APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3663

TERRY MARTIN; LINDA RUSSEL,
aka LINDA RUSSELL; NANCY SMITH; DEBORAH NEEDHAM,
Plaintiffs-Appellees,

v.

BEHR DAYTON THERMAL PRODUCTS LLC; BEHR AMERICA, INC.; CHRYSLER MOTORS LLC, nka OLD CARCO LLC; ARAMARK UNIFORM & CAREER APPAREL INC.,
Defendants-Appellants.

FILED: July 16, 2018

OPINION

Before: GILMAN, ROGERS and STRANCH, Circuit Judges.

This toxic tort class action case arises from Defendants' alleged contamination of the groundwater in the McCook Field neighborhood of Dayton, Ohio. Plaintiffs own properties in McCook Field, which is a low-income area surrounding a Superfund site. They allege that Defendants released volatile organic compounds and other

hazardous substances into the groundwater underlying their properties and were deliberately indifferent to the resultant harm. The district court denied Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23(b)(3), but certified seven issues for class treatment under Rule 23(c)(4). Defendants filed a Rule 23(f) petition to appeal the district court's issue-class certification order, and this court granted review. For the following reasons, we **AFFIRM** the district court's certification decision.

I. BACKGROUND

A. Factual Background

In 2008, thirty named plaintiffs filed this class action case, which now encompasses 540 properties in the McCook Field neighborhood. Defendants are four entities incorporated in Delaware and authorized to do business in Ohio: Behr Dayton Thermal Products LLC; Behr America, Inc.; Chrysler Motors LLC; and Aramark Uniform & Career Apparel, Inc.[1]

Plaintiffs allege that the groundwater beneath their properties is contaminated with a number of known and suspected carcinogenic volatile organic compounds (VOCs). They contend that Defendants Chrysler and Aramark released these chemicals into the environment over a period of many years while they operated their respective automotive and dry cleaning facilities.[2] The toxic

[1] Plaintiffs initially named several additional entities as defendants, but they have since dismissed their claims against those parties.

[2] Chrysler sold its facility, referred to as the Chrysler-Behr Facility, to Behr in 2002. The Chrysler-Behr facility is located just north of Aramark's facility.

chemicals seeped from the commercial properties into the groundwater in two separate plumes, which converge south of Aramark's facility.

The Chrysler-Behr Plume encompasses groundwater contamination from the Chrysler-Behr facility. Plaintiffs assert that Defendants Behr and Chrysler have known about the VOC contamination since 2000 but failed to take steps to remediate it or prevent its spread. The United States Environmental Protection Agency (EPA) became involved in 2006, initiated an emergency removal action in 2007, and designated the area as a Superfund site in 2009. According to the EPA, Defendants Behr and Chrysler released trichloroethene (TCE) and other hazardous substances from their facility, which contaminated the groundwater. This contaminated groundwater migrated south to the areas underlying Plaintiffs' properties. In 2006, the EPA conducted testing of the surface overlying the Chrysler-Behr Plume and determined that the "sub-slab" levels of TCE and other VOCs exceeded allowable levels.

The Aramark Plume encompasses groundwater contamination from Aramark's above-ground chemical storage tanks at the facility that the company formerly used for its dry cleaning operations. Aramark used these tanks to store cleaning agents, including tetrachloroethylene (PCE), a VOC. Deposition testimony indicates that Aramark was aware of PCE contamination as early as 1992.

Plaintiffs have access to a municipal water source for drinking, but the contaminated groundwater creates the risk of VOC vapor intrusion in their homes and buildings. Vapor intrusion, in turn, creates the risk that Plaintiffs will inhale carcinogenic and hazardous substances.

The EPA described the harm as follows:

> Elevated levels of TCE detected in the indoor air in four homes could harm residents who breathe the indoor air. Potential adverse effects from breathing TCE include immunological effects, fetal heart malformations, kidney toxicity, and an increased risk of developing kidney cancer. Installation of the vapor abatement systems has lowered the concentrations of contaminants to levels that are not expected to result in any adverse health effects. However, installation and operation of the vapor abatement systems are an interim action to mitigate or prevent current exposures and do not fully address the contaminated groundwater plume under the neighborhood and the source of contamination at this site.

Plaintiffs explain that "[a]ll of the properties above the Plumes have and will continue to have a risk of toxic vapor intrusion, and approximately half of the buildings that lie above the plumes currently experience severe vapor intrusion." Vapor intrusion in McCook Field structures has caused real harm: At least one school was closed and demolished when vapor mitigation systems were unable to adequately contain the levels of harmful substances in the air.

B. Procedural History

Plaintiffs originally filed suit in the Court of Common Pleas for Montgomery County, Ohio. Chrysler subsequently removed the action to the United States District

Court for the Southern District of Ohio, invoking jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(2). The district court consolidated this case with two related actions.

Plaintiffs filed a Master Amended Class Action Complaint in 2015. The operative complaint includes eleven causes of action: (1) trespass; (2) private nuisance; (3) unjust enrichment; (4) strict liability; (5) negligence; (6) negligence per se; (7) battery; (8) intentional fraudulent concealment; (9) constructive fraud; (10) negligent misrepresentation; and (11) civil conspiracy.

Plaintiffs sought Rule 23(b)(3) class certification as to liability only for five of their eleven causes of action—private nuisance, negligence, negligence per se, strict liability, and unjust enrichment. In the alternative, they requested Rule 23(c)(4) certification of seven common issues.

The district court determined that although Plaintiffs' proposed classes satisfied Rule 23(a)'s prerequisites, Ohio law regarding injury-in-fact and causation meant that Plaintiffs could not meet Rule 23(b)(3)'s predominance requirement.[3] Accordingly, the district court denied certification of the two proposed liability-only classes. The district court then addressed Plaintiffs' alternate request for issue-class certification under Rule 23(c)(4). It considered whether predominance constitutes a threshold requirement that must be satisfied with respect to the entire action before a court may certify certain issues, noting that

[3] Plaintiffs dispute this understanding of Ohio law and have reserved the right to appeal it on a non-interlocutory basis. Importantly, actual injury in this context does not relate to Article III standing but rather to the element of Ohio tort law.

this question has resulted in a conflict between several other circuits. Finding persuasive the so-called "broad view," the district court rejected treating predominance as a threshold requirement and certified the following seven issues for class treatment:

> Issue 1: Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;
>
> Issue 2: Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;
>
> Issue 3: Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;
>
> Issue 4: Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;
>
> Issue 5: Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;
>
> Issue 6: Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

> Issue 7: Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.

The district court concluded its class certification decision by stating that it would "establish procedures by which the remaining individualized issues concerning fact-of-injury, proximate causation, and extent of damages can be resolved" and noting that any such procedures would comply with the Reexamination Clause of the Seventh Amendment.[4]

Defendants filed a timely Rule 23(f) petition. They argued that the district court reached the wrong conclusion on the interaction between Rules 23(b)(3) and 23(c)(4) and that, even under the broad view, the issue classes do not pass muster. Defendants also raised Seventh Amendment arguments, citing the district court's mention of a potential procedure involving the use of a Special Master to resolve remaining issues. Plaintiffs cross-appealed, arguing that the district court should have granted their request for Rule 23(b)(3) certification of liability-only classes. A non-oral argument panel of this court granted Defendants' petition and denied Plaintiffs' cross-appeal. *In re Behr Dayton Thermal Prods. LLC*, Nos. 17-0304/17-0305 (6th Cir. June 22, 2017) (order). Our review is therefore limited to the district court's decision to certify issue classes under Rule 23(c)(4).

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[4] Plaintiffs sometimes refer to the district court's certification decision as "conditional." It is true that certification orders may be modified before final judgment, *see* Fed. R. Civ. P. 23(c)(1)(C), but the provision of Rule 23 that provided for conditional certification was removed as part of the 2003 amendments.

II. ANALYSIS

A. Jurisdiction

The district court properly exercised jurisdiction under CAFA because the value of the case exceeds $5,000,000, at least one Plaintiff is a citizen of a state different from at least one of the Defendants, and no statutory exceptions apply. *See* 28 U.S.C. § 1332(d)(2). This court has jurisdiction pursuant to 28 U.S.C. § 1292(e) and Rule 23(f), which together provide for discretionary appellate review of a district court's interlocutory class certification decision.

B. Standard of Review

The standard of review for appeals of class certification decisions is set forth comprehensively in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*:

> A district court has broad discretion to decide whether to certify a class. This court has described its appellate review of a class certification decision as narrow and as very limited. We will reverse the class certification decision in this case only if [the appellant] makes a strong showing that the district court's decision amounted to a clear abuse of discretion. An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.

> We will not find an abuse of discretion unless we reach a definite and firm conviction that the district court committed a clear error of judgment.

722 F.3d 838, 850 (6th Cir. 2013) (citations and internal quotation marks omitted). With this standard in mind, we turn to the certification decision in this case.

C. Issue Classes

1. Rule 23(b)(3) and Rule 23(c)(4)

As the district court and the parties point out, other circuits have disagreed about how Rule 23(b)(3)'s requirements interact with Rule 23(c)(4). Rule 23(b)(3) permits class certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(c)(4) provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."

