No. _____

In the United States Court of Appeals
for the Fifth Circuit

SHANNAN WHEELER, ET AL.,

Plaintiffs-Respondents.

– v. –

ARKEMA INC.

Defendant-Petitioner.

On Petition for Permission to Appeal from the United States District Court for the Southern District of Texas, No. 4:17-cv-2960
Hon. Keith P. Ellison

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CERTIFICATE OF INTERESTED PERSONS

Wheeler et al. v. Arkema Inc., No. ____.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The sole corporate party to this case, Arkema Inc., is a wholly owned subsidiary of Arkema Delaware, Inc. There are no publicly held companies that own 10% or more of the stock of Arkema Inc. However, Arkema Inc. is indirectly owned by Arkema, S.A., a French public company.

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INTRODUCTION

This is a mass-tort action arising out of releases from defendant Arkema Inc.'s facility in Crosby, Texas that resulted from Hurricane Harvey, the wettest tropical cyclone in recorded U.S. history. Plaintiffs allege that the class was commonly exposed to and injured by chemicals that, though ubiquitous in the environment and having a multitude of sources within the class area, assertedly are attributable to the air and water emissions only from Arkema's facility. The district court (Ellison, J.) certified a sweeping class of all individuals and businesses that reside or own property within a seven-mile radius around Arkema's facility—an area of over 150 square miles—and authorized both damages and unprecedented, untested classwide injunctive remedies for medical surveillance and property remediation. The district court's order requires this Court's review for several reasons.

First, in holding that common issues predominate, the district court ignored overwhelming evidence that questions of exposure, causation, and injury are highly individualized. Those issues could not be tried consistent with the Rules Enabling Act and Arkema's right to due process.

Second, in endorsing plaintiffs' proposal to address individualized questions of causation and damages through a bifurcated trial plan requiring tens of thousands of separate trials in the second phase, the court effectively certified an issues class based on a misreading of this Court's precedents that necessitates this Court's clarification and correction.

Third, the district court did not hold plaintiffs to their burden of demonstrating that their allegations are susceptible to classwide proof. Instead, the court accepted allegations in the complaint unsubstantiated by evidence and justified its conclusion that the case can be tried as a class action by advancing the unsupported premise that variations in exposure, causation, and injury are irrelevant because everyone in the 150-square-mile class area could move around that area.

Fourth, the court impermissibly certified a class for novel injunctive remedies, again ignoring individualized issues of causation and injury that splinter the class cohesion that Rule 23(b)(2) requires.

And all of these problems with the court's order are unfortunately only a few items on a long list.

In short, the order below defies this Court's repeated admonition that mass-tort events are ordinarily unsuitable for class treatment because of significant individualized questions of liability and damages. The Court should grant the petition and allow an appeal of this "legally and practically significant class certification decision." *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007).

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. §§ 1331 and 1332(d). It entered its class-certification order on June 3, 2019. The order was unsealed on June 14, 2019. This petition is timely filed, and this Court has jurisdiction under 28 U.S.C. § 1292(e) and FRCP 23(f).

BACKGROUND

A. Statement of Facts

Hurricane Harvey hit southeast Texas in late August 2017, causing unprecedented flooding. That flooding precipitated five distinct emissions events at Arkema's Crosby facility over six days: the overflow of two wastewater tanks overwhelmed by floodwaters; two events in which chemicals decomposed for 30 minutes and then burned for 90; a

limited decomposition event; and a controlled burning initiated by authorities of trailers containing chemicals which lasted approximately 120 minutes. Resp. Ex. 23, at 2-1-15.

Plaintiffs allege that three chemical groups constituting "contaminants of concern," or "COCs," were released during the emissions events. Mot. 3. Emissions from vehicles, burning trash, and many other things contain all three; they are ubiquitous in the environment. Resp. Ex. 11, at 67-69; Ex. 25, at 102-104; Ex. 26, at 135-136, 175-177, 236-238. Experts for both parties acknowledge that within the class area there are multiple additional sources for these alleged contaminants, including the Harvey floodwaters themselves, the Houston air shed (Resp. Ex. 26, at 265), and Highway 90 and the rail line that each border the Crosby facility (*id.* at 273). The Texas Commission on Environmental Quality ("TCEQ") reported 19 non-Arkema air-release events occurring between August 25 and September 15, 2017 that could have affected the class area. Resp. Ex. 11, at 11. And Arkema's expert found within the class area 63 sites identified by EPA as sources of hazardous or toxic substances (including 15 active hazardous waste sites), eight

sites that contribute to groundwater contamination, and 30 leaking petroleum storage tanks. Resp. Ex. 9, at 26-27.

Searching for a connection to COCs, plaintiffs' experts took 248 ash, soil, water, and dust samples. Resp. Ex. 11, at 19. But the samples were not chosen to be representative of the class area, as the district court acknowledged. Op. 8. Although the class area extends seven miles from the Crosby facility, nearly 75% of the samples were taken within two miles of it. A mere 7% of the samples were taken between four and seven miles from the facility, even though that stretch accounts for 67% of the class area. Resp. Ex. 11, at 19. Plaintiffs' sampling was also directionally biased. For example, plaintiffs obtained no ash samples north or east of the Crosby facility, or more than 5.3 miles from the facility. Indeed, plaintiffs obtained only seven ash samples from just six of the 20,000-plus properties in the class area. *Id.*; Resp. Ex. 9, at 9.

Plaintiffs' selective sampling failed to find evidence of widespread elevated COC levels. For example, 82% of plaintiffs' soil samples for one of the COC categories (polycyclic aromatic hydrocarbons) were below the clean "background" sample used for comparison. Resp. Ex. 11,

at 46-47. This is consistent with other analytical work. Contemporaneous ambient-air monitoring of the area around the Crosby facility detected no constituents of potential concern above established screening values. Resp. Ex. 8, at 11. In 180 additional samples collected by a consultant, 99.975% did not exceed screening levels. *Id.* at 14-15. And none of the COCs was the culprit for the remaining 0.025%. *Id.*

As for groundwater, only three of plaintiffs' samples exceeded screening levels, and none involved the COCs. Resp. Ex. 10, at 10. EPA and Harris County Pollution Control Services found that there were no ongoing health risks associated with groundwater following the emissions at the Crosby facility. Resp. Ex. 8, at 16-19.

B. Class-Certification Proceedings

Plaintiffs brought common-law and federal statutory claims, seeking damages for diminution in property value and cleanup costs and injunctions ordering property remediation and medical surveillance.[1] Plaintiffs requested certification of a class of "all residents and real property owners located within a seven-mile radius of" Arkema's facility. Dkt. No. 124, at 2. Plaintiffs proposed a bifurcated trial plan, with

[1] Plaintiffs originally brought—but then strategically dropped—claims for personal injury as well.

purportedly common issues to be resolved during a single trial in the first phase and individualized issues of specific causation and damages to be resolved through multiple trials in the second phase. Mot. Ex. 3. The district court certified plaintiffs' requested class under Rules 23(b)(3) and 23(b)(2). Op. 18-39.

QUESTIONS PRESENTED

1. Did the district court err in holding that common issues predominate under Rule 23(b)(3)?

2. Did the district court err in certifying an injunctive-relief class under Rule 23(b)(2)?

REASONS FOR GRANTING THE PETITION

This Court has instructed "that it is appropriate to grant leave to appeal" under Rule 23(f) "where (1) a certification decision turns on a novel or unsettled question of law or (2) [a]n order granting certification … may force a defendant to settle rather than incur the costs of defending a class action." *Regents*, 482 F.3d at 379 (quotation marks omitted).

Five Circuits additionally have held that manifest errors in a district court's certification decision independently warrant Rule 23(f) re-

view.[2] This Court has not explicitly weighed in on this third basis for review, but it has repeatedly accepted Rule 23(f) appeals and reversed when the district court erred in certifying a class.[3]

Each of these three factors independently warrants immediate appellate review of the district court's decision.

I. THE DECISION BELOW IS MANIFESTLY ERRONEOUS AND RAISES UNSETTLED LEGAL QUESTIONS.

A. In Holding That Common Issues Predominate Under Rule 23(b)(3), The District Court Disregarded Individualized Issues Of Exposure, Causation, And Injury.

This Court has repeatedly recognized that a mass tort

> is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances

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[2] *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

[3] *See, e.g.*, *Ahmad v. Old Republic Nat'l Title Ins. Co.*, 690 F.3d 698 (5th Cir. 2012); *Madison v. Chalmette Refining, LLC*, 637 F.3d 551 (5th Cir. 2011); *Gene & Gene LLC v. BioPay, LLC*, 624 F.3d 698 (5th Cir. 2010); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. 2008); *Robertson v. Monsanto Co.*, 287 F. App'x 354 (5th Cir. 2008); *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007); *Regents*, 482 F.3d 372; *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732 (5th Cir. 2003).

> an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Madison, 637 F.3d at 556 (quoting FRCP 23(b)(3) advisory committee note); *accord, e.g.*, *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 378 n.2 (5th Cir. 2016); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006).

As in those cases, plaintiffs here "have not demonstrated that this tort has any exceptional features that warrant departing from the general rule and treating it as a class action." *Steering Comm.*, 461 F.3d at 604.

1. There is no feasible way to try the tens of thousands of claims in this case consistent with Arkema's due process rights and the Rules Enabling Act.

a. Abuse of the class-action device imposes unfair burdens on both absent class members and defendants. The Supreme Court has therefore mandated that district courts conduct a "rigorous analysis" into whether the party seeking class certification has "affirmatively demonstrate[d] his compliance" with Rule 23, and that Rule 23 be construed in a manner that protects against these abuses. *E.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 629 (1997).

One such abuse is to certify a class when doing so would preclude defendants from challenging each class member's claim in the same manner as they could in an individual action brought by a single plaintiff. Because the Rules Enabling Act forbids interpreting Rule 23 to "'abridge, enlarge or modify any substantive right,'" the Supreme Court has admonished that "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem*, 521 U.S. at 613. The same principle that governs "statutory defenses" applies to the defendant's right to bring a "challenge to a plaintiff's ability to prove an element of liability." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018).

Consistent with these principles, this Court has held that the predominance inquiry requires courts to "consider 'how a trial on the alleged causes of action would be tried'" to ensure that the case will not

"degenerat[e] into a series of individual trials" that are incompatible with class treatment. *Gene & Gene*, 541 F.3d at 326 (quotation marks omitted)). This analysis requires probing "the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Robinson*, 387 F.3d at 421 (quotation marks omitted).

b. Here, the district court did not engage in that "meaningful determination." If it had, the analysis would have revealed that individualized issues surrounding exposure, causation, and injury, as well as damages, overwhelm any common issues and would need to be litigated over 20,000 times on an individual-by-individual and property-by-property basis—an entirely unworkable proposition.

As Arkema pointed out to the district court, plaintiffs never did the work of demonstrating that exposure to the alleged contaminants could be proven on a class-wide basis. Plaintiffs' limited ash, soil, water, and dust sampling evidence was non-representative, ignoring vast portions of the class area. *See* page 5, *supra*.

