IN THE SUPREME COURT
OF THE STATE OF GEORGIA

GEORGIA PACIFIC CONSUMER PRODUCTS, LP

Petitioner,

v.

KIRBI RATNER, AARON RATNER, DAVID L. McDONALD, And KATHY H. McDONALD, individually and on behalf of a class of persons similarly situated

Respondents.

COURT OF APPEALS NO. A13A0455

PETITION FOR CERTIORARI REVIEW

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Georgia-Pacific Consumer Products L.P. ("GPCP") respectfully petitions this Court for a writ of certiorari to review the July 16, 2013, decision of the Court of Appeals for the State of Georgia affirming the Superior Court of Effingham County's order granting the motion for class certification of named plaintiffs Aaron and Kirbi Ratner and David and Kathy McDonald ("Plaintiffs"). This Court has jurisdiction per article VI, § VI, ¶ V of the Constitution of the State of Georgia.

I. PRELIMINARY STATEMENT

A class action is litigation by proxy. As such, it is appropriate only if the lead plaintiff can demonstrate that there is a sufficiently cohesive class with common claims that can be resolved uniformly. The carefully balanced requirements for class certification, which Georgia law adopts from its federal counterpart, enforce this limitation and thereby ensure that both absent class members and defendants are afforded due process. Class actions bind absent class members, so it must be clear that the "proposed class has sufficient unity" to justify being subject to the class representatives' decisions. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 621 (1997). And for defendants, class treatment "may so increase . . . potential damages liability and litigation costs that [a defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The certification of

insufficiently cohesive classes magnifies this *in terrorem* effect on defendants. Given the grave consequences of class certification, courts must rigorously apply the rules to a putative class to ensure that this form of representative litigation respects due process and productively adjudicates the entire class's claims at once.

In the decision below, however, a narrow, 4-3 majority of the Court of Appeals gave the requirements of class certification little more than lip service. The case involves a putative class of owners of residential, industrial, and other properties nearby a permitted waste disposal area at a paper mill operated by GPCP ("the Mill"). Plaintiffs sue for trespass, nuisance, and negligence, claiming that the release of a chemical from the Mill's waste disposal area over several years damaged the property and harmed the health of class members. But there is no basis to believe that these claims can be resolved together without a host of individual mini-trials. Even Plaintiffs' experts agree that resolving whether a class member's property was affected, to what extent, and whether the impact (if any) was caused by the Mill require individual determination. The trial court made no factual findings to the contrary—or indeed any factual findings worthy of the name. Instead, in an opinion largely adopted wholesale by the majority below, the trial court thought it legally sufficient that, on the face of Plaintiffs' claims, the class members all sought compensation for the release of chemicals by GPCP.

The majority's radical relaxation of the rules of class certification makes three far-reaching errors of law. *First*, the majority held that the commonality prerequisite to class treatment—that there be "questions of law or fact common to the class"—is met as long as the claims of the class raise similar issues, such as whether the defendant is liable or the nature of its conduct. But the majority ignored whether *resolution* of those issues is possible for the class at once or would have to proceed plaintiff-by-plaintiff. This contradicts the teaching of this Court, which the United States Supreme Court has embraced, that "a common question is not enough when the *answer* may vary with each class member and is determinative of whether the member is properly part of the class." *Carnett's, Inc. v. Hammond*, 279 Ga. 125, 129 (2005); *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("What matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (quotation marks and alteration omitted). The majority's myopic focus on common questions overlooked the obvious individualized inquiries needed to resolve this case. And class actions, after all, are a device for *resolving* claims at once.

Second, the majority reduced the typicality prerequisite—that the named plaintiffs' claims and defenses be "typical of [those] of the class"—to a pleading formula. According to the majority, it was enough that Plaintiffs, on behalf of themselves and the class, asserted that GPCP released a harmful chemical that damaged the property and health of all class members. No attention was paid to critical distinctions between the circumstances of the named plaintiffs and those of the class. Most obviously, because the named plaintiffs purchased their property years after the Mill began operating, their claims are subject to the statutory "coming-to-the-nuisance" defense of O.C.G.A. § 41-1-7(c).

Third, the majority impermissibly narrowed the requirements that, for class actions to be certified under O.C.G.A. § 9-11-23(b)(3), common questions must "predominate" over "any" individual questions and class treatment must be superior to individual litigation. Thus, the majority excluded matters of injury and damages from its predominance analysis, ignoring both the text of Rule 23 and guidance from the U.S. Supreme Court making it clear that the predominance analysis requires consideration of damages determinations. *See Comcast v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013). Moreover, the majority took the same cursory approach to predominance and superiority that it did to commonality and typicality—it thought it sufficed that Plaintiffs asserted similar claims on behalf of

the class regardless of the individualized inquiries needed to actually *resolve* those claims at trial. *But see In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) (A trial court "must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.") (quotation marks omitted).

The majority's decision will have severe and far-reaching consequences. It contradicts Georgia precedent and breaks dramatically from the federal class action doctrine that Georgia courts have long used to clarify the law in this State. Moreover, every industrial facility in Georgia—even those, like the Mill, that abide by environmental rules—may now be targeted in a class action brought by a few disgruntled neighbors, including those who moved in years after operations began. Responsible facility operators will thus be subjected to the "hydraulic pressure to settle"—regardless of the merits—that class certification creates. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F. 3d 154, 165 (3d Cir. 2001). This Court should intervene and preserve the integrity of class actions in Georgia.

II. STATEMENT OF PROCEEDINGS BELOW

Plaintiffs first brought suit on December 10, 2010. They amended their complaint and moved for class certification on January 13, 2012. The trial court issued an order certifying the class on July 6, 2012. GPCP timely appealed.

On July 16, 2013, a four-judge majority of the Court of Appeals, adopting nearly wholesale the analysis of the Superior Court, upheld the grant of class certification over the dissent of three judges. In general, the grant of class certification is reviewed for abuse of discretion. *See Life Ins. Co. of Ga. v. Meeks*, 274 Ga. App. 212, 215 (2005). Errors of law constitute abuses of discretion. *E.g.*, *Holton v. Physician Oncology Servs., L.P.*, 292 Ga. 864, 867 (2013). Moreover, "the grant of class certification under Rule 23 (b)(3) will be reversed where it is clear from the record that the predominance requirement has not been met, rendering a trial of the case on a class-wide basis unmanageable." *Rollins, Inc. v. Warren*, 288 Ga. App. 184, 187 (2007) (citations omitted), *cert. denied*, 2008 Ga. LEXIS 216 (Ga. Feb. 25, 2008).

III. STATEMENT OF FACTS

This is an environmental tort class action arising from the operation of the Mill in Rincon, Georgia. The Mill began operations in 1986 in what was then a mostly rural area. R-541. The Mill's processes and environmental practices have been occasionally updated since 1986. R-541–42. It operates in compliance with regulations and permits issued by the Georgia Environmental Protection Division ("EPD"). *See, e.g.*, R-156–95; *see also* R-480. Upon receiving complaints about odor in the early 1990s, the Mill identified its waste disposal area as the source.

See R-788–810. Steps were taken to rectify the problem, and the Mill received no odor complaints for several years. *Id.*

In 2004–05, a local developer built a subdivision called Mallard Pointe on vacant land directly across Fort Howard Road from the Mill's waste disposal area. R-542. Approximately two years later, the Mill began receiving complaints from some Mallard Pointe residents, including the named plaintiffs (the Ratners and the McDonalds). *Id.*; R-544. These complaints related primarily to odor and corrosion of some air conditioners caused by the intermittent release of hydrogen sulfide, a naturally occurring byproduct of the waste treatment process. R-542–44. The Mill also received various, and differing, complaints of physical consequences from the hydrogen sulfide releases, including difficulty breathing, coughing or choking, headaches, and vomiting. Op. at 4; Dissent at 2. Several Mallard Pointe homeowners complained that the odor made their homes difficult to sell. *Id.*

In response, the Mill implemented several remedial measures. It installed a spray system in 2006 to neutralize odors and flares to burn off hydrogen sulfide. R-542–43. It also decided to close the three cells believed to be responsible for most of the odor. *Id.* This project was approved by Georgia's EPD, and is in the process of completion. *Id.* GPCP also voluntarily paid to repair or replace air conditioners in over 20 homes in the area, mostly in Mallard Pointe. R-544.

Indeed, the Ratner Plaintiffs accepted two replacement air conditioners from GPCP, and in exchange they signed releases of claims against the Company related to the failure of the old units. K. Ratner Dep. Tr. at Def. Exhs. 10, 11.

Before Plaintiffs filed this lawsuit, the Ratners held a meeting with about 25 area residents to gauge interest in litigation. Interest was tepid at best. *See* A. Ratner Dep. Tr. at 46–47. ("there wasn't really enough—enough people to get involved . . . . [j]ust a handful . . . [a]pproximately four or five homes."). But Plaintiffs sued anyway, bringing claims of nuisance, trespass, and negligence on behalf of a class of persons owning property in an area bounded by roads, a railroad right-of-way, and a line set by coordinates of latitude and longitude. Op. at 8. The area consists of 67 parcels of land, including 34 residences and 33 pieces of industrial, agricultural, timber or vacant land. Op. at 6; Dissent at 3.

