people to qualify for the 3M class. (The Band is a putative class member under section 5.1 of the DuPont Settlement (Dkt. No. 3393-1)). However, for reasons discussed below, it is unclear whether Indian Tribes like the Band, or Public Water Systems owned by Tribes, were intended to be included in either Settlement Class.

B. <u>Sovereign Tribal Water Systems Generally Serve Many Fewer People than Class Water Systems</u>

There are 574 federally recognized Tribes in the United States. Many of these Tribes provide water on Indian reservations, and most own and operate more than one Public Water System. In addition, most Tribes provide water to rural populations. As a result, Tribal Water Systems serve fewer people than many of those Systems included in the Settlement Classes.[1]

For example, in 2013, the Safe Drinking Water Information System ("S.D.W.I.S.") reported 847 Tribal Public Water Systems serving a total population of 1,269,153.[2] Of these, only 18 water systems served populations greater than 10,000.[3] In comparison, S.D.W.I.S. reported 67,864 Non-Tribal Public Water Systems serving a total population of 306,347,928.[4] On May 2, 2012, the E.P.A. published its Third Unregulated Contaminant Monitoring Rule ("UCMR-3"),

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[1] Summaries of the 3M and DuPont Settlement Class membership requirements are listed in Appendix A.
[2] Kira Mok et al., *Federal PFAS Testing and Tribal Public Water Systems*, 130 Env't Health Persp. 12 (Dec. 14, 2022), accessible at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9749477/ (last visited Nov. 3, 2023).
[3] *Id.*
[4] *Id.*

requiring public water systems nationwide to monitor from 2013 to 2015 for thirty contaminants, including PFAS.[5] Analysis completed under UCMR-3 only included 27 of the 847 Tribal Public Water Systems.[6] Most Non-Tribal Public Water Systems (65,904 of the 67,864) were included under UCMR-3.[7] As a result, most Tribes were excluded from EPA-required early PFAS testing.

More recently, in 2022, S.D.W.I.S. reported 855 Tribal Public Water Systems serving a total population of 1,400,197.[8] Of these, only 98 systems serve populations greater than 3,300.[9] Based on population size, only the largest 98 Tribal Public Water Systems are required to test under UCMR-5.[10] While the EPA began providing grants to test larger water systems, the EPA belatedly recognized a gap in testing Tribal Public Water Systems. The EPA has since implemented a Tribal PFAS Drinking Water Sampling Project. *However, the vast majority of results of the Sampling Project will not be available until after the settlement opt-out deadlines*, adding to Tribes' confusion as to whether they are in the Settlement Classes, and if so, whether the benefits justify not opting-out.[11]

III. ARGUMENT

A. The Settling Parties Must Clarify Whether Tribes are Class Members, and if so, What Claims They Are Releasing

This Court should grant the Band's Motion for Clarification and enter an order directing the settling parties to explain whether the Settlement Classes include Tribes, if so, what

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[5] E.P.A., *Revisions to the Unregulated Contaminant Monitoring Regulation (UMCR 3) for Public Water Systems*, 77 Fed. Reg. 26072 (May 2, 2012) ("All large community and non-transient non-community water systems serving more than 10,000 people are required to monitor.").
[6] *See* Kira Mok, *supra* note 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *See* E.P.A., *Tribal PFAS Drinking Water Sampling Project*,, accessible at https://www.epa.gov/tribal-pacific-sw/tribal-PFAS-drinking-water-sampling-project (last updated Oct. 3, 2023).

consideration is provided to Tribes and *what* claims Tribes are releasing, and how Tribes are impacted by the indemnity provisions. A settlement agreement must identify with specificity the settlement class and the claims intended to be released.[12] Further, a settlement notice[13] "must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connections with the proceedings.'" *Masters v. Willhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007).