This lack of evidence to demonstrate classwide exposure is especially glaring because, as the district court acknowledged, "wind and

flood patterns may have concentrated the contaminants in certain areas." Op. 26. One of plaintiffs' experts conceded that it is "normal and scientifically-accepted that air emissions from the Arkema plant would tend to follow the winds at the time of release." Resp. Ex. 16, at 4-5. Yet plaintiffs failed to offer any expert testimony on the effect of those winds on where the alleged contaminants fell—within the class area or otherwise.

The district court attempted to avoid the import of that fatal problem by stating that "contaminants were found radiating out in all directions from the facility" (Op. 26), but the record does not support that statement. One of the documents the court cited did not model where contaminants were deposited (Resp. Ex. 14, at 22), and the maps the court relied upon (noting the ground presence of COCs) did not purport to identify the source of such contaminants (Mot. Exs. 11, 13, 14).

The district court also failed to distinguish between claims based on exposure of persons (health risks) and those based on exposure of property (diminution in property value and remediation). Health risks are further complicated by individualized inquiries into where each individual class member was located at the time of, and after, the emis-

sion events at issue. The district court's analysis did not consider, for example, that government entities had established a 1.5-mile evacuation zone around the Crosby facility (Resp. Ex. 3, at 2-3), or that some named plaintiffs evacuated (Resp. Ex. 39, at 63), while others did not (Resp. Ex. 42, at 10-11)—variations that should have precluded treating the class as commonly affected or assuming that a substantial number within the class area were exposed at all.

In addition, each of the plaintiffs' common-law and statutory claims requires them to prove causation. The district court conceded that "[c]ausation could become individualized theoretically," but brushed that concern aside in a single sentence, stating (with no record citation) that "[b]ecause Plaintiffs focus only on chemicals with a strong link to the facility explosion, there are fewer hyper-localized alternative sources that would turn proof of causation into a series of mini-trials." Op. 31. Yet plaintiffs' limited sampling never demonstrated that the "strong link" between the contaminants and Arkema's facility that the court assumed—and that Arkema would be entitled to contest for each class member's claims—is susceptible to classwide proof. On the contrary, each of the contaminants is ubiquitous in the environment, and

experts for both parties recognized that sources unrelated to Arkema abound within the class area. *See* pages 4-5, *supra*. The district court's answer to the existence of alternative causes of any exposure was just as cursory and unsupported; the court simply stated that "alternative causes would likely apply to large chunks or all of the class area" (Op. 31)—despite evidence showing that isolating alternative sources requires a property-by-property analysis (Resp. Ex. 11, at 10-13).

To the extent the district court acknowledged individualized issues at all, it jumped past injury and focused almost exclusively on damages, making the analytical error of conflating the two. ***Injury***—an element of liability—cannot be proven classwide. For the reasons just discussed, plaintiffs did not show that exposure to the contaminants is capable of classwide proof. Neither did they show that any quantum of exposure to any of the contaminants is injurious, as the district court presumed. *See* Op. 27 ("it is certain that the health risks are severe"); Op. 32 ("the property rights of the class members are being damaged"). The district court's willingness to make assumptions about exposure and injury is illustrated, for example, by its certifying a damages class despite having ***excluded*** plaintiffs' sole expert on diminution of proper-

ty values (Op. 15, 35), and certifying a remediation class while ignoring the undisputed fact that the alleged COCs in the class area are at concentrations below established protective concentration levels (*see* pages 5-6, *supra*).

Finally, the district court conceded that both types of monetary damages plaintiffs request—cleanup costs and diminution in property values—require individualized determinations and are not susceptible to calculation through a classwide formula. Op. 34, 38. Yet the court endorsed plaintiffs' proposal that tens of thousands of individual damages trials could be avoided through use of "bellwether trials" in the "second phase of the case." *Id.* at 34. That was clear error: Plaintiffs' proposal to avoid individual issues of damages (and specific causation and injury) through bellwether trials is exactly the "novel project" of "Trial by Formula" that the Supreme Court squarely "disapprove[d]" in *Dukes* as incompatible with the Rules Enabling Act. 564 U.S. at 367.

2. The class certified by the district court is effectively an improper Rule 23(c)(4) issues class.

The district court's endorsement of plaintiffs' bifurcated trial proposal to ease the path to predominance was erroneous for the additional reason that it is forbidden by this Court's precedents, which hold that a

"'district court cannot manufacture predominance through the nimble use' of management tools." *Ibe v. Jones*, 836 F.3d 516, 531 (5th Cir. 2016) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996)). The rule in this Circuit is that "a cause of action, as a ***whole***, must satisfy the predominance requirement of (b)(3)" before a district court may employ case-management tools, such as Rule 23(c)(4), to "sever the common issues for a class trial." *Castano*, 84 F.3d at 745 n.21 (emphasis added); *accord, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

Yet plaintiffs' bifurcated trial plan was the sole basis on which the district court concluded that plaintiffs satisfied predominance notwithstanding their individualized damages claims. Op. 34-38. The court thus essentially certified a Rule 23(c)(4) issues class on the purportedly common issues to be resolved during the first phase of the trial.

The district court justified its decision by relying on *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014). Op. 36-37. In *Deepwater Horizon*, this Court—without mentioning *Castano*—appeared to endorse the use of "multi-phase trials under Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve

other issues for individual determination." 739 F.3d at 816. The opportunity to resolve any tension among the Court's precedents on this important legal issue is itself a strong reason to grant review.

Moreover, the district court's reliance on *Deepwater Horizon* was misplaced. *Deepwater Horizon* involved a settlement class, and therefore this Court did not have to consider whether it would have been feasible to conduct a trial on the individualized issues reserved for a later phase of the case. Indeed, the *Deepwater Horizon* decision itself states that when "'[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.'" *Id.* at 818 (quoting *Amchem*, 521 U.S. at 620). As the en banc Ninth Circuit recently ruled, "[a] class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable." *In re Hyundai & Kia Fuel Econ. Litig.*, --- F.3d ----, 2019 WL 2376831, at *7 (9th Cir. June 6, 2019). While *Deepwater Horizon* is therefore distinguishable, to the extent *Deepwater Horizon* conflicts with the Court's prior decisions in *Castano* and *Allison*, the prior deci-

sions control. *See United States v. Dial*, 542 F.3d 1059, 1060 (5th Cir. 2008).

3. The district court's suppositions in service of class certification lack evidentiary support and fail to hold plaintiffs to their burden of affirmatively satisfying the requirements of Rule 23.

The district court also failed to heed the Supreme Court's instruction that "Rule 23 does not set forth a mere pleading standard." *Dukes*, 564 U.S. at 350. The court relieved plaintiffs of their evidentiary burden to "affirmatively demonstrate [their] compliance with" Rule 23 (*id.*) by engaging in unsupported conjecture to fill in the gaps in plaintiffs' showing and accepting as true allegations in the complaint that plaintiffs never substantiated with evidence.

Most glaringly, when confronted with individualized issues of exposure, causation, or injury, the district court surmised repeatedly that these variations were irrelevant because everyone in the 150-square-mile class area could move around that area. *See* Op. 21 ("The health risks are common to the entire putative class, because putative class members are moving throughout the area and ***potentially*** encountering these contaminants as they do so.") (emphasis added); Op. 21-22 ("The putative class members, as they go about their daily lives and

move around the contaminated area, have ***likely*** been exposed to more than just the contaminants and concentrations found on their own property.") (emphasis added); Op. 26-27 ("individuals' exposure to contaminants results not just from contaminants on their properties, but from community-wide contaminants that individuals are exposed to as they go about their daily lives in the area"); Op. 28 ("Again, people often leave their homes, and if the putative class members do so here, they are ***potentially*** exposed to additional chemicals beyond just those found on their properties.") (emphasis added); Op. 32 ("[T]he class members who own property within the class boundary are more ***likely*** than the public at large to be moving within the contaminated area, and to experience more prolonged exposures to the contaminants.") (emphasis added).

Plaintiffs offered neither evidence nor argument in support of the district court's supposition about class members' movements. Plaintiffs also never argued that passing through a particular location within the class area is comparable for purposes of exposure, causation, and injury to residing or running a business there.

Relatedly, the district court recited allegations in the complaint

that plaintiffs offered no evidence to substantiate. For example, the court accepted plaintiffs' allegation that "all persons and property within a seven-mile radius of the Arkema facility were exposed to and negatively impacted by" the alleged contaminants. Op. 4; *see also* Op. 28 ("[p]laintiffs all face exposure and the concomitant health risks"); Op. 32 ("the property rights of the class members are being damaged"). The court justified a classwide medical-surveillance remedy by stating that "***If*** their allegations are true, Plaintiffs need to be repeatedly tested for health effects." Op. 27 (emphasis added). But the burden was on plaintiffs to provide evidence supporting their allegations; the district court was not permitted to take short cuts in service of its preference for class certification.

B. The District Court Impermissibly Certified An Injunctive-Relief Class Under Rule 23(b)(2).

The Supreme Court's opinion in *Dukes* makes clear that certification of a Rule 23(b)(2) class is appropriate only "when a single injunction … would provide relief to each member of the class." 564 U.S. at 360. In other words, the Rule 23(b)(2) class must be a "homogenous and cohesive group" whose members "suffer from a common injury properly addressed by classwide relief." *Allison*, 151 F.3d at 413.

For the reasons just discussed, that is far from the case here: Adjudicating each class member's entitlement to either of the two injunctive remedies authorized by the district court—medical surveillance or remediation—will require individualized inquiries into causation and injury discussed above.

> To be eligible for injunctive relief, a plaintiff must prove that
>
> (1) … it has suffered an irreparable injury; (2) … remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) … considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) … the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006). The Supreme Court has confirmed that this four-factor test applies in environmental cases and is not automatically satisfied by a violation of environmental laws. *See Monsanto v. Geerton Seed Farms*, 561 U.S. 139, 157 (2010); *see also LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 944 (7th Cir. 2019) (applying traditional four-factor test to Resource Conservation and Recovery Act ("RCRA") claim).

Moreover, no decision from this Court has authorized either a classwide medical-surveillance or a remediation injunction similar to those authorized here. Both the nature and source of the district court's

medical-surveillance remedy are uncertain. Plaintiffs' failure to provide basic details about how the requested medical-surveillance program would operate—what it would involve, how long it would last, and what symptoms would be surveilled—makes it impossible for the court to have determined whether a classwide injunction could be appropriate. In addition, while plaintiffs rely on RCRA as the source for a medical-surveillance injunction, there are no cases in this Circuit authorizing that remedy. The sole RCRA case that plaintiffs cited was an out-of-circuit district court decision that merely declined to dismiss a medical-monitoring claim at the pleadings stage while "offer[ing] no opinion … as to whether it will withstand future scrutiny or prove an appropriate remedy on the facts presented in the case." *Easler v. Hoechst Celanese Corp.*, 2014 WL 3868022, at *7 (D.S.C. Aug. 5, 2014). The novelty of the remedy underscores why a far more searching inquiry was required before the district court could certify a Rule 23(b)(2) class.