Plaintiffs allege that the actions of GPCP and "toxic fumes" emanating from the Mill cause "harm to the property within the class area and the persons who own those properties." Am. Compl. (R- 427–37) ¶ 10. This assertion of harm to both property and person is incorporated into each of the three counts of the amended complaint. *Id.* ¶¶ 22, 30, 38. The amended complaint further alleges the loss of the class members' right to use and enjoy their respective properties, and seeks "all

of their past, present and future general damages, special damages and nominal damages." *Id.* ¶ 45(b).[1]

Class discovery revealed remarkable agreement between the parties' experts. Specifically, Plaintiffs' own experts acknowledge that determining the existence, cause, and extent of any injury necessarily requires individualized examination.

For example, Plaintiffs designated real estate appraiser Henry Garrett as their class definition expert, but at deposition Garrett confirmed that the claims of the class could not be resolved class-wide. "[U]ntil I do my due diligence within that area," Garrett explained, "I don't know how many of the homes have been affected *or may be affected*." Garrett Dep. Tr. at 32 (emphasis added). By "due

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[1] Plaintiffs tried below to disavow any claim of personal injury, perhaps knowing such claims are classic examples of claims that do *not* merit class treatment. *See, e.g.*, *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601–604 (5th Cir. 2006) (Causation, injury, and damages from exposure to toxic chemicals from an accident too individualized, as each class member suffered different alleged periods and magnitudes of exposure and had different symptoms); MOORE'S FEDERAL PRACTICE ¶ 23.45[5][d][i] (3rd Ed. 2013) ("Courts traditionally have been reluctant to certify class actions under Rule 23(b)(3) in mass tort cases because individualized questions would predominate over common ones, due to the inherent nature of personal injury suits."); Fed. R. Civ. P. 23(b)(3) advisory committee's note to the 1966 amendments ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action . . . ."). As the dissent below noted, however, "although plaintiffs, as well as the majority, would have us ignore any claims for personal injury on appeal, the complaint alleges that the 'ongoing releases of toxic chemicals . . . do[] harm to both the property within the class area and the persons who own those properties,' with plaintiffs suffering various symptoms (as listed in their appellate brief) including difficulty breathing, headaches, and vomiting." Dissent at 10 (alteration omitted).

diligence" he meant that "it would take further investigation on my part, or somebody's part, to determine the individual damages to each one of the properties and the amounts of those properties, whether it's severe, or whether it's minor, or whether . . . there are different categories of damage. So, each individual property within that class is looked at *on a case-by-case basis*." *Id.* at 38 (emphasis added). He further admitted that property-by-property inspections are needed to determine the impact, if any, of hydrogen sulfide on each class property and its value. *Id.* at 32–33, 36–38, 41–42. Thus, Garrett's analysis would necessarily be unique to each property in the putative class:

> I think it's a seat of the pants kind of thing. You have to be on the property, you have to look at the topography, you have to look at the boundaries, you have to look at the different areas, to determine what might or might not be affected by whatever it is that you're dealing with in terms of contamination.

Id. at 42. *See also* Dissent at 5 ("Although plaintiffs introduced no expert testimony concerning the health effects . . . [GPCP]'s medical expert averred that . . . each class member would be required to undergo a 'unique' or 'tailored' medical evaluation in order to determine the cause of each plaintiff's condition.").

Plaintiffs also designated two air conditioner repairmen as experts. Both testified that they would have to inspect each unit in the area in order to determine (1) whether there was corrosion; and (2) if so, whether the cause of corrosion was

hydrogen sulfide and not something else. *See generally* Walbert Dep. Tr. at 30–31, 55–56; Burke Dep. Tr. at 18–19, 22–23, 52–54; *see also* Dissent at 5. One conceded that a unit at one house might be corroded, while a unit at a house right across the street—or even another unit in the same house—might have no corrosion. Walbert Dep. Tr. at 30–31. He also admitted that he did not know whether the corrosion of the air conditioners was caused by hydrogen sulfide and said that, without testing each affected air conditioner, it "would be totally off the wall" to say that the corrosion was the result of a chemical reaction. *Id.* at 55–56.

IV. ENUMERATION OF ERRORS

1. The Court of Appeals majority improperly concluded that Plaintiffs had shown commonality under O.C.G.A. § 9-11-23(a) merely by pointing to common issues, ignoring that the resolution of those issues would require individualized determinations; this violated the rule articulated by the U.S. Supreme Court and anticipated by this Court—that commonality requires proof that *common answers* will resolve issues in the proceeding. *See Carnett's, Inc. v. Hammond*, 279 Ga. 125, 129 (2005); *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

2. The majority incorrectly found that Plaintiffs had shown typicality under O.C.G.A. § 9-11-23(a) simply because the claims of both the named plaintiffs and the class depend on the release of hydrogen sulfide, ignoring critical distinctions

between the named plaintiffs and the class, including that the former are subject to affirmative defenses that render them ineligible to represent the putative class.

3. In finding that Plaintiffs had met the requirements of O.C.G.A. § 9-11-23(b)(3), the majority improperly ignored matters of injury and the amount of damages in its predominance analysis, and incorrectly held Rule 23(b)(3) classes are *per se* permissible if there is one defendant engaged in a general "course of conduct" where that conduct varies over many years and affects different plaintiffs and their properties differently (if at all).

V. ARGUMENT AND CITATION OF AUTHORITIES

a. The Majority's Commonality and Typicality Analyses Ignored *Wal-mart v. Dukes* and *Carnett's, Inc. v. Hammond.*

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 131 S. Ct. at 2550 (quotation marks omitted). The substantively identical prerequisites to class treatment established in O.C.G.A. § 9-11-23(a) and Federal Rule of Civil Procedure 23(a) ensure that the exception is warranted in a particular case. These provisions require any plaintiff seeking to certify a class to show that the class bears the characteristics of commonality ("[t]here are questions of law or fact

common to the class") and typicality ("[t]he claims or defenses of the representative parties are typical of [those] of the class").[2]

The plaintiff must demonstrate that these requirements are met as a matter of fact, and failure to prove any single requirement is fatal to class certification. *See Carnett's*, 279 Ga. at 127; *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 348 (S.D. Ga. 1996). The trial court must engage in a "rigorous analysis" to ensure that the plaintiff has met his burden. *Rite-Aid of Ga., Inc. v. Peacock*, 315 Ga. App. 573, 574–75 (2012) (quoting *Dukes*, 131 S. Ct. 2551). "[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

i. Commonality requires that there be common answers apt to drive resolution of the litigation.

Commonality requires that there be "questions of law or fact common to the class." As the U.S. Supreme Court noted in *Dukes*, the language of the rule "is easy to misread, since any competently crafted class complaint literally raises common questions." *Dukes*, 131 S. Ct. at 2551 (quotation marks and alteration omitted). Like the other Rule 23(a) prerequisites to class treatment, commonality is designed to "effectively limit the class claims to those fairly encompassed by the

[2] The other Rule 23(a) prerequisites to certification are numerosity ("[t]he class is so numerous that joinder of all members is impracticable") and adequacy ("[t]he representative parties will fairly and adequately protect the interests of the class").

named plaintiff's claims." *Id.* at 2550 (quotation marks omitted). This means, *Dukes* explains, that all class claims must "depend upon a common contention":

> That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. . . . [What is required is] the capacity of a classwide proceeding to generate *common answers* apt to drive the resolution of the litigation.

Id. at 2551. Georgia courts have already adopted the *Dukes* articulation. *See, e.g.*, *Rite-Aid*, 315 Ga. App. at 574–75.[3]

Focusing on the need to generate common answers makes sense. For when the plaintiff (or the court) merely recites common issues implicated by the class members' claims, there is "no cause to believe that all [the] claims can be productively litigated at once." *Dukes*, 131 S. Ct. at 2551. And the whole point of class actions is to productively litigate at once—that is, *to resolve*, not simply to raise, issues "in one stroke."

Georgia was ahead of the curve in this area of the law. In *Carnett's, Inc. v. Hammond*, this Court explained the commonality requirement, anticipating the U.S. Supreme Court's later pronouncement in *Dukes* by six years. *See* 279 Ga. 125 (2005). *Carnett's* involved a putative class action alleging that the defendant

[3] *See also Rollins, Inc. v. Warren*, 288 Ga. App. 184, 187 n.2 (2007) ("In addressing class certification issues, Georgia courts have relied on federal cases construing Federal Rule of Civil Procedure 23 as persuasive authority.").

had faxed unsolicited—and therefore illegal—advertisements to the class. But the facts were such that some of the faxes might have been solicited, depending on where the class members lived. *Id.* at 128–29. The Court of Appeals "sidestepped this issue by holding that the predominant *question* of solicitation is common to all class members and thus supports, rather than undermines, a finding of commonality." *Id.* at 129 (quotation marks omitted). But this Court understood that was insufficient. It explained that "a common question is not enough when the *answer* may vary with each class member and is determinative of whether the member is properly part of the class." *Id.* Again, it does not suffice that claims raise common issues; it must be possible to *resolve* them uniformly.

ii. The majority mistakenly found commonality based merely on the existence of common issues.