The principle purpose of Rule 23(e)(1) is "to ensure that absentee class members, for whom a settlement will have preclusive effect, have an opportunity to review the materials relevant to the proposed settlement and to be heard or otherwise take steps to protect their rights before the court approves or rejects the settlement." *2 McLaughlin on Class Actions* § 6:17 (10th ed. 2013). "Rule 23(c)(2)(B) specifies information that must be included in a notice, such as the nature of the action, the definition of the class, and the claims, issues, and defenses . . . . The rule requires that notices state essential terms 'concisely and clearly . . . in plain, easily understood language.'" *Manual for Complex Litigation (Fourth)* §21.31 (2004); Fed. R. Civ. P. 23(c) (amended 2018).[14] In failing to

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[12] "Defining the class is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled under Rule 23(c)(2) to the 'best notice practicable' in a Rule 23(b)(3) action. The definition must be precise, objective, and presently ascertainable." *Manual for Complex Litigation (Fourth)* §21.222 (2004). Further, "[i]f the definition fails to include a substantial number of persons with claims similar to those of the class members, the definition of the class may be questionable. . . . If the class definition includes people with similar claims but divergent interests or positions, subclasses with separate class representatives and counsel might suffice." *Id*.

[13] "Notice . . . provides the structural assurance of fairness that permits representative parties to bind absent class members. In a Rule 23(b)(3) class, notice conveys the information absent class members need to decide whether to opt out and the opportunity to do so." *Manual for Complex Litigation (Fourth)* § 21.31 (2004) (footnote omitted).

[14] *See also* Fed. R. Civ. P. 23(e) (amended 2018); Fed. R. Civ. P. 23 Advisory Committee's Notes to 2018 Amendments ("The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or . . . to object or to make claims.").

explicitly include or exclude Tribes, the settlement notices and the agreements themselves do not appear to satisfy Rule 23.

B. The Settlement Agreements Are Ambiguous as to Whether Tribes Are Included in the Settlement Classes.

Tribes are more similar to states and the federal government, which are excluded from the Settlement Classes, than the cities, counties, and water districts ("Water Providers") that the settlements include. Unlike the Water Providers, Tribes are sovereign "and subordinate to, only the Federal Government." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980). As sovereigns, Tribes have different needs and concerns than the Water Providers. However, both Settlement Agreements fail to address whether or not Tribes are treated in a similar manner as federal and state sovereigns.

The 3M Settlement Agreement fails to address Tribes in the Settlement Class definition. (Dkt. No. 3620-1 ¶ 2.75). Phase One Eligible Claimants are either (1) Community Water Systems providing water to residents of a city or community; or (2) Non-Transient Non-Community Water Systems serving more than 3,300 individuals. *Id*. Phase Two Eligible Claimants are those systems that are subject to UCMR-5 monitoring. *Id*. Water systems subject to UCMR-5 monitoring are Public Water Systems serving more than 3,300 individuals. *See supra* note 2, at 3. The 3M Settlement Agreement mentions Tribes only once: Exhibit F to the 3M Settlement Agreement identifies several water systems owned by Tribes as Phase Two Eligible Claimants.[15] (Dkt. No. 3620-1, Ex. F). But the parties explain that Exhibit F "is illustrative only" and that the parties only "have attempted" to list Phase Two Eligible Claimants in Exhibit F. (Dkt. No. 3620-1 ¶ 5.2). The

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[15] It is unclear how the parties established the list in Exhibit F, but the list may have been created from records on the S.D.W.I.S.

lack of clarity as to the actual status of Tribes in the language of the 3M Settlement must be resolved in order to provide Tribes the opportunity to exercise their rights.