Under what is known as the broad view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The broad view permits utilizing Rule 23(c)(4) even where predominance has not been satisfied for the cause of action as a whole. *See In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (permitting issue certification "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Valentino v. Carter-Wallace,*

Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)[ ] and proceed with class treatment of these particular issues."). In addition to the Second and Ninth Circuits, the Fourth and Seventh Circuits have supported this approach. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) ("Rule 23(c)(4) provides that 'when appropriate, an action may be brought or maintained as a class action with respect to particular issues.' The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted."), *abrogated on other grounds by Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 559 (7th Cir.), *reh'g and suggestion for reh'g en banc denied*, (7th Cir. Aug. 3, 2016); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) ("A district court has the discretion to split a case by certifying a class for some issues, but not others, or by certifying a class for liability alone where damages or causation may require individualized assessments."); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439–45 (4th Cir. 2003) (holding that courts may employ Rule 23(c)(4) to certify a class as to one claim even though all of the plaintiffs' claims, taken together, do not satisfy the predominance requirement).

The Fifth Circuit explained in a footnote what is known as "the narrow view," which prohibits issue classing if predominance has not been satisfied for the cause of action as a whole. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot man-

ufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."). The narrow view has been referenced with tenuous support by the Eleventh Circuit. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (rejecting a district court's certification of a class of hospitals suing a health maintenance organization for underpayment but nevertheless recognizing "the long and venerated practice of creating subclasses as a device to manage complex class actions"). But *Castano*'s issue-class footnote has not been adopted by any other circuit, and subsequent caselaw from within the Fifth Circuit itself indicates that any potency the narrow view once held there has dwindled. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (noting that bifurcation might serve "as a remedy for the obstacles preventing a finding of predominance" but that the plaintiffs had not made such a proposal to the district court).

Two circuit court decisions have relied on a functional, superiority-like analysis instead of adopting either the broad or the narrow view. *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (evaluating issue certification based on the factors set forth in Principles of the Law of Aggregate Litigation §§ 2.02-05 (2010)); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (declining to certify issue classes because they "would do little to increase the efficiency of the litigation").

Our Circuit has not yet squarely addressed the interplay between Rule 23(b)(3) and Rule 23(c)(4), *see Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 356 (6th Cir. 2011) ("The Sixth Circuit has not yet weighed in on this issue and we do not [do so] at this time . . . . "), but the case at hand requires us to grapple with the two provisions. An evaluation of the broad approach persuades us of its merits.

First, the broad approach respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous. The broad approach retains the predominance factor, but instructs courts to engage in the predominance inquiry *after* identifying issues suitable for class treatment. Accordingly, the broad view does not risk undermining the predominance requirement. By contrast, the narrow view would virtually nullify Rule 23(c)(4). *See Gunnells*, 348 F.3d at 439–40.

Second, the broad view flows naturally from Rule 23's text, which provides for issue classing "[w]hen appropriate." A prior version of Rule 23 even instructed that, after selecting issues for class treatment, the remainder of Rule 23's provisions "shall then be construed and applied accordingly." Although the Rule no longer contains this sequencing directive, the Advisory Committee made clear that the changes to the Rule's language were "stylistic only." Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 2007 amend. The Advisory Committee has also declined to alter the language of Rule 23(c)(4) to reflect the narrow view or otherwise limit the use of issue classes. *See* Advisory Committee on Civil Rules, *Rule 23 Subcommittee Report* 90–91 (2015), http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf (indicating that the broad

approach's dominance reflects the proper understanding of the Rule—"[t]he various circuits seem to be in accord about the propriety of such [issue] treatment 'when appropriate,' as Rule 23(c)(4) now says").

Third, the concomitant application of Rule 23(b)(3)'s superiority requirement ensures that courts will not rely on issue certification where there exist only minor or insignificant common questions, but instead where the common questions render issue certification the superior method of resolution. Superiority therefore functions as a backstop against inefficient use of Rule 23(c)(4). In this way, the broad view also partakes of the functional approach employed in *Gates*, 655 F.3d at 273, and *St. Jude*, 522 F.3d at 841.

In sum, Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution. *See Nassau*, 461 F.3d at 226; Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1966 amend. A requirement that predominance must first be satisfied for the entire cause of action would undercut the purpose of Rule 23(c)(4) and nullify its intended benefits. The broad approach is the proper reading of Rule 23, in light of the goals of that rule.

2. Application

Although the district court adopted the broad approach, its analysis did not include a robust application of predominance and superiority to the issues it certified for class treatment. The record nevertheless confirms that the issue classes satisfy both requirements, and this court may affirm for any reason supported by the record. *Loftis*

v. United Parcel Serv., Inc., 342 F.3d 509, 514 (6th Cir. 2003).

a. Predominance

Rule 23(b)(3)'s predominance inquiry asks whether "the questions of law or fact common to class members predominate over any questions affecting only individual members." To evaluate predominance, "[a] court must first *characterize* the issues in the case as common or individual and then *weigh* which predominate." William B. Rubenstein, Alba Conte, & Herbert B. Newberg, Newberg on Class Actions § 4:50 (5th ed. 2010). The Supreme Court recently explained how this evaluation works:

> An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

Tyson Foods, Inc. v. Bouaphakeo, ___ U.S. ___, 136 S. Ct. 1036 (2016) (alteration, citations, and internal quotation marks omitted).

Here, the district court certified only issues capable of resolution with generalized, class-wide proof. All seven of these issues are questions that need only be answered once because the answers apply in the same way to each property owner within the plumes. Expert evidence will be central to resolving these seven issues, especially Issues 1, 4, and 5.[5] Such evidence will bear on all of the property owners within each plume in the same way. In addition, Issues 1, 2, 3, 6, and 7 turn on each Defendant's knowledge and conduct, which need only be established once for each plume.[6]

The district court's determination that individualized inquiries predominate over the elements of actual injury and causation does not mean that the same individualized inquiries taint the certified issues. To the contrary, the certified issues do not overlap with actual injury or causation. Issue 6, to be sure, includes the word "caused," but whether Defendants created the risk of vapor intrusion is distinct from the ultimate question of whether they caused an actual injury to property owners. That distinction insulates Issue 6 from overlapping with the liability

[5] Issue 1 concerns each Defendant's role in creating the contamination within their respective plumes; Issues 4 and 5 concern whether contamination from the Defendants' facilities underlies their respective plumes.

[6] Issue 1 concerns each Defendant's role in creating the contamination within their respective plumes; Issue 2 concerns foreseeability; Issue 3 concerns whether Defendants engaged in abnormally dangerous activities; Issue 6 concerns the risk of vapor intrusion; and Issue 7 concerns failure to investigate and remediate.

elements that the district court found incompatible with class treatment.

Nor have Defendants identified any individualized inquiries that outweigh the common questions prevalent *within each issue*. For example, although Defendants have disputed the plume boundaries identified by Plaintiffs' expert, they have not argued that the contamination varies within plumes. At oral argument on appeal, Defendants raised the concepts of temporal and locational variation for the first time. Discussing Issue 7, Defendants asserted that the failure to immediately remediate contamination might constitute negligence with respect to a property directly adjacent to one of the facilities, but not with respect to properties located farther away from the facilities. Given that this case concerns many years of sustained contamination in a contained and relatively small geographic area, this argument carries little weight. Accordingly, "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson*, 136 S. Ct. at 1045 (quoting *Newberg on Class Actions* § 4:45 (5th ed. 2013)).

What is more, *Tyson* instructs that certification may remain "proper" even if "important matters" such as actual injury, causation, and damages will have to be tried separately. *Id.* The Eighth Circuit's decision in *Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016), on which Defendants rely, does not indicate otherwise. There, the court found that the district court's certification of a liability class was an abuse of discretion because "even on the certified issue of liability, there are determinations contained within that analysis that are not suitable for

class-wide determination." *Id.* at 479. Specifically, the Eighth Circuit stated:

> Adjudicating claims of liability will require an inquiry into the causal relationship between the actions of General Mills and the resulting alleged vapor contamination. This analysis will include many additional considerations beyond the limited inquiry into General Mills' liability. And, even on the certified issue of liability, there are determinations contained within that analysis that are not suitable for class-wide determination. To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance.

Id. The district court noted that these same problems arise from Ohio's construction of causation and actual injury, and in fact relied on *Ebert* when denying Plaintiffs' request for certification of two liability-only classes under Rule 23(b)(3). But predominance problems within a liability-only class do not automatically translate into predominance problems within an issue class, and Defendants fail to explain why *Ebert* extends to issue-only classes. Accordingly, their invocation of *Ebert*'s broad cautionary language does not map onto the specific certification order at issue here.

Because each issue may be resolved with common proof and because individualized inquiries do not outweigh common questions, the seven issue classes that the district court certified satisfy Rule 23(b)(3)'s predominance requirement.

b. Superiority

Rule 23(b)(3)'s superiority requirement asks whether a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It aims to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23 adv. comm. n. to 1966 amend.). This court's caselaw instructs:

> To determine whether a class action is the superior method for fair and efficient adjudication, the district court should consider the difficulties of managing a class action. The district court should also compare other means of disposing of the suit to determine if a class action is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court. Additionally, the court should consider the value of individual damage awards, as small awards weigh in favor of class suits.

Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 630–31 (6th Cir. 2011) (citations and internal quotation marks omitted); *see also In re Whirlpool*, 722 F.3d at 861 ("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery."). Courts also consider the related nonexhaustive factors set forth in Rule 23(b)(3) itself.

Defendants frame all of the Rule 23(b)(3) factors as going to manageability and argue that "[c]ertification would not serve as a superior method for fairly and efficiently adjudicating this controversy because of the numerous, highly individualized inquiries that would be required even after certification." They also contend that some of the issues certified by the district court "can be more easily resolved through the use of discovery devices or stipulations."

Defendants are correct that resolution of the certified issues "will not resolve the question of Defendants' liability either to the class as a whole or to any individual therein." But resolving the certified issues will go a long way toward doing so, and this is the most efficient way of resolving the seven issues that the district court has certified. Defendants' suggestion about discovery devices and stipulations rings hollow given that this case is ten years old and Defendants have yet to agree to such mechanisms.

Although not explicitly engaging in a superiority analysis, the district court correctly noted that issue certification "will ensure that property owners in the McCook Field neighborhood have an opportunity to litigate their claims. By trying these common questions to a single jury,

this procedure also saves time and scarce judicial resources." Indeed, the record indicates that the properties are in a low-income neighborhood, meaning that class members might not otherwise be able to pursue their claims. Even if the class members brought suit individually, the seven certified issues would need to be addressed in each of their cases. Resolving the issues in one fell swoop would conserve the resources of both the court and the parties. Class treatment of the seven certified issues will not resolve Defendants' liability entirely, but it will materially advance the litigation. The issue classes therefore satisfy Rule 23(b)(3)'s superiority requirement.

Because the issue classes satisfy predominance and superiority, the district court did not abuse its discretion by certifying them under Rule 23(c)(4).

D. The Seventh Amendment

Defendants have also raised Seventh Amendment arguments, and the order granting their Rule 23(f) petition contemplated interlocutory review of these constitutional concerns. At this time, however, we find no Seventh Amendment issues.

The district court mentioned the possibility of using a Special Master to resolve the individualized issues remaining after the certified issues have been resolved by a jury. Defendants argue that this procedure runs afoul of the Reexamination Clause of the Seventh Amendment, which provides that "no fact tried by a jury[ ] shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. This constitutional argument incorporates the Rules Enabling Act, which states that procedural rules like Rule 23 "shall not abridge, enlarge or

modify any substantive right." 28 U.S.C. § 2072(b). Plaintiffs respond that the district court was merely hypothesizing about the best procedure and that a properly bifurcated case does not violate the Seventh Amendment.

Plaintiffs have the better of the argument. At this stage, the district court has not formalized any procedures for resolving either the common issues or the remaining individualized inquiries. The certification decision outlines one option, but the district court may ultimately find that another procedure better facilitates the fair resolution of Plaintiffs' claims. Because the district court has not settled on a specific procedure, no constitutional infirmities exist at this time. Moreover, the fact that the district court preemptively raised the potential for Seventh Amendment concerns suggests that it will take care to conduct any subsequent proceedings in accordance with the Reexamination Clause. And this circuit has confirmed that, "if done properly, bifurcation will not raise any constitutional issues." *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2004). Leading class action treatises agree. *See, e.g.*, 2 *Newberg on Class Actions* § 4:92 (5th ed. 2010). Because the district court has yet to select and implement a procedure for resolving Plaintiffs' claims, no Reexamination Clause problems exist at this time.

III. CONCLUSION

This case has dragged on for ten years, but the district court's use of Rule 23(c)(4) issue classing took a meaningful step toward resolving Plaintiffs' claims. Under the broad view, the certification decision did not constitute an abuse of discretion. Nor, at this time, are any Seventh Amendment problems presented. We therefore **AFFIRM**

the district court's issue-class certification decision and return this case to the district court with the expectation that it be moved expeditiously toward resolution.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3663

TERRY MARTIN; LINDA RUSSEL, aka LINDA RUSSELL; NANCY SMITH; DEBORAH NEEDHAM,
Plaintiffs-Appellees,

v.

BEHR DAYTON THERMAL PRODUCTS LLC; BEHR AMERICA, INC.; CHRYSLER MOTORS LLC, nka OLD CARCO LLC; ARAMARK UNIFORM & CAREER APPAREL INC.,
Defendants-Appellants.

FILED: August 20, 2018

Before: GILMAN, ROGERS, and STRANCH, Circuit Judges.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion

for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: BEHR DAYTON THERMAL PRODUCTS, LLC, et al.,
Petitioners (No. 17-0304)

and

In re: TERRY MARTIN, et al.,
Petitioners (No. 17-0305).

FILED: June 22, 2017

ORDER

Before: SILER and BATCHELDER, Circuit Judges; BERTELSMAN, District Judge.*

In this toxic-tort action, the district court denied certification of a class action under Federal Rule of Civil Procedure 23(b)(3)—requiring that common issues of law and fact predominate over individual issues—and certified a class action under Federal Rule of Civil Procedure 23(c)(4)—permitting maintenance of a class action on particular issues. In No. 17-0304, Defendants Behr Dayton Thermal Products, Behr America, Chrysler Motors, and

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* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Aramark Uniform and Career Apparel petition for permission to appeal the Rule 23(c)(4) portion of the district court's order. *See* Fed. R. Civ. P. 23(f). In No. 17-0305, Plaintiffs cross-petition for permission to appeal the Rule 23(b)(3) portion of the order, *see id.*, and separately move to add cross-petitioners. Defendants oppose the cross-petition.

We may, in our discretion, permit an appeal from an order granting or denying class certification. Fed. R. Civ. P. 23(f). This "unfettered" discretion is akin to the discretion of the Supreme Court in considering whether to grant *certiorari*; thus, we may consider any relevant factor we find persuasive. *See* Fed. R. Civ. P. 23, advisory committee's note (1998); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002). Factors that we consider include: (1) whether the petitioner is likely to succeed on appeal under a deferential abuse-of-discretion standard; (2) whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered; (3) whether the case presents a novel or unsettled question of law; and (4) the procedural posture of the case before the district court. *In re Delta Air Lines*, 310 F.3d at 960.

Provided that the court applied the correct framework for evaluating a class-action claim, we review the denial of certification for an abuse of discretion. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). The novelty of a claim "weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before us, but also to class litigation in general." *In re Delta Air Lines*, 310 F.3d at 960.

In No. 17-0304, Defendants petition for permission to appeal the district court's Rule 23(c)(4) certification, arguing that: (1) the decision contravenes all current authority on predominance; (2) the district court abused its discretion by certifying a Rule 23(c)(4) class action without addressing superiority; and (3) the certification violates fundamental constitutional principles and the Rules Enabling Act. Defendants have established a likelihood of success, their petition involves novel issues of first impression, and a ruling on these issues would be relevant to class litigation in general. The procedural posture of the case also weighs in favor of appeal because Plaintiffs do not oppose the petition and our ruling could materially advance the termination of the litigation below.

In No. 17-0305, Plaintiffs summarily cross-petition for permission to appeal, with few citations to authority and no analysis of how that authority favors review. The district court outlined elements of Plaintiffs' liability case that were subject to individualized proof. That there are other issues subject to common proof does not, standing alone, establish predominance or that the district court abused its discretion in denying certification on this basis. Also, critically, Plaintiffs have not shown that application of the law to these facts is an issue relevant to class litigation in general or addressed any of the other relevant factors supporting review.

The petition for permission to appeal in No. 17-0304 is **GRANTED**. The cross-petition for permission to appeal in No. 17-0305 is **DENIED** and the motion to add petitioners in No. 17-0305 is **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:08-cv-326

IN RE BEHR DAYTON
THERMAL PRODUCTS, LLC

DECISION AND ENTRY OVERRULING IN PART AND SUSTAINING IN PART PLAINTIFFS' AMENDED RENEWED MOTION FOR CLASS CERTIFICATION (DOC. #254); CONDITIONALLY CERTIFYING VARIOUS ISSUES FOR CLASS TREATMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(c)(4); CONFERENCE CALL SET

Before: JUDGE WALTER H. RICE.

Plaintiffs Terry Martin, Linda Russell, Deborah Needham and Nancy Smith filed suit, on behalf of themselves and all others similarly situated, against Behr Dayton Thermal Products, LLC, and Behr America, Inc. (collectively "Behr"), Chrysler, LLC (n/k/a Old Carco LLC), and Aramark Uniform & Career Apparel, LLC ("Aramark"), seeking money damages and injunctive relief. At issue is Defendants' alleged contamination of Plaintiffs' properties with toxic, carcinogenic and otherwise ultrahazardous chemicals.

This matter is currently before the Court on Plaintiffs' Amended Renewed Motion for Class Certification, Doc. #254. For the reasons set forth below, the Court overrules Plaintiffs' request for class certification under Federal Rule of Civil Procedure 23(b)(3), but sustains Plaintiffs' alternative request to certify certain issues for class treatment under Federal Rule of Civil Procedure 23(c)(4).