The Court of Appeals majority, however, took an approach opposite to both *Dukes* and *Carnett's*. Although the majority, in a footnote, paid lip service to *Dukes*'s admonition that class treatment is an "exception" to the usual rule of individual litigation (*see* Op. at 7 n. 6 (quoting Superior Court)), it did not actually require that "common answers" justify the exception. Instead, both lower courts thought it sufficient as a matter of law to identify common issues that a class action would raise, ignoring that *resolving* those issues for each plaintiff would require individualized determinations.

In a page and a half of cursory discussion, the majority opinion lists a set of issues it regarded as common. Largely adopted wholesale from Plaintiffs' briefing, those issues are 1) the nature of hydrogen sulfide as "noxious smell[ing], toxic[], and corrosive"; 2) issues surrounding the nature of GPCP's waste disposal practices; 3) GPCP's liability; 4) GPCP's common affirmative defenses (the majority did not identify any such defenses); and 5) various remedies issues, including the appropriate measure of damages and punitive damages. According to the majority, these issues are common "given that the claims asserted on behalf of all members of the proposed class are based upon harm allegedly caused by hydrogen sulfide gas coming from the mill," so that a class-wide trial "would involve many of the same witnesses, same documents and same testimony and would require resolution of the same issues of both law and fact." Op. at 10–11.

The majority's approach is precisely what *Dukes* and *Carnett's* rejected, because all it did was identify common issues raised by Plaintiffs' claims. *See Dukes*, 131 S. Ct. at 2551 (noting that "raising common 'questions'—even in droves"—does not justify class treatment) (citation omitted). Misunderstanding the commonality standard, the majority made no effort to consider whether the resolution of the general issues it pointed to could be done "in one stroke." It therefore failed to see what is obvious from a largely undisputed factual record—

that litigating the issues it identified would be rife with individualized determinations.

1. ***The nature of hydrogen sulfide.*** As Plaintiffs' own expert admits, exposure to hydrogen sulfide does not automatically mean injury. *See* Garrett Dep. Tr. at 37–38 ("Properties within that boundary area could or could not be adversely affected by the existence of pollution."). The relevance of the nature of hydrogen sulfide depends on the nature and extent of a plaintiff's exposure to it, which in turn depends on where each plaintiff's property is located; whether it is upwind or downwind of the waste disposal area; and the use to which the property is put (residential, agricultural, etc.). And because GPCP's waste disposal practices have changed over time, *see infra* 6–7, when class members have owned property in the area also matters. In short, the abstract nature of hydrogen sulfide resolves little. *Compare Dukes*, 131 S. Ct. at 2551 (Giving as examples of questions that are "not sufficient to obtain class certification" the following: "Do all of us plaintiffs indeed work for Wal-mart? Do our managers have discretion over pay?").

2. ***GPCP's practices.*** Although the majority speaks as though there is a "single course of conduct," in fact GPCP's waste disposal practices have changed over the years as it has taken steps to remediate the effects of the hydrogen sulfide

releases. As explained above, GPCP took initial remedial measures in the early 1990s before Mallard Pointe was built, then undertook several steps to mitigate hydrogen sulfide releases in 2006–07 after residents of that new development complained, and has continued doing so up to the present. Thus, proof of the class members' claims will turn on different practices at different times.

3. *Liability.* Here the majority's flawed legal analysis is on full display. Commonality demands more than the common question, "Is the defendant liable?" Trial courts must undertake a "rigorous analysis" of the facts to determine whether liability can be established—that is, that the question can be answered—as to all class members "in one stroke." *Dukes*, 131 S. Ct. at 2551. The majority did not require that here. Causation and injury are elements of trespass, nuisance, and negligence claims under Georgia law, but whether a class member's property and health were harmed, and what caused the harm, require individual examination. Plaintiffs' own expert Garrett admitted that the extent of hydrogen sulfide impact (if any) will vary from property to property, depending on a "seat of the pants," "case-by-case" consideration of that property's topography, boundaries, and "the different areas" of the particular parcel. Moreover, any loss of enjoyment of property is subjective and depends on context-specific factors such as whether property owners reside in or rent out their homes or use their property for

industrial or agricultural purposes. Finally, as the dissent explained, "the personal injuries suffered by some class members range from difficulty breathing to coughing or choking, headaches, and vomiting—proving causation of which will be inherently specific to the individuals affected." Dissent at 15 (quotation marks omitted). Thus, determining whether GPCP is liable requires examining what each class member complains of, whether his injuries were caused by GPCP, and the extent of those injuries. Cf. *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005) ("The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual.").

4. *GPCP's affirmative defenses.* The majority vaguely referred to "common affirmative defenses," but the defenses that GPCP raised depend on facts that vary among class members. For example, GPCP raised the statute of limitations and laches, but resolution of those defenses turns on when a property was allegedly harmed. Similarly, GPCP's waiver/estoppel defense revolves around when a class member learned of the supposed harm, what he did about it, and whether he released some of his claims by accepting GPCP's replacement of an air conditioner, as, for example, the Ratners did. And the coming to the nuisance defense codified by O.C.G.A. § 41-1-7 depends on when each class member came to the alleged nuisance and the state of it at that time. The same

goes for GPCP's assertion of the prior trespass defense, which bars recovery for property damages incurred before a plaintiff purchased.

5. *Remedies/Punitive Damages.* The majority listed as a common issue "the appropriate measure of damages." But damages must be measured according to the harm caused to each property by actionable misconduct of GPCP (assuming there is any), which requires individualized assessment, as Plaintiffs' expert Garrett admitted. *See* Garrett Dep. Tr. at 38 (agreeing he "would have to look at each individual property to know, first A, has it been affected, and then B, if it has, the damages, the severity of how it's been affected"). The same goes for the cause and nature of the health impacts and loss of enjoyment Plaintiffs claim, such as eye irritation, coughing, headaches, or other symptoms. Differences in the nature and extent of injury would also affect the propriety of any punitive damages.

* * *

The correct legal analysis reveals that there is no evidentiary basis to certify this class. Instead of analyzing how the issues in this case might be *resolved,* the majority substituted the emphasis *Dukes* and *Carnett's* place on the actual litigation and resolution of the class claims with a pleading exercise in which would-be named plaintiffs meet their burden by listing generalized issues based on assertion, not evidence. This approach nullifies the commonality prong.

iii. The majority's typicality analysis ignored obvious distinctions between the named plaintiffs' claims and those of the class.

Rule 23(a) requires that "[t]he claims or defenses of the representative parties [be] typical of the claims or defenses of the class." As the U.S. Supreme Court has noted, typicality and commonality are related; "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named 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." *Falcon*, 457 U.S. at 157 n. 13. For typicality as for commonality, that determination requires consideration of how the class members' claims will be resolved in practice.

The majority, however, thought it sufficient that "the claims asserted" were generically the same, "namely that the release of hydrogen sulfide gas has damaged [Plaintiffs'] respective properties." Op. at 11. Even though it recognized that "there may be different types of affected properties involved in this case," the majority declared, "the basic claims of nuisance, trespass, and negligence are the same." *Id.* This blithe statement is not "rigorous analysis," if indeed it can be described as analysis at all. The majority ignored Plaintiffs' burden to point to facts demonstrating typicality. *But see Falcon*, 457 U.S. at 160 ("[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable."). As it did in

addressing commonality, the majority collapsed the typicality requirement into a meaningless pleading exercise—any competent lawyer can draft a class complaint asserting the same claims for the entire class.

Here, the Ratners and McDonalds cannot stand in the various shoes of the class members they seek to represent. They are disqualified at the threshold because they are subject to particular affirmative defenses that not all the class faces. The Ratners released some of their claims against GPCP when they accepted replacement air conditioners from the Company. *Compare Brenntag MidSouth, Inc. v. Smart*, 308 Ga. App. 899, 905 (2011) (excluding one class representative on typicality grounds because she released some or all of her claims). And both the Ratners and the McDonalds bought their property in 2005, long after the Mill began operating in 1986. As to them, O.C.G.A. § 41-1-7 provides a "coming to the nuisance" defense, barring nuisance suits arising from situations where non-agricultural uses (such as a residential subdivision) locate themselves near plants (such as the Mill) which manufacture or distribute forest products. *Id.* at (c); (b) (3.1), (4), & (4.2).[4] While those who have lived in the area since before 1986, or whose land is put to agricultural instead of residential uses,

[4] The legislature enacted this law because "facilities are sometimes forced to cease operations [as a result of nuisance suits]. Many others are discouraged from making investments . . . or adopting new related technology or methods." O.C.G.A. § 41-1-7(a). The statute thus applies in spirit as well as letter.

would not be subject to the defense, the named plaintiffs are. "When the named plaintiff has no valid claim against the defendant, he is not eligible to represent the purported class." *Meeks*, 274 Ga. App. at 218.

