File # C2-04-6309

FILED
WASHINGTON COUNTY
DISTRICT COURT
JUN 19 2007
CHRISTINA M. VOLKERS
COURT ADMINISTRATOR
By KAL Deputy

FILED

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF WASHINGTON **TENTH JUDICIAL DISTRICT**

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

Plaintiffs,

vs.

3M Company,

Defendant.

Case Type: Other Civil

Court File No: C2-04-6309
Hon. Mary E. Hannon

ORDER

The above-captioned matter came on for hearing before the Honorable Mary E. Hannon on March 27 and March 28, 2007, at the Washington County Courthouse in Stillwater, Minnesota, on Plaintiffs' Motion for Class Certification. Appearances are noted in the record.

The Court, having reviewed the extensive pleadings and attachments submitted prior to the motion hearing, having heard the arguments of counsel and having considered the applicable rules and relevant case law, now makes the following:

ORDER

1. Plaintiffs' Motion for Class Certification is hereby **DENIED**.

2. The parties shall meet and confer regarding the schedule for the case going forward, and shall submit their joint proposal or competing proposals to the Court by

August 10, 2007. The parties shall appear in court at the Washington County Courthouse on August 17, 2007 at 9:00 a.m. before the Honorable Mary E. Hannon to discuss the proposal(s) and schedule further proceedings before this Court related to the above-entitled matter.

3. The attached Memorandum of the Court is incorporated herein by reference.

4. The Washington County Court Administrator shall serve a true and correct copy of this Order and Memorandum by U.S. Mail upon counsel for the above-named parties and any *pro se* parties.

BY THE COURT:

Signed at Chambers
Stillwater, Minnesota
This 19th day of
June, 2007

Honorable Mary E. Hannon
Judge of District Court
Tenth Judicial District

MEMORANDUM

Palmer, et al. v. 3M Company
Court File No.: C2-04-6309

INTRODUCTION

Rule 23 of the Minnesota Rules of Civil Procedure, the rule governing class actions in this state, requires the moving party to meet several procedural requirements, thus placing a significant burden on any party seeking to proceed as a class. This Court finds that Plaintiffs have failed, on several grounds, to meet their burden of proof, and therefore, the case cannot be certified as a class action. The class definition proposed by Plaintiffs is unworkable and inadequate and prevents certification. Class action status is not necessary to prevent a risk of inconsistent adjudications as contemplated by the rules, nor is injunctive relief available on a class-wide basis. Proceeding as a damages class is not proper where individual, not common, issues would predominate at trial and the class action is not a superior method of adjudicating the claims due to problems of manageability and concerns for fairness to all parties.

This memorandum is provided as part of the Court's Order to explain the Court's application of the class action rules and relevant case law to Plaintiffs' motion for certification and to set forth the Court's analysis and reasoning for its decision. At the outset, it should be noted that the denial of Plaintiffs' Motion for Class Certification does not end Plaintiffs' lawsuit. Any findings made in this Order relating to evidence and arguments presented for purposes of Plaintiffs' Motion for Class Certification are limited to this Order and do not bear on any rulings the Court may make as it considers the merits of any case during any future dispositive motions and/or trials. Consequently, this Order does not and cannot, in any way, extinguish or abrogate the rights of putative

class members to individually pursue any actions and remedies against 3M Company that may be available to them.

FACTS

The facts of this case are well known to the parties and to the Court. Given the detailed briefing by the parties in preparation for the class certification motion hearing, the Court will not provide an in-depth recitation of the facts. However, an overview of the relevant facts is necessary.

This case involves claims for personal injury and property damage due to contaminated residential water supplies. The alleged contaminants are perfluorochemicals (hereinafter "PFCs"), including PFOS, PFOA, PFBA, and PFBS, which were produced and manufactured by Defendant 3M Company (hereinafter "3M") at its Cottage Grove, Minnesota plant for approximately 50 years beginning in the early 1950s. PFCs are synthetic chemicals produced by electrochemically combining fluorine and carbon and are used in various ways in the production of a number of products, including stain repellants, fire-fighting foam and grease-resistant packaging materials. PFCs are bio-persistent and bio-accumulative materials, meaning that they have an extremely stable chemical structure that very slowly degrades in the environment. PFCs "bio-accumulate" in soil, water, and in the blood of animals and humans, and pose potential health risks to exposed animals and humans.[1] 3M has been monitoring

[1] According to Plaintiffs' expert, Dr. Barry Levy "PFCs cause, or are likely to be found to cause, subcellular, subclinical, and clinical abnormalities associated with the following disorders in human beings: liver damage and dysfunction; abnormalities in lipids and lipoproteins; coronary artery disease and cerebrovascular disease; endocrine, metabolic, and allergic disorders; cancer; reproductive and developmental disorders; and immunotoxic and other disorders." Dr. Levy's opinions have been the subject of criticism in other chemical exposure cases, *see In re Silica Prod. Liab. Litig.*, 398 F.Supp.2d 563, 611-16, 638-40 (S.D. Tex. 2005); *Castellow v. Chevron USA*, 97 F.Supp.2d 780, 793-40, 798 (S.D. Tex. 2000), and none of the named plaintiffs in this case claims to have suffered any illness or disease as a consequence of having been exposed to PFCs. But whether or not PFCs actually pose serious health

the health of its employees exposed to PFCs since the early 1980s. 3M ceased production of PFCs in 2002.

3M disposed of PFC waste materials from its Cottage Grove plant at the Oakdale, Minnesota landfill from approximately 1956 to 1960. 3M disposed of PFC waste materials at the Washington County, Minnesota landfill from approximately 1970 to 1974. Such disposals were consistent with applicable regulations at the time. In November 2002, the Minnesota Department of Health (hereinafter "MDH") issued the first Health Based Values (hereinafter "HBVs") regarding consumption of PFOS and PFOA. MDH set the drinking water HBVs at 7 parts per billion (ppb) for PFOA and 1 ppb for PFOS.[2] In June 2003, 3M began a voluntary investigation of the presence of PFCs at its Cottage Grove plant. These efforts led 3M to conduct an analysis of off-site PFC waste disposals, specifically at the Oakdale and Washington County landfills.[3]

In 2004, 3M and the Minnesota Pollution Control Agency (hereinafter "MPCA") performed tests which found PFCs in the groundwater at the Oakdale and Washington County landfills. PFCs have been detected in a number of private wells in Lake Elmo, principally in the Tablyn Park and Lake Elmo Heights neighborhoods, and in the Oakdale municipal wells.[4] PFCs have also been detected in the blood of Washington

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risks to humans is not dispositive of Plaintiffs' Motion for Class Certification. *See In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (the "court may not weigh conflicting expert evidence or engage in statistical dueling of experts" for Rule 23 purposes).

[2] An HBV is an action of the MDH's technical staff. An HBV is issued by the MDH when no Health Risk Limit (HRL) exists for a compound and the department is called upon to evaluate a situation. An HRL is a value that has gone through a regulatory process. Both HBVs and HRLs are set with the intention that water containing the contaminant at the HBV or HRL value is safe to drink over a full lifetime.

[3] These landfills are now closed and are subject to various federal and state environmental regulations. The groundwater at these landfills has been tested and treated for many years.

[4] Since the class certification motion hearing, PFCs have also been detected in the wells of various other Washington County communities.

County residents.[5] In 2005, 3M entered into an agreement with the City of Oakdale to provide treatment for certain Oakdale municipal water supply wells.[6] 3M has also entered into an agreement with the City of Lake Elmo to provide land for a water tower and a funding grant to cover the cost of extending Lake Elmo's municipal water supplies to certain private well owners in Lake Elmo. In September 2006, the MDH announced that it revised its HBVs to 1 ppb for any carboxylated PFC (any PFC ending with the letter "A"), and 0.6 ppb for any sulfonated PFC (any PFC ending with the letter "S"). In early 2007, the MDH again revised its HBVs to 0.5 ppb for PFOA and 0.3 ppb for PFOS.

Procedural History

This lawsuit has been ongoing in Washington County District Court for nearly three years, beginning when Plaintiffs filed their Class Action Complaint and Demand for Jury Trial on October 8, 2004. Plaintiffs' Complaint sought declaratory, injunctive, equitable, compensatory, and punitive relief for the following: breach of duty, negligence and concealment; medical monitoring; public and private nuisance; and trespass and battery. This case was initially assigned to Washington County District Court Judge Stephen L. Muehlberg. 3M filed its Answer to Plaintiffs' Complaint and its Notice of Motion and Motion to Dismiss Plaintiffs' Complaint on November 24, 2004 seeking to dismiss Plaintiffs' claims for concealment, medical monitoring, public nuisance,

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[5] Blood testing of willing residents in the affected areas of Washington County was arranged and paid for by Plaintiffs' counsel; such tests were not done as part of the diagnosis or treatment of any illness of any plaintiff.

[6] On October 30, 2006, this treatment system, which is a "carbon treatment system," began operation to remediate PFC contamination in the Oakdale municipal water supply.

trespass, and battery.[7] Prior to the hearing on 3M's Motion to Dismiss, Plaintiffs requested leave to delete their claims for punitive damages and to be allowed to later re-plead their claims for concealment by bringing a Motion to Amend the Complaint. Judge Muehlberg granted this request and issued an Order on April 26, 2005 granting 3M's Motion to Dismiss Plaintiffs' claims for medical monitoring and public nuisance with prejudice.[8] 3M's Motion to Dismiss Plaintiffs' claims for trespass and battery was denied.