The DuPont Settlement Agreement is seemingly more inclusive of all water systems – regardless of size, although like the 3M Settlement Agreement it generally excludes state and federal systems, with exceptions expressly defined in the agreement. (Dkt. No. 3393-2 ¶¶ 5.1.1, 5.1.2(b)-(c)). However, the DuPont Settlement Agreement is limited by the Phase One cut-off date. (Dkt. No. 3393, at 13). A Public Water System of any size qualifies for Phase One of the DuPont Settlement Class only if that water system tested positive for PFAS before the June 30, 2023 cut-off date. *Id*. Prior to June 2023, only a fraction of Tribal Public Water Systems received PFAS testing through the EPA.[16] Additionally, the Phase Two Eligible Claimants are limited to Public Water Systems that are subject to UCMR-5 monitoring or some similar state or federal PFAS testing requirements, and many Tribes have historically been excluded from most federal and state PFAS testing. (Dkt. No. 3393-2 ¶ 5.1.1). Lastly, the DuPont Settlement Agreement and Exhibits do not mention Tribes or any Tribal Water Systems. (Dkt. No. 3393-2). As with the 3M Settlement, the information sought in this Motion is necessary to protect the Tribal rights.

C. The Releases are Ambiguous Regarding Natural Resource Damages Claims.

A crucial part of any class settlement agreement is the description of the release. If Tribes or the water systems they own and operate are members of either Settlement Class, they risk releasing claims unique to sovereigns, including natural resource damages. However, neither settlement agreement addresses whether class members release natural resource claims. Instead, as described below, the release provisions are broad and could be interpreted as either inclusive or exclusive of natural resource damage claims.

[16] *See* discussion of the belated EPA testing of Tribal water systems, *supra*.

The 3M Settlement Class releases five categories of PFAS-related claims: (1) Potable Water Claims; (2) PFAS Product Claims; (3) Non-Potable Water Claims; (4) PFAS Representation Claims; and (5) Punitive or Exemplary Claims. (Dkt No. 3620-1, ¶ 11.1.1(i-v)). The DuPont Settlement Class releases four categories of PFAS-related claims: (1) PFAS Contamination Claims related to potable water, facilities, and real property; (2) PFAS Product Claims; (3) PFAS Remediation Claims; and (4) PFAS MDL Claims. (Dkt. No. 3393-2, ¶ 12.1.1(i-iv)).

Both settlements include two categories of claims excluded from each release: (1) real property claims, so long as the real property is separate from and not related to a Public Water System, and (2) stormwater and waste water claims. (Dkt. No. 3620-1, ¶ 11.1.2.1(i)-(ii); Dkt. No. 3393-2 ¶ 12.1.2(a)). The system or facility must be separate from and unrelated to the Class Member's Public Water System. (Dkt. No. 3620-1, ¶ 11.1.2.2(i)-(ii); Dkt. No. 3393-2, ¶ 12.1.2(a)).

Neither settlement provides a definition for "real property" or explains whether natural resources, such as fish, game, soil, surface water, and crops are treated separately from real property. If real property, such as a residential home, is contaminated through the use of water from a contaminated Public Water System, it is unclear whether claims for remediation of contaminated fish from a river passing through the property would be released if the river is separate from the Public Water System. Likewise, it is unclear whether claims for contamination of wild rice crops on the property contaminated by a separate water system for irrigation are released.

Because of cultural significance and subsistence lifestyles, natural resource contamination is a significant concern for Tribes. For example, fish, deer, and wild rice are sources of cultural significance and staples of the Leech Lake Band members' diets. The Band has a duty to remediate contamination of its natural resources for tribal members' health and safety and the continuation

of their culture and lifeways. In 2018-2019, the EPA identified PFAS contamination of Northern Pike located in the Leech Lake River on the Leech Lake Band's Reservation.[17] The Band is undergoing testing of other species of fish, deer, and wild rice so that it may issue consumption advisories to tribal members to prevent further health impacts.

As the Settlement Agreements are written, it is not possible for Leech Lake to know whether claims arising from the contamination of these resources, and the Band's obligation to remediate that contamination, are released. For example, it is unclear whether Leech Lake may remain in a settlement class and also bring a legal action against 3M and/or DuPont for the contamination of wild rice or fish if the source of the contamination is related to a contaminated Public Water System that does not fall within the class definitions if another of the Band's Public Water Systems is included. As a result, it is not possible for the Band to make an informed decision to opt out or to remain in the settlement classes. The same is true for many other Tribes that did not have the benefit of PFAS testing in advance of the June 22, 2023 deadlines. The parties must resolve this ambiguity so that Tribes that are eligible Class Members may make an informed decision whether to remain in either Settlement Class.