I. Background and Procedural History

Plaintiffs live in what is commonly known as the "McCook Field" neighborhood of Dayton, Ohio, near the convergence of the Great Miami and Mad Rivers. The groundwater below Plaintiffs' properties is contaminated with trichloroethylene ("TCE"), tetrachloroethylene ("PCE" or "PERC"), dichloroethene ("DCE") and other volatile organic compounds ("VOCs"), posing a potential health hazard. These chemicals were allegedly released into the environment over a period of many years, by Defendants Chrysler, LLC (n/k/a Old Carco, LLC), and Aramark Uniform & Career Apparel, Inc. Defendant Behr Dayton Thermal Products, LLC, purchased the Chrysler property in 2002.

The Chrysler-Behr facility is located just north of the Aramark facility. The toxic chemicals allegedly migrated off the commercial properties and into the groundwater under Plaintiffs' properties. According to Plaintiffs' hydrology expert, Nicole T. Sweetland, Ph.D., L.G., R.G., two separate plumes of toxic groundwater contamination converge in an area south of the Aramark facility. Plaintiffs allege that Defendants have known about the contamination for many years, but failed to take steps to abate it, and failed to notify McCook Field residents of the hazard. The United States Environmental Protection

Agency ("USEPA") became involved in 2006, and designated this area as a Superfund site in 2009.

Although residents have a municipal water source, vapors from the contaminated groundwater have allegedly risen up through the vadose zone to the surface, and into some of the homes and other buildings located in the McCook Field neighborhood. [1] All told, approximately 530 properties are located in the affected areas. Of the properties already tested for vapor intrusion, only about half had contamination levels that exceeded acceptable screening levels. Nevertheless, Plaintiffs maintain that *all* of the properties are at *risk* for vapor intrusion, a risk that will continue to exist until the groundwater has been remediated. In the meantime, vapor mitigation systems have been installed in some of the buildings, and a soil vapor extraction system has been installed in a small portion of the affected area.

The Third Master Amended Class Action Complaint, Doc. #242, asserts the following causes of action: (1) trespass; (2) private nuisance; (3) unjust enrichment; (4) strict liability; (5) negligence; (6) negligence per se; (7) battery; (8) intentional fraudulent concealment; (9) constructive fraud (negligent fraudulent concealment); (10) negligent misrepresentation; and (11) civil conspiracy (against Chrysler and Behr only).[2] Plaintiffs seek damages for loss of property value and interference with the use and enjoy-

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[1] The "vadose zone" is that area of soil or rock that sits below the surface, but above the water table.

[2] The Court's jurisdiction is based on the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A). The amount in controversy exceeds $5 million, and at least one class member is a citizen of a State other than Delaware, where all Defendants are incorporated.

ment of their property. They also seek an injunction requiring Defendants to promptly and completely remove all of the contaminants from the properties, and to prevent further migration.

This matter is currently before the Court on Plaintiffs' Amended Renewed Motion for Class Certification, Doc. #254. Based on Dr. Sweetland's geographical delineation of two separate plumes of groundwater contamination, as shown on an exhibit attached to Plaintiffs' motion, Plaintiffs ask the Court to certify two classes:

> Chrysler-Behr Class: All persons who on or after April 1, 2006, owned property located within the Chrysler-Behr Class Area, which is geographically depicted by the yellow shaded area on Exhibit 4.
>
> Chrysler-Behr-Aramark Class: All persons who on or after April 1, 2006, owned property located within the Chrysler-Behr-Aramark Class Area, which is geographically depicted by the red shaded area on Exhibit 4.

The Chrysler-Behr Class Area overlies contamination allegedly attributable only to the Chrysler-Behr facility. The Chrysler-Behr Aramark Class Area overlies the area of the alleged commingled Chrysler-Behr and Aramark plumes.[3]

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[3] Excluded from the proposed classes are: (1) persons who own industrial property within the Class Areas; (2) Defendants in this action (and their officers, directors, agents, employees and members of their

Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3), Plaintiffs seek class certification as to *liability only* for the following five claims: (1) private nuisance; (2) negligence; (3) negligence per se; (4) strict liability; and (5) unjust enrichment.[4] In the alternative, Plaintiffs seek certification of numerous discrete issues under Federal Rule of Civil Procedure 23(c)(4).

II. Federal Rule of Civil Procedure 23

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979)). The party seeking class certification bears the burden of proving that certification is warranted. *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 537 (6th Cir. 2012).

Class actions are governed by Federal Rule of Civil Procedure 23, which provides, in part, as follows:

> (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

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immediate families); (3) any entity in which Defendants have a controlling interest; (4) legal representatives, heirs, successors and assigns of Defendants; and (5) judicial officers to whom this case is assigned, including their staff and the members of their immediate families.

[4] Plaintiffs intend to individually pursue their claims for battery, trespass, civil conspiracy, constructive fraud, intentional fraudulent concealment, and negligent misrepresentation following the conclusion of the class litigation.

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition to meeting each of these four prerequisites, the party seeking class certification must satisfy the requirements of one of the subsections of Rule 23(b). Plaintiffs currently seek certification under Rule 23(b)(3), which requires them to prove that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).[5] In the alternative, should the Court refuse to certify a class under Rule 23(b)(3), Plaintiffs ask

[5] In the Third Master Amended Class Action Complaint, Plaintiffs also seek class certification under Federal Rule of Civil Procedure 23(b)(2). They allege that "Defendants have acted or refused to act on grounds generally applicable to all members of the respective Classes, thereby making final injunctive relief or declaratory relief in the form of removal of all VOC Contaminants released, emitted or emanating from the Facilities from all Plaintiffs' land and prevention of such further contamination of Plaintiffs' land appropriate." Doc. #242, PageID #7100. However, Plaintiffs have asked the Court to hold this claim for injunctive and declaratory relief in abeyance pending the completion of the USEPA's investigation and plan for remedial action. Doc. #254-1, PageID #7406.

the Court to certify certain issues for class treatment under Federal Rule of Civil Procedure 23(c)(4).

III. Analysis

Before certifying a class, a district court must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met. *In re Am. Med. Sys., Inc.,* 75 F.3d 1069, 1078-1079 (6th Cir. 1996) (citing *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982)).

A. Ascertainability of Class Members

As a threshold matter, "the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young,* 693 F.3d at 537-38 (citing James W. Moore et al., Moore's Federal Practice § 23.21 [1] (Matthew Bender 3d ed.)).

> For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria . . . [A] reference to fixed, geographic boundaries will generally be sufficiently objective for proper inclusion in a class definition.

James W. Moore *et al., Moore's Federal Practice* § 23.21[3] (Matthew Bender 3d ed.) (footnotes omitted).

Here, it is easy to objectively determine, from public property records, which individuals live within the geographical boundaries of each of the two proposed classes. The two areas at issue are clearly indicated by the yellow and red shaded areas on the map attached as Exhibit 4 to

the Amended Renewed Motion for Class Certification, Doc. #254-5, PageID #7416. The applicable boundaries are supported by the expert witness reports of Dr. Nicole T. Sweetland, Plaintiffs' hydrology expert.[6] Doc. #255; Doc. #254-25. For purposes of class certification, the Court finds that the classes are adequately defined.

B. Scope of Class

Defendants argue that the proposed class definitions are overbroad, sweeping in all property owners within the geographically-defined areas, regardless of whether they have a legally cognizable claim or have suffered any actual injury. Defendants note that not all of the properties have been tested for vapor intrusion and, of those that *have* been tested, many tested negative. According to Defendants, absent a property-by-property inquiry, it will be impossible to determine who should be included in the proposed classes.

Certainly, if a proposed class includes a great number of individuals who have suffered no injury, class certification would be inappropriate. *See Kohen v. Pac. Inv. Mgmt. Co., LLC*, 571 F.3d 672, 677 (7th Cir. 2009). However, the mere fact that the proposed class includes some individuals who may not be able to recover damages does

[6] Defendant Aramark has submitted a Declaration of its expert witness, David J. Hagen, a geologist who disagrees with many aspects of Dr. Sweetland's expert witness report, including the geographical boundaries of the plumes. Doc. #258. Likewise, Behr Dayton's expert witness, David J. Folkes, P.E., disagrees with Dr. Sweetland on several accounts. Doc. #257-3. Nevertheless, the Court need not resolve conflicting expert opinions at the class certification stage. *Bentley v. Honeywell Int'l, Inc.,* 223 F.R.D. 471, 479 (S.D. Ohio 2004).

not necessarily mean that the class definition is overbroad, or that certification is not warranted. *Id. See also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,* 722 F.3d 838, 855 (6th Cir. 2013) (rejecting an argument that, because the class included some consumers who had suffered no injury, the class was overbroad and should not be certified).[7]

As discussed in greater detail below, under Ohio law, property owners have no viable claim for property damage unless they can show *actual* vapor intrusion on their property; the *potential* for vapor intrusion is not enough. *See Ramirez v. Akzo Nobel Coatings, Inc.,* 153 Ohio App. 3d 115, 2003-0hio-2859, 791 N.E. 2d 1031, at ¶¶20-21 ("pure environmental stigma, defined as when the value of real property decreases due solely to public perception or fear of contamination from a neighboring property, does not constitute compensable damages in Ohio.").