The named plaintiffs are distinct in other ways. Their properties are adjacent to the waste disposal area, which is located across the street, while other class members' properties are farther away. That geographical difference distinguishes the nature and extent of the named plaintiffs' exposure to hydrogen sulfide from the exposure (if any) of other class members. Moreover, Plaintiffs' expert Garrett admitted that he needed to discuss the alleged effects of hydrogen sulfide releases with each property-owner before he could reach a final opinion on any alleged impact to that property. *See* Garrett Dep. Tr. at 32–33. Nor is that surprising; many factors affect the value of a home—how well it is maintained, its curb appeal, its proximity to road noise or construction, its layout, its location relative to nonresidential uses, the topography of the lot, etc.—such that the question how one supposed factor impacts value is a highly individualized inquiry.

Against these various distinctions between the named plaintiffs and the rest of the class, the majority simply insisted that "the basic claims of nuisance, trespass, and negligence are the same." This mirrors the majority's recitation of general issues that the class shares in order to satisfy the commonality requirement

of Rule 23(a), and it similarly misreads the rule. This "quick look" version of typicality also contradicts the Court of Appeals' prior, correct understanding. In *Rite-Aid*, the Court instructed that "a plaintiff seeking to represent a class must do more than draft a complaint; instead, he must show that the class members 'have *suffered the same injury,*' [which] *does not mean merely that they have all suffered a violation of the same provision of law.*" *Rite Aid*, 315 Ga. App. at 575 (citing *Dukes*, 131 SC at 2551 (quoting *Falcon*, 457 U.S. at 157)). Only this Court can correct the confusion the majority below has sown in the law of Georgia.

b. <u>The Majority Improperly Narrowed the Rule 23(b)(3) Analysis.</u>

In addition to meeting the pre-requisites of class treatment under Rule 23(a), Plaintiffs' putative class action must comply with Rule 23(b)(3). That rule requires that Plaintiffs demonstrate predominance—that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"—and superiority—that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Class actions under Rule 23(b)(3) are reserved for situations where "class-action treatment is not as clearly called for" and the predominance requirement is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 615, 624 (quotation marks omitted); *see also Comcast*, 133 S. Ct. at 1432

(emphasizing "the court's duty to take a close look at whether common questions predominate over individual ones") (quotation marks omitted).

Here, the majority brushed aside the multiple individualized inquiries that permeate Plaintiffs' claims. Specifically, it excluded from its predominance analysis the need for individualized determinations of damages and injury. And it adopted the view that Rule 23(b)(3) (especially its predominance requirement) is always satisfied when a plaintiff merely asserts a class was harmed by the same general type of conduct of a single defendant. But that is not the law.

i. Injury and damages are part of the predominance inquiry.

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over *any* questions affecting only individual members." (emphasis added). Because "any" questions affecting individual members of a proposed class are relevant, the court must consider not only matters of the defendant's conduct, but also whether the class members have been injured and, if so, by how much. Thus, the court may not limit itself to questions of liability divorced from injury and damages. *See, e.g.*, *Winfrey v. Sw. Cmty Hosp.*, 184 Ga. App. 383, 384 (1987) (citing "the determination of individual damages" as an example of an individual, predominating issue) (quotation marks and alteration omitted).

The U.S. Supreme Court's decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), reflects this straightforward understanding of the statutory text. In *Comcast*, the Court reversed a decision approving of class treatment precisely because there was no reliable way to measure damages class-wide and thus "[q]uestions of individual damage calculations w[ould] inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. Further, it did not suffice for the plaintiff simply to identify *any* theory of damages that might apply class-wide; rather, the plaintiff had to match a reliable theory to the damages actually sought to be recovered. *See id.* (rejecting the notion that "at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements might be").

Two principles follow from *Comcast*. First, damages are part of the predominance inquiry. Second, there is only a "common" issue for purposes of predominance if it can be reliably resolved for all class members at once, without individualized determinations. These principles build on the interpretation of commonality adopted in *Dukes* and anticipated in *Carnett's*.

ii. The majority narrowed the Rule 23(b)(3) requirements, contradicting established class action law.

Until the decision below, the Georgia Court of Appeals understood these principles. But in this case the majority violated both of them. First, it excluded

damages from consideration in the tally of common versus individual issues, opining that "the proper focus is on issues of fact and law that relate to *liability* rather than damages." Op. at 13. Nor did the majority recognize that whether the class members here have suffered any injury at all must be determined property-by-property and plaintiff-by-plaintiff. Thus, the majority wrongly circumscribed its predominance analysis, excluding matters of injury and damage in flat contradiction of the text of Rule 23(b)(3) and *Comcast*.[5]

Second, even in terms of what it *did* consider, the majority limited itself to a cursory glance at Plaintiffs' complaint. As the majority recognized, GPCP argued below that "each property owner would have to prove the various elements of nuisance, trespass, and negligence as to their respective properties." Op. at 14. The breadth of these individualized determinations—which, as set forth above, Plaintiffs' own experts conceded—vitiates any finding of either predominance or superiority. *See Rollins*, 288 Ga. App. at 187 ("Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3).") (citation omitted); *Dunnigan v. Metro. Life Ins.*

[5] As shown above, there can be little doubt that proving injury and damages here would generate predominating individualized inquiries. *See supra* 17–20.

Co., 214 F.R.D. 125, 142 (S.D.N.Y. 2003) (Where "the Court would be required to conduct a series of mini-trials . . . . , a class action is not a feasible, let alone superior, method for the fair, efficient, and manageable adjudication of the putative class's claims for interest.").

But the majority concluded that common issues predominated and that a class action would be manageable (and thus superior) anyway.[6] For the majority, it did not matter that each property owner would have to prove its case individually. It suffices that there is one defendant that Plaintiffs allege committed (over years, even decades) a series of similar actions that allegedly harmed a class.

The majority's neutering of Rule 23(b)(3) is a significant retreat from what had been the established understanding in the Georgia Court of Appeals. For example, in *Perez v. Atlanta Check Cashers, Inc.*, the Court held, following the guidance of *Rollins* quoted above, that certification was inappropriate because of the need to determine whether each class member had authorized the submission of certain license applications to a state agency. 302 Ga. App. 864, 868–69 (2010). And in *Doctors Hospital Surgery Center, LP v. Webb*, the need to litigate

[6] Regarding predominance, the majority wrote, GPCP "is the sole defendant and its conduct is the only conduct at issue," "[t]he same negligent actions are alleged to have caused harm to each class member in substantially the same ways," and "[t]he same types of damages are sought for every class member." Op. at 15. With respect to superiority, the majority simply declared, "[t]his case, *as presented*, should be manageable as a class action." Op. at 16 (emphasis added).

"highly personalized injuries including anxiety, emotional distress, and loss of consortium" required reversing a grant of class certification. 307 Ga. App. 44, 47 (2010). As the Court put it in another case involving breach of contract, "[e]ven if the members of the class seek to enforce the same contractual right and to obtain the same relief . . . the predominance requirement is not met when the *answer* to the question . . .will require a highly individualized, case-by-case determination as to each putative class member." *Roland v. Ford Motor Co.*, 288 Ga. App. 625, 631 (2007) (citation and alterations omitted), *cert. denied*, 2008 Ga. LEXIS 270 (2008). The same goes here.

c. Left Undisturbed, the Decision Below Will Have Grave Adverse Consequences for the Integrity of Class Litigation in Georgia.

Class actions are strong medicine, and plaintiffs should only have access to them—and the enormous settlement pressure they create—if there is in fact a cohesive class of plaintiffs whose claims can be litigated together consistent with Rule 23. Understanding the exceptional nature of class treatment, the U.S. Supreme Court, in cases like *Dukes* and *Comcast*, and the federal courts of appeals in other cases have increasingly insisted on strict adherence to these requirements. *See, e.g., CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit."). The courts of

Georgia, including this Court in *Carnett's, Inc. v. Hammond*, were ahead of this development in the law.

The decision of the majority below, however, takes Georgia backwards. And, if left uncorrected, this misstep will have grave practical consequences. Any industrial facility, even one operating responsibly and within the law like GPCP's Mill, would be subject to the *in terrorem* threat of class certification whenever any neighbor—even one who chose to live nearby with full knowledge of the facility's operations—objects to the presence of the facility. Under the majority's analysis, it would not matter that there were "[j]ust a handful" of area residents interested in suing. A. Ratner Dep. Tr. at 47. It would not matter that the would-be class plaintiffs' own experts recognize that each class member's claims cannot be resolved without individual determinations. All that would be needed is a defendant, a course of conduct, and injuries asserted on behalf of a class (even if not provable class-wide). This cursory approach contradicts federal standards and the traditional insistence in this State on actual compliance with the requirements of class treatment. Only this Court's intervention can restore the integrity of class action law on which Georgia's citizens and businesses alike rely.

VI. CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

This 5th day of August, 2013.

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So certified this 5th day of August, 2013.

s/s *David E. Hudson*

David E. Hudson

WHOLE COURT

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
http://www.gaappeals.us/rules/

July 16, 2013

In the Court of Appeals of Georgia

A13A0455. GEORGIA-PACIFIC CONSUMER PRODUCTS, LP v. RATNER et al.