D. The Indemnification Provisions Remain Overbroad and Ambiguous as to Tribes.

The Settlement Agreements also fail to address how Tribes are impacted by the indemnification provisions. For example, if a Tribe remains in either Settlement Class, the Tribe may be required to indemnify 3M or DuPont from any claim related to the Tribe's contaminated drinking water – exposing the Tribe to an uncapped financial obligation that could easily exceed

[17] In 2018-2019, the EPA surveyed fish from rivers and streams throughout the United States. *See* EPA, *National Rivers and Streams Assessment*, accessible at https://www.epa.gov/national-aquatic-resource-surveys/nrsa (last updated Mar. 9, 2023). Although results of the study are not yet available, the data has been published and identifies PFAS contamination in Northern Pike in the Leech Lake River.

any amount the Tribe receives through the settlements. Because the Leech Lake Band's contaminated water system is a Non-Transient Non-Community Water System, the Band is only entitled to $1,750 from the DuPont settlement. If the Band was required to indemnify DuPont for a surrounding city or county's claims, that amount undoubtedly will exceed the Band's settlement payment.

Conversely, Tribes not included in the 3M or DuPont Settlement Classes would be limited by the indemnity provisions if any PFAS contamination is related to a Class Member's water. For example, if a Tribe files an action against 3M related to contaminated fish, and the source of contamination is a non-tribal Class Member's contaminated water source, the Class Member (*e.g.*, a city, county, or water district) would be liable for 3M's contamination rather than 3M itself.

States too expressed concern for sovereigns' indemnity obligations under the Settlement Agreements. *See* States' & Sovereigns' Omnibus Opp'n to Pls.' Mot. Prelim. Approval of Class Settlement (Dkt. No. 3460). Specifically, the States argued "[t]he Sovereigns [] have the responsibility to protect the health and welfare of their citizens. . . . Because this provision, as written, would require each class member to indemnify 3M as to any such claim by a Sovereign, it would effectively paralyze the class members' ability to accept such funding, thereby leaving them without the full amount needed to protect their customers with effective PFAS treatment." *Id*. at 9. The indemnification provisions in the Settlement Agreements were revised to exclude States. *See* Prelim. Approval Order for 3M Settlement Agreement (Dkt. No. 3626); Prelim. Approval Order for DuPont Settlement Agreement (Dkt. No. 3603).

However, the issues raised in the States' opposition remain concerns for Tribes. As a Class Member of the DuPont Settlement, it is unclear whether the indemnity provision shifts DuPont's liability onto the Leech Lake Band of Ojibwe if the Band remains in the Settlement Class.

Likewise, the 3M indemnity provision could shift 3M's liability onto a Class Member, such as Cass County, to remediate the contamination of water at the Band's Bug-O-Nay-Ge-Shig School. Therefore, for Tribes, the indemnification provisions remain overbroad, or at a minimum, ambiguous, and must be addressed.

IV. CONCLUSION

A class settlement agreement must clearly identify the class, the consideration, and the scope of the claims being released. The 3M and DuPont Settlement Agreements fail to address several issues of concern for Tribes, including whether federally recognized Tribes are included in the settlement classes, whether natural resource damages claims are included in the Releases, and how indemnification provisions impact Tribes. Until these ambiguities are resolved, the Leech Lake Band of Ojibwe, as well as other federally recognized Tribes, cannot make informed decisions whether to opt out or remain in either settlement class. For the reasons set forth above, the Band respectfully requests the Court grant the Band's Motion for Clarification and direct the parties to resolve the several ambiguities described.