On March 10, 2005, Plaintiffs sought leave to amend their Complaint and pursuant to the parties' stipulation of May 25, 2005, Plaintiffs amended their Complaint on May 31, 2005. 3M filed its Answer to Plaintiffs' First Amended Complaint on June 28, 2005. Due to Judge Muehlberg's retirement, the case was re-assigned to Judge Mary E. Hannon on July 27, 2005. On September 27, 2005, several motions were heard by this Court and on December 19, 2005, the Court issued a Protective Order governing certain of the parties' confidential information and a Case Management Order setting the hearing on Plaintiffs' Motion for Class Certification for the week of November 13, 2006. Retired Chief U.S. Magistrate Jonathan G. Lebedoff was appointed by the Court as Special Master on February 1, 2006. The parties filed a Stipulation and Order to Amend the Complaint on April 11, 2006. On April 24, 2006, Plaintiffs filed their Notice of Motion and Motion for Class Certification. 3M filed its Answer to Plaintiffs' Second Amended Complaint on May 11, 2006.[9] On June 7, 2006, the Court signed the parties'

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[7] 3M did not move to dismiss Plaintiffs' claims for negligence or private nuisance.

[8] Medical monitoring is not recognized as an independent cause of action under Minnesota law.

[9] Although Plaintiffs' Second Amended Complaint was attached as an exhibit to the Stipulation and Order to Amend the Complaint, it appears that Plaintiffs' Second Amended Complaint was never filed with the Court Administrator as a separate document.

proposed Stipulation and Order dismissing the claims of Plaintiffs Felicia Palmer and Sesario Briseno.[10] Pursuant to the parties' agreement, the Case Management Order was amended on June 22, 2006, rescheduling Plaintiffs' Motion for Class Certification for the week of March 26, 2007. The Second Amended Case Management Order was issued on August 21, 2006, rescheduling the deadlines for the parties' submissions to the Court for the class certification hearing. Plaintiffs filed an Amended Notice of Motion and Motion for Class Certification on October 3, 2006, and filed a Second Amended Notice of Motion and Motion for Class Certification on October 9, 2006. On November 29, 2006, Plaintiffs sought leave to amend their Complaint a third time to add an additional named plaintiff. The Court denied this request after oral arguments heard on January 25, 2007. Therefore, Plaintiffs' Second Amended Class Action Complaint is the Complaint currently pending before the Court and sets forth Plaintiffs' claims for negligence, private nuisance, trespass, battery, and relief pursuant to the Minnesota Environmental Response and Liability Act (MERLA).

Although granted leave to do so by Judge Muehlberg, to date, Plaintiffs have not re-pled their claims for concealment. Also, Plaintiffs have never renewed their request for punitive damages.

Plaintiffs filed their memorandum and exhibits in support of their Motion for Class Certification on November 29, 2006. 3M filed its response memorandum and exhibits on January 19, 2007 and Plaintiffs filed their reply memorandum on January 26, 2007. The record was closed at that point. The Court heard arguments on Plaintiffs' Motion

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[10] Plaintiffs agreed to dismiss Palmer and Briseno from the case because they no longer fit within Plaintiffs' proposed class.

for Class Certification on March 27 and 28, 2007. The matter was taken under advisement as of March 28, 2007.

LAW AND ANALYSIS

Class Action Rules

In Minnesota, class certification is essentially a three-step process. First, the moving party must establish that a class actually exists by defining the class in a reasonable and clearly ascertainable manner. *See* Minn. R. Civ. P. 23.03(a)(2); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 662 (S.D. Ala. 2005).[11] Second, the moving party must persuade the Court that the proposed class meets the four prerequisites of Minnesota Rule of Civil Procedure 23.01. Third, at least one of the three grounds for certification as set out in Rule 23.02 must be satisfied. *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 129 (Minn. 1981). The party seeking class certification bears the burden of proof. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). Trial courts have considerable discretion in deciding whether to certify a class. *Forcier*, 310 N.W.2d at 130. Before certifying a class, the court "must conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met." *O'Connor v. Boeing N. Am.*, 184 F.R.D. 311, 318 (C.D. Cal. 1998) (quoting *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996)).

When determining whether a class should be certified, the substantive allegations of the complaint should be taken as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). However, it may be necessary for the court to look beyond the

[11] Because federal procedural rules for class actions are essentially parallel to Minnesota procedural rules for such cases, federal precedent on this topic is instructive in interpreting and applying Minnesota's class action rules. *Lewy 1990 Trust ex rel. v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. App. 2002) (citing *Johnson v. Soo Line R.R.*, 463 N.W.2d 894, 899 n.7 (Minn. 1990)).

pleadings at the substantive claims of the parties to determine whether the elements of Rule 23 have been met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).[12] Recently, courts have interpreted Rule 23 flexibly and have given it a liberal construction. *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 159 (S.D. W. Va. 1996). Certainly, the "flexibility" of Rule [23] "enhances the usefulness of the class action device, [but] actual, not presumed, conformance with [the Rule] remains...indispensable." *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) (quoting *Falcon*, 457 U.S. at 160).

Class Definition

When making the determination of whether to certify a class, the court should begin with the proposed class definition because the Rule 23 requirements are irrelevant absent a cognizable class. *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 163 (C.D. Cal. 2002). "An order certifying a class action must define the class and the class claims, issues, or defenses..." Minn. R. Civ. P. 23.03(a)(2).[13] To determine whether a class is adequately defined, a court considers whether the proposed definition "specifies a particular group that was harmed during a particular time frame, in a particular location, in a particular

[12] *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (certification of a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *Castano*, 84 F.3d at 744 (the district court "certainly may look past the pleadings to determine whether the requirements of [R]ule 23 have been met"). This Court is cognizant of the potential unfairness that may result from not reviewing the substantive merits of the plaintiffs' claims to some extent. Simply taking a plaintiff's allegations as true could force a defendant to defend unmeritorious claims or could result in unfairness to class members who may lose their opportunity to pursue claims if certification is accomplished too early or if the class claims are unsuccessful at trial.

[13] "Rule 23.03(a)(2) places in the rule an express requirement that the class be defined at the time of certification and that class counsel be appointed. Precise definition of the class is necessary to identify the persons entitled to relief, bound by a judgment in the case, and entitled to notice." Minn. R. Civ. P. 23 advisory committee's note (2006).

way" and if it "facilitat[es] the court's ability to ascertain [class] membership in some objective manner." *LaBauve*, 231 F.R.D. at 662 (quoting *Bentley v. Honeywell Intern., Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004)). While Plaintiffs need not prove that class members have been injured for purposes of defining the class, Plaintiffs' definition must have some relation to the defendant's activities. *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602-03 (D. Colo. 1990). Class certification should be denied where the class definition is overly broad, amorphous, and vague or where the number of individualized determinations required to determine class membership becomes too administratively difficult. *Perez v. Metabolife Intern., Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003).

Plaintiffs currently propose the following class definition:[14]

> All individuals whose residential source of drinking water in Minnesota is or has been supplied, in whole or in part, by one or more wells that contains or has contained any one or more carbox[ ]lated PFCs, including but not limited to PFOA and PFBA, at a concentration exceeding 1.0 ppb; any one or more sulfonated PFCs, including but not limited to PFOS and PFBS, at a concentration exceeding 0.6 ppb; or any combination of PFCs that exceeds the Hazard Index (HI) recommended or used by the Minnesota Department of Health for PFCs in human drinking water.

Plaintiffs further limit the class to "only those individuals who have been using or who used the residential drinking water source for a minimum of one year."

Plaintiffs argue that this class is ascertainable because their proposed class definition does not require ownership of property and does not require proof that the putative class members consumed the water. In fact, Plaintiffs argue that this is an easily identifiable class because the State of Minnesota has, or is in the process of, determining plumes of PFC contamination. Therefore, Plaintiffs contend that there is an objective basis upon which to determine where PFCs are located. According to

[14] Plaintiffs' proposed class definition has been amended four times over the course of this litigation.

Plaintiffs, because the proposed class definition does not require tap water data, determining which Minnesota residents are class members will be objectively feasible by using information maintained by the local water districts.[15] Plaintiffs also argue that this proposed class has already been handled as a class by the State of Minnesota when the State sent letters to those people affected by PFCs. They assert that 3M has also been dealing with the citizens who have polluted water as if they are a class.

In response, 3M argues that Plaintiffs' proposed definition is fatally over-inclusive. 3M contends that Plaintiffs' proposed definition does not provide a basis from which to determine which Minnesota residents may actually be entitled to assert claims against it because the proposed class definition does not relate to any of Plaintiffs' claims. 3M argues that it is insufficient to simply obtain water district maps, as Plaintiffs argue, because it cannot be determined from these maps which residents qualify for class membership without testing each well head for actual contamination of the water used by that resident given that the proposed definition does not take into consideration whether each resident's water has been mixed, diluted or otherwise treated before reaching the tap.

The Court finds that Plaintiffs' proposed class definition lacks the required specificity and clarity and is therefore not adequately ascertainable as required by class action law.[16] Plaintiffs' proposed definition fails to identify how PFC contamination is

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[15] All of the six proposed named plaintiffs are in areas of Washington County currently known to have or have had water sources contaminated by PFCs. However, Plaintiffs acknowledged at oral argument that given their proposed class definition, additional class members could possibly be identified in the future from locations anywhere in Minnesota.

[16] As opposed to class definitions used in some contamination cases, Plaintiffs' proposed class definition does not identify subclasses based on characteristics such as property ownership or geographic boundaries. *See Yslava v. Hughes Aircraft Co.*, 845 F.Supp. 705, 712 (D. Ariz. 1993) (finding that the

related to 3M. Even though it is now commonly known that 3M produced and manufactured PFCs, for purposes of defining class membership, Plaintiffs must make a connection between the claims of the proposed class members and 3M's alleged torts. The omission of 3M from Plaintiffs' proposed definition severely limits the Court's ability to issue an order certifying a class action that would properly define the class, and the class claims, issues or defenses as mandated by Rule 23.03(a).

Plaintiffs' proposal to use local water district maps to identify class members is inadequate to determine whether each class member's residential source of drinking water is at the levels of PFC contamination required by the class definition. Water district maps do not provide an objective means to determine whether each resident's water has been contaminated with PFCs at the definition levels. Absent property by property testing, the Court would have to assume, based on names and addresses from the water district maps, that each resident's water is contaminated with PFCs to an extent that meets the proposed definition. This assumption renders Plaintiffs' proposed definition unworkably vague and overbroad.