According to Dr. Sweetland, all of the properties at issue lie on top of contaminated groundwater, and all buildings overlying or within 100 feet of that groundwater are at *risk* for vapor intrusion. Doc. #263-1, PageID ##9113-14. She explains in her report that "VOC [volatile organic compound] concentrations in the air at the site are expected to vary from building to building, as well as over time" due to a number of factors. *Id.* at PageID #9114. The Court finds that, under these circumstances, even though the proposed classes may include some individuals who, at this particular point in time, have not suffered a

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[7] The Supreme Court recently refused to consider the question of whether a class may be certified when it contains members who suffered no injury and have no legal right to any damages. *See Tyson Foods, Inc. v. Bouaphakeo,* ___ U.S. ___, 136 S. Ct. 1036, 1049 (2016).

compensable injury, they are properly included in the classes.

Defendants contend that the proposed classes are also temporally overbroad. The proposed classes include all persons who "on or after April 1, 2006," owned property located within the two areas. Defendants maintain that the April 1, 2006, cutoff date is arbitrary, and that there is no factual basis for believing that this is the date that the public became aware of the contamination. The Court disagrees. Plaintiffs note that high levels of VOCs were detected in the groundwater in March of 2006, and the USEPA began soil testing in November of that year. It was therefore reasonable to expect that, by April 1, 2006, people were aware that a problem existed.

For the reasons stated above, the Court finds that the proposed classes are easily ascertainable and, for purposes of class certification, the scope of those classes is not overbroad. The Court turns now to the question of whether Plaintiffs have satisfied the requirements of Rule 23(a) and 23(b)(3).

C. Rule 23(a)

As previously noted, a class must satisfy all four prerequisites contained in Rule 23(a)—numerosity, commonality, typicality, and adequate representation.

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." There is no strict numerical test for determining impracticability of joinder. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079.

"When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *Id.*

In this case, over 500 separate properties (232 in the Chrysler-Behr area, and 292 in the Chrysler-Behr-Aramark area) have allegedly been affected by the contamination. Defendants impliedly concede that joinder of all of these plaintiffs would be impracticable. The Court finds that the numerosity requirement has been satisfied.

2. Commonality/Typicality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." The commonality and typicality requirements " 'tend to merge' because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Young,* 693 F.3d at 542 (quoting *Dukes,* 564 U.S. at 349 n.5).

a. Commonality

The commonality test "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." *In re Am. Med. Sys., Inc.*, 75 F.3d at 1080 (quotation omitted). That issue must be "capable of classwide resolution." *In re Whirlpool*, 722 F.3d at 852. *See also Dukes*, 564 at 350 (holding that class treatment must be capable of generating "common *answers* apt to drive the resolution of the litigation.").

Plaintiffs maintain that Defendants engaged in a common course of conduct which has similarly affected all class members, and that questions concerning the nature, scope, and cause of the groundwater contamination, and the attendant risk of vapor intrusion, are all capable of classwide resolution. Plaintiffs have identified seven specific questions common to each class member:

1. Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;

2. Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;

3. Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;

4. Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;

5. Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;

6. Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

7. Whether Defendants negligently or intentionally failed to investigate and remediate the contamination at and flowing from their respective Facilities.

Doc. #254-1, PageID #7392-93.

Plaintiffs note that their claims of private nuisance, negligence, negligence per se, and unjust enrichment each require proof of the cause, nature and extent of the contamination.[8] The Court finds that the issues identified above are common to the claims of all class members, and are capable of classwide resolution. Accordingly, the Court finds that the commonality requirement is satisfied.

b. Typicality

The typicality requirement is satisfied "if the class members' claims are fairly encompassed by the named plaintiffs' claims" such that "by pursuing their own interests, the class representatives also advocate the interests of the class members." *In re Whirlpool,* 722 F.3d at 852-53 (quotation omitted). A claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members," and is "based on the same legal theory." *In re Am. Med. Sys., Inc.,* 75 F.3d at 1082 (quotation omitted). Plaintiffs maintain that,

[8] Plaintiffs' strict liability claim requires proof of an abnormally dangerous activity, but does not require Plaintiffs to show that Defendants' conduct was wrongful.

based on this criteria, their claims are typical of the other class members.

Defendants' arguments to the contrary are unavailing. Defendants rely heavily on *Mays v. Tennessee Valley Authority,* 274 F.R.D. 614 (E.D. Tenn. 2011), which involved claims of property damage caused by a dike failure and coal ash spill. The court refused to certify a Rule 23(b)(3) class. With respect to typicality, the court found that there was no "typical" proof for how the coal ash came to be on each individual piece of property, whether it affected or damaged each individual piece of property, or how each individual property owner used or enjoyed his property. It concluded that "the analysis and ultimate determination of each plaintiff's claim will turn primarily on individualized inquiries into how the coal ash affected each plaintiff's specific property interest." *Id.* at 625.

In this Court's view, the court in *Mays* improperly, partially conflated the question of "typicality" with the question of whether individualized inquiries would predominate over common ones. The individual differences cited by the court do not change the fact that the class members' claims all arose from the same events and were based on the same legal theories.

Moreover, *Mays* is factually distinguishable, given that the plaintiffs there sought class certification on the issues of liability *and* damages. Here, Plaintiffs ask the Court to certify two liability-only classes. This distinction also disposes of several of Defendants' other arguments with respect to typicality. For example, Defendants maintain that Plaintiffs' claims are not typical of "other residential property owners who have not had any vapor intrusion, who have refused to have their home tested, have

a mitigation system installed, or who have vapor intrusion but have not actually suffered any substantial property damage or loss of use and enjoyment." Doc. #257, PageID #8250. Defendants also argue that Plaintiffs' claims are not typical of property owners who rent their residential properties to others, of commercial and tax-exempt property owners, or of class members who purchased property after 2006 and "came to the nuisance." Given that the vast majority of these arguments are directed to the question of proof of *damages,* they are inapplicable and need not be considered.

In addition, Defendants argue that, because Plaintiffs have dismissed Gem City—a possible additional source of contamination—as a named defendant, Plaintiffs' claims may not be typical of other class members whose damages might be traceable to that particular tortfeasor. Plaintiffs counter, however, that the entire geographical area affected by Gem City has been excluded from the class definitions.

Defendants also suggest that household cleaners and solvents may be the source of at least *some* of the contamination in *some* of the homes. The Sixth Circuit, however, has held that typicality is not destroyed simply because some class members may be subject to different defenses, or may have suffered different degrees of injury. *Daffin v. Ford Motor Co.,* 458 F.3d 549, 553 (6th Cir. 2006).

The relevant question with respect to typicality is whether Plaintiffs' claims are generally typical of those of the other class members. The claims on which Plaintiffs seek class certification, for liability purposes only, all arise from the same course of conduct, and are based on the

same legal theories. The Court therefore finds that Plaintiffs' claims are typical of those of the class members.

3. Fair and Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The court looks to two criteria in determining the adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re Am. Med. Sys., Inc.,* 75 F.3d at 1083. *Id.* (quotation omitted).

Plaintiffs Deborah Needham and Linda Russell own residential property located above the Chrysler-Behr plume. Plaintiffs Terry Martin and Nancy Smith own residential property located above the Chrysler-Behr-Aramark plume. Defendants contend that there are two reasons why these named plaintiffs will not adequately represent the interests of the proposed class members.

First, Defendants argue that the named Plaintiffs cannot adequately represent the unique interests of commercial or tax-exempt property owners, whose damages with respect to decreased property values or loss of use and enjoyment of property may be measured in a significantly different manner than those of an owner-occupied property. Defendants also note that acceptable screening levels for TCE and PCE at commercial and tax-exempt properties differ from those at residential properties. Defendants argue that, at a minimum, the class should be limited to exclude owners of commercial and tax-exempt properties.

Plaintiffs correctly point out that Defendants' arguments relate to damages, and are therefore irrelevant to the question of whether the named Plaintiffs can adequately represent a liability-only class. Absent any evidence that Plaintiffs' interests are antagonistic to those of commercial and tax-exempt property owners, adequacy of representation is not adversely affected by the presence of certain issues that may be unique to those class members. *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 484 (S.D. Ohio 2004). For purposes of establishing that Defendants engaged in conduct that resulted in contamination underlying the properties within the defined class areas, the Court finds that Plaintiffs will adequately represent the interests of residential, commercial and tax-exempt property owners alike.

Second, Defendants argue that Plaintiffs' past actions, in abandoning class claims for medical monitoring and personal injury, and in choosing to now separately pursue individual claims for battery, civil conspiracy, constructive fraud, intentional fraudulent concealment, negligent misrepresentation and trespass, have prejudiced potential class members, who may be barred by the doctrine of *res judicata* from pursuing those claims individually, or suffer other adverse consequences.[9] Accordingly, Defendants contend that the named Plaintiffs' interests conflict with the interests of the other class members.