As for remediation, Arkema already has remediated to the satisfaction of TCEQ some properties within the proposed class area south and southwest of the Crosby facility that were affected by wastewater tank overflows. Resp. Ex. 10, at 12. Those "mitigative steps" create an

additional individualized issue that splinters the cohesiveness of the class. *Madison*, 637 F.3d at 557. Moreover, the remediation required, if any, would necessarily turn on a property-specific analysis, and any remediation plan would have to be consistent with the National Contingency Plan ("NCP")—which requires performing a feasibility study and analysis based on localized factors such as cost effectiveness, concentrations of any contaminants, and remedial alternatives. Resp. Ex. 10, at 4-8. Tellingly, the district court did not require plaintiffs to propose an actual remediation plan that follows the NCP—instead concluding that it was enough for them to have described the plan in general terms as "one that orders testing of Plaintiffs' properties and cleanup of contaminants." Op. 28.

In addition, Arkema pointed out to the district court that the Eighth Circuit has ***rejected*** certification of a similar injunction class seeking remediation because "the cohesiveness necessary to proceed as a class under (b)(2) is lacking." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). The Eighth Circuit explained that the "remediation sought is not even universal" because "[r]emediation efforts on each of the affected properties, should they be awarded, will be unique" and

that "these distinctions matter at this stage under the rigorous analysis required." *Id.* at 481. The conflict between the district court and *Ebert*—which the district court ignored—on the propriety of this remedy provides another compelling reason for this Court's review.

C. The District Court's Order Raises Additional Issues Worthy Of Review.

The errors and legal issues detailed above are unfortunately just the tip of the iceberg:

- ***Daubert***. In determining that common issues predominate, the district court relied on the opinions of plaintiffs' experts, each of whom Arkema had challenged under *Daubert*. The court described as "unclear" whether "a full *Daubert* analysis at the class certification stage is required." Op. 6. The court then repeatedly indicated that an expert's testimony was admissible "at the class certification stage" (Op. 12, 14, 17, 18)—even if it would not necessarily be admissible "on the merits" (Op. 17). The class-action jurisprudence in this Circuit would benefit from this Court's guidance on this novel and frequently recurring issue. A number of other Circuits have held, correctly, that the rigorous analysis required at the class-certification stage means that expert testimony

must satisfy the full *Daubert* inquiry and be admissible at trial before it may support class certification.[4]

- **Class definition**. The district court required only a "rational relationship" between the boundaries of the class area and "Defendant's allegedly harmful activities." Op. 26-27. That standard comes from a handful of district court decisions, not this Court's precedent. And it's in tension with the "rigorous analysis" required as to other elements of class certification. This case underscores the problems with a too-loose standard; the breadth of the class definition reinforces the individualized inquiries required to determine whether any given member of that class can prove exposure, causation, and injury.
- **Standing**. The district court reasoned that plaintiffs had standing to pursue injunctive relief because their injury in fact was "the chemical exposure itself," which "has already occurred." Op. 29. In addition to improperly assuming classwide exposure and equating exposure with injury, the district court erred in basing stand-

[4] *See In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Sher v. Raytheon Corp.*, 419 F. App'x 887, 890 (11th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).

ing on past injury because standing to seek injunctive relief requires a "real or immediate threat that the plaintiff will be wronged again—a likelihood of substantial and immediate irreparable injury" in the future. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (quotation marks omitted); *see also Funeral Consumers All., Inc. v. Service Corp. Int'l*, 695 F.3d 330, 342 (5th Cir. 2012) (plaintiffs lacked standing to obtain injunction because likelihood of future harm was speculative).

II. THE DECISION BELOW CREATES UNDUE PRESSURE TO SETTLE.

This Court and the Supreme Court have long recognized that class certification may create "insurmountable pressure on defendants to settle, whereas individual trials would not"—and that is true "even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Regents*, 482 F.3d at 379.

Accordingly, despite Arkema's strong defenses to plaintiffs' claims, the district court's certification of a sweeping class of all persons and

businesses that reside or own property within a 150-square-mile area, coupled with an indeterminate and untested classwide medical-surveillance remedy, manifestly calls for "appellate review before settlement may be coerced by an erroneous class certification decision." *Regents*, 482 F.3d at 379.

CONCLUSION

The petition for permission to appeal should be granted.

Dated: June 17, 2019

Respectfully submitted,

/s/ *Evan M. Tager*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 5(c) and 32(g), the undersigned counsel for Petitioner certifies that this petition:

(i) complies with the type-volume limitation of Rule 5(c)(1) because it contains 5,193 words, including footnotes and excluding the parts of the petition exempted by Rule 32(f) and Fifth Circuit Rule 5; and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 17, 2019 /s/ *Evan M. Tager*

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, true and correct copies of the foregoing petition were served via UPS overnight delivery and email on the following counsel of record for Respondents:

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on June 17, 2019, the foregoing was transmitted to the Clerk of the U.S. Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, and that (1) the required privacy redactions were made pursuant to Circuit Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to Circuit Rule 25.2.1, and (3) the document has been scanned with the most recent version of Microsoft Windows Defender Security Center and is free of viruses.

Dated: June 17, 2019 /s/ *Evan M. Tager*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHANNAN WHEELER, *et al*,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	**CIVIL ACTION NO. 4:17-CV-2960**
	§	
ARKEMA FRANCE S.A., *et al*,	§	**SEALED**
	§	
DEFENDANTS.		

MEMORANDUM OPINION & ORDER

Pending before the Court are Plaintiffs' Motion for Class Certification (Doc. Nos. 124, 125), and Defendant's five Motions to Exclude the Expert Testimony and Reports of Marc Glass, Dr. Marco Kaltofen, Dr. Randall Bell, Dr. William Rogers, and Dr. Richard Troast. (Doc. Nos. 139-143.) The Court held a class certification hearing on May 1, 2019 to hear argument on the motions.

I. BACKGROUND

The following allegations are taken from Plaintiffs' Second Amended Complaint. (Doc. No. 75.)

During Hurricane Harvey, toxic chemicals were released from a facility owned by Arkema Inc. in Crosby, Texas (the "Arkema facility"). (Doc. No. 75 ¶ 1.) The Arkema facility produces Luperox, an organic peroxide product. Organic peroxide products like Luperox are highly unstable and will explode if not refrigerated. (Doc. No. 75 ¶ 27.) When Hurricane Harvey struck, the Arkema facility lost power and had to move its stores of Luperox to refrigerated trucks. (Doc. No. 75 ¶ 33.) Eventually, the water levels in the Arkema facility rose high enough to threaten the diesel

generators powering each of the refrigerated trucks. (Doc. No. 75 ¶ 35.) Between August 31, 2017 and September 3, 2017, nine refrigerated trucks storing containers of Luperox exploded.[1] (Doc. No. 75 ¶ 39.)

On August 29, 2017, prior to the explosions, residents were evacuated from a 1.5-mile-radius exclusion zone around the Arkema facility. (Doc. No. 75 ¶ 3.) Those residents were excluded from their homes for eight days, during which mold grew in their homes and damaged their property. (Doc. No. 75 ¶ 8.)

The eleven[2] named Plaintiffs include owners of residential property, commercial property, and agricultural property surrounding the Arkema facility. (Doc. No. 75 ¶¶ 15-22.) Some of them live within the 1.5-mile-radius exclusion zone, and some of them live outside of it. (Doc. No. 75 ¶¶ 15-22.) Some found toxins on their property, and some sought medical treatment for injuries related to the explosions. (Doc. No. 75 ¶¶ 15-22.)

The Arkema facility lies in an area prone to flooding and at risk of losing power if hit by a hurricane, and Defendant knew or should have known of those risks. (Doc. No. 75 ¶¶ 41-46.) While Harris County requires permits for floodplain management for structures such as those at the Arkema facility, Defendant had no such permits. (Doc. No. 75 ¶¶ 44-45.) While other chemical factories and refineries ceased production and prepared for the hurricane in the week leading up to it, the Arkema facility continued chemical production until August 25, 2017, the day Hurricane Harvey hit. (Doc. No. 75 ¶¶ 31-32.)

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[1] The final of the three explosions was a controlled burn initiated by the Unified Command once it became clear that there was no way to safely remove the trailers. (Doc. No. 125-2 at 14.)

[2] Four former named Plaintiffs reached settlements with Defendant in 2018 and were dismissed from the suit. (Doc. No. 108.)

The relief Plaintiffs seek has evolved between the filing of the Second Amended Complaint and the Motion for Class Certification. Plaintiffs now request injunctive relief, specifically a medical surveillance program and remediation of their properties, as well as damages for the diminution of their property values. (Doc. No. 146 at 3.) They bring claims for this relief under state law, the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). (Doc. No. 75.)

A. Air Pollution

At the Arkema facility in Crosby, Texas, Defendant used, controlled, stored, manufactured, distributed, transported, and disposed of many known toxic chemicals in the production of Luperox chemicals. (Doc. No. 75 ¶ 27.) Defendant knew that its organic peroxide products would combust if not kept at low temperatures. (Doc. No. 75 ¶ 28.) Storm-related power outages disabled refrigeration in Defendant's normal storage buildings. (Doc. No. 75 ¶ 33.) Defendant moved Luperox to refrigerated trucks, powered by diesel generators. This method of refrigeration failed, and nine refrigerated tractor trailers containing up to ten thousand plastic containers of Luperox exploded, sending plumes of smoke and noxious odors into the air. (Doc. No. 75 ¶¶ 35, 39, 60.) These ignitions released 62,394 pounds of toxic chemicals into the air, as reported by the Texas Commission on Environmental Quality ("TCEQ"), including ethylhexanol, ethyl hexaldehyde, acetone, acetophenone, ethane, nonane, nonene, isobutene, isobutene, N-propanol, carbon monoxide, nitrogen dioxide, and other volatile organic chemicals. (Doc. No. 75 ¶ 40.) Defendant's Chief Executive Officer claimed that the smoke was not toxic, which is inconsistent with Defendant's Safety Data Sheets, which indicate that Luperox releases toxic chemicals if burned. (Doc. No. 75 ¶¶ 48-50.)

B. Water Pollution

Two wastewater tanks accumulated rainwater in quantities that exceeded the tanks' capacities, causing the contents to overflow into the containment dike, which overflowed in turn, releasing stormwater containing an estimated 23,608 pounds of contaminants, as reported by the TCEQ. (Doc. No 75 ¶ 53.) These contaminants included: ethylbenzene, mineral spirits, naptha, naphthalene, organic peroxides, trimethylbenzene, tert-butyl aclochol, 2,5 dimethyl-2,5 di hexane, and t-amyl alcohol. (Doc. No. 75 ¶ 53.) Some of this water was transported through surface water in ditches from the Arkema facility to Cedar Bayou, endangering public health. (Doc. No. 75 ¶ 56.)