ELLINGTON, Presiding Judge.

Four Effingham County property owners[1] sued Georgia-Pacific Consumer Products, LP ("Georgia-Pacific") for nuisance, trespass, and negligence arising out of the intermittent but continuing release of hydrogen sulfide gas onto their properties from Georgia-Pacific's Savannah River Mill ("the mill") in Rincon.[2] The plaintiffs moved the trial court to certify a class consisting of the owners of 65 additional properties neighboring the plant. After a hearing, the trial court certified the class

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[1] Class representatives Kirbi and Aaron Ratner own a single family residence in Mallard Crossing, in Rincon. David and Kathy McDonald own a single family home in Mallard Pointe, Rincon.

[2] The facility operates a paper mill, a power plant, a waste water treatment facility, a landfill, and sludge fields.

pursuant to OCGA § 9-11-23 (c) (1).[3] Georgia-Pacific contends that the trial court abused its discretion when it certified the class. We disagree and, for the reasons set forth below, we affirm.

> Under OCGA § 9-11-23, a class action is authorized if the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact. The character of the right sought to be enforced may be common although the facts may be different as to each member of the alleged class.

(Footnotes omitted.) *Bd. of Regents of the Univ. Sys. of Ga. v. Rux*, 260 Ga. App. 760, 764 (3) (580 SE2d 559) (2003). In order to gain class certification, a plaintiff has the burden of establishing that the prerequisites of OCGA § 9-11-23 (a) have been satisfied, those being (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. See OCGA § 9-11-23 (a); see also *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 76 (1)(666 SE2d 420) (2008) ("Under Georgia law, a case may proceed as a class action if all prerequisites of OCGA § 9-11-23 (a) are satisfied: numerosity, commonality, typicality, and adequacy[.]"). Additionally, the class must satisfy at

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[3] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits." OCGA § 9-11-23 (c) (1).

least one ground under OCGA § 9-11-23 (b), which provides, in relevant part, that a case may proceed as a class action if

> the prerequisites of OCGA § 9-11-23 (a) are satisfied and[ ] (1) the prosecution of separate actions would create a risk of inconsistent adjudications or would impair other parties' ability to protect their interests; (2) the defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or declaratory relief with respect to the whole class; or (3) questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(Footnote omitted.) *EarthLink, Inc. v. Eaves*, 293 Ga. App. at 76 (1); see also OCGA § 9-11-23 (b). "[W]e review the trial court's decision in certifying or refusing to certify a class action for an abuse of discretion." (Citation omitted.) *Rite Aid of Ga., Inc. v. Peacock*, 315 Ga. App. 573 (726 SE2d 577) (2012). This Court "will not reverse the factual findings in a trial court's class certification order unless they are clearly erroneous[.]" Id. "Implicit in this deferential standard of review is a recognition of the fact-intensive basis of the certification inquiry and of the trial court's inherent power to manage and control pending litigation." *Resource Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 729 (2) (698 SE2d 19) (2010).

The facts relevant to this dispute are as follows. The mill has been in operation since 1986. Since 1992, Georgia-Pacific has received complaints from neighboring property owners concerning noxious gasses emanating from the mill's grounds, and the mill took steps to rectify the problem with some success. However, in 2006, the mill began receiving complaints about noxious odors emanating from the plant from surrounding landowners, including homeowners in a new subdivision, Mallard Pointe, located directly across the street from the mill. The plaintiffs submitted evidence of 107 odor-related complaints from 2006 through 2012, 28 of which came from the Mallard Pointe landowners. The landowners complained that the noxious gases, among other things, interfered with their ability to enjoy their properties; irritated their eyes, skin, and lungs and made them feel ill; and damaged some exterior household fixtures, primarily air conditioning equipment. Further, the landowners were concerned that continued emissions from the mill would adversely affect the value and marketability of their properties.

In response to these complaints, Georgia-Pacific identified the noxious gas as hydrogen sulfide fumes "created by the biological breakdown of living organisms necessary to [the mill's] wastewater treatment process" and intermittently emanating from pits containing sludge produced by that process. The mill is deemed a "major

source" of pollutants, including hydrogen sulfide, and must demonstrate compliance with both federal and state law in order to obtain permits to operate.[4] To abate the problem, Georgia-Pacific admitted that it has considered closing three of the sludge pits thought to be the source of most of the hydrogen sulfide gas. Documents produced by Georgia-Pacific revealed that numerous property owners neighboring the mill have complained that the gases emanating from the plant have caused their air conditioning systems to fail. Georgia-Pacific has paid to replace or to repair air conditioning units on at least 20 homes in the area, most of which are located in the Mallard Pointe subdivision. The plaintiffs' expert witnesses opined that the homes in the area surrounding the mill are exposed to enough hydrogen sulfide to cause corrosive damage to air conditioning units and that, indeed, evidence of such damage was found in the units inspected. Documents produced by Georgia-Pacific also demonstrated that hydrogen sulfide gas emissions could cause substantial corrosion of metal components within a half-mile of the storage area.

The named plaintiffs filed suit on December 10, 2010, and they sought certification for a class consisting of certain Georgia citizens owning property within

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[4] See the Georgia Air Quality Act, OCGA § 12-9-1, et seq., Georgia Rules for Air Quality Control, Chapter 391-3-1, and Title V of the Clean Air Act, 42 U.S.C.S. § 7401 et seq.

a half-mile of a geographic point near the mill. They amended the complaint on January 13, 2012, to propose a class consisting of property owners neighboring the mill within a discrete area circumscribed by roads, railroad rights-of-way, and specific geographic coordinates. The area includes 34 residential properties and 33 parcels zoned industrial, agricultural, or other. It is undisputed that each of the properties in the area have either been exposed to the hydrogen sulfide gas to some degree or is at risk of exposure given the proximity to the mill.[5] The mill's environmental manager deposed that hydrogen sulfide gas can be detected up to four miles away from the plant. The property in the class area furthest from the mill's sludge field is less than a mile away. . In an affidavit offered in support of class certification, a real estate appraiser averred that, based upon his examination of the

[5] The dissent focuses on distinctions (the type of property, the length of exposure, the degree of physical damage, etc.) that may be relevant to the amount of money *damages* appropriate to each class member, but the nature of the *injury* to each member of the class is nevertheless the same. Further, the plaintiffs are not bringing claims for bodily injury and thus will not be pursuing "necessarily individualized injuries" as the dissent asserts. The defendant admitted that the release of hydrogen sulfide gas from its wastewater treatment process creates a problem for neighboring landowners; moreover, it admitted that it has taken measures to remedy the problem. That problem is essentially the same for each landowner: exposure to hydrogen sulfide gas, a corrosive and irritating pollutant.

area around the mill, "the reported toxic fumes would constitute a factor impairing the value and marketability" of the properties included in the proposed class.

After a hearing, the trial court issued an order certifying the class. Although Georgia-Pacific challenges each of the court's legal findings and contends the trial court abused its discretion in certifying the class, it did not enumerate as error any specific factual finding made by the superior court. Because the superior court's detailed order adequately addresses the issues raised by the appellant, we adopt the court's order certifying the class as our opinion in this case. We note that the superior court prefaced its opinion with a lengthy acknowledgment that it was undertaking a "rigorous analysis" in light of recent United States Supreme Court precedent.[6] The following is excerpted, with minor modifications, from the order of the trial court.

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[6] The superior court, citing this Court's opinion in *Rite Aid of Ga., Inc. v. Peacock*, 315 Ga. App. at 573, and the United States Supreme Court's precedent cited therein, *Wal-Mart Stores v. Dukes*, ___ U. S. ___, ___ (II) (A) (131 SCt 2541, 180 LE2d 374) (2011), wrote that a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The court noted that, in order to justify a departure from "the usual rule" and establish that a case is sufficiently exceptional to warrant class treatment, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule." Id. at 2551. The court further noted that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." The court acknowledged that the plaintiffs were required to carry their burden with"significant proof." The court then proceeded to set forth its required factual findings and conclusions of law.

This action asserts claims in nuisance, trespass and negligence on behalf of a class of property owners defined as follows:

> All citizens of the State of Georgia who, as of November 18, 2010, owned property lying, in whole or in part, within an area of land lying in Effingham County, Georgia, and bounded as follows: On the east by a line running along the west side of the right of way of Fort Howard Road between the intersection of Fort Howard Road and Seckinger Ford Road and the south side of the right of way of the railroad line that serves the Georgia-Pacific Plant; On the north by a line running along the south side of said railroad right of way between Ford Howard Road and Rincon Stillwell Road; On the west by a line running along the east side of the right of way of Rincon Stillwell Road: On the south by a line running along the north side of the right of way of Bunyan-Kessler Road beginning at Rincon-Stillwell Road and going in an easterly direction to a point at Latitude 32.30582649 and Longitude minus 81.21047668 and thence easterly along a straight line to the intersection of Fort Howard Road and Seckinger Ford Road. Expressly excluded from membership in the class are the above-named Defendant, its related corporations and all directors, officers and employees of the Defendant.