The Court disagrees. As Plaintiffs explain, they have narrowly tailored their class certification request to ensure that all residents who live in the affected areas have the best possible opportunity to obtain compensation for

[9] Under the doctrine of *res judicata*, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979).

the harm they have suffered as a result of the contamination. To achieve this goal, Plaintiffs have abandoned the class claims for medical monitoring and personal injury, and have chosen to pursue their other claims individually *after* the class claims have been resolved. In doing so, Plaintiffs were not protecting their own interests at the expense of the other class members, but were seeking to achieve the greatest good for the greatest number of people.

Moreover, when Plaintiffs abandoned the class action personal injury claims and medical monitoring claims in 2012, the Court issued a notice to all putative class members notifying them that those claims were being dismissed without prejudice, and informing them that, if they wanted to pursue those claims, they would have to do so in a separate action. Doc. #144. Accordingly, those putative class members with personal injury claims, and those seeking medical monitoring as a form of relief, are not reasonably relying on the named Plaintiffs to protect their interests with respect to those claims.

Like the putative class members, the named Plaintiffs have allegedly suffered a loss of property value, and lost use and enjoyment of their properties, and seek to be compensated for these injuries. The Court finds that the named Plaintiffs will adequately represent the interests of the class members.

In addition to reviewing the adequacy of the named representatives of the class, the Court must also review the adequacy of class counsel to determine if they "are qualified, experienced and generally able to conduct the litigation." *Stout v. J.D. Byrider,* 228 F.3d 709, 717 (6th Cir. 2000). The record indicates that Plaintiffs' counsel in this case have experience with environmental class action

litigation, and are well qualified to represent the class. Defendants do not argue to the contrary.

For the reasons stated above, the Court finds that Plaintiffs have satisfied all of the requirements of Rule 23(a). The Court turns, then, to the question of whether class certification is warranted under Rule 23(b)(3).

D. Rule 23(b)(3)

To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: (1) common questions of law or fact must "predominate over any questions affecting only individual members"; and (2) a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Pertinent factors include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (D) the likely difficulties in managing a class action.

Id.

1. Predominance

The predominance requirement is satisfied if "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Young*, 693 F.3d at 544 (quotation omitted). The predominance inquiry is "far more demanding" than Rule 23(a)(2)'s commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The focus of this inquiry is whether the case is "sufficiently cohesive to warrant adjudication by representation." *Id.* at 623.

Here, Plaintiffs ask the Court to certify two *liability-only* classes: one for properties affected by the Chrysler-Behr plume of contamination, and one for properties affected by the Chrysler-Behr-Aramark plume. According to Plaintiffs, a common course of wrongful conduct produced a common class-wide injury, *i.e.,* contamination of the groundwater and the vadose zone, leading to actual vapor intrusion, or the risk thereof, in all properties within the defined geographical areas.

Defendants argue, however, that certification under Rule 23(b)(3) is inappropriate because, with respect to each cause of action alleged, individualized issues concerning fact-of-injury, proximate causation, and the nature and extent of damages overwhelm any common issues of law and fact. Defendants maintain that separate mini-trials, with individualized proofs, would be required on each of these issues.

a. Common Issues of Law and Fact

Plaintiffs acknowledge that there are several issues which must be resolved on an individual basis, including

whether individual class members suffered any compensable injury and, if so, to what extent. Plaintiffs contend, however, that it can, at least, be determined on a class-wide basis whether Defendants are legally responsible for the contamination within the defined class areas. They maintain that the following issues can be resolved on a class-wide basis, regardless of any factual variations among class members and their properties: (1) Defendants' conduct in releasing VOCs into the environment; (2) Defendants' conduct in failing to investigate and remediate the contamination; (3) Defendants' awareness of the dangers posed by the release of VOCs; (4) the nature and extent of the groundwater and soil contamination; and (5) the risk of toxic vapor intrusion.

b. Individualized Issues of Law and Fact

Defendants argue that certification under Rule 23(b)(3) is inappropriate because individualized issues of law and fact predominate with respect to fact-of- injury, causation, and damages. True, Plaintiffs are seeking class certification on the issue of liability only; nevertheless, because fact-of-injury and proximate cause are elements of liability rather than damages, resolution of the common issues identified by Plaintiffs will not resolve the question of Defendants' liability either to the class as a whole or to any individual therein. *See McCormick v. Halliburton EnergyServs., Inc.,* No. Civ-11-1272, 2015 WL 918767, (W.D. Okla. Mar. 3, 2015) (denying certification of a liability-only class because resolution of common questions concerning the scope and extent of groundwater contamination was "unlikely to substantially aid resolution of the ultimate determination of Halliburton's liability" to any class member). *See also Fisher v. Ciba Specialty Chems.*

Corp., 238 F.R.D. 273, 315 (S.D. Ala. 2006) ("To the extent plaintiffs would ask the Court to simply sever the damages portion of the case from the liability portion and certify the latter, such a maneuver would not overcome the Rule 23(b)(3) predominance problems because many of the individual-specific issues . . . go to liability, not damages.")

This case is analogous. Although certain questions related to Defendants' liability could be resolved on a classwide basis, numerous individualized issues must still be resolved before liability can be established. For the reasons stated below, the Court agrees that Plaintiffs have not satisfied the predominance requirement of Rule 23(b)(3).

i. Injury in Fact

Under Ohio law, Plaintiffs are not entitled to "recover damages for loss in value of their properties resulting from [ ] stigma from the public perception that their properties were contaminated." *Baker v. Chevron USA, Inc.,* 1:05-cv-227, 2009 WL 3698419, at (S.D. Ohio Nov. 4, 2009) (citing *Chance v. BP Chem., Inc.,* 77 Ohio St. 3d 17, 670 N.E.2d 985 (Ohio 1996)). *See also Brown v.Whirlpool Corp.* 996 F. Supp. 2d 623, 638-39 (N.D. Ohio 2014) (holding that Ohio law does not allow for "stigma" damages, and that plaintiffs can recover only if there is actual, physical damage to the property); *Little Hocking Water Ass'n, Inc. E.I. du Pont Nemours Co.,* 91 F. Supp. 3d 940, 975 (S.D. Ohio 2015) (noting that, under Ohio nuisance law, a landowner cannot recover for "unsubstantiated or unrealized fears."). Instead, each plaintiff must prove *actual* injury. This involves a property-by-property inquiry.

Baker is instructive in this regard. There, the plaintiffs' properties sat above a contaminated plume of groundwater. Plaintiffs asserted claims of negligence, negligence per se, conspiracy and fraud, strict liability, trespass, private nuisance, and failure to warn. They alleged that, because of the plume, they feared illness and disease. They had stopped using their basements, stopped gardening, and refused to let their children and pets play in their yards. 2009 WL 3698419, at *7.

The district court found these fears to be unfounded, and granted summary judgment in favor of Chevron on all claims. *Id.* Citing *Chance,* the court explained that the plaintiffs "possess subsurface rights to the extent of their actual and reasonable use of the subsurface," and "may only recover damages to the extent that the plume actually interferes with their use of the subsurface." *Id.* at *5. Plaintiffs presented no such evidence of interference. As here, they had a municipal water source and did not use the groundwater, and there was no indication that the contaminated plume had caused them to abandon plans that required drilling or excavation. Moreover, plaintiffs had presented no admissible evidence showing that harmful vapors from the plume had actually reached the surface of their properties or penetrated their homes. *Id.* The court concluded that the plaintiffs were "barred from recovering damages for loss in market value allegedly caused by environmental stigma." *Id.* at *7.

Plaintiffs concede that, standing alone, groundwater contamination is insufficient to establish actual injury. They maintain, however, that *Baker* is factually distinguishable because, in that case, the contamination had not yet reached the vadose zone, and the risk of vapor intru-

sion was therefore slight. In contrast, in this case, the vadose zone is also contaminated, thereby substantially increasing the risk of vapor intrusion. Plaintiffs maintain that this constitutes a present injury. They argue that all properties within the proposed classes either have *actual* vapor intrusion, or the *risk* of vapor intrusion, resulting in decreased property values, annoyance, discomfort and inconvenience.

Plaintiffs' attempts to distinguish *Baker* are unavailing. Because Ohio law does not provide for the recovery of stigma damages, individual Plaintiffs cannot succeed on their claims absent a showing of *actual* vapor intrusion. The *risk* of vapor intrusion, *no matter how great,* is not enough.[10] Plaintiffs cannot establish a class-wide injury-in-fact, because many of the homes have tested negative for vapor intrusion. To prove actual injury, each class member must rely on highly individualized proofs. This weighs heavily against class certification.

ii. Causation

Defendants argue that the issue of proximate causation will likewise require a property-by-property inquiry. In contrast to toxic tort cases involving a single source of contamination, this case involves at least two potential sources. Each class member will have to prove which, if any, entity or entities are liable for the vapor intrusion on his or her individual property.

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[10] Defendants concede that Plaintiffs need not prove actual injury for each class member as a prerequisite to class certification. They do argue, however, that class members have no compensable injury absent a showing of actual vapor intrusion.