C. Samples

Plaintiffs allege that all persons and property within a seven-mile radius of the Arkema facility were exposed to and negatively impacted by the toxic releases. (Doc. No. 75 ¶ 59.) That seven-mile radius is the boundary of the putative class. (Doc. No. 75 ¶ 74.) After the first two explosions, a Harris County Pollution Control Services Department investigator collected two air samples three miles northwest of the facility, which revealed concentrations of volatile organic compounds at 3.0 parts per million. (Doc. No. 75 ¶ 61.) Plaintiffs have gathered samples of black ash with an oily residue as far as 3.8 miles west and 1.4 miles north of the Arkema facility. (Doc. No. 75 ¶ 63.) These samples, and other soil and water samples indicate the presence of chemicals expected to be produced after the explosions. (Doc. No. 75 ¶¶ 64-65.) Some of the chemicals detected are considered likely human carcinogens by federal agencies. (Doc. No. 75 ¶ 67.)

II. *DAUBERT* MOTIONS

A. Legal Standard

Federal Rule of Evidence 702 provides that

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

This rule codifies the Supreme Court's holding in *Daubert* that courts should serve a "gatekeeping role" in ensuring that only reliable expert testimony is admitted into evidence. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). Specifically, *Daubert* instructs courts to consider factors including "whether the proposition is testable and has been tested; whether the proposition has been subjected to peer review and publication; whether the methodology has a known error rate; whether there are accepted standards for using the methodology; and whether the methodology is generally accepted." 1 Kenneth S. Broun, et al, McCormick on Evidence § 13 (7th ed. 2016).

Expert witnesses must describe the specific technique or theory they used to come to their

opinions. "It is . . . clear that it is not enough for the witness to assert in conclusory fashion that she is relying on her general 'expertise,' 'knowledge,' or 'education.'" *Id.* Identifying the specific technique used to reach an expert opinion allows courts to identify the reliability of that particular technique, as opposed to the field of expertise more broadly. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997).

Whether a full *Daubert* analysis at the class certification stage is required is unclear. *See Cone v. Vortens, Inc.*, 2019 WL 1407420, at *3 (E.D. Tex. Mar. 28, 2019) (discussing the conflicting precedents and the trend in the Fifth Circuit); *In re Katrina Canal Breaches Consol. Litig.*, 2007 WL 3245438 (E.D. La. Nov. 1, 2007) (declining to undergo a full *Daubert* examination at the class certification stage, and instead asking whether "the expert testimony has sufficient reliability to be presented at the class certification hearing"). *But see Cannon v. BP Prods. N. Am., Inc.*, 2013 WL 5514284 (S.D. Tex. Sept. 30, 2013) ("When considering expert opinions at the class certification stage, 'court[s] should rely on the admissibility standards for expert evidence as construed by the Supreme Court in *Daubert* and *Kumho*.'" (internal citations and quotation marks omitted) (citing Judge David Hittner et al., Practice Guide: Federal Civil Procedure Before Trial, 5th Circuit Edition ¶ 10:577.1 (2011))).

For the purposes of resolving these motions, the Court will examine the reliability of the expert opinions on the issues relevant to class certification.

B. Motion to Exclude Marc Glass

Plaintiffs introduce the testimony of Marc Glass to establish the reliability of the collection methods used for their soil samples and that a remediation program would not be too individualized to order as a part of class-wide injunctive relief. (Doc. No. 125-19 at 6.) Mr. Glass is the Principal

and Senior Scientist at an environmental consulting firm, where he directs the environmental monitoring and remediation program. (Doc. No. 139-2 at 16.) He is a licensed remediation specialist in the state of West Virginia, with over eighteen years of experience conducting environmental investigation, site characterization, and cleanup of environmental releases. (Doc. No. 139-2 at 16.) Mr. Glass served for six years as the court-appointed technical expert for a class-action settlement that involved soil and interior dust remediation of a thirty-five-square-mile area. (Doc. No. 139-2 at 16.)

Defendant moves to exclude Mr. Glass's expert report under *Daubert*. (Doc. No. 139.) It argues (1) Mr. Glass's testimony about the potential remediation plan is irrelevant, because he admitted it was provisional, (2) Mr. Glass's opinion about the potential remediation plan is irrelevant, because he cannot say the methods he recommended are needed for any specific property at this point, and (3) the sampling data collected is unreliable, because locations for samples were not chosen according to a representative methodology and the data was not validated. (Doc. No. 139 at 5-6.)

Defendant's first challenge is to Mr. Glass's statement that "a demonstrated and scalable cleanup methodology can be implemented to reduce community inhabitants' exposure to persistent Arkema-related particulate contaminants." (Doc. No. 125-19 at 6.) Defendant argues that Mr. Glass failed to comply with the requirements set forth in the Environmental Protection Agency's ("EPA") National Contingency Plan ("NEQ") and the Texas Commission on Environmental Quality's ("TCEQ") Texas Risk Reduction Program ("TRRP"). (Doc. No. 139 at 10.) Both programs establish procedures for designing and conducting a remedial cleanup plan. (Doc. No. 139 at 10.) In his deposition, Mr. Glass agreed that these programs were mandatory and would apply to any cleanup assessments and methods implemented in this case. (Doc. No. 139 at 11.)

Before writing his expert report, Mr. Glass did not complete certain tasks that are required before selecting a remedy under these programs. (Doc. No. 139 at 11-12.)

These arguments miss the point of Mr. Glass's report, which is not to pick a final remediation plan, but to establish redressability for standing purposes and to show that a remediation plan could be implemented on a class-wide basis. The regulatory procedures to which Defendant argues Mr. Glass should have adhered are for formulating a specific plan tailored to the type and concentration of contaminants located on the site. *See e.g.*, 40 C.F.R. § 300.430 (discussing the "remedy selection process"); 30 Tex. Admin. Code § 350.2(a) ("The rules in this chapter specify objectives for *response actions* for affected properties and further specify the mechanism to evaluate such response actions *once an obligation is established* to take a response action via other applicable rules, orders, permits or statutes." (emphasis added)). Creating such a plan will only occur after Plaintiffs succeed on the merits, and is not necessary at the class certification stage.

Defendant's second challenge is to the specific cleanup methodology—interior cleaning and soil replacement—used as an example by Mr. Glass to estimate potential costs of remediation. (Doc. No. 139 at 14-15.) Defendant argues that, in order for his opinions to be reliable, Mr. Glass needed to establish Protective Concentration Levels ("PCLs") for each chemical. (Doc. No. 139 at 14.) PCLs are the "concentration of a chemical of concern, which can remain within the source medium, and not result in levels which exceed the applicable human health risk base exposure limit or ecological protective concentration level at the point of exposure for that exposure pathway." (Doc. No. 139-2 at 161.) Formulas for determining chemicals' PCLs on various types of property are established by the Texas Administrative Code and are used in TRRP remediation. 30 Tex. Admin. Code §§ 350.71, 350.75. Defendant argues that, without this background level

against which to compare the sampling data, Mr. Glass's report is unreliable.

However, developing PCLs for each chemical is one of the required steps for conducting a response action under the TRRP. As noted above, the TRRP is designed to apply "once an obligation is established to take a response action," such as through a court order following success on the merits of Plaintiffs' class action claims. 30 Tex. Admin. Code § 350.2(a). Even interpreting Defendant's reference to PCLs as a stand-in for a threshold level of contaminants indicating risk to human health, Defendant's argument is not persuasive. Mr. Glass's report was not used by the Plaintiffs to establish that the sampling data demonstrated health risk to Plaintiffs. It was Dr. Troast's report that discussed the possibility of health effects related to exposure to the chemicals—not the report of Mr. Glass.

Further, the question of whether the contamination exceeded some (yet to be determined) threshold level is a merits issue that will determine whether Plaintiffs ultimately succeed. For example, it may establish whether Defendant breached a duty to or harmed Plaintiffs, or whether the contamination presents an "imminent and substantial endangerment to health or the environment" under RCRA. *See Cox v. City of Dallas*, 256 F.3d 281, 292 (5th Cir. 2001).

Finally, Defendant argues that the sampling methodology used by Mr. Glass is unreliable. (Doc. No. 139 at 15-19.) According to Defendant, locations for samples were chosen not according to scientific methods but instead were based on where Mr. Glass saw debris or where he had consent to go on private property (generally, Plaintiffs' homes). (Doc. No. 139 at 16-17.) Defendant—correctly—states that this is a biased sampling method that cannot be reliably extrapolated to the whole class area. (Doc. No. 139 at 18.)

However, neither Mr. Glass nor any of the other experts using his sampling data needed to

make inferences about the levels of contaminants outside their sampling points. Defendant argued in its opposition to class certification that Plaintiffs had to prove uniform contamination for class certification, and its argument about sampling bias might be valid if uniformity were actually required. At this stage, Plaintiffs offered Mr. Glass's report to prove that each Plaintiff had standing (through evidence of contaminants on their property or other exposure to the chemicals), and to establish some rational boundary for the class (by comparing samples taken 6.21 miles and ten miles from the facility). There was no need for Mr. Glass to take randomized samples and generalize about the entire class area. As addressed further below in the discussion of certification in Section III, Plaintiffs' real property is not the only place they could be exposed to these chemicals, because Plaintiffs are presumably moving about their neighborhoods.

Relatedly, one of Defendant's experts, Dana Hebert, also alleges that Mr. Glass did not follow the steps he sets out in his report for appropriate sample collection. (Doc. No. 139-2 at 459.) The Court credits Mr. Glass's testimony that he followed these procedures, over that of Defendant's expert, who only alleges that someone else saw and told her about the alleged deficiencies.

The Court finds that Mr. Glass's testimony is reliable.

C. Motion to Exclude Dr. Kaltofen

Plaintiffs introduce the testimony of Dr. Marco Kaltofen to identify the chemicals found in the samples, and to establish that the contaminants found on the Plaintiffs' properties and other sampled locations are likely traceable to the Arkema facility. (Doc. No. 125-6.) Dr. Kaltofen has been the President of the Boston Chemical Data Corporation since 1988, and a Research Engineer in the Nuclear Science and Engineering Program at the Worcester Polytechnic Institute since 2016.

(Doc. No. 125-6 at 30.) He holds a civil engineering Ph.D. with a nuclear science and engineering graduate certificate from Worchester Polytechnic Institute. (Doc. No. 125-6 at 31.)

Defendant argues that Dr. Kaltofen's testimony should be excluded because (1) he failed to establish background levels of the contaminants, (2) he ignored alternative sources of the contaminants and equated the chemical's presence with causation, despite the chemicals being present in the environment generally, (3) he relied upon unreliable sampling data, and (4) he improperly attributed toxic effects to "tentatively identified compounds." (Doc. No. 140 at 6-7.)

Defendant notes that Dr. Kaltofen has previously been excluded under *Daubert*. *Henricksen v. Conocophillips, Co.,* 605 F. Supp. 2d 1142, 1166-68 (E.D. Wash. 2009). *Daubert* motions to exclude Dr. Kaltofen's testimony were denied in *Fisher v. Ciba Specialty Chems. Corp.*, 2007 WL 2302470, at *17 (S.D. Ala. Aug. 8, 2007) and *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 611-12 (E.D. La. Jan. 30, 2006).