This class definition is unambiguous and the members of the class are readily identifiable from public records. The amended complaint asserts that the releases of hydrogen sulfide gas from the waste produced

by the mill permeate the class area, have interfered with the use and enjoyment of property and have impaired the value of the properties owned by members of the proposed class.

1. OCGA § 9-11-23 (a) Analysis.

a. Numerosity

Evidence in the record supports a finding that the owners of the properties within the proposed class who are the members of the proposed class are readily identifiable and that public records identify 116 individual owners and sixteen corporate owners of the property that lies within the bounds of the proposed class area. The "impracticality of joinder . . . is generally presumed if a putative class amounts to more than forty individuals." (Citations and punctuation omitted.) *American Debt Foundation, Inc. v. Hodzic*, 312 Ga. App. 806, 809 (1), n. 15 (720 SE2d 283) (2011). Georgia-Pacific asserts that the numerosity requirement is not met because it would be, in its view, practical to join all 116 individuals and sixteen corporate owners of property within the proposed class area in a single action.[7] The number of members of the proposed class meets the numerosity requirement. The case management tools afforded a trial court by OCGA § 9-11-23 make this action far

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[7] Georgia-Pacific's argument that it would be permissible to join all of the putative class members as named parties in this action rather than the case proceeding as a class action could be viewed as an acknowledgment that the claims being asserted on behalf of these absent class members arise, out of the same transaction, occurrence, or series of transactions or occurrences, and raise common questions of law and fact as required for joinder of parties in a single action.

more manageable as a class action than would be a mass joinder action. The Court finds that joinder of this many parties is impractical and that the numerosity of OCGA § 9-11-23 (a) (1) is met.

b. Commonality

OCGA § 9-11-23 (a) (2) requires that there be "questions of law or fact common to the class[.]" "[T]he commonality requirement does not require that all questions of law and fact be common to every member of the class. Rather, the rule requires only that resolution of the common questions affect all or a substantial number of the class members." (Citations and punctuation omitted.) *Flournoy v. Honeywell Intl, Inc.*, 239 FRD 696, 699 (S.D. Ga. 2006). See also *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 906 (2) (b) (i) (710 SE2d 569) (2011).

The record supports a finding that there are a number of issues of fact common to the class given that the claims asserted on behalf of all members of the proposed class are based upon harm allegedly caused by hydrogen sulfide gas coming from the mill. The noxious smell, toxicity, and corrosive nature of this chemical present questions of fact common to the class. Other common questions involve: (a) the safety programs implemented by Georgia-Pacific at the mill and their adequacy; (b) the materials used at the mill, including those in the landfill and sludge fields; (c) the causes and effects of toxic releases from the mill, including those from its sludge fields and landfill; (d) all factual issues relating to Georgia-Pacific's operation of the mill, including its generation, storage and use of materials and products at the plant, including its sludge fields and landfill, and the precautions that it undertakes to prevent releases of pollutants into the environment; (e) the

liability of Georgia-Pacific; (f) common affirmative defenses raised by Georgia-Pacific; (g) remedies available under Georgia law and the appropriate measure of damages; (h) the claim for expenses of litigation; and (i) the claim for exemplary damages.

The trial of a single case or the trial of this case on a class-wide basis would involve many of the same witnesses, same documents and same testimony and would require resolution of the same issues of both law and fact. Some number of individualized questions will almost assuredly be presented. However, the prevailing common questions make this matter appropriate for resolution as a class action. The requirement for the existence of common questions of law and fact is met.

c. Typicality

OCGA § 9-11-23 (a) (3) requires that the claims asserted by the named parties and the defenses raised thereto by Georgia-Pacific be typical of the claims asserted on behalf of the class and the defenses raised by Georgia-Pacific to those claims. This requirement of typicality has been held to require a showing of, "the same unlawful acts [by the defendant] in the same method against [the] entire class." (Citation, punctuation and footnote omitted.) *Liberty Lending Svcs. Inc. v. Canada*, 293 Ga. App. 731, 738 (1) (b) (668 SE2d 3) (2008). The claims asserted on behalf of the named plaintiffs are, in this case, the same as the claims asserted on behalf of the class, namely that the release of hydrogen sulfide gas has damaged their respective properties. While there may be different types of affected properties involved in this case, the basic claims of nuisance, trespass, and negligence are the same. The common proof would show the same unlawful acts by Georgia-Pacific

in the same method against the entire class. Id. Thus, the requirement of typicality is met.

d. Adequacy of Representation

OCGA § 9-11-23 (a) (4) requires a finding that the "representative parties will fairly and adequately protect the interests of the class." The focus of adequacy of representation is on class counsel. *Stevens v. Thomas*, 257 Ga. 645, 649 (2) (361 SE2d 800) (1987) ("The important aspects of adequate representation are whether the plaintiffs' counsel is experienced and competent and whether plaintiffs' interests are antagonistic to those of the class.") (citation omitted). Georgia-Pacific has agreed that plaintiffs' counsel will provide adequate representation. There was no showing of any antagonistic interests between those of the class representatives and the interests of the members of the proposed class. The Court finds, as a matter of fact, that the named plaintiffs and their counsel will provide adequate representation of the interests of the class.

2. OCGA § 9-11-23 (b) (3) Analysis.

Having concluded that the requirements of OCGA § 9-11-23 (a) have been met, the court now addresses the requirements of OCGA § 9-11-23 (b) (3). Under Rule 23 (b) (3) a class may be certified if the questions of law or fact predominate over individual issues and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." OCGA § 9-11-23 (b) (3).

Factors to be considered include:

(A) [t]he interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) [t]he extent and nature

of any litigation concerning the controversy already commenced by or against members of the class; (C) [t]he desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) [t]he difficulties likely to be encountered in the management of a class action.

OCGA § 9-11-23 (b) (3).

> *a. Predominance of Common Issues Over Individual Issues*
> Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief. Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23 (b) (3).

(Citation omitted.) *Liberty Lending Svcs v. Canada*, 293 Ga. App. at 739-740 (2). When determining whether common issues predominate, the proper focus is on issues of fact and law that relate to *liability* rather than damages. See *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. at 906 (2) (b) (i); see also *Resources Life Ins. v. Buckner*, 304 Ga. App. at 732. Thus, "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." (Citations and punctuation omitted.) *In re Tri-State Crematory Litigation*, 215 FRD 660, 694 (N.D. Ga. 2003).

See also *Sterling v. Velsicol Chem. Corp.*, 855 F2d 1188, 1197 (6th Cir. 1988) ("where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy"). The resolution of whether common issues predominate is a matter addressed to the discretion of the trial court. *Fortis Ins. Co. v. Kahn*, 299 Ga. App. 319, 323 (2) (a) (683 SE2d 4) (2009).

Here, the determination of Georgia-Pacific's liability to class members will necessarily focus on the its conduct, the toxicity and corrosiveness of hydrogen sulfide, and the legal issues flowing from the law of nuisance, trespass and negligence.[8] Defendant argues that each affected property owner was affected in different ways and degrees, necessitating numerous individualized determinations of harm. Further, Defendant argues that each property owner would have to prove the various elements of nuisance, trespass and negligence as to their respective properties. All of this, according to Defendant, shows that individual questions of law and fact predominate over the common ones in this case. While Georgia-Pacific's contentions have some merit as each plaintiff will have unique elements or amounts of damage, there are more significant questions that are common to the class and which

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[8] The common issues listed above in Division 1 (b) concerning commonality are also common issues in regard to the predominance analysis, as the legal and factual issues regarding the liability and damages caused by the mill's hydrogen sulfide emissions to the property of the named plaintiffs are the same as the issues of liability and damage to the rest of the class.

predominate over the individual issues in this case. The superior court anticipated that the evidence as to liability would be presented on a class-wide basis, and would be the same for all class members. That the amount of damages may vary among class members does not defeat the predominancy of common issues as to liability. Georgia-Pacific is the sole defendant and its conduct is the only conduct at issue. The same negligent actions are alleged to have caused harm to each class member in substantially the same ways. The same types of damages are sought for every class member. The Complaint sets forth the common course of conduct alleged by the plaintiffs. Under these facts and the controlling authority cited above, the Court finds that the common issues of fact and law predominate over any individual issues.

b. Superiority

OCGA § 9-11-23 (b) (3) lists factors for a court to consider when making its determination as to whether a class action is superior to other alternative procedures to adjudicate the case.[9] The cost to hire experts, to conduct discovery, and to present the case for trial for an individual party owning property in the class area would be essentially the same as preparing and presenting the case for all class members. The cost of

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[9] OCGA § 9-11-23 (b) (3) lists the following factors: "(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) The difficulties likely to be encountered in the management of a class action."