Dated: November 3, 2023

Respectfully submitted,

By: */s/ Eric B. Fastiff*

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Elizabeth Cabraser
Eric B. Fastiff
Dan Drachler
Robert Nelson
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008
ecabraser@lchb.com
efastiff@lchb.com
ddrachler@lchb.com
rnelson@lchb.com

Emily N. Harwell
250 Hudson Street, 8th Floor
New York City, NY 10013
Telephone: (212) 355-9500
eharwell@lchb.com

SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY LLP

Frank S. Holleman, IV
145 Willow Street
Suite 200
Bonita, CA 91902-1349
Telephone: (619) 267-1306
fholleman@sonosky.com

K. Amanda Saunders
510 L Street
Suite 310
Anchorage, AK 99501
Telephone: (907) 258-6377
amandas@sonosky.net

LEECH LAKE BAND OF OJIBWE
Christopher Murray
Legal Director
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 355-3676
christopher.murray@llojibwe.net

Ralph Overholt
Tribal Attorney
190 Sailstar Drive NE
Cass Lake, MN 56633
Telephone: (218) 407-7229
ralph.overholt@llojibwe.net

Attorneys for Leech Lake Band of Ojibwe

APPENDIX A

A. The 3M Settlement Class

The Proposed Settlement Class includes "[e]very Active Public Water System in the United States of America that—(a) has one or more Impacted Water Sources[18] as of [June 22, 2023]; or (b) does not have an Impacted Water Source as of [June 22, 2023], and (i) is required to test for certain PFAS under UCMR-5[19], or (ii) serves more than 3,300 people, according to SDWIS.[20]" (Dkt. No. 3620-1 ¶ 5.1). An estimated 12,000 water systems fall within the Proposed Settlement Class definition. (Dkt. No. 3370-1, at 14).

"Each Active Public Water System that qualifies as a member of the proposed Settlement Class is either a 'Phase One Eligible Claimant' or a 'Phase Two Eligible Claimant,' but cannot be both." (Dkt. No. 3626 (citing Dkt. No. 3620-1 ¶ 5.1)). Eligible Claimants with one or more Impacted Water Sources as of June 22, 2023, are "Phase One Eligible Claimants," and Eligible Claimants that do not have one or more Impacted Water Source as of June 22, 2023, are "Phase Two Eligible Claimants." (Dkt. No. 3620-1 ¶ 2.25).

The Settlement Agreement organizes water systems into the following categories:

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[18] An Impacted Water Source is a potable water source that has tested positive for PFAS. (Dkt. No. 3620-1, ¶ 2.30).

[19] UCMR-5 means the U.S. E.P.A.'s Fifth Unregulated Contaminant Monitoring Rule which requires certain Public Water Systems to test for drinking water contaminants. Public water systems serving more than 10,000 people are required to test under UCMR-5. Systems serving 3,300 to 10,000 people, and 800 representative Public Water Systems serving fewer than 3,300 people are required to test, subject to funding and laboratory capacity. *See* Fifth Unregulated Contaminant Monitoring Rule, https://www.epa.gov/dwucmr/fifth-unregulated-contaminant-monitoring-rule.

[20] S.D.W.I.S. is the U.S. E.P.A. Safe Drinking Water Information System. *See* S.D.W.I.S. Federal Reports Search, https://sdwis.epa.gov/ords/sfdw_pub/r/sfdw/sdwis_fed_reports_public/200.

1. Community Water System. A Community Water System "serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents." (Dkt. No. 3620-1 ¶ 2.18).

2. Non-Transient Non-Community Water System. This type of water system "is not a Community Water System" and "regularly serves at least twenty-five (25) of the same persons over six (6) months per year." (Dkt. No. 3620-1 ¶ 2.36).

3. Transient Non-Community Water System. A Transient Non-Community Water System "is not a Community Water System" and "does not regularly serve at least twenty-five (25) for at least (6) months per year." (Dkt. No. 3620-1 ¶ 2.75).