Defendant's first argument is that Dr. Kaltofen's report is unreliable, because it fails to establish background levels of the contaminants in the environment. (Doc. No. 140 at 11.) The only background measurement used for comparison was one soil sample taken about eleven miles from the facility. (Doc. No. 140 at 13.) This sample contained much lower concentrations of the chemicals identified in Dr. Kaltofen's report. (Doc. No. 125-6 at 13-15.) Defendant argues that Dr. Kaltofen inappropriately assumes that the facility explosion deposited these chemicals without identifying what normal levels would be in the environment. (Doc. No. 140 at 11.)

Dr. Kaltofen should have discussed further the normal background levels of the identified chemicals. He stated that he compared the concentrations against databases discussing normal concentrations of the chemicals (Doc. No. 151 at 10), but the best practice would have been to take

samples more specific to the region but outside the range of likely contamination.

However, Dr. Kaltofen used other methods that were sufficiently reliable under *Daubert.* For example, he compared the chemicals found off-site to the list of chemicals known to have been present at the Arkema facility before the explosions. (Doc. No. 125-6 at 4-5, 8). He then linked each of the chemicals of concern to either those chemicals reported to be at the facility or to byproducts of the explosion of those chemicals. (Doc. No. 125-6 at 8, 13-15, 18.) He also conducted an instrumental analysis of certain samples from the Arkema facility and off-site and found very similar elemental profiles. (Doc. No. 125-6 at 11.) He compared physically the large chunks of ash that were found on the sampled properties. (Doc. No. 125-6 at 11.) He also compared the chemicals found in the samples to the models created by Defendant's expert, Trinity Consultants, which show the likely paths of contaminants released by the wastewater overflow and explosions. (Doc. No. 125-6 at 4.) While it certainly would have been *better* for Dr. Kaltofen additionally to include the background levels, it was not necessary under *Daubert* at the class certification stage.

Second, Defendant argues that Dr. Kaltofen inappropriately attributed the chemicals to the explosions despite recognizing that some of the chemicals exist in the environment. (Doc. No. 140 at 14.) This argument is very similar to Defendant's first objection, and the Court rejects it for the same reasons.

Relatedly, Defendant complains that Dr. Kaltofen cherry-picked his data to fit with Plaintiffs' case theory. (Doc. No. 140 at 16-18.) Defendant argues that he "ignored the fact that the vast majority of the chemicals evaluated in Plaintiffs' samples from the proposed class area were either not detected or were detected at levels that were, based on published datasets, below

background levels." (Doc. No. 140 at 16-17.)[3] Defendant specifically takes issue with Dr. Kaltofen's references to two samples near the Arkema facility that returned high levels of PAH compared to samples taken further from the facility. Defendant states that the lab had to dilute the sample extracts, creating unreliable results. (Doc. No. 140 at 17.) Further, Defendant argues that some of Dr. Kaltofen's comparisons are misleading, including those between the soil control sample and ash/residue samples, because soil samples generally display lower levels due to the presence of other organic matter. (Doc. No. 140 at 19.)

Defendant is correct that some of these methods are not best practices. Dr. Kaltofen should have included more context in his comparisons. However, *Daubert* requires not best practices, but generally accepted ones, and often investigations and testing in the real world do not adhere to ideal conditions an expert could create when designing an experiment in a laboratory. The methodology underlying Dr. Kaltofen's identification of the chemicals and their links to the Arkema facility is still reliable and supported by evidence. *See Cedar Lodge Plantation, LLC v. CSHV Fairway View I, LLC*, 753 F. App'x 191 (5th Cir. 2018) (unpublished) (holding that it was abuse of discretion for trial court to exclude witness due to his failure to address certain data points).

Third, Defendant complains that Dr. Kaltofen did not address alternative explanations for the presence of contaminants. (Doc. No. 140 at 20.) Defendant names various other sources for

[3] Defendant assumes the purpose of the expert report is to establish *uniformity* of the contamination throughout the class area. That is not required. *See Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 606 (E.D. La. Jan. 30, 2006) ("Defendant argues that the oil did not spread uniformly throughout the affected area, and that different homes in the area received differing degrees, if any, of oil contamination. However, the central factual basis for all of Plaintiffs' claims is the leak itself—how it occurred, and where the oil went."). A few sites of hazardous contamination could theoretically have widespread health consequences for anyone who frequents the area.

some of the contaminants found. (Doc. No. 140 at 21-22.) Defendant does not identify which contaminants each of these alternative sources might have produced.

Again, it would have been more comprehensive to address specifically these alternative sources of the contaminants. However, Dr. Kaltofen relied on other evidence to match the contaminants present at the Arkema facility with those found off-site. He found that the concentration of the chemicals was generally stronger closer to the facility and weaker further from the facility. (Doc. No. 125-6 at 13-14, 17, 19.) He compared ash and residue physically and chemically, which both produced matches. (Doc. No. 125-6 at 11.) He stated in his depositions that there were certain chemicals that could have *only* come from the Arkema facility. (Doc. No. 140-2 at 253.) Defendant's own expert admitted that the ash and residue could reasonably be said to be from the Arkema explosion. (Doc. No. 151-1 at 15-16.) Further, Dr. Kaltofen addressed some of these alternative sources and ruled them out in his rebuttal report. (Doc. No. 109-3 at 10-11.) This is sufficient under *Daubert*—especially at the class certification stage.

Fourth, Defendant raises the same objections to the sampling methodology that are addressed above in Section II.B, discussing the motion to exclude Mr. Glass. (Doc. No. 140 at 23.) Dr. Kaltofen stated that none of the qualified data changed his opinions. (Doc. No. 151-1 at 209.)

Finally, Defendant complains that Dr. Kaltofen improperly attributed toxic effects to "tentatively identified compounds" ("TICs") that were never identified or confirmed by the laboratory. (Doc. No. 140 at 27.) EPA protocol dictates that TICs should be examined and considered. (Doc. No. 109-3 at 2-3.) Defendant's own expert, Dana Hebert, identified the value of including information about TICs in the report as "help[ing] in the process of trying to determine what you need to be looking for," as a "step in the process of helping you select your chemicals of

concern," and as "important in investigating an uncharacterized site." (Doc. No. 151-1 at 244-45.) Dr. Kaltofen's point is that unknown hazards result from combining effects of chemicals, and that these unidentified chemicals increase the risk of a more severe cumulative effect.

The Court finds that Dr. Kaltofen's testimony is reliable.

D. Motion to Exclude Dr. Bell

Plaintiffs offered a report by Dr. Randall Bell to show that property damages could be established on a class-wide basis through mass appraisal. (Doc. No. 125-22.) Defendant challenges Dr. Bell's report, because he has not actually built or tested any regression analyses that he suggests could be appropriate for determining damages on a class-wide basis. (Doc. No. 141 at 5.) The Court cannot evaluate Dr. Bell's methods if it does not know what type of regression analysis he is using, or what factors would be used as inputs. *See Tawfilis v. Allergan, Inc.*, 2017 WL 3084275, at *7 (C.D. Cal. June 26, 2017).

Without more information, the Court cannot determine the reliability of Dr. Bell's opinion that regression could, on a class-wide basis, account for the property damage attributable to only the Arkema facility explosions. Dr. Bell's report will not be considered.

E. Motion to Exclude Dr. Rogers

Plaintiffs are not offering Dr. William Rogers as an expert, do not mention his report in their certification briefing, and do not attach any reports by Dr. Rogers as exhibits. (Doc. No. 125.) Dr. Rogers's report was, for a time, intended to establish a narrower class boundary than the seven-mile radius now used by Plaintiffs. Both Dr. Bell and Dr. Troast discuss Dr. Rogers's report in reference to the class area. (Doc. No. 125-22 at 2, 5-6, 8, 11-13; Doc. No. 125-20 at 4, 22-23, 25.)

Dr. Troast's report is used to establish the toxicity of the chemicals identified by Plaintiffs, and that remediation and medical surveillance would be appropriate given overlapping exposures to different toxic chemicals and their unknown cumulative health effects. (Doc. No. 125-20 at 25-26.) The toxicity of identified chemicals has no relation to the class boundary. Similarly, Dr. Troast's opinion about remediation and medical surveillance is based on Plaintiffs' sampling, which revealed many different types of chemicals that he identifies as toxic to humans. This opinion does not depend on Dr. Rogers's report.

Dr. Bell's report may be more greatly affected by a ruling on the reliability of Dr. Rogers's report. However, for the reasons given above, Dr. Bell's report will be excluded on other grounds.

The Court finds that Dr. Rogers's report is not properly at issue here.

F. Motion to Exclude Dr. Troast

Dr. Richard Troast was offered as an expert to link the chemicals found on Plaintiffs' properties with negative health outcomes. (Doc. No. 125-20.) Dr. Troast has a Ph.D. in environmental science (toxicology) from George Mason University. (Doc. No. 125-20 at 2-3.) He worked at the EPA as a toxicologist and environmental scientist for thirty-three years. (Doc. No. 125-20 at 3.) Defendant challenges his report because (1) he is not qualified to provide an opinion on medical monitoring, (2) his opinion is not based on evidence of exposure above risk-based screening levels, (3) his opinions are based on regulatory principles instead of scientific evidence about causation, (4) his reliance on Material Safety Data Sheets ("MSDS") to determine potential health effects contravenes Fifth Circuit law, (5) he misapplies Bradford Hill criteria, and (6) he relied on other experts' reports, which were unreliable. (Doc. No. 142 at 5.)

Defendant's first argument is about Dr. Troast's qualifications. (Doc. No. 142 at 10.) Dr.

Troast is a toxicologist whose report focuses on the toxicity of the chemicals identified by Plaintiffs. (Doc. No. 125-20.) He does not give a recommendation for any particular type of medical surveillance program. In his rebuttal report, he noted that medical surveillance would be appropriate in this case based on the toxicity and persistence of the chemicals involved. (Doc. No. 148-1 at 65.) This opinion does not go beyond his qualifications in the way it might if he were recommending a particular program of medical surveillance, or identifying what data should be collected.

Defendant's second argument is about the lack of evidence of exposure above acceptable levels. (Doc. No. 142 at 12.) Again, the primary point of Dr. Troast's report is to establish the toxicity of the chemicals found, not to make specific recommendations for a program of medical surveillance. Further, Defendant is asking for a merits determination at the class certification stage. Proof that the chemicals were found in concentrations that are seriously hazardous to human health is the core of a successful RCRA claim. *See Cox v. City of Dallas*, 256 F.3d 281, 292 (5th Cir. 2001).

Defendant's third argument is about causation. (Doc. No. 142 at 14.) At this stage, the expert report does not need to fully prove causation between the chemicals and specific health effects; Plaintiffs just have to show that causation will be "capable of classwide resolution." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Defendant's argument about the weight of the evidence approach would apply when determining causation on the merits.