> preparation of an individual claim could well exceed the potential recovery of actual damages. The efficiencies of preparation and presentation on a class-wide basis outweigh any interest of class members proceeding on an individual basis. Moreover, anyone who wishes to opt out will be given the opportunity to opt out of this class action. There is no other competing litigation of the claims presented in this action. The Superior Court of Effingham County is the logical court to adjudicate these claims. This case, as presented, should be manageable as a class action. The Court notes that counsel for plaintiffs and for Georgia-Pacific have extensive experience in representation of parties in class actions adjudicating claims brought on behalf of property owners for damage caused by releases of hazardous chemicals, and that these cases have been managed to a final conclusion. A class action would clearly be more manageable than dozens of separate lawsuits or mass joinder of over a hundred named plaintiffs in a single action. The use of experts, likely including an attorney, real estate agent, environmental scientist and an appraiser, giving testimony relevant to the claims of all class members is far more efficient and manageable than numerous trials for each separate property owner.

We find the trial court's reasoning given the facts of this case reasonable and supported by competent evidence. Thus, we find no abuse of discretion in the court's decision to certify the class.

Judgment affirmed. Phipps, C. J., Barnes, P. J., and Miller, J., concur. Andrews, P. J., Ray and Branch, JJ., dissent.

A13A0455. GEORGIA-PACIFIC CONSUMER PRODUCTS, LP
v. RATNER et al.

BRANCH, Judge, dissenting.

I believe that the trial court erred when it certified this class consisting of Effingham County property owners allegedly harmed by appellant Georgia-Pacific's facility's release of hydrogen sulfide gas over a period of years. I therefore dissent.

As the majority notes, we review a trial court's decision in certifying or refusing to certify a class for an abuse of discretion. *Jones v. Douglas County*, 262

Ga. 317, 323-324 (2) (418 SE2d 19) (1992).[1] The facts relevant to this appeal are not in dispute. In 2006, the Mill began receiving complaints from Mallard Pointe landowners, including the plaintiffs, about noxious odors alleged to cause physical consequences including difficulty breathing, coughing or choking, headaches, and vomiting. Some homeowners also complained that the odors had made it more difficult for them to sell their houses.[2] During this same period, a number of Mallard Pointe homeowners complained that the odors were penetrating into their houses. Residents also complained that exterior household fixtures, and especially air conditioning units, were suffering from unusual levels of corrosion and mechanical failure.

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[1] See also *Reed v. State*, 291 Ga. 10, 13 (3) (727 SE2d 112) (2012) (an "abuse of discretion" standard of review is not identical to the "clearly erroneous" or "any evidence" standards; "where a determination by the trial court involves an exercise of discretion, the standard of review is 'abuse of discretion,' which is at least slightly less deferential than the 'any evidence' test") (citations omitted)

[2] One of the documents cited by plaintiffs on this point shows that in September 2007, one homeowner listed her house for sale but delisted it after telling her real estate broker "everything" about the odors. Other parts of the record show that in November 2009, one homeowner attributed her house's failure to sell to "the economy"; in August 2010, another attributed the same outcome to "the economy, the odor *and* the polluted groundwater in the area." (Emphasis supplied).

In response to these complaints, Georgia-Pacific took short-term steps to remedy the odors including the installation of an odor abatement system in July 2006 and the use of flares to burn off fumes from October 2007 through at least June 2011. By September 2010, Georgia-Pacific had drawn up plans, not completed as of March 2012, to close three of the pits thought to be the source of most of the odors. Georgia-Pacific also paid to replace or repair air conditioning units on at least 20 homes in the area, most of which were located in Mallard Pointe, and some of which required more than one replacement or repair.

Plaintiffs' amended complaint featured a proposed class of Georgia citizens owning property within an area circumscribed by area roads, railroad rights-of-way, and one specified latitude and longitude. The 67 properties included in the proposed class consist of 34 residences and 33 other parcels of industrial, agricultural, timber or vacant land. In an affidavit submitted by plaintiffs in support of the geographical boundaries of the proposed class, real estate appraiser Henry Garrett averred that based on his examination of the area around the Mill, "the reported toxic fumes would constitute a factor impairing the value and marketability of property within [the] area" defining the class. When asked at his 2012 deposition what the "affected area" was, Garrett responded: "We're in the process of trying to establish [the class area] . . . .

But until I do my due diligence within that area, I don't know how many of the houses have been affected or may be affected."

Garrett also testified that he had collected no sales or market data to ascertain whether property values had been affected by the releases of hydrogen sulfide. When asked whether more investigation of each property was needed as to which areas within the class were "actually affected," Garrett replied:

> [W]e took a boundary – we looked at a boundary area to describe an area where the potential for problems could exist. *Properties within that boundary area could or could not be adversely affected by the existence of the pollution*, . . . whatever it is that's polluting and causing these air conditioning units to have a problem. So, it would take further investigation on my part, or somebody's part, to determine the individual damages to each one of the properties and the amounts of those damages, whether it's severe, or whether it's minor . . . . [E]ach individual property within that class is looked at on a case-by-case basis.

(Emphasis supplied.) Garrett also confirmed that the class could become larger or smaller "depend[ing] on looking at each property and determining . . . whether it's been affected or not." When asked whether he had followed any specific "appraisal methodology," Garrett replied:

> *I think it's a seat of the pants kind of thing.* You have to be on the property, you have to look at the topography, you have to look at the boundaries, you have to look at the different areas, to determine what might or might not be affected by whatever it is that you're dealing with in terms of contamination.

(Emphasis supplied.) When asked whether he had consulted any appraisal or scientific literature in his work thus far on the case, Garrett replied that he had not.

Other experts produced by plaintiffs testified that without chemical tests of each affected air conditioning unit, it would be unreasonable to conclude that any corrosion of those units was the result of a chemical reaction, and that it was not yet known whether the hydrogen sulfide actually released onto each property was sufficient to cause corrosion there. Although plaintiffs introduced no expert testimony concerning the health effects of the hydrogen sulfide releases, Georgia-Pacific's medical expert averred that the symptoms alleged have many common causes such that each class member would be required to undergo a "unique" or "tailored" medical evaluation in order to determine the cause of each plaintiff's condition.

In determining whether a Georgia class action should proceed, "the first issue to be resolved is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of OCGA § 9-11-23 (a)

have been met." (Citations and punctuation omitted.) *Rite-Aid of Ga. v. Peacock*, 315 Ga. App. 573, 574 (1) (726 SE2d 577) (2012) (cert. denied, Oct. 29, 2012). Under OCGA § 9-11-23 (a), and as the majority notes, a plaintiff may sue on behalf of a class "only if" all four of the following requirements are met:

> (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.

(Emphasis supplied.) Under subsection (b) of the same statute, the plaintiff must also prove at least one of the following: that (1) "[t]he prosecution of separate actions by or against individual members of the class would create a risk" of "[i]nconsistent or varying adjudications with respect to individual members of the class"; (2) "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class," thereby making injunctive or declaratory relief "appropriate" as to the entire class; or (3) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," such that "a class action is superior to other available methods for the fair and efficient

adjudication of the controversy." OCGA § 9-11-23 (b) (1) (A) and (B), (b) (2), and (b) (3).

A failure to establish each of the requirements of OCGA § 9-11-23 (a) and at least one of the requirements of OCGA § 9-11-23 (b) is fatal to class certification. See *Rite-Aid*, supra at 578 (1) (a), (b) (plaintiffs' failure to prove commonality, typicality, and adequacy required reversal of class certification). In *Rite-Aid*, for example, we noted with approval the United States Supreme Court's explanation of the burden of proof facing a class representative on a motion for certification under Rule 23 of the Federal Rules of Civil Procedure, on which OCGA § 9-11-23 is modeled:

> [S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that *certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites to [certification] have been satisfied.* Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. The class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

(Emphasis supplied and omitted.) *Rite-Aid*, supra at 574-575 (1), quoting *Wal-Mart Stores v. Dukes*, ___ U. S. ___, ___ (II) (A) (131 SCt 2541, 180 LE2d 374) (2011).

(a) *Section 9-11-23 (a): Commonality and Typicality.* As we noted in *Rite-Aid*, ""any competently crafted class complaint literally raises common questions."" (Citation and punctuation omitted.) Id. at 575, quoting *Dukes*, supra at 2551 (II) (A).

> What matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

(Emphasis in original; citation and punctuation omitted.) *Dukes*, supra at 2551 (II) (A). As the Supreme Court of Georgia has likewise stated, therefore, "a common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class." (Footnote and emphasis omitted.) *Carnett's, Inc. v. Hammond*, 279 Ga. 125, 129 (4) (610 SE2d 529) (2005). Although a class may be certified when "common questions predominate, . . . even if some individual questions of law or fact exist," *Village Auto Ins. v. Rush*, 286 Ga. App. 688, 691 (1) (649 SE2d 862) (2007), a plaintiff seeking to represent a class must show ""that the class members have suffered the same injury, [which] does not mean merely that they have all suffered a violation of the same provision of law."" (Citation and emphasis omitted.) *Rite-Aid*, supra at 575 (1) (a), quoting *Dukes*, supra

at 2551 (II) (A). As the *Dukes* Court also noted, "the commonality and typicality requirements of Rule 23(a) tend to merge" in that "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named 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." *Dukes*, supra at 2551, n. 5 (II) (A).

The threshold inquiry in any commonality analysis is that of class definition – that is, "whether a precisely and appropriately defined class exists and whether the named [p]laintiffs are members of the proposed class." *Kemblesville HHMO Ctr. v. Landhope Realty Co.*, Case No. 08-2405, 2011 U. S. Dist. LEXIS 83324 at *14 (E. D. Pa., decided July 27, 2011) (citations and punctuation omitted). Class members must be "readily identifiable such that a court can determine who is in the class and bound by its ruling without engaging in numerous fact-intensive inquiries." *Jim Ball Pontiac-Buick-GMC v. DHL Express*, Case No. 08-CV-761C, 2012 U. S. Dist. LEXIS 13546 at *2 (W. D. N. Y., decided Feb. 3, 2012). Factors to consider in evaluating the viability of a proposed class include whether there is "a particular group that was harmed during a particular time frame, in a particular location, in a particular way," and whether class membership has been defined "in some objective manner."

Kemblesville, supra at *14. "Certification should be denied when determining membership in the class would essentially require a mini-hearing on the merits of each case." Id.

Under this rubric, plaintiffs were required to make a factual showing that even allowing for some variation between the effects of numerous releases on individual properties and property owners, each member of the proposed class has suffered "'the same injury.'" *Rite-Aid*, supra at 575 (1) (a), quoting *Dukes*, supra at 2551. This plaintiffs have failed to do. First, and although plaintiffs, as well as the majority, would have us ignore any claims for personal injury on appeal, the complaint alleges that the "ongoing releases of toxic chemicals and fumes by [Georgia-Pacific] constitute continuing nuisances doing harm to [both] the property within the class area and the persons who own those properties," with plaintiffs' suffering various symptoms (as listed in their appellate brief) including difficulty breathing, headaches, and vomiting. As a result of these necessarily individualized injuries, plaintiffs cannot show that Georgia-Pacific "committed the same unlawful acts in the same method against an entire class." *Liberty Lending Svcs. v. Canada*, 293 Ga. App. 731, 738 (1) (b) (668 SE2d 3) (2008) (citation and punctuation omitted); see also *Georgine v. Amchem Products*, 83 F.3d 610, 627 (III) (A) (3d Cir. 1996), aff'd, *Amchem Products*

v. Windsor, 521 U. S. 591 (117 SCt 2231, 138 LE2d 689) (1997) (even when plaintiffs' exposure to asbestos posed a common question, the trial court erred when it certified a class; "the commonality barrier is higher in a personal injury damages class action, like this one, that seeks to resolve all issues, including noncommon issues, of liability and damages"). Second, plaintiffs' own accounts of the impact of the releases on the values of their homes show that the properties may have failed to sell because of economic conditions as much as from any nuisance suffered. According to their own experts, moreover, plaintiffs' amended class definition was a "seat-of-the-pants" result reached without determining whether each included property had actually been affected by any or all of the Mill's hydrogen sulfide releases over a period of some years, let alone whether each property suffered the same kind of measurable injury as a result.

In light of their failure to establish even the fundamental proposition that the Mill's hydrogen sulfide releases actually affected each property included in the class, and because of the necessity of conducting numerous fact-intensive inquiries as to the scope of their injuries, plaintiffs' "mere claim" that they have suffered a common injury "gives no cause to believe that all their claims can be productively litigated at once." *Dukes*, supra at 2551 (II) (A). Specifically, plaintiffs have failed (1) to provide

evidence that numerous hydrogen sulfide releases over a period of years affected all of the persons and properties included in the proposed class in a substantially similar way; (2) to show that the injuries they and/or their properties have suffered are "common" to or "typical" of most or all members of the class"; or (3) to show that the class definition is the result of a rational determination of the actual effects of the hydrogen sulfide releases at issue. Thus the class appears to have been defined not by any "logical" determination of the actual effects of the Mill's numerous and intermittent releases of hydrogen sulfide on persons and property over a period of years, but rather by means of "arbitrarily drawn lines on a map." (Citations and punctuation omitted.) *Brockman v. Barton Brands*, Case No. 3:06CV-332-H, U. S. Dist. LEXIS 86732 at **5, 9 (II) (A) (W. D. Ky. 2007, decided November 20, 2007) (denying class certification where plaintiffs offered "no evidence whatsoever" that contaminants "spread in a uniform fashion in all directions" from defendants' distillery). I would therefore conclude that the trial court abused its discretion when it certified the class. *Rite-Aid*, supra at 576-578 (1) (reversing certification of a class when plaintiffs failed to show that they suffered any legally cognizable injury); *Kemblesville*, supra at **18, 22 (denying class certification where geographic definition of a class was "arbitrary and not reasonably related to evidence of record"

concerning the contamination at issue, where plaintiffs had failed to show a "reasonable relationship" between the relevant [groundwater contaminant] release and the proposed class area," and where plaintiffs also failed to offer a "dispersal model or concrete expert opinion as to the extent or eventual movement" of the alleged plume). Compare *Brenntag Mid South v. Smart*, 308 Ga. App. 899, 904 (2) (a) (iii) (710 SE2d 569) (2011) (trial court did not err in certifying a class consisting of persons living in evacuation zone after a single accidental release of glacial acetic acid from a chemical storage tank).

(b) *Section 9-11-23 (b): Predominance of Common Questions and Superiority of Class Action as a Remedy.* Although plaintiffs' failure to prove commonality and typicality should dispose of the issue whether the trial court erred when it certified the class, see *Rite-Aid* at 578 (1) (b), I also note that plaintiffs have not met the requirements of OCGA § 9-11-23 (b) (3), under which a class may be certified if "questions of law or fact predominate over any questions affecting only individual members" *and* if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

> The Rule 23 (b) (3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. A plaintiff may satisfy this requirement by showing that

> issues subject to class-wide proof predominate over issues requiring proof that is unique to the individual class members. Therefore, *class certification is not appropriate if resolution of individual questions plays a significant, integral part of the determination of liability.* But as long as the common questions predominate, a class may be certified even if some individual questions of law or fact exist.

(Citations and punctuation omitted; emphasis supplied.) *Brenntag*, supra at 906 (2) (b) (i).

The United States Supreme Court has highlighted the "disparate questions undermining class cohesion" in cases involving numerous plaintiffs' exposure to pollutants or contaminants over years or decades, noting that "[e]ven if [Federal] Rule 23 (a)'s commonality requirement may be satisfied" as to a particular class, "the predominance criterion [of Rule 23 (b) (3)] is far more demanding." *Amchen Products v. Windsor*, 521 U. S. 591, 623-624 (IV) (A) (117 SCt 2231, 138 LE2d 689) (1997). This Court has thus reversed a trial court's certification of a class as to liability when individualized questions as to the cause, extent and nature of plaintiffs' injuries predominate over common ones. *Doctors Hosp. Surgery Ctr. v. Webb*, 307 Ga. App. 44, 47-48 (2) (704 SE2d 185) (2010) (reversing certification of class arising from a hospital's failure to properly sterilize equipment in colonoscopies administered to

1300 patients over a period of more than a year in the absence of "proof that the defendant's negligence was both the cause in fact and the proximate cause of the injury"; plaintiffs' injuries, including anxiety, loss of consortium, and emotional distress, were "inherently specific to the individuals affected"). Other courts have also concluded that a class action is not a superior method for adjudicating cases involving environmental contamination not involving a single exposure where "no evidence is offered establishing class-wide contamination." *Duffin v. Exelon Corp.*, 2007 U. S. Dist. LEXIS 19683 at * 11 (II) (B), *24 (II) (D) (N.D. Ill., March 19, 2007) (refusing to certify a class allegedly injured by the release of six million gallons of tritium-contaminated water through a pipeline into a river over a period of five years when the class area was "defined in geographic terms unrelated to evidence of actual tritium contamination," when the class was "plainly overbroad," and when common questions did not predominate over "questions affecting individual members").

As I have already noted, the personal injuries suffered by some class members range from difficulty breathing to coughing or choking, headaches, and vomiting – proving the causation of which will be "inherently specific to the individuals affected." *Doctors Hosp.*, supra at 48 (2). As to property damage, the undisputed testimony of plaintiffs' own experts shows that (1) plaintiffs have not established

whether most of the properties within the geographical boundaries of the class have actually been affected by multiple releases of hydrogen sulfide from the Mill over a period of years; (2) no sales or market data has shown that property values have been affected by the releases; and (3) it is not yet known whether the hydrogen sulfide present on any property was the proximate cause of air conditioning units or other fixtures there. At the very least, this undisputed evidence shows that "substantial factual differences" are likely to emerge between class members whose properties were most affected and others such that "[s]ignificant trial time would be devoted to determining separate issues of liability," including proximate causation, "regarding individual properties." *Duffin*, supra at *24 (II) (D).

For these reasons, I conclude that plaintiffs have failed to demonstrate, as they are required to do by OCGA § 9-11-23 (b) (3), that a class action is superior to traditional means of adjudicating their claims. Id.; *Doctors Hosp.*, supra at 47-48 (2) (reversing grant of class certification as to liability where common questions as to the extent and nature of plaintiffs' injuries did not predominate over individual ones).

I respectfully dissent. I am authorized to state that Andrews, P. J., and Ray, J., join in this dissent.