Citing Dr. Sweetland's report, Plaintiffs argue that the geographical areas for which each Defendant is legally responsible are already well-defined. Defendants' experts, however, maintain that the plume boundaries are inaccurately defined, and that there are other possible sources for the contaminants found within each plume. *See* Docs. ##258 and 257-3. The Court need not resolve the battle of the experts at the class certification stage. *Bentley*, 223 F.R.D. at 479. Suffice it to say, however, that their differences in opinion serve to highlight the individualized nature of the proximate cause inquiry.

To summarize, resolution of the common questions concerning Defendants' conduct and the nature and extent of the alleged contamination is not enough to establish Defendants' liability to the class. The Court would still have to conduct individualized inquiries into each class members' fact-of-injury and the proximate causation thereof. Moreover, even if Defendants' liability could be determined on a class-wide basis, the Court would still have to determine the nature and extent of damages for each individual class member.[11] Under these circumstances, certification under Rule 23(b)(3) is not warranted.

iii. Relevant Case Law

The Sixth Circuit has noted that:

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[11] Given that Plaintiffs seek certification of *liability-only* classes, the Court need not address Defendants' argument that, under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Plaintiffs' inability to establish damages on a class-wide basis precludes class certification. The Court notes, however, that the Sixth Circuit has held that where determinations on liability and damages have been bifurcated, *Comcast* has "limited application." *In re Whirlpool*, 722 F.3d at 860.

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.

Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988).

Defendants cite to several toxic tort cases in which courts have refused to certify Rule 23(b)(3) classes for these very reasons. In a case involving remarkably similar facts, the Eighth Circuit reversed a district court's order certifying a class under Rule 23(b)(2) and (b)(3). In *Ebert v. General Mills, Inc.,* 823 F.3d 472 (8th Cir. 2016), Plaintiffs alleged that General Mills had released TCE into the environment, contaminating the groundwater and the soil above the groundwater, thereby diminishing property values. Sub-slab testing was conducted, and vapor mitigation systems were installed in 118 homes where the TCE concentration exceeded acceptable levels. However, 327 nearby homes had no detectable TCE concentrations.

The district court certified a class on the narrow question of General Mills' conduct in causing the contamination. On appeal, General Mills argued that class certification was improper, because individualized inquiries regarding fact-of-injury, causation and damages overwhelmed the common issues. The Eighth Circuit agreed, concluding that, in certifying the class on such a narrow issue, the district court had "essentially manufactured a

case that would satisfy the Rule 23(b)(3) predominance inquiry." *Id.* at 479. The court noted, however, that the "narrowing and separating of the issues ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial." *Id.*

Those individual issues included questions of actual injury, causation, and damages.

The Eighth Circuit held as follows:

> To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of General Mills' actions, and, if so, whether that contamination is wholly, or actually, attributable to General Mills in each instance. Accordingly, accompanying a determination regarding General Mills' actions, there likely will be a property-by-property assessment of additional upgradient (or other) sources of contamination, whether unique conditions and features of the property create the potential for vapor intrusion, whether (and to what extent) the groundwater beneath a property is contaminated, whether mitigation has occurred at the property, or whether each individual plaintiff acquired the property prior to or after the alleged diminution in value. This action is directed at TCE in breathable air, where both its presence and effect differ by property. These matters, to name a few, will *still* need to be resolved household by household even if a determination can be made class-wide on

> the fact and extent of General Mills' role in the contamination, which determination is problematic. Thus, any limitations in the initial action are, at bottom, artificial or merely preliminary to matters that *necessarily* must be adjudicated to resolve the heart of the matter.

Id. at 479-80 (emphasis in original).

Plaintiffs correctly note that *Ebert* is non-binding authority. Nevertheless, this Court finds the reasoning of the Eighth Circuit to be extremely persuasive, particularly given the nearly-identical fact pattern presented here. As in *Ebert*, even if a class-wide determination is possible concerning the role that each Defendant played in the alleged groundwater contamination, individualized inquiries are still required to determine whether vapor intrusion exists at each property, and whether it is attributable to one or both Defendants or to some other source.[12]

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[12] Plaintiffs suggest that the decision in *Ebert* is undermined by the Supreme Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036 (2016). *Tyson Foods* involved a collective action under the Fair Labor Standards Act, in which class members sought compensation for the time they spent donning and doffing protective gear. Because no one had kept track of how long these activities took, the employees hired an expert who calculated the average time that representative employees spent donning and doffing each day. The employees argued that individualized inquiries were not needed, because it could be assumed that "each employee donned and doffed for the same average time observed in [the expert's] sample." *Id.* at 1046.

The district court certified the class under Rule 23(b)(3), and the Eighth Circuit affirmed. On appeal, the company objected to the court's reliance on this "representative sample" to prove injury. It argued that *each* employee had to prove how much time he or she

The Third Circuit case of *Gates v. Rohm and Haas Co.,* 655 F. 3d 255 (3d Cir. 2011), is also persuasive. In *Gates,* the court affirmed the district court's order denying plaintiffs' motion for certification of a liability-only class on a property damage claim. Although there were some common questions concerning the source of the alleged groundwater contamination, the court found significant individual questions concerning causation, the extent of the contamination, and the fact and amount of damages. *Id.* at 271. The court noted that, unlike cases involving a single release of hazardous substances by a single defendant, the plaintiffs had alleged multiple potential pathways of contamination, at various levels and at various times, rendering class treatment inappropriate. *Id.* at 271-72.

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spent donning and doffing, and that this individualized inquiry predominated over any common questions.

The Supreme Court refused to adopt a broad rule prohibiting the use of representative evidence to satisfy the predominance inquiry. The Court noted that the admissibility of such evidence turns "on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* at 1046. It further stated that, "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 1049. The relevant question is whether each class member could have relied on the representative sample "to establish liability if he or she had brought an individual action." *Id.* at 1046.

To the extent that Plaintiffs suggest that evidence of actual vapor intrusion in *some* of the class members' homes constitutes a "representative sample" that can be used to satisfy the predominance requirement, the Court rejects this argument. Given Ohio's requirement, as set forth in *Chance* and *Baker,* that Plaintiffs cannot recover on their tort claims unless they each prove *actual* vapor intrusion, *Tyson Foods* is not instructive. Class members could not have relied on representative sample readings from the same neighborhood to establish liability if they had brought individual actions.

Plaintiffs note that the Sixth Circuit has twice upheld Rule 23(b)(3) class certification orders in cases involving toxic torts. These cases, however, are factually distinguishable. In *Sterling v. Velsicol Chemical Corp.,* 855 F.2d 1188 (6th Cir. 1988), the Sixth Circuit upheld the district court's order certifying a 23(b)(3) class in a case involving contaminated groundwater. The court reasoned that, "[i]n mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issues of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action." *Id.* at 1197.

In *Sterling,* however, there was just one alleged source of contamination, and each class member had allegedly suffered actual damages from drinking, or otherwise using, the contaminated groundwater. The court noted that "almost identical evidence would be required to establish the level and duration of chemical contamination, the causal connection, if any, between the plaintiffs' consumption of the contaminated water and the type of injuries allegedly suffered, and the defendant's liability." *Id.* The only issue that would require an individualized inquiry was the nature and amount of damages sustained. *Id.*

In contrast, in this case, because not all properties have actual vapor intrusion, Plaintiffs cannot establish a class-wide injury-in-fact. In addition, because there are multiple potential sources of contamination, proximate cause also involves an individualized inquiry. The *Sterling* court specifically cautioned *against* class certification in

cases "where no one set of operative facts establishes liability" and "no single proximate cause equally applies to each potential class member and each defendant." *Id.*

Plaintiffs also cite to *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), a case involving claims of trespass, nuisance, and medical monitoring. The certified class consisted of property owners whose persons and/or property were damaged by a cement plant's emission of toxic air pollutants. Cement dust had settled over class members' houses, plants, and personal property, and allegedly caused an increased risk of cancer and other diseases. The Sixth Circuit found that the district court had not abused its discretion in conditionally certifying the class under Rule 23(b)(2) and (b)(3).

Despite the fact that individualized damage determinations would be needed, the court noted that the case could be bifurcated. It found that the plaintiffs had raised common issues that would "likely allow the court to determine liability (including causation) for the class as a whole." *Id.* at 508. The court found that any toxins attributable to two other nearby industrial sites were *de minimis,* and could be distinguished from toxins originating from the cement plant. *Id.* The court also rejected defendant's argument that individual differences in the *types* of personal injuries and property damage suffered by class members would overwhelm any common questions. It held that the questions of whether the cement plant's negligence *generally* increased the risk of medical problems or *generally* caused minor property damage could likely be resolved on a class-wide basis. Specific causation issues could be dealt within the damages phase of the litigation. *Id.* at 508-09.

Again, *Olden* is factually distinguishable in that there was only one *major* source of contamination, and all class members had suffered some injury-in-fact, as a result of the cement dust that had settled on their property.[13] The same cannot be said here.

Plaintiffs also cite to two local district court cases involving 23(b)(3) class certification in toxic tort cases. These cases are likewise factually distinguishable, however, given that all class members suffered an actual injury. *See Bentley,* 223 F.R.D. 471 (S.D. Ohio 2004); *Stepp v. Monsanto Research Corp.,* No. 3:91-cv-468, 2012 WL 604328 (S.D. Ohio Feb. 24, 2012).[14]

iv. Conclusion

Based on the reasoning set forth in *Ebert* and *Gates,* the Court finds that Plaintiffs have failed to satisfy the predominance requirement of Rule 23(b)(3). Highly individualized issues concerning fact-of-injury and causation overwhelm the few questions that are common to the class.

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[13] The court noted that, under Michigan law, the cement dust would likely be sufficient to establish the "significant harm" needed to prevail on the nuisance claim. *Olden,* 383 F.3d at 509 n.5.

[14] The other cases cited by Plaintiffs, while perhaps factually similar to this one, are legally distinguishable because they did not involve Ohio law. *See e.g., LeC/ercq v. Lockformer Co.,* No. 00C7164, 2001 WL 199840 (N.D. Ill. Feb. 28, 2001)*; Smith v. ConocoPhillips Pipe Line Co.,* 298 F.R.D. 575 (E.D. Mo. 2014), *rev'd and remanded,* 801 F.3d 921 (8th Cir. 2015)*; Mejdreck v. Lockformer Co.,* 2002 WL 1838141 (N.D. Ill. Aug. 12, 2002), *aff'd sub nom. Mejdrech v. Met-Coil Sys. Corp.,* 319 F.3d 910 (7th Cir. 2003); *McHugh v. Madison-Kipp Corp.,* Case No. 11-cv-724 (W.D. Wisc. April 16, 2012).

2. Superiority

In addition to establishing that common issues predominate over individual ones, plaintiffs seeking class certification under Rule 23(b)(3) must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Having determined that Plaintiffs have failed to satisfy the predominance requirement, the Court need not address the superiority requirement.

For the reasons set forth above, the Court **OVERRULES** Plaintiffs' motion for class certification under Rule 23(b)(3).

E. Alternative Motion to Certify Issues for Class Treatment Under Fed. R. Civ. P. 23(c)(4)

The Court acknowledges, however, that Plaintiffs have cited many worthy reasons for class treatment. These include the fact that most of the putative class members lack the financial resources to pursue individual lawsuits, and the fact that judicial economy is best served by trying common issues in one lawsuit instead of hundreds of individual lawsuits. Accordingly, the Court turns to Plaintiffs' alternative motion to certify certain issues for class treatment under Federal Rule of Civil Procedure 23(c)(4).

Federal Rule of Civil Procedure 23(c)(4) states, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). This rule is designed to give the courts additional flexibility in handling class actions. As one commentator has noted, "its utilization may allow a

Rule 23(b)(3) action to be adjudicated that otherwise might have to be dismissed or reduced to a nonrepresentative proceeding because it appears to be unmanageable." 7AA Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1790 (3d ed.). The theory behind the Rule "is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis may be secured even though other issues in the case may need to be litigated separately by each class member." *Id.*

As before, Plaintiffs maintain that the following issues can be resolved on a class-wide basis:

1. Each Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage;

2. Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;

3. Whether Chrysler, Behr, and /or Aramark engaged in abnormally dangerous activities for which they are strictly liable;

4. Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;

5. Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;

6. Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

7. Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.

Doc. #254-1, PageID #7405.

Citing *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), Defendants argue that Rule 23(c)(4) cannot be used to circumvent Rule 23(b)(3)'s predominance requirement. In *Castano,* the Fifth Circuit held:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.

Id. at 745 n.21. The court went on to state:

> Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common is-

> sue predominates *over* the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Id.

Although the Sixth Circuit has not yet addressed this issue, several district courts within the Sixth Circuit have adopted the view set forth in *Castano. See Taylor v. CSX Transp., Inc.,* 264 F.R.D. 281, 296 (N.D. Ohio 2007) (collecting cases); *In re Welding Fume Prods. Liab. Litig.,* 245 F.R.D. 279, 312 (N.D. Ohio 2007) (declining to use Rule 23(c)(4) to "cure" the problems with the motion for class certification).

Other circuits, however, have held that issue certification under Rule 23(c)(4) may be appropriate regardless of whether the class as a whole satisfies the predominance requirement. In *Gunnells v. Healthplan Services, Inc.,* 348 F.3d 417, 439 (4th Cir. 2003), the Fourth Circuit held that a contrary interpretation would render Rule 23(c)(4) superfluous. *See also In re Tetracycline Cases,* 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("If the requirement under Rule 23(c)(4)(A) was not only that there be one or more issues which met the Rule 23(a) tests . . . , but also that those issues 'predominate,' in the usual Rule 23(b) sense, when compared with all the issues in the case, there would obviously be no need or place for Rule 23(c)(4)(A).").

In *Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir. 1996), the court held that, "[e]ven if the common questions do not predominate over the individual

questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."

The Second Circuit is in accord. It held that "a court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement." *In re Nassau Cty. Strip Search Cases,* 461 F.3d 219, 225 (2d Cir. 2006). The court further noted that this view is supported by the plain language of the Rule, which states that an action may be maintained "with respect to particular issues." *Id.* at 226. Citing 7AA Wright & Miller, *Federal Practice & Procedure* § 1790 (3d ed. 2005), and 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:7 (4th ed. 2002), the Second Circuit further noted that "commentators agree that courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)." 461 F.3d at 227.

The Court finds the reasoning of the Second, Fourth and Ninth Circuits to be very persuasive, particularly under the circumstances of this case. Accordingly, even though Plaintiffs have failed to satisfy the predominance requirement of Rule 23(b)(3), the Court finds that the following issues are suitable for class treatment under Rule 23(c)(4):

1. Each Defendant's role in creating the contamination within their respective

Plumes, including their historical operations, disposal practices, and chemical usage;

2. Whether or not it was foreseeable to Chrysler and Aramark that their improper handling and disposal of TCE and/or PCE could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries;

3. Whether Chrysler, Behr, and/or Aramark engaged in abnormally dangerous activities for which they are strictly liable;

4. Whether contamination from the Chrysler-Behr Facility underlies the Chrysler-Behr and Chrysler-Behr-Aramark Class Areas;

5. Whether contamination from the Aramark Facility underlies the Chrysler-Behr-Aramark Class Area;

6. Whether Chrysler and/or Aramark's contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion; and

7. Whether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective Facilities.

Accordingly, the Court **SUSTAINS** Plaintiffs' alternative motion to certify these issues under Federal Rule of

Civil Procedure 23(c)(4). Once a jury answers these questions, and determines the geographical boundaries of the two plumes of contamination, the Court will establish procedures by which the remaining individualized issues concerning fact-of-injury, proximate causation, and extent of damages can be resolved. The Court is inclined to appoint a Special Master to complete these tasks.

Fact-of-injury can easily be proven through test results showing that the property in question has contamination levels that exceed acceptable screening levels. Proximate causation issues will largely be resolved by the jury's answers to the above questions; however, to the extent there are individualized defenses, such as a claim that household cleaners had more than a *de minimis* effect on contamination levels inside a particular property, the Special Master can resolve those issues. Finally, the Special Master can determine the nature and extent of damages for each property.

In the Court's view, this procedure will ensure that property owners in the McCook Field neighborhood have an opportunity to litigate their claims. By trying these common questions to a single jury, this procedure also saves time and scarce judicial resources.

Moreover, this procedure does not appear to implicate any Seventh Amendment concerns. The Reexamination Clause of the Seventh Amendment to the United States Constitution prohibits facts tried by one jury from being reexamined by another fact-finder. U.S. Const. amend. VII ("no fact tried by a jury [,] shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). Separate juries may hear different portions of the same case, but only if the

issue tried by the second jury is "so distinct and separable" that trial of that issue alone "may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

In resolving individualized issues concerning fact-of-injury and damages, there would be no need for the Special Master to reexamine any of the jury's findings on any of the questions certified for class treatment. With respect to proximate causation, the jury's findings will determine who is legally responsible for the contamination underlying each individual property. Even if individualized *defenses* exist (such as a claim that household cleaners had more than a *de minimis* effect on contamination levels inside a particular property), the Special Master could resolve these issues without having to reconsider the jury's findings concerning the cause of the groundwater contamination.

IV. Conclusion

Although Plaintiffs have satisfied the requirements of Federal Rule of Civil Procedure 23(a), they have failed to prove that common questions of law or fact predominate over individualized issues. Accordingly, the Court OVERRULES Plaintiffs' Amended Renewed Motion for Class Certification under Federal Rule of Civil Procedure 23(b)(3). The Court nevertheless SUSTAINS Plaintiffs' alternative request to certify certain issues for class treatment under Federal Rule of Civil Procedure 23(c)(4). Doc. #254.

Counsel of record should take note that a telephone conference call will be convened by the Court at **9:45 a.m. on Friday, March 31, 2017,** to discuss further procedures to be followed in this case. Counsel asking to participate

in the conference call should notify the Court no later than the close of business on Tuesday, March 28, 2017, of their desire to do so.

Date: March 20, 2017

/s/ Walter H. Rice
Walter H. Rice
United States District Judge