Defendant's fourth argument is about Dr. Troast's references to MSDS sheets. (Doc. No. 142 at 16.) The case cited by Defendant indicates that MSDS sheets alone "need not have been accorded any weight" in establishing causation at the summary judgment stage. *Johnson v.*

Arkema, Inc., 685 F.3d 452, 462-63 (5th Cir. 2012) (discussing reliability of expert's conclusion that the chemical at issue causes scarring to lung tissue, where the MSDS sheet does not state that exposure can cause the health effects at issue, and the expert "did not provide any science behind the MSDS"). Plaintiffs are not required to conclusively establish causation at the certification stage.

Defendant's fifth point is another argument about merits-level proof of causation that is inappropriate at the class certification stage. (Doc. No. 142 at 17.)

Defendant's sixth argument is addressed in Section II.E, discussing the motion to exclude Dr. Rogers. (Doc. No. 142 at 20.)

The Court finds that Dr. Troast's testimony is reliable.

III. MOTION FOR CLASS CERTIFICATION

A. Legal Standard

The requirements for class certification under Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impracticable [numerosity];

(2) there are questions of law or fact common to the class [commonality];

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and

(4) the representative parties will fairly and adequately protect the interests of the class [adequacy of representation].

Fed. R. Civ. P. 23(a). Plaintiffs, as the party seeking certification, bear the burden of proving that the proposed class satisfies the requirements of Rule 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S.

338 (2011).

In addition to the requirements of Rule 23(a), Plaintiffs must meet the requirements of one of the subparts under Rule 23(b). *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). Here, Plaintiffs seek certification under Rule 23(b)(2) for their requested injunctive relief and Rule 23(b)(3) for their damages claim. Rule 23(b)(2) allows certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) allows for certification if "the court finds that the 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." Fed. R. Civ. P. 23(b)(3).

B. Rule 23(a) Requirements

Plaintiffs seek to certify a class of "all residents and real property owners located within a seven-mile radius of the Crosby, Texas, Arkema Chemical Plant." (Doc. No. 124 at 2.)

i. Numerosity

To satisfy the numerosity requirement under Rule 23(a)(1), the proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Defendant does not dispute that numerosity is met here. Plaintiffs estimate that the class could contain between 23,000 and 24,000 people. (Doc. No. 124 at 15.) The Court finds that the numerosity requirement has been met.

ii. Commonality

"To satisfy the commonality requirement under Rule 23(a)(2), class members must raise at least one contention that is central to the validity of each class member's claims." *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014). Plaintiffs' claims "must depend upon a common contention [that is] of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

As the Fifth Circuit has explained, however, "this contention need not relate specifically to the damages component of the class members' claims. Even an instance of injurious conduct, which would usually relate more directly to the defendant's liability than to the claimant's damages, may constitute 'the same injury.'" *Deepwater Horizon*, 739 F.3d at 810. If the common question is based on a single course of conduct by defendant, a court must find that the "common course of conduct provides a class-wide basis for deciding significant common issues of fact and law." *Frey v. First Nat'l Bank Sw.* 602 F. App'x 164, 172 (5th Cir. 2015) (unpublished).

Plaintiffs identify the following common questions:

> (1) whether Defendants are liable for damages to the Class for negligently allowing the release of toxic chemicals and/or for their negligent failure to plan and prepare for an emergency involving release of toxic chemicals, including to warn of their toxicity; (2) the type and scope of damages caused by Defendants' conduct; (3) whether Defendants are strictly liable to members of the Class; (4) whether Defendants are liable for nuisance and trespass; and, (5) whether Defendants may be compelled under statute or court order to take steps to protect human health and the environment including but not limited to medical

monitoring, top-soil replacement, a compliance audit and improved environmental safety measure.

(Doc. No. 75 at 19-20.) Here, Defendant has stipulated to commonality (Doc. No. 98), but is actively disputing predominance (Doc. No. 138). The Court finds that the common questions identified by Plaintiffs are capable of class-wide resolution.

The commonality requirement has been met.

iii. Typicality

Rule 23(a)(3) "requires that the named representatives' claims be typical of those of the class." *Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299, 314 (5th Cir. 2007). The analysis focuses on the typicality of the named representatives' claims, not the representatives themselves. *See Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002).

Here, all the class members are proceeding under identical theories of liability. (Doc. No. 125 at 9-10.) Individual personal-injury claims have been split off from this litigation and will not be raised. (Doc. No. 125 at 9-10.) All claims stem from identical conduct by Defendant. The health risks are common to the entire putative class, because putative class members are moving throughout the area and potentially encountering these contaminants as they do so.

Defendant argues that the factual variations between the amount of exposure and the type of contaminants found at each individual's property destroy typicality. (Doc. No. 138 at 50.) The Court does not find this argument persuasive. As noted above, most individuals frequent locations beyond just their own property. Expert reports and soil sampling have shown the contaminants to be persistent and present in soil almost a year after the explosions. (Doc. No. 125 at 17; Doc. No. 125-7 at 302:13-21, 303:4-15.) The putative class members, as they go about their daily lives and

move around the contaminated area, have likely been exposed to more than just the contaminants and concentrations found on their own property. Further, individual differences in exposure levels do not change the common injury of prolonged exposure to toxic chemicals and the health risks that causes.

The Court finds that the typicality requirement has been met.

iv. Adequacy

The question of adequacy can be broken up into three subcategories: (1) "the zeal and competence of the representative[s'] counsel"; (2) "the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees"; and (3) the risk of "conflicts of interest between the named plaintiffs and the class they seek to represent." *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017). To meet the adequacy requirement, "the court must find that class representatives, their counsel, and the relationship between the two are adequate to protect the interests of absent class members." *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005).

Defendant does not challenge the adequacy of Plaintiffs' counsel. Plaintiffs' counsel has proved themselves more than competent before the Court thus far. The Court finds Plaintiffs' counsel adequate.

Defendant instead focuses on the possibility of conflicts of interest to defeat adequacy. Defendant argues that Plaintiffs' decision to split off the personal-injury claims from the instant litigation creates a potential conflict of interest, because *res judicata* may bar unnamed plaintiffs from later bringing individual personal-injury actions. (Doc. No. 138 at 51.)

When evaluating "whether a class representative's decision to forego certain claims defeats

adequacy," district courts should weigh "(1) the risk that unnamed class members will forfeit their right to pursue the waived claim in future litigation, (2) the value of the waived claim, and (3) the strategic value of the waiver, which can include the value of proceeding as a class (if the waiver is key to certification)." *Slade*, 856 F.3d at 413.

a. Risk that Unnamed Class Members Will Forfeit Their Right to Pursue the Waived Claim in Future Litigation

The Fifth Circuit in *Slade* noted that the risk of preclusion is difficult to evaluate.

> The risk of preclusion here is uncertain. Part of this risk is inherent whenever a party waives claims to secure class certification because "[a] court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action." Moreover, courts have inconsistently applied claim preclusion to class actions. On one hand, class actions are "one of the recognized exceptions to the rule against claim-splitting." At the same time, courts have also refused to certify class actions because of perceived risk of down the line preclusion.

Id. at 413-14.

Many courts have interpreted the Supreme Court's decision in *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984), to preclude the use of *res judicata* described by Defendant.

> Cases on *res judicata,* ample in many areas, are fairly sparse where preclusion of distinctive individual claims is urged based upon an earlier class action judgment. But in *Cooper v. Federal Reserve Bank of Richmond*, the Supreme Court confirmed what common sense would suggest: a class action judgment—there, in a discrimination case—binds the class members as to matters *actually litigated* but does not resolve any claim based on individual

circumstances that was not addressed in the class action.

Cameron v. Tomes, 990 F.2d 14, 17 (1st Cir. 1993) (internal citations omitted); *see also Gates v. Rohm & Hass Co.*, 265 F.R.D. 208, 218 (E.D. Pa. Mar. 5, 2010) (recognizing "that there is a risk that claims arising from such injuries will be barred in a later action because of the general rule against claim-splitting," but finding the risk low, in part because of *Cooper*); *Bentley v. Honeywell Int'l*, 223 F.R.D. 471 (S.D. Ohio Sept. 23, 2004) (rejecting the same *res judicata* argument in light of *Cooper*).

The Fifth Circuit, in contrast, previously upheld the denial of class certification on the ground that, while it was unclear whether *res judicata* would bar a subsequent personal-injury action, "if the price of a Rule 23(b)(2) . . . class both limits individual opt outs and sacrifices class members' rights to avail themselves of significant legal remedies, it is too high a price to impose." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 283 (5th Cir. 2008).

Here, Plaintiffs seek certification under both Rule 23(b)(2) and (b)(3). The opt-out right for putative class members under Rule 23(b)(3) reduces the risk of *res judicata* dramatically. *Slade*, 856 F.3d at 414. There is no established right to opt out of a class certified under 23(b)(2), however. *McClain*, 519 F.3d at 283. This risk must be balanced against the value of the waived claim and the strategic value of the waiver.

b. Value of the Waived Claim

The most serious personal injuries linked to the explosions in the briefing were open sores and skin rashes. (Doc. No. 75 at 4-5, 9; Doc. No. 125-24 at 21.) The more significant risk after this kind of chemical exposure is the risk of *future* adverse health consequences—like developing cancer or other diseases. (Doc. No. 125-20 at 10-12, Doc. No. 125-24 at 17, Doc. No. 125-25 at

17.) Because one cannot be expected to raise a claim before it comes into existence, these claims would not be barred by *res judicata*, regardless of the usual claim-splitting rules. *Gates*, 265 F.R.D. at 218. The Court finds the value of unnamed class members' personal-injury claims to be relatively minor.

c. Strategic Value of Waiver

Because the most significant risk with this type of chemical exposure is the risk of future adverse health consequences, the value of the medical surveillance claim is much greater than the value of present personal-injury claims. Gaining class-wide medical surveillance would not only help catch any symptoms of serious diseases in time for more effective treatment, but would also build up information about the effects of these contaminants that would benefit the entire class should they begin to experience the same symptoms. (Doc. No. 125 at 23-24, Doc. No. 148-1 at 65.) Class-wide remediation would similarly prove much more valuable than personal-injury claims, because the chemicals persist in the soil and in dust, and can continue to expose class members indefinitely if their properties are not returned to a safe state. (Doc. No. 125 at 17; Doc. No. 125-7 at 302:13-21, 303:4-15.)

For these reasons, the Court finds that the value of the waived personal injury claim pales in comparison to the strategic value of the waiver. Balancing the three factors, the Court finds a low risk of a conflict of interest, and that the adequacy requirement has been met.

v. Ascertainability

"Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.3 (5th Cir.

2007). "An identifiable class exists if its members can be ascertained by reference to objective criteria." *Cleven v. Mid-Am. Apartment Communities, Inc.*, 328 F.R.D. 452, 467 (W.D. Tex. 2018).

Sometimes, the requisite "objective criteria" are geographic boundaries. "[I]n such circumstances, courts often seek a reasonable relationship between the proposed boundary and the defendants' allegedly harmful activities. [C]ourts have rejected proposed classes where plaintiffs failed to identify any logical reason . . . for drawing the boundaries where they did." *Brockman v. Barton Brands, Ltd.,* 2007 WL 4162920, at *4 (W.D. Ky. Nov. 21, 2007).