The Settlement Agreement provides a lengthy, multi-part definition for the term "Public Water System." (Dkt. No. 3620-1 ¶ 2.54). First, a water system must provide potable water "through pipes or other constructed conveyances," and the system must (a) have "at least fifteen (15) service connections" or (b) regularly serve "an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year[.]" *Id.*

Second, the definition includes "(a) any collection, treatment, storage, or distribution facilities under control of the operator of such system and used primarily in connection with such system," and "(b) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system." *Id.* Lastly, a water system must be "a Community Water System of any size or a Non-Transient Non-Community Water System that serves more than 3,300 people, according to S.D.W.I.S[.]" *Id.*

Public Water Systems excluded from the Proposed Settlement Class include Non-Transient Non-Community Water Systems serving 3,300 or fewer people and all Transient Non-Community Water Systems. (Dkt. No. 3620-1 ¶ 2.54). Among those excluded are all Public

Water Systems owned by the federal government and any state government. (Dkt. No. 3620-1, Ex. H); (Dkt. No. 3620-1, Ex. I). However, the Settlement Class definition, as well as other provisions of the Settlement Agreement, fails to clearly identify whether Tribes are intended to be included in the Settlement Class, what consideration is provided to Tribes, what claims Tribes are releasing, and how Tribes are impacted by the indemnity provision.

B. The DuPont Settlement Class

The DuPont Settlement Class includes (1) all Public Water Systems in the United States "that draw or otherwise collect from any Water Source[21] that, on or before [June 30, 2023], was tested or otherwise analyzed for PFAS and found to contain PFAS at any level"; and (2) all Public Water Systems in the United States "that, as of [June 30, 2023], are (i) subject to the monitoring rules set forth in UCMR 5[,]" or (ii) are "required under applicable state or federal law to test or otherwise analyze any of their Water Sources or the water they provide for PFAS before the UCMR 5 Deadline." (Dkt. No. 3393-2 ¶ 5.1.1). An estimated 14,000 water systems are included in the DuPont Settlement Class. (Dkt. No. 3393, at 15.)

All active and inactive Community Water Systems, Non-Transient Non-Community Water Systems, and Transient Non-Community Water Systems are included in the DuPont Settlement's Public Water System definition. (Dkt. No. 3393-2 ¶ 5.1.1). However, all Transient Non-Community Water Systems and Non-Transient Non-Community Water Systems serving fewer than 3,300 individuals are limited to small, one-time payments from the Settlement.[22]

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[21] A Water Source is "any groundwater well, surface water intake, and any other intake point from which a Public Water System draws or collects Drinking Water." §2.16. Drinking Water means "water that has entered or is provided by a Public Water System, including water stored or maintained by a Public Water System for distribution to customers or users." (Dkt. No. 3393-2 ¶ 2.71).

[22] Transient Non-Community Water Systems will receive a one-time payment of $1,250, and Non-Transient Non-Community Water Systems serving fewer than 3,300 people will receive a one-time payment of $1,750. (Dkt. No. 3393-2, Ex. C, at 10), (Dkt. No. 3393-2 ¶ 4(f)(ii), at 23), (Dkt.

Public Water Systems <u>excluded</u> from the Proposed Settlement Class include those owned and operated by any state government and by the federal government. (Dkt. No. 3393-2 ¶¶ 5.1.2(b), (c). The Settlement Class definition, as well as other provisions of the Settlement Agreement and exhibits, fails to identify whether Tribes are intended to be included in the Settlement Class, what consideration is provided to Tribes, what claims Tribes are releasing, and how Tribes are impacted by the indemnity provision.

No. 3393-2 ¶ 5(g)(ii)). Recipients of these payments <u>are not</u> eligible for any additional payments other than those for testing eligible water systems in the amount of $200 per system. *Id*.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 3rd day of November, 2023 and was thus served electronically upon counsel of record.

Dated: November 3, 2023

/s/ Eric B. Fastiff
Eric B. Fastiff