Furthermore, Plaintiffs' proposed class definition does not include a time frame from which to ascertain class membership. As written, Plaintiffs' proposed class definition could include a person who was a resident anywhere in the State of Minnesota at any time when PFCs existed, who used the water for more than one year, that is or was contaminated with PFCs at or above the definition levels. Is the Court to assume that such a potential class member had water contaminated with PFCs within the proposed class definition simply because that person lived at a certain residence

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plaintiffs had rationally defined the proposed class where the "plaintiffs delineated 24 separate subgroups representing precise geographic areas where plaintiffs lived, worked and went to school").

that has PFC contamination at or above the definition requirements today? Plaintiffs did not provide any argument regarding identification of such class members. No evidence was presented to this Court tending to show that information contained in local water district maps will provide the names and current addresses of potential class members that received water services in the past. Equally troubling is the fact that the proposed definition does not include a date when class membership closes.[17] The fluidity of Plaintiffs' proposed class definition makes the Court's identification of the class members tremendously difficult from an administrative standpoint.

The Court is likewise concerned with the fact that there appears to be no way to determine if potential class members use or have used the water source for drinking as is required by the proposed definition. When this problem was raised by the Court at oral argument, Plaintiffs suggested that it might be possible to survey residents about their actual use somehow, but did not seem to have any clear plan to obtain that information.

The Court finds that accepting this proposed definition would be inconsistent with the demands of Rule 23.03(a) and relevant case law and is unwilling to use it to define a class in this case.[18] Therefore, for all of the above-stated reasons, the Court cannot

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[17] For example, is a resident whose residential water supply that has just recently been found to be contaminated with PFBA at the definition limits included in the class pursuant to the definition? Because PFBA is only now being detected in residential water supplies, presumably these residents will be excluded from the proposed class because of the definition's one year requirement.

[18] When questioned on the adequacy and practicality of their proposed definition at oral argument, Plaintiffs urged the Court to certify the class now based on their proposed definition and make any required adjustments or alterations if and when necessary later. Both parties discussed the language of the Advisory Committee Comment to the 2006 Amendments to Rule 23 regarding conditional certification, which states, "the rule omits reference to a 'conditional' certification, reflecting the disfavor this device has earned, but preserves the ability of the courts to amend a certification order any time before final judgment is entered." Rule 23 advisory committee's comments. In keeping with this comment and relevant case law, this Court is not willing to be as creative as Plaintiffs seem to want it to be. There are courts that have been willing to "re-write" class definitions for plaintiffs. At least one court has held that

find that Plaintiffs' proposed class definition adequately and reasonably defines a class. This failure is dispositive of Plaintiffs' Motion for Class Certification. However, this Court chooses to continue and conduct a thorough analysis of the other class action requirements.

Rule 23.01

Rule 23.01 sets out four prerequisites for class certification. One or more members of a class may sue or be sued as representative parties on behalf of all only if;

a) the class is so numerous that joinder of all members is impracticable;

b) there are questions of law and fact common to the class;

c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

d) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01.

Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." *Jenson v. Cont'l Fin. Corp.*, 404 F.Supp. 806, 809 (D. Minn. 1975). There are no "arbitrary or rigid rules" to define the required size of a class. *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 337 (D. Minn. 1999). However, the moving party must provide "some evidence or reasonable estimate of the number of purported class members." *Lewy*, 650 N.W.2d at 452-53 (quoting *Linquist v. Bowen*, 633 F.Supp.

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the court itself may construct a class definition, *Metcalf v. Edelman*, 64 F.R.D. 407, 409 (N.D. Ill. 1974), and another found that the court may modify a definition where the original is inadequate, *Metropolitan Area Housing Alliance v. Department of Housing and Urban Development*, 69 F.R.D. 633, 637-38 n.7 (N.D. Ill. 1976). This Court is not willing, and likely would not be able, to craft a workable class definition here. *See LaBauve*, 231 F.R.D. at 641 n.14 ("The Rule 23 motion must stand or fall based on [P]laintiffs' proposed class dimensions, which the Court cannot and will not reconfigure.").

846, 858 (W.D. Mo. 1986)). In determining impracticability, courts consider several factors, including the size of the class, the size of the class member's individual claims, the inconvenience of trying individual suits and the nature of the action itself. *Lewy*, 650 N.W.2d at 452.

Plaintiffs allege that the numerosity requirement is satisfied. According to Plaintiffs, there are thousands of prospective class members because PFCs have been detected at levels above those set forth in their proposed class definition in over 145 private wells near Lake Elmo and Oakdale, Minnesota, and in the municipal water supply of the City of Oakdale, which serves approximately 28,000 people. At oral argument Plaintiffs expanded the estimated number of potential class members to 67,700 based on the number of residents served by the water districts of Oakdale municipal, Cottage Grove municipal, St. Paul Park municipal and additional private wells. In response, 3M argues that Plaintiffs cannot meet the numerosity requirement because Plaintiffs' proposed definition is over-inclusive and therefore the number of people in the proposed class is unknown.

Plaintiffs have provided a reasonable estimate of the number of potential class members. A potential class consisting of nearly 70,000 members is clearly so numerous as to make joinder impracticable, thus satisfying the numerosity requirement. The Court finds that Plaintiffs have adequately demonstrated numerosity.

Commonality

Commonality requires that there be questions of law or fact common to the class. *Streich v. Am. Family Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn. App. 1987). The threshold for commonality is not high and requires only that the resolution of the

common questions affect all or a substantial number of class members.[19] *Id.* (citing *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). The fact that individual issues remain "after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *O'Connor*, 184 F.R.D. at 330 (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)). "The simple question is whether there are issues common to all class members." *Yslava*, 845 F.Supp. at 712. However, at least one court has stated that "the commonality barrier is higher in a personal injury damages class action...that seeks to resolve *all* issues, including noncommon issues, of liability and damages." *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996).

Plaintiffs argue that there are questions of fact common to all of the proposed class members because each member's claims arise from 3M's release of PFCs into the environment. 3M did not make a specific argument relating to the commonality requirement, but instead focused its discussion of commonality within Rule 23.02(c)'s predominance requirement.

Each of the claims of the proposed class members arises out of 3M's release of PFCs into the environment, which has caused contamination of the drinking water supplies. This fact is common to each and every class member. Given the minimal threshold for commonality, the Court finds that Plaintiffs have adequately satisfied the commonality requirement.

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[19] The Court is mindful that Rule 23.01(c)'s commonality requirement is subsumed, or superseded by, the more stringent predominance requirement of Rule 23.02(c). *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Therefore, the Court will focus its analysis more directly on the predominance requirement of Rule 23.02(c), *infra*.

Typicality

Typicality focuses on the representative parties and requires that representative parties "have an interest compatible with that of the class sought to be represented." *Lewy*, 650 N.W.2d at 453 (quoting *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985)). Typicality refers to the potential for rivalry and conflict which may jeopardize the interests of the class. *Ario*, 367 N.W.2d at 513. The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members. *Lewy*, 650 N.W.2d at 453. "A 'strong similarity of legal theories' satisfies the typicality requirement even if substantial factual differences exist." *Id.* (quoting *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569; 575 (D. Minn. 1995)). "The burden of showing typicality is not an onerous one." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982).

Plaintiffs argue that each of the claims of the named plaintiffs are typical of those of the class members.[20] Plaintiffs argue that the typical question regarding their claims for trespass is whether 3M was or should have been aware that its production of PFCs and disposal of PFC waste would result in contamination of private and public water supplies. With regard to their private nuisance claims, Plaintiffs argue that the legal question is identical for all class members; whether the presence of PFCs in the drinking water constitutes a nuisance from the perspective of a reasonable person. Plaintiffs further contend that the typical issue for all class members for their negligence claims is whether 3M had or has a legal duty that it breached in connection with PFC contamination. Finally, Plaintiffs argue that the typical question related to their MERLA

[20] In their memorandum in support of class certification, Plaintiffs argued and analyzed Rule 23.01's commonality and typicality requirements together.

claims is whether PFCs constitute "hazardous substances" and whether 3M is responsible for a "release" of PFCs after 1983.[21] In response, 3M contends that the claims of the named plaintiffs are not typical of the class claims.

It is clear in this case that the claims of the named plaintiffs all arise from the same course of conduct on the part of 3M due to 3M's disposal of PFC waste at various disposal sites in Washington County. The claims of the named plaintiffs and the other class members are interrelated and predicated on the same alleged wrongdoing by 3M and the same legal theories of liability, notwithstanding the potential for significant factual differences in each plaintiff's claims. This lends support to a finding of typicality. However, the Court questions whether Plaintiffs can actually satisfy the typicality criteria.

The claims of Gary and Karen Paulson may not be typical of those of the class members because the Paulsons have lived in Lake Elmo since 1971 on property which is in very close proximity to the Washington County landfill. Because of their close proximity to the Washington County landfill, the Paulsons' claims may be subject to unique defenses as raised by 3M, which may render their claims atypical of the claims of the proposed class members.[22] *In re GenesisIntermedia, Inc. Sec. Litig.*, 232 F.R.D. 321, 329 (D. Minn. 2005) (unique defense to the named plaintiffs' claims rendered them inappropriate class representatives). Moreover, the typicality of the Paulsons' claims is also uncertain because the Paulsons stopped drinking their private well water in the

[21] *See* Minn. Stat. § 115B.04, subd. 6.

[22] The Paulsons purchased their property before the Washington County landfill was operational and they specifically consented, in writing, to the presence of the landfill. Because of this, 3M may be able to assert a defense under the Landfill Cleanup Act against any claims that the Paulsons may have based on PFCs migrating from the Washington County landfill to their residential water supply. The Paulsons' claims may also be subject to a unique waiver argument based on their consent to the placement of the landfill in their immediate surroundings.

1980s due to the discovery of lead and volatile organic chemicals on a neighboring property.

Possibly giving rise to defenses which would be available to 3M as to some class members, but not others is the fact that the landfills in which 3M disposed of PFC waste are currently subject to various state and federal environmental regulations. Such defenses could create potential conflicts among class members. Additionally, the typicality of the claims of each of the named plaintiffs is questionable because each of the named plaintiff's properties has a unique set of non-PFC related conditions. Radon levels exceeding EPA municipal water standards have been detected on the Maslowski, Krank, and Henry properties. The presence of polycyclic aromatic hydrocarbons, semi-volatile compounds, and pesticides has been detected on the Maslowski property. The Maslowski property also has a recurring mold problem. There are landfill-related problems such as rats and blowing waste on the Paulson property.

Irrespective of the obvious fact that all of the claims of the named plaintiffs and class members are based upon 3M's disposal of PFC waste, and while acknowledging binding precedent which states that a "strong similarity of legal theories satisfies the typicality requirement even if substantial factual differences exist" *Lewy*, 650 N.W.2d at 453, the Court still questions whether Plaintiffs could meet the typicality requirement given the many significant factual and legal differences presented by the claims of the named plaintiffs and the claims of other class members.

Adequacy of Representation

The adequacy requirement ensures that the representative parties will adequately protect the interests of the class. *Ario*, 367 N.W.2d at 513; Minn. R. Civ. P.

23.01(d). To meet this requirement, the interests of the named "plaintiffs must coincide with the interests of the other class members" and the named plaintiffs and their counsel must competently and vigorously prosecute the lawsuit. *Id.* (citing *Jensen v. Fin. Corp.*, 404 F.Supp. 806, 811-12 (D. Minn. 1975)). Adequacy requires that (1) there be no disabling conflicts among the interests of the named plaintiffs and members of the class; and (2) counsel for the proposed class is competent and capable of handling the lawsuit. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

To meet this requirement, the named plaintiffs must have a basic understanding of the allegations made in the complaint, what law is alleged to have been violated, and must be willing to contest any action made by the attorneys that the representative finds disagreeable. *Lewy*, 650 N.W.2d at 454. General knowledge and participation on the part of class representatives is sufficient to satisfy the adequacy requirement. *Id.* at 455. Named plaintiffs must have "honesty, conscientiousness, and other affirmative personal qualities required of class representatives." *Weisman v. Darneille*, 78 F.R.D. 669, 671 (S.D.N.Y. 1978). Named plaintiffs must also have the ability and willingness to take an active role in prosecuting the lawsuit on behalf of the class. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 479 (5th Cir. 2001). Where named plaintiffs are either untrustworthy or have ceded their control of the lawsuit to counsel, certification should be denied. *Scott v. New York City Dist. Council of Carpenters' Pension Plan*, 224 F.R.D. 353, 356-57 (S.D.N.Y. 2004).

This requirement also directs the court to examine the adequacy of the attorneys seeking to be appointed as class counsel. *Russell Corp. v. Russell Corp.*, 703 So.2d 953, 963 (Ala. 1997). This examination involves an analysis of whether class counsel

have conducted themselves in an ethical and professionally responsible manner. *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 248 (C.D. Cal. 2006).

Plaintiffs argue that no conflicts exist between the interests of the named plaintiffs and the proposed class members.[23] In addition, Plaintiffs argue that their counsel are adequate particularly because their counsel include attorneys who were certified as class counsel in the only other class action certified to date that involved PFC water contamination, *Leach v. Du Pont*.[24] In response, 3M argues that the named plaintiffs cannot adequately represent the proposed class members because they are not capable of upholding their important fiduciary duties to class members as required. Contrary to Plaintiffs' assertion, 3M claims that conflicts of interest exist between the interests of the named plaintiffs and the interests of the proposed class members. 3M also criticizes actions taken by Plaintiffs' counsel in this litigation and argues that Plaintiffs' counsel cannot adequately represent the class.

Because this Court is denying Plaintiffs' Motion for Class Certification due to Plaintiffs' failure to meet other class action criteria, the Court need not fully decide the adequacy requirement. Nonetheless, the Court feels compelled to address the parties'

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[23] However, Plaintiffs do acknowledge that the amount of damages potentially owed to each named plaintiff and each class member will differ depending on the individual facts presented by each plaintiff; an important difference between the named plaintiffs and other class members.

[24] Those of Plaintiffs' attorneys who were certified as class counsel in *Leach v. Du Pont* received the 2005 "Trial Lawyers of the Year" award for their work from Trial Lawyers for Public Justice. Plaintiffs' counsel also include attorneys that have been lead attorneys and have actively participated as counsel in numerous mass tort and products liability cases; including PCB community exposure cases and on-going, nationwide consumer class action litigation involving PFCs and Teflon®. Plaintiffs' counsel also consists of three Minnesota attorneys who have extensive experience handling tobacco cases, Minnesota Consumer Protection Statute claims, complex products liability cases, and class actions. All three Minnesota attorneys are counsel of record representing the certified class in *Curtis v. Philip Morris*, a "light" cigarette case. Finally, Ms. Wivell was one of attorneys on the team of attorneys that represented the State of Minnesota and Blue Cross and Blue Shield in their case against the tobacco industry. For their efforts, that trial team received the Trial Lawyers for Public Justice's Trial Lawyers of the Year award and were named Members of the Year by the Minnesota Trial Lawyers Association.

arguments. In many cases addressing motions for class certification, the defendant does not even challenge the adequacy requirement.[25] In this case, however, Defendant 3M has raised various concrete criticisms of the adequacy of the named plaintiffs and class counsel that the Court finds to be valid and the Court questions whether Plaintiffs could satisfy the adequacy requirement.

The Court is concerned about potential conflicts of interest among the named plaintiffs and other class members. Possible conflicts of interest may arise between those class members asserting only personal injury claims, those class members with only property damage claims, and those class members asserting both types of claims. Additionally, while Plaintiffs conceded at oral argument that there are no known class members with present injuries, other than "subcellular injuries," conflicts between those who may develop additional personal injuries in the future and those who do not may also arise.

The Court also finds that there are questions as to the credibility and reliability of Terry and Pamela Maslowski. The Maslowskis have experienced serious financial and legal difficulties in the past. The Maslowskis have filed for bankruptcy on a number of occasions in the past several years, a fact they failed to report on a mortgage application. In addition, Pamela Maslowski has been convicted of welfare fraud.[26] The Maslowskis no longer own their home as they were forced to sell their home to their son to avoid foreclosure on their mortgage. The Maslowskis have repeatedly failed to be

[25] *See Lewy*, 650 N.W.2d at 454; *Streich*, 399 N.W.2d at 217; *LaBauve*, 231 F.R.D. at 670 n.82.

[26] This Court is mindful of the reality that many people make mistakes at some point in their lives that result in criminal consequences, and that often such acts or behavior are of questionable relevance to future behavior. However, Ms. Maslowski's criminal conviction was for fraud, by definition a crime of dishonesty, which calls into question her fitness as a class representative for thousands of class members.

candid and forthcoming about these problems throughout this case, even with their own counsel. As evidenced throughout these proceedings, Plaintiffs' counsel have had difficulty maintaining communication with the Maslowskis. As a matter of fact, before Plaintiffs' counsel were informed or learned that the Maslowskis' home was in foreclosure status, counsel for 3M discovered that information and notified the Court of the situation. Given their failure to stay in regular contact with their counsel, the Court is also concerned with the Maslowskis' level of interest in this case. Therefore, the ability of the Maslowskis to carry out their fiduciary duties to the class is dubious, at best.

Likewise, the Court is disturbed about the apparently low levels of interest in this case demonstrated by some of the other named plaintiffs. It is questionable whether the levels of interest exhibited by these named plaintiffs rises even to the required "general knowledge and participation." Bradley Krank testified at his deposition that he "didn't think" that he had reviewed a copy of the Second Amended Complaint, did not recall seeing 3M's interrogatories, did not draft his interrogatory responses, and did not review the responses in any detail even after counsel provided them for his signature. William Henry could not recall having seen a copy of the proposed class definition, the motion for class certification, or his written interrogatory responses until the day before his deposition. Due to the low levels of participation by some of these other named plaintiffs, the Court questions whether the named plaintiffs are actually willing or prepared to take an active role in the prosecution of this lawsuit.

The adequacy requirement additionally requires that the Court inquire into the ability of class counsel to adequately represent the class. In this Court's opinion, there have been some troubling actions taken by Plaintiffs' counsel. First, Plaintiffs' counsel

went door-to-door in Washington County making unsolicited contacts with local residents about this lawsuit, seeking residents willing to give blood samples for testing in exchange for $50 payments. Plaintiffs' counsel then entered into attorney-client relationships with some of these residents. Minnesota Rule of Professional Conduct 7.3 specifically prohibits attorneys from engaging in "in-person" solicitation of professional employment and Plaintiffs' counsel denied having done so. However, when 3M requested discovery of the names and addresses of those Washington County residents contacted by Plaintiffs' counsel during their door-knocking campaign, Plaintiffs' counsel claimed the names of the residents contacted were protected by the attorney-client privilege. The inconsistency of these arguments by Plaintiffs' counsel still puzzles this Court.

Second, Plaintiffs' counsel, and/or those acting at their behest, have made less than accurate public statements about the effects of PFCs. At a town hall meeting, one of Plaintiffs' experts, Dr. David Gray stated that "low levels of PFCs in pregnant women have produced mental retardation in children." When asked about this statement in his deposition, Dr. Gray stated that he was trying to convey "the importance of the thyroid effect in rodent development studies" and he was "making no implications for human health consequences" based on PFC exposure. However, named Plaintiff Gary Paulson stated that he understood that Dr. Gray had said that PFCs cause birth defects. Also, in their July 2005 mailing to thousands of Washington County residents, Plaintiffs' counsel wrote that "PFOA and PFOS have been linked to adverse health effects in various animal studies and some human studies—including liver toxicity, thyroid hormone imbalance, developmental effects (including birth defects or abnormalities)

increased levels of cholesterol, and an increased risk of certain types of cancer." This statement is misleading because it does not differentiate the effects of PFCs found in animals from those found in humans. This style of client advocacy concerns this Court. While the Court fully agrees that the public has a right to as much information as is available about PFCs and their effects and any potential consequences of exposure to them, citizens are entitled to information that is as accurate as can be provided. Misleading information amounts to a disservice to the citizens.

Overall, the actions of Plaintiffs' counsel raise questions as to their ability to adequately represent the interests of the proposed class. However, the Court does not find the issue of the adequacy of the named plaintiffs or their counsel to be dispositive of the decision to deny Plaintiffs' Motion for Class Certification.

Rule 23.02

After plaintiffs seeking certification have adequately defined the class and met the four prerequisites of Rule 23.01, they must next satisfy at least one of the three categories of Rule 23.02. *See Forcier*, 310 N.W.2d at 129. An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

> (a) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;[27] or

[27] Rule 23.02(b)(1)(B) includes "limited fund" cases, in situations where numerous persons make claims against a fund insufficient to satisfy all of the claims. *Windsor*, 521 U.S. at 614. In their reply memorandum, Plaintiffs contend that they argued that class certification is proper under Rule 23.02(a)(2)

(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(c) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Minn. R. Civ. P. 23.02.

Leach v. Du Pont

Throughout their memoranda to the Court in support of their Motion for Class Certification and at oral argument, Plaintiffs relied heavily on *Leach v. Du Pont*, 01-C-608, 2002 WL 1270121 (W. Va. Cir. Ct. April 10, 2002).[28] *Leach* involved claims arising out of the contamination of drinking water with a chemical known as ammonium perfluorooctanoate (a/k/a APFO or PFOA or C-8). *Id.* at *3. Du Pont purchased PFOA from 3M for use as a raw material in Du Pont's production and manufacture of Teflon®.

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on pp. 36-37 of their original memorandum in support of class certification. However, in that original memorandum to the Court, Plaintiffs only cite to Rule 23.02(a)(1), and do not make either a specific reference or an argument with regard to Rule 23.02(a)(2). Plaintiffs' reply memorandum does not make clear their argument as to Rule 23.02(a)(2) either. There, Plaintiffs merely state, "3M does not contest Plaintiffs' assertion at pages 36-37 of their brief that certification is appropriate under subsection (a)(2)." Plaintiffs are correct that 3M did not put forth a response argument regarding Rule 23.02(a)(2), possibly because Plaintiffs did not argue that basis for certification. This Court will not speculate about the substance of any argument by Plaintiffs as to why class certification is appropriate under Rule 23.02(a)(2) and therefore, Plaintiffs' conclusory assertion in their reply memorandum that certification is appropriate under Rule 23.02(a)(2) will not be addressed.

[28] Some of Plaintiffs' counsel in this case against 3M, Larry A. Winter, R. Edison Hill, Gerald J. Rapien, and Robert A. Bilott, were appointed as class counsel for the plaintiffs in the *Leach* case.

Id. Given the similarity of the facts in *Leach* to the facts of this case, Plaintiffs strongly and repeatedly urged this Court to proceed as the *Leach* trial court did.

In *Leach*, the trial court certified a class with respect to all of the plaintiffs' underlying liability claims and their claims for equitable, injunctive, and declaratory relief, including medical monitoring. *Id.* at *18. All matters related to proof of the amount of any punitive damages and calculation of individual damages, including all individual personal injury and property damages, were stayed and reserved for later litigation. *Id.* Plaintiffs' lawyers, even those who represented the plaintiffs in *Leach*, could not clearly tell this Court what happened to all of the "reserved" claims once the medical monitoring claims were settled.

Despite any factual similarities, this Court declines to follow the *Leach* court's decision. Simply put, what worked under West Virginia law cannot work under Minnesota law. In making its findings regarding the requirements of Rule 23, the *Leach* court consistently referenced and seemed to focus exclusively on the plaintiffs' claims for medical monitoring. *Id.* at *11-13, *17.[29] Minnesota law does not recognize an independent tort of medical monitoring. As noted previously in the procedural history,

[29] For example, in its analysis of the commonality requirement, the *Leach* court cited a number of cases addressing the commonality of issues related to medical monitoring programs. *See* 2002 WL 1270121, at *11. In its analysis of the typicality requirement, the *Leach* court rejected Du Pont's argument that the existence of potential individualized issues precluded a finding of typicality, and stated, "the Court rejects Du Pont's argument, ...particularly with respect to Plaintiffs' claims for medical monitoring." *See id.* at *12. In its analysis of Rule 23(b)(1)(A), the *Leach* court stated, "[o]ther courts have recognized the appropriateness of certifying a class to proceed ..., at least with respect to claims for medical monitoring relief." *See id.* at *13. The *Leach* court went on to find that certification was appropriate under Rule 23(b)(1)(A) and discussed only the plaintiffs' claims for medical monitoring. Specifically, the *Leach* court stated that "the potential for inconsistent adjudications would establish incompatible standards of conduct for the defendants both in the decision to create the fund, the appropriate monitoring to be provided, and the particular requirements for entitlement to the benefits of the fund." *Id.* Finally, the *Leach* court concluded that allowing the plaintiffs to proceed as a class action was a superior method of adjudication, citing a number of cases that had certified class actions in mass tort cases where the plaintiffs sought relief in the form of medical monitoring. *Id.* at *17.

Plaintiffs' claims for medical monitoring against 3M were dismissed with prejudice. As such, the *Leach* decision is clearly distinguishable from the facts presented here. Further, *Leach* is a trial court decision, not a decision rendered after appellate review. Once the medical monitoring settlement was reached, it is unclear if any of the other claims, some of which are similar to those in this case, were or ever will be addressed as a class action or otherwise. For several reasons, *Leach* is not helpful or persuasive to this Court.

Rule 23.02(a)(1)

For purposes of Rule 23.02(a)(1), "inconsistent adjudications" does not contemplate a situation in which several people sue the same defendant for damages and some win while others lose. *Forcier*, 310 N.W.2d at 130. "To bring a class action pursuant to Rule 23.02(a)(1), there must be a real risk that the same defendant will be sued by different plaintiffs for different and incompatible affirmative relief." *Id.* (citing *Landau v. Chase Manhattan Bank*, 367 F.Supp. 992 (D.N.Y. 1973)). "Incompatible affirmative relief" refers to a situation where "different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1773 at 431 (2d ed. 1986)). Rule 23.02(a)(1) includes cases where the defendant is required by law to treat class members alike, such as "a utility acting toward customers; a government imposing a tax," or where the defendant must treat all persons alike as a matter of practical necessity, such as "a riparian owner using water as against downriver owners." *Windsor*, 521 U.S. at 614.

Plaintiffs argue that class certification is appropriate under Rule 23.02(a)(1) because in addition to the class representatives, Plaintiffs' counsel represents approximately one thousand individual Oakdale and Lake Elmo area residents who are putative class members. According to Plaintiffs, because Plaintiffs' claims are based on the reasonable person standard, there is a significant risk that separate litigations could result in inconsistent adjudications due to the elasticity of this standard and the leeway afforded juries in awarding monetary damages.[30]

In response, 3M argues that Rule 23.02(a)(1) does not justify class certification merely because the opposing party might have to pay different damage awards to different individuals based on different jury determinations. Rather, argues 3M, the fact that the opposing party might be found liable to some plaintiffs and not to others is irrelevant for purposes of 23.02(a)(1). 3M contends that the appropriate question for purposes of Rule 23.02(a)(1) is whether there is a real risk that the same defendant will be sued by different plaintiffs for different and incompatible affirmative relief. 3M argues that this rarely, if ever, occurs in mass tort contexts, and that use of Rule 23.02(a) in mass tort situations has historically not occurred in Minnesota.

The Court finds that certification of Plaintiffs' proposed class is not appropriate under Rule 23.02(a)(1) because Plaintiffs' claims, if brought individually, do not pose a risk of inconsistent adjudications, i.e., 3M being required to follow inconsistent courses of continuing conduct. In this case such a dilemma could only arise if another party

[30] Plaintiffs urge the Court to follow the reasoning and decision made in *Leach*, 2002 WL 1270121. This Court declines to do so. As stated previously, the *Leach* court focused on the plaintiffs' claims for medical monitoring. The *Leach* court's findings related to Rule 23(b)(1)(A) (Minnesota's Rule 23.02(a)(1)) specifically discussed the potential for inconsistent adjudications that would establish incompatible standards of conduct related exclusively to the proposed medical monitoring fund. *See id.* at *13. Because Minnesota law does not allow for Plaintiffs here to pursue a separate cause of action for medical monitoring, this Court finds the reasoning in *Leach* unpersuasive.

sued 3M demanding that 3M not clean up the residential water sources in Washington County. Such a claim is unlikely and there was no evidence presented of such a situation. Plaintiffs' argument focuses on incompatible or differing awards of monetary damages, if any, by judges and juries. However, such is not the protection that Rule 23.02(a)(1) seeks to provide. Therefore, the Court cannot find that there is a real risk that 3M will be sued by different plaintiffs for different and incompatible affirmative relief as contemplated by the rule.

Rule 23.02(b)

It is well settled that class certification under either Minnesota Rule 23.02(b) or Federal Rule 23(b)(2) is only appropriate where equitable and injunctive relief is the sole or primary relief sought. *See Streich*, 399 N.W.2d at 216 (if a claim is primarily for money damages then Rule 23.02(b) is not satisfied); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 481-82 (E.D. Pa. 1997). Class certification as an injunctive relief class "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004). Instead, class certification pursuant to Rule 23(b)(2) is only proper where any monetary relief sought is incidental to the injunctive relief requested. *Id.* (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). Monetary damages are considered "incidental" relief where they are "capable of computation by means of objective standards and not dependent in any significant way on intangible, subjective differences of each class member's circumstances." *In re Monumental Life*, 365 F.3d at 416 (quoting *Allison*, 151 F.3d at 415).

Plaintiffs argue that class certification is appropriate under Rule 23.02(b) even if their claims for monetary damages are certified along with their claims for declaratory and injunctive relief because the overall nature of their case is predominantly one for injunctive-type relief.[31] Furthermore, Plaintiffs argue that the primary relief sought in this action is remediation. Plaintiffs contend that the relief they are seeking is primarily injunctive because they desire a court order requiring 3M to take any steps necessary to stop the PFC contamination and to remove, through non-monetary means, the PFC contamination that already exists. Plaintiffs argue that they are not primarily seeking monetary damages from 3M while the company continues to release PFCs into the environment and leaves existing contamination in place.

In response, 3M argues that class certification under Rule 23.02(b) is not appropriate here because Plaintiffs' claims are primarily for monetary damages related to alleged personal injuries and property damage. Citing *Windsor*, 521 U.S. at 614, 3M contends that a prime example of a case properly certified as an injunctive relief class would be a civil rights case against a party charged with unlawful, class-based discrimination, where the defendant can be ordered to provide uniform relief to the entire class. 3M argues that Plaintiffs' case is not such a case given that Plaintiffs' claims are primarily for personal injuries and property damages. In addition, 3M argues that individualized issues among the named plaintiffs and putative class members

[31] Plaintiffs again urge this Court to follow the reasoning and decision made in *Leach v. Du Pont*. This Court declines to do so. West Virginia law authorizes the certification of a class to pursue medical monitoring claims under Rule 23. *Id.* at *15. As stated above, Minnesota law does not provide for such a cause of action. Accordingly, because the success of the *Leach* plaintiffs was seemingly so dependent on their medical monitoring claims, this Court finds the *Leach* reasoning inapposite.

destroy any presumption of cohesiveness and preclude this Court from certifying the proposed class as an injunctive relief class under Rule 23.02(b).

At oral argument during the class certification hearing, Plaintiffs strenuously argued that injunctive relief is their first and foremost request in this lawsuit. But that was the first time that Plaintiffs presented the Court with specific requests regarding what types of injunctive relief they seek. Plaintiffs stated that they seek the following as injunctive relief: bio-monitoring;[32] an order to 3M to abate and remediate all sources of PFC contamination of the groundwater, including public and private drinking water sources which contain PFC levels at or above the levels contemplated in the class definition; an order to 3M to provide clean bottled water or other alternative clean drinking water pending completion of a permanent means of providing uncontaminated water to the class members; medical monitoring as a form of future damages; and a declaratory finding that PFCs constitute "hazardous substances" under MERLA. Plaintiffs did not propose how this Court could grant or implement their proposed relief.

For example, Plaintiffs did not provide an explanation as to how this Court could order 3M to develop abatement and remediation programs for the clean-up of municipal water supplies and disposal sites in Washington County which are clearly not under 3M's control and are each subject to different regulatory schemes. Further, this Court does not have authority to make orders directed at municipalities which are not parties to this action. Additionally, it is possible that some forms of injunctive relief, if granted,

[32] Plaintiffs were deliberate in their attempts to differentiate between "bio-monitoring" and "medical monitoring." According to Plaintiffs, "bio-monitoring" is focused on testing residents' exposure levels; it would reveal whether exposure is continuing and whether 3M's abatement procedures are effective. On the other hand, they explain, "medical monitoring" involves tests performed on residents designed to detect the onset of disease. Plaintiffs' claims for medical monitoring in this case were dismissed with prejudice by Judge Muehlberg in 2005. Nevertheless, Plaintiffs stated that they are maintaining their request that the Court establish, maintain, and administer a medical monitoring program if it is determined to be an appropriate form of future damages.

could conflict with current remediation efforts by the MPCA and some of Plaintiffs' requests may have been rendered moot by ongoing regulatory agency activities. As to Plaintiffs' MERLA claim, the statute requires that private citizens have damages for economic loss in order to have a right of action. *See* Minn. Stat. § 115B.05, subd. 1. Thus, even if this Court were to declare PFCs "hazardous substances" as defined by MERLA, the inquiry into whether each plaintiff is entitled to recover under MERLA for economic loss, death, personal injury, and disease would have to be addressed on an individual basis, not by formulaic, objective calculations, thus making the Plaintiffs' monetary damages non-incidental.

At oral argument, Plaintiffs further argued that class certification is appropriate under Rule 23.02(b) because any monetary damages sought for 3M's release of PFCs into the environment would be merely incidental to the injunctive relief sought. Plaintiffs claim that the monetary relief they seek for property damages can be assessed objectively, on a class-wide basis. They support this argument with their claim that all class members' property damages can be calculated by methods proposed by their expert, Dr. Robert Simons. Dr. Simons' expert report concludes that "real estate trends analysis" and "contingent valuation analysis" are methodologies that can be applied in a formulaic manner for all residential properties facing the common problem of PFC contamination.[33] At the time of his report dated October 2006, Dr. Simons mentioned his intent to do a "real estate trends analysis" in Oakdale and Lake Elmo. It is not clear whether any such analysis has been completed to date. Dr. Simons did perform a

[33] The Court notes that Dr. Simons' report only speaks, by way of conclusory proposals, to property valuations in Oakdale and Lake Elmo. There is no evidence before the Court as to how property damages in other communities allegedly affected by PFC contamination (where some of the 67,700 potential class members live) would be assessed on a class-wide basis.

"potential residential buyer market survey" in portions of the Twin Cities area, but none of the questions in the survey contained specific information about any of the named plaintiffs' properties. Based on that survey and his "real estate trends analysis," Dr. Simons made questionable conclusions as to permanent reductions in the value of certain properties in Washington County attributable to PFC contamination.

Despite Dr. Simons' optimistic conclusion that Plaintiffs' property values and losses can be calculated on a class-wide basis through a formulaic methodology, he seems to contradict himself in his own report's introduction where he states "enjoyment means different things if it is [in reference to] an owner-occupied house or an investment property." Also, Dr. Simons' report fails to provide any guidance as to how any monetary damages awarded to the class members might be dispersed among the class members.

The methodologies proposed by Dr. Simons in this case are similar to those proposed by Dr. Simons for the plaintiffs in *LaBauve v. Olin Corporation*, a case involving claims for property damages as a result of mercury contamination. In contrast to Dr. Simons' conclusory promises of a "common, formulaic methodology" which could be used to award property damages on a class-wide basis, this Court agrees with the reasoning of the *LaBauve* court and finds that there are likely to be numerous conceptual and practical obstacles in the application of a class-wide formula to assess property damages. *See* 231 F.R.D. at 676-78. A rational and common sense examination of the many factors that may impact each class member's property damages award leads to the conclusion that such damages are not amenable to computation by an easy or mechanical method. In fact, these property damage

calculations would hinge on property-specific determinations of a number of factors including: to what extent the property is contaminated with PFCs; to what extent the class member has altered or changed her use of the property because of PFC contamination; and any other non-PFC related problems or defects with the property that may affect that property's value, including the effects of the current state of the real estate market in any given area.[34]

That some Plaintiffs will seek damages by way of both personal injury and property damages claims while others will seek only one or the other will present additional and potentially insurmountable obstacles to performing damages calculations on a class-wide formulaic basis. Clearly, individualized inquiries into the property damages claims appear to be inevitable, therefore defeating any argument by Plaintiffs that their claims for monetary relief for property damages are merely incidental to their claims for injunctive relief.

This Court finds that class certification is not appropriate in this case under Rule 23.02(b) because the Court cannot find that Plaintiffs here are primarily seeking injunctive relief.

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[34] Citing *Dealer Manufacturing Co. v. County of Anoka*, 615 N.W.2d 76 (Minn. 2000), Plaintiffs argued that the monetary relief they seek for property damages can be assessed objectively, on a class-wide basis, in a manner analogous to that used to assess market stigma for tax values. In *Dealer*, which was not a class action lawsuit, the Minnesota Supreme Court considered whether a taxpayer challenging a property tax assessment is entitled to a reduction in the assessed value of contaminated property based on stigma. 615 N.W.2d at 77. However, *Dealer* does not appear to stand for the proposition that tax values are assessed on a neighborhood-wide or class-wide basis as Plaintiffs seem to argue. In fact, Minnesota's statute regarding the assessment of real property states, "...in estimating and determining the value of lands for the purpose of taxation, [the assessor must] consider and give due weight to every element and factor affecting the market value thereof..." *See* Minn. Stat. Ann. § 273.12 (West 2007). The language of section 273.12 appears to direct tax assessors in Minnesota to consider property-specific characteristics when determining a property's value for tax purposes.

Rule 23.02(c)

In order to certify a class action under Rule 23.02(c), the court must determine that "questions of law or fact common to the members of the class predominate." *Forcier*, 310 N.W.2d at 130. "The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement..." *Smith v. Ill. Cent. R.R. Co.*, 860 N.E.2d 332, 337 (Ill. 2006).

There are no bright-line rules to determine whether common questions predominate. *Lewy*, 650 N.W.2d at 455. "A court must consider whether the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member's individual position." *Id.* To determine whether issues common to the class predominate over individual issues, the court must identify the substantive issues that will control the outcome of the case, assess which issues will predominate, and then determine whether these issues are common to the class. *Smith*, 860 N.E.2d at 337 (citing *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003)). The test for predominance is whether common or individual issues will be the object of most of the efforts of the litigants and the court. *Smith*, 860 N.E.2d at 337. Moreover, to predominate, common issues must constitute a significant part of the individual cases. *Lewy*, 650 N.W.2d at 456 (citing *Streich*, 399 N.W.2d at 217). "Where the predominance test is met, 'a judgment in favor of the class should decisively settle the entire controversy, and all that should remain is for the other members of the class to file proof of their claim.' " *Smith*, 860 N.E.2d at 337 (quoting *Bernal*, 22 S.W.3d 434).

Plaintiffs argue that common questions among class members predominate. According to Plaintiffs, there are several common issues of law and fact in this case. All of their claims arise out of the same course of conduct by 3M, and basic, fundamental elements of each tort or statute-based claim are common to all potential class members and do not depend on any individual characteristics or traits of the class members. Plaintiffs did not develop this argument at the two-day class certification hearing, but did direct the Court's attention to six cases on which Plaintiffs suggest the Court rely.[35]

First, Plaintiffs' rely very heavily on *Leach v. Du Pont*. At oral argument, Plaintiffs argued that this Court should follow *Leach* because *Leach* was not merely a medical monitoring case. According to Plaintiffs, the *Leach* plaintiffs sought injunctive relief and monetary damages for bodily injury and property damage and the *Leach* court did not find that individual issues defeated class certification. Despite Plaintiffs' arguments, this Court does not find *Leach* to be similar to the instant case. The *Leach* court found that common issues predominated over individual issues and concluded that certification was appropriate under Rule 23(b)(3); however, that court provided surprisingly little legal analysis as to why common issues predominated. The *Leach* court also found that proceeding as a class action was a superior method of adjudication. *Id.* at *17. However, the *Leach* court's superiority finding seemed to hinge exclusively on the plaintiffs' medical monitoring claims. Without explanation or description of a case management plan, *Leach* "reserved" all of the plaintiffs' personal injury claims for future

[35] The Court notes that all six of the cases highlighted by Plaintiffs at oral argument are trial court, district court, or circuit court opinions. As such, they are opinions which have not been reviewed on appeal by a higher court, and none of them create binding precedent upon this district court. More importantly, none of the six cases offer much, if any, analysis or instruction regarding the predominance criteria as it relates to personal injury claims like those brought by Plaintiffs. This Court feels the predominance question is a critical one to its decision on class certification and expected to hear substantial argument about this.

litigation. For these reasons, and the others explained above, this Court will not rely on the reasoning presented in *Leach*.

Second, Plaintiffs rely on *O'Connor v. Boeing North American, Inc.* In *O'Connor*, the plaintiffs motioned the court for class certification to pursue claims resulting from alleged TCE contamination. 184 F.R.D. at 316. The plaintiffs there proposed three separate classes. *Id.* at 317. The Court allowed the plaintiffs to proceed as a class under Rule 23(b)(2) with regard to their claim for injunctive relief in the form of a court-supervised medical monitoring program. *Id.* at 339. The facts presented in *O'Connor* are distinguishable from those presented here for three reasons. First, in this case, Plaintiffs have not proposed any subclasses either in their definition or in a class management proposal. Second, because Plaintiffs here cannot pursue injunctive relief in the form of a medical monitoring fund, *O'Connor* has no bearing on the claims before this Court. Finally, the *O'Connor* court allowed the plaintiffs to proceed as a "property class" under Rule 23(b)(3) after accepting the potential validity of a "multiple regression analysis" to determine loss of property value for all property class members. *Id.* at 342. As explained previously, this Court is not willing to assume that a class-wide assessment of property damages claims can be accomplished by using a formula similar to a "multiple regression analysis." Therefore, the facts presented in *O'Connor* are distinguishable from those presented in this case.

Third, Plaintiffs argue that this Court should follow *Yslava v. Hughes Aircraft Co.* In *Yslava*, the plaintiffs raised federal and state claims seeking to recover costs already incurred in determining whether and to what extent they had been exposed to contaminated water. 845 F.Supp. at 708. The plaintiffs also sought to recover

damages for medical monitoring costs already incurred, as well as future medical monitoring costs. *Id.* The Court granted the plaintiffs' motion to proceed as a class action, finding that certification was appropriate under Rules 23(b)(1) and 23(b)(2). *Id.* at 713. The Court stated that the plaintiffs were not merely seeking money from the defendant, but sought to implement a court-supervised program requiring ongoing medical monitoring. *Id.* Because of this, the Court found that the plaintiffs' relief qualified as injunctive, and certified the class under Rule 23(b)(2). While the Court did state that the plaintiffs' claims could be certified under Rule 23(b)(3), it did not elaborate on its conclusion that the common questions of law and fact presented predominated over any individual issues. *See id.* Instead, the court merely stated that "when class certification is sought in the alternative under 23(b)(2) and (b)(3), the 23(b)(2) class is preferred." *Id.* Accordingly, this Court cannot find the reasoning of the *Yslava* court instructive or persuasive. That court appeared to base its decision to certify the class solely on the plaintiffs' medical monitoring claims and such claims are not permitted under Minnesota law.

Finally, Plaintiffs urge this Court to follow three cases decided in the Northern District of Illinois, namely *Ludwig v. Pilkington North America, Inc.*, 2003 WL 22478842 (N.D. Ill. Nov. 4, 2003); *Mejdreck v. Lockformer Co.*, 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002); and *LeClercq v. Lockformer Co.*, 2001 WL 199840 (N.D. Ill. Feb. 28, 2001). In each of these cases, the trial court granted the plaintiffs' motions for class certification, but failed to provide any meaningful legal analysis on the issue of predominance. Given the critical importance of the predominance requirement to the analysis of the proper use of the class action device, this Court finds these cases

unhelpful. More importantly, these three courts did not base their minimal legal analysis of the predominance requirement on the correct rule of law. Citing *Mejdreck*, *Ludwig* stated, "[c]onsiderable overlap exists between the court's determination of commonality and a finding of predominance." 2002 WL 22478842, at *4. Moreover, citing *Mejdreck* again, *Ludwig* stated, "[a] finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." 2002 WL 22478842, at *4. A careful reading of case law regarding class actions leads to the conclusion that such statements are simply incorrect. *See e.g. Windsor*, 521 U.S. at 623-24 (predominance inquiry is far more demanding than commonality inquiry); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601-03 (5th Cir. 2006) ("the predominance inquiry is more rigorous than the commonality requirement;" it tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation); *Smith*, 860 N.E.2d at 337 (predominance is a far more demanding requirement than the commonality requirement); and *Bernal*, 22 S.W.3d at 435 ("the exacting standards of the predominance inquiry serve as a check on the flexible commonality" inquiry). This Court cannot follow *Ludwig*, *Mejdreck*, and *LeClercq* in making its determination under Rule 23.02(c).

This Court is more persuaded by other cases, particularly *Steering, Smith, and Bernal*. The facts presented in these cases are similar to those presented here. Each involved plaintiffs seeking class certification for monetary damages related to chemical exposure. In *Steering*, the plaintiffs sought to proceed as a class action to pursue personal injury and property damages claims against the defendant for chemical exposure related to an oil fire. 461 F.3d at 600. The Fifth Circuit Court of Appeals

affirmed the district court's denial of class certification due to the plaintiffs' failure to satisfy the predominance and superiority requirements. *Id.* at 605. In *Smith*, the plaintiffs sought class certification for personal injury and property damages for chemical exposure resulting from a train derailment and subsequent fire. 860 N.E.2d at 334. The Illinois Supreme Court reversed the judgments of the appellate court and the circuit court and concluded that common issues of law and fact did not predominate. *Id.* at 342. In *Bernal*, the plaintiffs sought class certification for alleged personal injuries related to chemical exposures resulting from a refinery tank fire. 22 S.W.3d at 428. In that case, the Texas Supreme Court reversed the trial court's certification decision and held that the plaintiffs could not proceed as a class action because individual issues predominated over common issues. *Id.* at 436-38. Key to the helpfulness of these opinions is the fact that each provides a significant and meaningful legal analysis regarding the predominance requirement.

Predominance

Because the predominance question turns on whether the majority of effort in the proof of Plaintiffs' claims will be on common issues or on individual issues, in order to determine whether Plaintiffs have met the predominance requirement of Rule 23.02(c), it is necessary to review the elements of each of Plaintiffs' claims. To prevail on their negligence claims, each Plaintiff must prove (1) the existence of a duty of care; (2) breach; (3) proximate cause; and (4) injury in fact. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). This Court cannot find that the elements of 3M's duty to each plaintiff and 3M's breach of those duties are common issues that would predominate their proof. Plaintiffs' claims involve various actions by 3M that occurred over a 60 year

period with disposal of PFC waste occurring at multiple locations. The evidentiary finding of what duty, if any, on the part of 3M is owed to each plaintiff will inevitably require an individualized analysis of each plaintiff's unique circumstances, including the location of their residence in relation to each disposal site. Even if this Court concluded that questions of whether 3M is responsible for the contamination and whether PFCs are capable of producing the injuries that Plaintiffs allege are ones where common issues predominate, the individualized matters of proximate cause must still be litigated for each plaintiff. This generalized liability and causation is not enough to prove individualized damages and, as a result, the case would be overwhelmed by the need for individual, not class-wide evidence.

The issues of causation and damages will turn on the individual facts and circumstances presented by each plaintiff. To the extent that Plaintiffs seek damages for their "subcellular injuries" based on 3M's alleged negligence, each plaintiff must prove to a reasonable degree of medical certainty that PFC contamination caused her injuries. *See Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 721 (Minn. App. 1998) ("injuries are not 'real' simply because they are subcellular;" "the effect of volatile organic compounds on the human body is a subtle, complex matter" (*Werlein v. U.S.*, 746 F.Supp. 887, 901 (D. Minn. 1990)).

With regard to their personal injury claims, Plaintiffs urge the Court to adopt their position (as recited at oral argument) that expert testimony at the merits stage will show that each plaintiff exposed to PFCs at the proposed class definition levels will automatically have "subcellular injury" due to the unique chemical structure of PFCs. The Court declines to accept Plaintiffs' position for two reasons. First, Plaintiffs' position

improperly prohibits any inquiry into causation, and this Court is unwilling and unable to allow causation to be presumed for each member of the class.[36] Ultimately, many factors would likely have to be considered in order to determine if PFC exposure is the cause of each plaintiff's "subcellular injury," including among others, lifestyle, level of exposure, and susceptibility to illness. Second, Plaintiffs' argument requires that the Court presume that "subcellular injury" has occurred in each plaintiff. In reality, the proof required to establish whether each plaintiff has even developed "subcellular injury" will require some type of individualized inquiry into the medical records and histories of each plaintiff. One set of operative facts simply cannot establish causation or damages for the entire class. Instead of decisively settling this controversy, any judgment in favor of Plaintiffs as to 3M's liability would just begin the predominant process of determining which of the plaintiffs are entitled to what amount of damages. Consequently, individual issues surrounding exposure, health effects, and damages would undoubtedly overwhelm the trial process.

Plaintiffs also argue that issues common to their private nuisance claims will predominate. According to Plaintiffs, nuisance requires a showing of "wrongful conduct," *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 804 (Minn. App. 2001), and whether a nuisance has occurred is judged from the standpoint of a reasonable person. *Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328 (Minn. 1942). Therefore, Plaintiffs contend that for all class members, the question is identical: does the presence of PFCs in their water constitute a nuisance in

[36] "The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment." *Bernal*, 22 S.W.3d at 437. "It is not meant to alter the parties' burdens of proof, right to jury trial, or the substantive prerequisites to recovery under a given tort." *Id.* "Procedural devices may 'not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.' " *Id.* (quoting Tex. R. Civ. P. 815).

the eyes of a reasonable person? 3M asserts, however, that private nuisance claims are inherently individualized, and as such, they are *per se* uncertifiable under 23.02(c).

A nuisance has been defined in Minnesota as "anything which is...injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." *Citizens*, 624 N.W.2d at 803 (quoting Minn. Stat. § 561.01 (2000)). The degree of discomfort created by the alleged nuisance is measured by "the standards of ordinary people in the area where they reside." *Id.* As such, because the discomfort created by the nuisance is judged from the standards of ordinary people, whether PFCs are a nuisance could be determined on a class-wide basis. But that would only be the beginning of the litigation. Each plaintiff would still need to show that her individual use and enjoyment of the property has been altered or otherwise infringed upon because of the presence of PFCs in the water. Such a determination could only be made by inquiring into the lifestyles and practices of each and every plaintiff, and would amount to thousands of mini-trials. As to each plaintiff, a jury would have to determine the proper amount of damages that would compensate each plaintiff for the loss of use and/or enjoyment of her property due to PFC contamination. This Court fails to see how individual issues would not predominate with regard to Plaintiffs' private nuisance claims.

Pursuant to Minnesota law, a plaintiff alleging battery must prove intent. *Essex Ins. Co. v. Davidson*, 248 F.3d 716, 718 (8th Cir. 2001). Intent is present where the person knows that her acts are substantially certain to cause a battery. *See R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn. 1975); CIVJIG § 60.10. A plaintiff asserting battery must also prove offensive or harmful contact. *Essex*, 248 F.3d at 718. A bodily contact

is offensive if it offends a reasonable sense of personal dignity. Restatement (Second) of Torts § 19 (1965). Accordingly, the Court agrees with Plaintiffs that whether PFC contamination is offensive contact is a common issue that could be determined on a class-wide basis at trial. However, whether 3M intended PFC contamination in the water supplies of each and every class member is an issue laden with individual inquiries that are certain to dominate at trial. 3M's intent, or substantial certainty, is dependent on each plaintiff's location of residence and the time period of residence. Moreover, each plaintiff must also prove damages related to her battery claim. CIVJIG 90.15. Here again, any inquiry into damages will require individualized probes into the lifestyles, age, health, gender and family history of each of the class members. Such an inquiry makes these individual issues predominate over any common issues of whether PFC contamination is a harmful or offensive contact.

"A person is subject to liability for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally enters land in the possession of the other, causes a thing or a third person to do so, remains on the land, or fails to remove from the land a thing which he is under a duty to remove." *Victor v. Sell*, 222 N.W.2d 337, 340 n.1 (Minn. 1974). 3M's intent, or whether 3M should have been aware that its production, emission, and discharge of PFCs into the environment was substantially certain to result in contamination of private and public water supplies, is not an issue common to all class members. Any inquiry into 3M's intent will differ depending on the proximity of each plaintiff's property to the sites where PFC waste was disposed. The differences in proximities to disposal sites pertain to the question of whether PFC contamination even constitutes a trespass. Perhaps 3M was

"substantially certain" that PFCs would migrate and contaminate the water supply of a home very close to a disposal site, like the Paulsons', but not to a class member's home many miles from a disposal site. Consequently, the individual characteristics of each plaintiff's property, its location and its use are crucial to the trespass analysis.

For these reasons, this Court is unable to find that common issues predominate over individual issues with regard to the proof at trial of Plaintiffs' claims; therefore, Plaintiffs cannot proceed with a class action under Rule 23.02(c).

Superiority and Manageability

In addition to showing that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, Plaintiffs must show that proceeding as a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23.02(c).[37] Important to the superiority inquiry is an analysis of any difficulties likely to be encountered in the management of a class action. *Id.*

Plaintiffs contend that this case would be manageable as a class action overall and that proceeding as a class action is superior to other methods of adjudication. Plaintiffs argue that transaction costs will be lower if this matter proceeds as a class action. At oral argument Plaintiffs proposed for the first time that this litigation could be divided into phased trials. While their description of the phases was fairly confusing and disorganized, the Court understands that Plaintiffs' proposal would likely be as follows: in the first phase, a jury would determine common liability and common damage issues,

[37] The superiority analysis is "intertwined" with the predominance analysis; "[w]hen there are no predominant common issues of law or fact,...class treatment would be either singularly inefficient...or unjust." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 n.12 (11th Cir. 1997).

including property damages. The first phase would also determine if Plaintiffs are entitled to injunctive relief. In phase two, the Court would decide what specific injunctive relief (i.e., abatement and remediation efforts) would be granted. Plaintiffs further proposed that determinations of individual damages would be stayed. Despite these proposals, Plaintiffs stated that they cannot predict right now how this case will be managed, but urged the Court to rely on their assurances that this case will be manageable. Given the explicit requirements of Rule 23, the interests at stake for all the parties, and the factual and legal complexities presented by this case, this Court declines to "certify now and worry later."[38]

Based on the record before it, the Court cannot find that a class action is the superior method of adjudicating this controversy. Because the issues of damages do not lend themselves to formulaic, mechanical calculations, but instead would require separate "mini-trials" of a significant number of individual claims, this Court would be faced with astounding problems of logistics. *See Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. App. 1987). If Plaintiffs are successful in proving 3M's liability on some or all of their claims, it will still be necessary for each plaintiff to show the diminution in market value for her own parcel of property and/or the effects of PFCs on her health in order to show individual damages. Based on the multitude of individual issues that would be necessary to the plaintiffs' claims for personal injuries and property damages, each potential class member may find it more prudent to control the prosecution of her own action.

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[38] *See Bernal*, 22 S.W.3d at 435 (quoting *Windsor*, 521 U.S. at 620 ("courts must be mindful that the rule as now composed sets the requirements they are bound to enforce...The text of a rule...limits judicial inventiveness").

At oral argument, Plaintiffs made an emotional appeal to the Court arguing that denial of class certification will ultimately amount to a complete denial of legal redress for many plaintiffs because of potential financial barriers and because 3M is such a large and powerful defendant. While this Court does not disagree with Plaintiffs' contention that some plaintiffs may decide not to pursue their claims individually against 3M because of financial concerns, the Court cannot ignore the real possibility that proceeding as a class action may very well cost all of the plaintiffs more in the long run, if, as may be expected here, the class must ultimately be dissolved later because there is no manageable, fair way to resolve the individual issues. *See Bernal*, 22 S.W.3d at 439.

Plaintiffs also argued that class action is a superior method of adjudication by warning that if class certification is denied, hundreds, if not thousands, of individual lawsuits would be filed, flooding the Washington County District Court.[39] As far as this Court is aware, as yet, there have been no other lawsuits filed by a Washington County resident against 3M regarding PFC contamination of residential drinking water. Any estimates of the number of cases or predictions as to the viability of cases yet to be filed are entirely speculative. As pointed out before, decertifying a class that should not have

[39] Applying the "immature tort doctrine," 3M argued that this Court cannot determine whether proceeding as a class action would be a superior method of adjudication because of the novelty of Plaintiffs' claims and the lack of a track record of chemical exposure cases in Minnesota. According to this doctrine, when the plaintiffs seek class certification of claims that are new or novel (or immature), the class complaint must be dismissed as class certification cannot be found to be a superior method of adjudication. *Castano*, 84 F.3d at 740-41. The specific concern raised is that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to properly conduct the predominance and superiority analysis required by Rule 23. *Id.* at 747. Until plaintiffs decide to file individual claims, according to the doctrine, a court cannot, from the existence of injury, presume that all or even any plaintiffs will pursue legal remedies. *Id.* at 748 Nor can a court make a superiority determination based on such speculation. *Id.* While acknowledging the potential applicability of the immature tort doctrine to this case where Plaintiffs' claims based on PFC contamination are novel and have not been tested by previous similar litigation, especially where the science of PFCs and information about their effects seems to change on an almost daily basis, the Court does not rely on this doctrine as a specific grounds for its decision.

been certified initially may be a much more intense drain on court resources than the individual cases that may be filed by residents that are potential class members. It is important to note that methods such as consolidation of claims or cases and other judicial case management tools are available to the Court and could be used to manage multiple similar lawsuits. Given the lack of evidence before the Court regarding other cases filed or likely to be filed, Plaintiffs' minimal showing of how this case could be managed as a class action, and the availability of other judicial case management tools, the Court cannot find that a class action is the superior method of adjudication of Plaintiffs' claims. Therefore, Plaintiffs cannot satisfy the superiority requirement of Rule 23.02(c).

CONCLUSION

For the above-stated reasons, Plaintiffs' Motion for Class Certification is **DENIED**. Although the Court is not permitting Plaintiffs to proceed as a class, it is not in any way precluding Plaintiffs from recovering should they decide to seek damages individually. Exposure to potentially hazardous substances is certainly a serious occurrence and such exposure should be prevented or limited and those injured should be compensated. However, that compensation must be made in accordance with accepted legal principles. Here, Plaintiffs cannot meet the requirements set forth in Minnesota law to be granted class action status. As such, Plaintiffs' motion must be denied.

M.E.H.

M.E.H. 6-19-07