Defendant argues that the seven-mile class boundary proposed by Plaintiffs is arbitrary and defeats ascertainability. Defendant states that the law requires Plaintiffs to show uniform contamination throughout the class area. (Doc. No. 138 at 53.) However, there is no requirement of "uniform contamination."[4] Further, Plaintiffs have provided evidence of high concentrations of contaminants up to ten kilometers (6.21 miles) from the Arkema facility and that the contaminants were not found at elevated levels eleven miles from the facility. (Doc. Nos. 125-6, 125-9, 125-13.) Although wind and flood patterns may have concentrated the contaminants in certain areas, contaminants were found radiating out in all directions from the facility. (Doc. Nos. 125-7 at 5, 125-11, 125-13, 125-14.) Additionally, individuals' exposure to contaminants results not just from

[4] Defendant cites to *Brockman* for this proposition. The *Brockman* court complained that the plaintiffs "offer[ed] no evidence whatsoever that the airborne contaminants spread in a uniform fashion in all directions from Defendants' facility for a distance of up to two miles." *Brockman v. Barton Brands, Ltd.*, 2007 WL 4162920, at *4 (W.D. Ky. Nov. 21, 2007). However, the *Brockman* court earlier identified the correct standard—a "rational relationship"—and was using this lack of evidence as an example of the way that the plaintiffs failed to establish any objective criteria for their boundary line. *See also Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 606 (E.D. La. Jan. 30, 2006) ("Defendant argues that the oil did not spread uniformly throughout the affected area, and that different homes in the area received differing degrees, if any, of oil contamination. However, the central factual basis for all of Plaintiffs' claims is the leak itself—how it occurred, and where the oil went.").

contaminants on their properties, but from community-wide contaminants that individuals are exposed to as they go about their daily lives in the area.

The Court finds that Plaintiffs have established a rational relationship between the seven-mile boundary and Defendant's allegedly harmful activities. The class is ascertainable.

C. Rule 23(b)(2) Requirements

Rule 23(b)(2) allows certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." This type of class action is directed toward injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

Although not explicitly stated in the rule, courts require plaintiffs to show that the putative class is sufficiently cohesive. "[T]he group nature of the harm alleged and the broad character of the relief sought," requires a "homogenous and cohesive group with few conflicting interests among its members." *Id.* at 413.

i. Cohesiveness

Plaintiffs' allegations stem from a single course of conduct by Defendant that Plaintiffs argue negligently allowed the chemical exposure to occur. Common evidence will be presented to prove the claims, including evidence of Defendant's actions and of causation. The actions alleged apply broadly to the entire class, and the injunctive relief sought will commonly address this injury. Although experts could not predict the cumulative effects of exposure to the different chemicals identified by Plaintiffs, it is certain that the health risks are severe. (Doc. No. 125-12 at 242:14-244:1; Doc. No. 125-20 at 25-26.) If their allegations are true, Plaintiffs need to be repeatedly tested for health effects so that cancer or other diseases may be caught early and treated. The early

detection and treatment will benefit the class as a whole, as a more complete understanding of the potential consequences of exposure is attained and treatment plans are put into place. Similarly, remediation is better suited to class-wide resolution than to individual trials. Individual clean-up attempts would be ineffectual, because landowners could still be exposed as they move throughout the class area.

Defendant attacks the cohesiveness of Plaintiffs' putative class. Defendant suggests that the different chemicals and levels of exposure would require separate, specifically tailored injunctions to fulfill the medical surveillance and remediation orders, should Plaintiffs prevail on the merits. (Doc. No. 138 at 35-36.) The Court does not find this argument persuasive. Regardless of individual differences in the concentrations and types of chemicals found on their properties, Plaintiffs all face exposure and the concomitant health risks, the effects of which can be mitigated by a medical surveillance program. Again, people often leave their homes, and if the putative class members do so here, they are potentially exposed to additional chemicals beyond just those found on their properties. Similarly, a remediation program can be applied class-wide—perhaps one that orders testing of Plaintiffs' properties and cleanup of contaminants, as described in Dr. Glass's expert report. (Doc. No. 125-19.)

The Court finds that the putative class is sufficiently cohesive.

ii. Standing

To have standing to sue, plaintiffs must demonstrate (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Defendant argues that Plaintiffs lack standing to request medical surveillance. (Doc. No. 138 at 47.) It argues that the future risk of harm is too speculative, and that medical surveillance is not sufficiently likely to

redress any injury.

This argument misses the point of the medical surveillance. The injury-in-fact is not a specific disease that all plaintiffs have or will contract from the chemical exposure, but rather the chemical exposure itself, which allegedly creates severe health risks. (Doc. No. 125-20.) This injury cannot be speculative, because it has already occurred.

Causation has been sufficiently established for the purposes of class certification. Dr. Kaltofen conducted extensive comparisons between ash and particulates found on-site at the Arkema facility and off-site throughout the class area. (Doc. No. 125-6 at 8, 11, 13-15, 18.) He traced all the identified chemicals to either the organic peroxides, the refrigerated trailers, or chemicals produced by the decomposition of other chemicals known to be at the facility at the time of the explosions. (Doc. No. 125-6 at 4-5, 8, 13-15, 18.) The instrumental analysis indicated that the same elements were present in ash samples collected both at the facility and off-site throughout the class area, suggesting that they derived from the same source. (Doc. No. 125-6 at 10-11.)

The harm resulting from the chemical exposure can be mitigated by a medical surveillance program, which will monitor the health consequences from the contaminants to create better health outcomes. *See In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (finding that plaintiffs had standing to bring class action).

The Court finds that the plaintiffs have standing to request a medical surveillance program.

D. Rule 23(b)(3) Requirements

i. Predominance

"The predominance inquiry requires that questions of law or fact common to the members

of the class predominate over any questions affecting only individual members." *Steering Comm. v. Exxon Mobil Corp.,* 461 F.3d 598, 601 (5th Cir. 2006). This analysis requires courts to consider the plaintiffs' case claim-by-claim to determine whether common or individual issues will predominate. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 606 (E.D. La. Jan. 30, 2006).

The Fifth Circuit has taken different approaches to how individualized damages may be without destroying predominance. It is clear that "the necessity of calculating damages on an individual basis will not necessarily preclude class certification." *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006). "However, where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue *may* predominate over any common issues shared by the class." *Id.* (emphasis added). For example, "[w]here the plaintiffs' damage claims focus almost entirely on facts and issues specific to individuals rather than the class as a whole, the potential exists that the class action may degenerate in practice into multiple lawsuits separately tried. In such cases, class certification is inappropriate." *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 744–45 (5th Cir. 2003) (internal citations and quotation marks omitted).

One circumstance in which claims for individual damages irreducible to a common formula do not preclude certification is where "predominance [is] based not on common issues of damages but on the numerous common issues of liability." *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014). The line between these two categories is unclear, but the Fifth Circuit has noted that certification despite some individualization of damages is more appropriate where the case turns on "single episodes of tortious conduct usually committed by a single defendant." *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 378 (5th Cir. 2016) (analyzing various

Fifth Circuit cases holding that damages were too individualized or that the individualized nature of damages did not destroy predominance).

a. Negligence

The elements of a negligence action are (1) duty, (2) breach of duty, (3) causation, and (4) harm. Duty and breach are elements clearly focused on Defendant's conduct. Causation could become individualized theoretically, but the Plaintiffs have structured the suit in such a way that it will likely be entirely focused on Defendant's conduct. Because Plaintiffs focus only on chemicals with a strong link to the facility explosion, there are fewer hyper-localized alternative sources that would turn proof of causation into a series of mini-trials. Further, alternative causes would likely apply to large chunks or all of the class area. Both Defendant and Plaintiffs will be establishing proof of causation on a class-wide basis, not property by property.

Harm will also be proven on a class-wide basis, as described above in Section III.C.i.

The Court finds that, for Plaintiffs' negligence claim, questions of law and fact common to the class predominate over individual issues. *See Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 607 (E.D. La. Jan. 30, 2006) (finding that common issues predominated in negligence claim).

b. Trespass to Real Property

The elements of a trespass claim under Texas law are "(1) the plaintiff owns or has a right to lawfully possess the property; (2) the defendant entered the plaintiff's [property] and the entry was physical, intentional, and voluntary; and (3) the defendant's trespass caused injury to the plaintiff." *Wilen v. Falkenstein*, 191 S.W.3d 791, 798 (Tex. Ct. App. 2006).

Owning or having a right to lawfully possess the property is built into the class definition

and will not require individualized evidence. The inquiry into entry on Plaintiffs' properties revolves around a single incident—Defendant's actions or lack thereof during Hurricane Harvey and the resulting explosions. Because all injuries resulted from this single course of conduct, the focus will be on Defendant's actions, and common questions will predominate.

The Court finds that, for Plaintiffs' trespass claim, questions of law and fact common to the class predominate over individual issues. *See Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 609 (E.D. La. Jan. 30, 2006) (finding that common issues predominated in trespass claim).

c. Public Nuisance

The elements of a public nuisance claim are "an unreasonable interference with a right common to the general public" and "a special injury . . . distinct from the injury to the public at large." *Peiqing Cong v. ConocoPhillips Co.*, 250 F. Supp. 3d 229, 233 (S.D. Tex. 2016).

Defendant claims that the special injury requirement necessitates individualized proof. However, an injury can be identical as to the individuals in a limited radius surrounding a location and still be different from the injury to the public at large. Here, the property rights of the class members are being damaged, in addition to the potential exposure that the general public who enters the contaminated area faces. Further, the class members who own property within the class boundary are more likely than the public at large to be moving within the contaminated area, and to experience more prolonged exposures to the contaminants.

The inquiry into unreasonable interference focuses only on Defendant's behavior and by its nature will not require any individualized proof.

The Court finds that, for Plaintiffs' public nuisance claim, questions of law and fact common to the class predominate over individual issues. *See Turner v. Murphy Oil USA, Inc.*, 234

F.R.D. 597, 609 (E.D. La. Jan. 30, 2006) (finding that common issues predominated in nuisance claim).

d. RCRA

The Fifth Circuit requires plaintiffs bringing RCRA actions to prove "(1) that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) that the solid or hazardous waste may present an imminent and substantial endangerment to health or the environment." *Cox v. City of Dallas*, 256 F.3d 281, 292 (5th Cir. 2001). Each of these elements focuses on Defendant's conduct shortly before and during the explosions at the Arkema facility. Proof of the RCRA claim thus will not require individualized evidence.

The Court finds that, for Plaintiffs' RCRA claim, questions of law and fact common to the class predominate over individual issues.

e. CERCLA[5]

In the Fifth Circuit, a CERCLA plaintiff must show "(1) that the site in question is a 'facility' as defined in [42 U.S.C.] § 9601(9); (2) that the defendant is a responsible person under [42 U.S.C.] § 9607(a); (3) that a release or a threatened release of a hazardous substance has

[5] It is not entirely clear whether the CERCLA response costs can be recovered under Rule 23(b)(2), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998), or whether they are only appropriately sought under Rule 23(b)(3), *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011); *FPX, LLC v. Google, Inc.*, 276 F.R.D. 543, 552 (E.D. Tex. Sept. 29, 2011). The Court assumes that CERCLA costs are being sought under Rule 23(b)(3), along with damages for property value diminution.

occurred; and (4) that the release or threatened release has caused the plaintiff to incur response costs." *Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312, 315 (5th Cir. 2015). "Cleanup costs recoverable under CERCLA include not only the direct cost of removal, but of site testing, studies, and similar 'response costs,' direct and indirect." *May v. Apache Corp.*, 870 F. Supp. 2d 454, 457 (S.D. Tex. 2012).

The first three elements focus entirely on the Defendant's conduct and will not present individualized issues.

Proving response costs may be more difficult to establish on a class-wide basis, because Plaintiffs may need to submit receipts or other evidence that show that they incurred a cost and how much they spent. However, in *Bentley v. Honeywell International, Inc.*, the court certified a CERCLA class action under both Rule 23(b)(2) and 23(b)(3). 223 F.R.D. 471 (S.D. Ohio 2004). In that case, the court noted that "Plaintiffs seek class-wide injunctive and monetary relief, but seek class certification on the issues of Defendants' liability and the appropriateness of injunctive relief only." *Id.* at 476. In its predominance analysis, the court relied on the fact that the damages questions were not being certified for class adjudication, noting that the individualization of the response costs "pertain to damages, which can be handled separately after a trial to determine whether Defendants are liable for the commingled plume and water supply contamination." *Id.*

Similarly, here Plaintiffs suggest that damages be determined in the second phase of the case through "bellwether trials." (Doc. No. 125-3.) Despite this somewhat individualized inquiry into damages, "virtually every issue prior to damages is a common issue." *Bertulli v. Ind. Ass'n of Continental Pilots*, 242 F.3d 290, 298 (5th Cir. 2001). Thus, common questions about liability stemming from Defendant's course of conduct will predominate. *See In re Deepwater Horizon*,

739 F.3d 790, 815 (5th Cir. 2014).

f. Damages for Property Value Diminution

According to Plaintiffs' motion for class certification, the only monetary damages they will seek in the suit are for diminution of property value.[6] Plaintiffs argue that diminution in property value can be determined on a class-wide basis through mass appraisal techniques. (Doc. No. 125-22.) Plaintiffs' expert Dr. Bell provided a declaration describing regression techniques that could theoretically account for the decrease in property value that is attributable to the Arkema facility explosions and not from other factors. (Doc. No. 125-22.) However, Dr. Bell's expert report has been excluded for failing to provide enough information to assess reliability.

Defendant argues that these damages models would be much too individualized and destroy predominance. According to Defendant, it is not enough for Plaintiffs to say that some kind of regression analysis could determine damages *en masse*; they have to actually describe the methodology they propose in detail. (Doc. No. 138 at 23-24.)

Plaintiffs rely on *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), in which the Fifth Circuit affirmed a four-phase trial plan for a certified class action.

> In Phase 1 a jury would determine common issues of liability. If the jury found punitive damage liability it would then perform the Phase 2 function and determine compensatory damages in 20 fully-tried sample plaintiff cases. Based on the findings in these cases, the jury would then establish the ratio of punitive damages to compensatory damages for each class member. If the jury finds no punitive damage liability in Phase 1,

[6] *But see supra*, note 5.

> Phase 2 is to be omitted.
>
> In Phase 3, a different jury is to resolve issues unique to each plaintiff's compensatory damage claims, *e.g.* injury, causation, and quantum. Phase 3 calls for trials in waves of five, scheduled according to a format based upon factors, including location of the injured person or property at the time of the explosion and extent and nature of the damages. The district court anticipates that "after several waves are tried, a reasonable judgment value for each category of claims would emerge so as to facilitate settlements." In Phase 4 the district court is to compute, review, and award punitive damages, if any are established in Phase 1, for the plaintiffs awarded compensatory damages.

Id. at 1018. The Fifth Circuit upheld the district court's finding of predominance and certification of the class. *Id.* at 1022-23.

However, *Watson*'s continuing validity has been called into question after the Supreme Court's decisions in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *See Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 556 (5th Cir. 2011) ("Whether *Watson* has survived later developments in class action law—embodied in *Amchem* and its progeny—is an open question . . . ."). *But see id.* at 557-59 (Dennis, J., concurring) (disapproving of the majority's "dicta" about *Watson* in light of other Fifth Circuit cases post-*Amchem* reaffirming *Watson*).

The Fifth Circuit's decision in *Deepwater Horizon* specifically addressed the effect of *Comcast* on the predominance inquiry. *In re Deepwater Horizon*, 739 F.3d 790, 816–17 (5th Cir. 2014). The court held that *Comcast* did not require a formula for class-wide damages calculation in every case.

> The principal holding of *Comcast* was that a "model purporting to serve as evidence of damages ... must measure only those damages attributable to th[e] theory" of liability on which the class action is premised. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." In this case, however, the district court's inquiry into predominance was never premised on such a formula. As our three fellow circuits have already concluded, we agree that the rule of *Comcast* is largely irrelevant "[w]here determinations on liability and damages have been bifurcated" in accordance with Rule 23(c)(4) and the district court has "reserved all issues concerning damages for individual determination." Even after *Comcast,* the predominance inquiry can still be satisfied under Rule 23(b)(3) if the proceedings are structured to establish "liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members." As explained above, this is precisely how the district court planned to calculate the claimants' damages, which "would have to be decided on an individual basis were the cases not being settled." The principal holding of *Comcast* therefore has no application here.

Id. at 817.

Here, "virtually every issue prior to damages is a common issue," *Bertulli*, 242 F.3d at 298, and those common issues (like breach of duty and causation) are "not only significant but also pivotal," *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs' claims stem

from a "single episode[] of tortious conduct[7] . . . committed by a single defendant." *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370, 378 (5th Cir. 2016). Further, the trial structure discussed in *Deepwater Horizon* matches the trial plan proposed by Plaintiffs.

The Court finds that, although damages will be somewhat individualized, the common issues of liability still predominate.

ii. Superiority

Rule 23(b)(3) requires a determination that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy," based upon factors including the interests of the members of the class in individually controlling the prosecution, the extent and nature of any litigation concerning the controversy already commenced by members of the class, the desirability of concentrating the litigation in a particular forum, and the management difficulties likely to be encountered. Fed. R. Civ. P. 23(b)(3). "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prod., Inc.*, 521 U.S. at 617 (citation omitted).

Defendant argues that this is a circumstance in which individual actions are possible, because attorney's fees and damages are available. However, the costs of bringing an action like this are truly monumental. This case involves huge expert fees, complicated organization and

[7] Defendant claims that the three explosions over the course of four days brings this case nearer to cases like *Crutchfield*, where the plaintiffs sought "different damages caused by different acts committed by different defendants at different times over a five year period." 829 F.3d at 379. Although the explosions did not all occur simultaneously, the alleged tortious conduct was Defendant's failure to sufficiently prepare for Hurricane Harvey, which led to the series of explosions over a short period time. This allegation—not the explosions themselves—is the "single episode of tortious conduct . . . committed by a single defendant." *Id.* at 378.

planning, and numerous attorney hours. The Court finds that class resolution is a superior method of resolving this case.

IV. CONCLUSION

The Court **GRANTS** the Motion to Exclude Dr. Bell. (Doc. No. 141.) The Court **DENIES AS MOOT** the Motion to Exclude Dr. Rogers. (Doc. No. 143.) The Court **DENIES** the Motions to Exclude Marc Glass, Dr. Kaltofen, and Dr. Troast. (Doc. Nos. 139, 140, 142.)

The Court **GRANTS** Plaintiffs' motion for class certification under Rule 23(b)(2) and Rule 23(b)(3). (Doc. No. 124.) The class is defined as follows: "All residents and real property owners located within a seven-mile radius of the Crosby, Texas, Arkema Chemical Plant." The Court appoints Corey Prantil, Ronald Whatley, Betty Whatley, Beverly Flannel, Roland Flannel, Greg Nason, Larry Anderson and Tanya Anderson as class representatives.

The Court **GRANTS** Plaintiffs' motion to appoint class counsel. (Doc. No. 124.) The Court appoints Michael G. Stag and Ashley Liuzza and the law firm of Stag Luizza, LLC; Van Bunch and the law firm of Bonnett Fairbourn Friedman & Balint, P.C.; Mark F. Underwood and the law firm of Underwood Law Offices; and Kevin W. Thompson and the law firm of Thompson Barney as Co-Lead Class Counsel for the class.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 3rd day of June, 2019.

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHANNAN WHEELER, *et al.*,	§	
PLAINTIFFS,	§	**CIVIL ACTION NO. 4:17-CV-2960**
VS.	§	
ARKEMA FRANCE S.A., *et al.*,	§	
DEFENDANTS.	§	

AGREED ORDER

The parties agree, subject to the Court's approval, to the following order:

1. On February 26, 2019, Plaintiffs filed a motion for class certification (Doc. 124) and a memorandum in support of that motion (Doc. 125).

2. On March 26, 2019, Arkema Inc. ("Arkema") filed its response to the motion for class certification (Doc. 138).

3. On April 10, 2019, Plaintiffs filed a reply memorandum in support of their motion for class certification (Doc. 146).

4. The parties filed all of these documents under seal.

5. On June 3, 2019, the Court entered a memorandum opinion and order (Doc. 169) (the "Opinion") resolving the Plaintiffs' motion for class certification and the Defendant's five *Daubert* motions.

6. The Court filed its Opinion under seal, presumably because it refers to deposition testimony the Defendant designated as confidential.

7. On June 7, 2019, the Court entered an order (Doc. 171) striking Arkema's confidentiality designations to various depositions without prejudice.

8. Arkema has chosen not to make new designations to those transcripts.

9. As a result, none of the material in the motion, memoranda or Opinion regarding class certification contain information designated as confidential and there is no longer a need for those documents to remain under seal.

10. In addition, none of the exhibits in support of or in opposition to class certification remain confidential.

11. Accordingly, the parties request that the Court approve this agreed order and unseal the June 3, 2019, memorandum opinion and order (Doc. 169), Plaintiffs' motion for class certification (Doc. 124), Plaintiffs' memorandum in support of their motion for class certification (Doc.125), Arkema's response to the motion for class certification (Doc. 138), Plaintiffs' reply in support of their motion for class certification (No. 146) and all exhibits filed by the parties with those documents.

Respectfully submitted,

/s/ Michael G. Stag
Counsel for Plaintiffs

/s/ Thomas E. Birsic
Counsel for Defendant

The Court approves the agreed order, and the following documents are unsealed: the June 3, 2019, memorandum opinion and order (Doc. 169), Plaintiffs' motion for class certification (Doc. 124), Plaintiffs' memorandum in support of their motion for class certification (Doc.125), Arkema's response to the motion for class certification (Doc. 138), Plaintiffs' reply in support of their motion for class certification (No. 146) and all exhibits filed by the parties with those documents.

HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE