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United States Court of Appeals for the Second Circuit

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-versus-

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC.,

Defendants-Petitioners.

Petition for Review of an Order of the United States District Court
for the Northern District of New York (Kahn, J.)
Case No. 1:16-cv-00917

PETITION FOR PERMISSION TO APPEAL

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CORPORATE DISCLOSURE STATEMENT OF SAINT-GOBAIN PERFORMANCE PLASTICS CORPORATION

Defendant Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") states as follows:

1. Saint-Gobain is a wholly owned subsidiary of Saint-Gobain Ceramics & Plastics, Inc.

2. The parent of Saint-Gobain Ceramics & Plastics, Inc. is Saint-Gobain Abrasives, Inc., the parent of which is Saint-Gobain Delaware Corporation, the parent of which is Saint-Gobain Corporation, the parent of which is Societe de Participations Financieres et Industrielles, the parent of which is Compagnie de Saint-Gobain.

3. Compagnie de Saint-Gobain, a French company whose shares trade on the Euronext exchange, is the only publicly traded company to hold, directly or indirectly, at least 10% of Saint-Gobain's stock.

4. Saint-Gobain has no U.S. affiliates whose shares trade on public stock exchanges.

/s/ Sheila L. Birnbaum
Sheila L. Birnbaum

Counsel for Defendant-Petitioner Saint-Gobain Performance Plastics Corporation

CORPORATE DISCLOSURE STATEMENT OF HONEYWELL INTERNATIONAL INC.

Defendant-Petitioner Honeywell International Inc. ("Honeywell") states that it is a publicly traded company. Honeywell has no parent company and no publicly held corporation owns 10% or more of Honeywell's stock.

/s/ Michael D. Daneker
Michael D. Daneker

Counsel for Defendant-Petitioner Honeywell International Inc.

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PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 1292(b) and FRAP 5(a), Defendants-Petitioners Saint-Gobain Performance Plastics Corp. and Honeywell International, Inc. respectfully petition for permission to appeal the February 6, 2017 Order of the Northern District of New York (Kahn, J.). (*See* Ex. A.) In this putative class action alleging contamination of groundwater in Hoosick Falls, New York, the district court's Order denied Defendants' motion to dismiss under Rule 12(b)(6) as to substantially all of Plaintiffs' claims for damages. Its decision turned on two important questions of law concerning the "fundamental principle" of New York law that a plaintiff must "sustain physical harm before being able to recover in tort." *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013) (citation omitted). Ruling at the inception of a large coordinated litigation involving this action and 17 other related actions pending before the district judge, the district court *sua sponte* certified the Order for interlocutory review. With discovery yet to commence, this Court should grant immediate review to spare years of potentially wasteful litigation in the district court by deciding threshold questions of law that determine the viability of this litigation.

1. Medical Monitoring. The district court allowed asymptomatic Plaintiffs to pursue tort claims for medical monitoring based on the alleged accumulation of an allegedly harmful substance in their blood. That question is controlled by the New York Court of Appeals' decision in *Caronia*, which dictates that damages for medical monitoring are not proper for asymptomatic plaintiffs, but rather "only after a physical injury has been proven." *Caronia*, 22 N.Y.3d at 448. *Caronia* was decided on certification from this Court, and it led to this Court's dismissal of medical monitoring claims by asymptomatic plaintiffs. *Caronia v. Philip Morris USA, Inc.*, 748 F.3d 454, 455-56 (2d Cir. 2014) (per curiam).

Yet, in this case, the district court held that New York law permits medical monitoring based on "accumulation" of a substance as a "physical injury" under *Caronia*. (Order at 26.) In doing so, the district court disregarded the facts and holding of *Caronia.* "Accumulation" is no different from the cumulative exposure theory of injury that *Caronia* rejected as contrary to New York tort law and public policy. *See Caronia*, 22 N.Y.3d at 445-46. Asymptomatic plaintiffs without manifest physical injuries cannot seek recovery in tort. *See id.* As the

district court recognized, review by this Court would bring clarity to the proceedings below. This Court should grant the Petition to decide this controlling question of law and potentially avoid years of needless litigation.

2. Diminution of Value. The district court authorized claims for diminution of property value where the only alleged physical injury was to groundwater, which is not Plaintiffs' property. Notably, the district court did not dispute that groundwater is a "natural resource" that "does not belong to the owners of real property." *Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 130 (N.Y. App. Div. 2014). Under *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280 (2001), tort duties are limited to those who have "suffered personal injury or property damage" and do not extend to "purely economic losses," such as those alleged by Plaintiffs here. *Id.* at 291-92.

Nevertheless, the district court held that *532 Madison* was limited to its facts and that as a matter of "sensible public policy," *532 Madison* would not "prevent[] a person whose water supply was contaminated … from recovering in tort, even if she seeks economic damages." (Order at 18.) But *532 Madison* was decided as a matter of "[p]olicy-driven line-

drawing" to require a physical injury before a plaintiff may recover for economic harm. 96 N.Y.2d at 291-92. The bright-line rule of *532 Madison* has been applied in many factual contexts. The district court's decision not to apply it here warrants this Court's immediate review.

* * * *

This Court should grant review to decide important questions concerning the "physical injury" requirement of New York tort law. Whether the district court's ruling was correct will determine whether Plaintiffs' claims may proceed to discovery and class certification proceedings, or whether they must be dismissed as a matter of law at the outset of this litigation. A ruling from this Court would provide guidance not only for this case and several other related cases assigned to Judge Kahn, but also for other tort litigations. The Petition should be granted.

QUESTION PRESENTED

1. Whether under *Caronia*, an asymptomatic plaintiff may state a claim in tort for medical monitoring damages by alleging accumulation of an allegedly harmful substance in the plaintiff's body.

2. Whether under *532 Madison*, a plaintiff may state a claim in tort for economic harm alone in the form of diminution of property value without alleging physical injury to the subject property.

RELIEF SOUGHT

Defendants request permission to take an immediate appeal, seeking reversal of the Order to the extent it denied Defendants' motion to dismiss.

STATEMENT OF FACTS

A. Litigation Background

This putative class action concerns the presence of perfluorooctanoic acid ("PFOA") in groundwater in Hoosick Falls, New York. PFOA is a compound that repels oil, grease, and water, and was widely used by many companies for decades to manufacture numerous products, including food packaging, clothing, furniture fabrics, and cookware. (Ex. B, Compl. ¶¶ 37-38.)[1] PFOA was not designated or regulated as a hazardous substance under New York or federal law

[1] The facts taken from the allegations in the Complaint are assumed to be true solely for the purpose of this petition. Defendants do not waive their right to challenge any factual allegations in the Complaint.

until 2016, when New York designated it a hazardous substance in a temporary rule. (*Id.* ¶¶ 53-54.)

The Village of Hoosick Falls first detected PFOA in its municipal water supply in October 2014. (*Id.* ¶¶ 89.) In December 2014, Saint-Gobain was advised thereof and voluntarily reported the presence of PFOA in the Village's water supply to EPA.[2] New York's Department of Environmental Conservation (DEC) has since commenced investigations into the presence of PFOA in groundwater in Hoosick Falls. While investigations were and remain pending, Saint-Gobain has voluntarily provided a number of remedial measures for Hoosick Falls, including:

- Providing residents with interim bottled water;
- Funding the installation of a temporary granulated activated carbon (GAC) treatment system for the municipal water system to remove PFOA from drinking water;
- Designing, installing, operating, and maintaining a long term full capacity GAC treatment system for the municipal supply wells;

[2] *See* Letter from David G. Sarvadi to EPA at 1 (Dec. 30, 2014), http://www.villageofhoosickfalls.com/Water/Documents/Saint-GobainLetterToEPA_Re_TSCA.pdf.

- Funding installation of individual point-of-entry treatment systems for Village residents who obtain their water from private wells; and

- Ongoing work with Hoosick Falls and New York Department of Health.

These remedial measures have been finalized in a consent decree between Saint-Gobain, Honeywell, and DEC. (Compl. ¶ 125.) Pursuant to that decree, a permanent GAC filtration system has been installed on the village water supply, in which PFOA is no longer detectable.[3] Based on these remedial measures being conducted by state agencies in cooperation with Defendants, Plaintiffs agreed to an interim stay of all claims for injunctive relief, with the stay to be revisited in six months. (*See* Ex. C, Stipulation and Order Staying Injunctive Claims.)

B. Consolidated Complaint and Motion to Dismiss

The master consolidated complaint in this action was filed following an order consolidating four similar putative class actions and appointing interim class counsel. (Ex. D, Consolidation Order at 4.) The central factual allegation of the Complaint is that Defendants

[3] *See* Village of Hoosick Falls Municipal Water News, *New York State Announces Hoosick Falls Full Capacity Water Filtration System is Fully Operational* (Feb. 7, 2017), http://www.villageofhoosickfalls.com/Water/news.html.

"contaminated the aquifer beneath Hoosick Falls with PFOA" (Compl. ¶ 5), for which they seek recovery on behalf of five putative classes. Plaintiffs seek injunctive relief, as well as three general categories of alleged damage: (1) medical monitoring (under negligence and strict liability); (2) property damage (under negligence, strict liability, and trespass); and (3) damage for interference with use and enjoyment of property (under private nuisance). (*See id.* ¶¶ 135, 164-66, 170-72, 176-78, 181-84.)

Plaintiffs do not allege that they have manifest physical injuries to their persons or property as a result of PFOA exposure and specifically exclude from their putative class individuals who have "filed a lawsuit for personal injury for a PFOA-related illness related to exposure to municipal or private well water." (*Id.* ¶ 137.) Instead, Plaintiffs allege an increased risk of "human health effects" due to the "accumulation of PFOA in their bodies," and, in turn, "injury and damage at the cellular and genetic level." (*Id.* ¶¶ 48, 165-66.)

Defendants moved to dismiss Plaintiffs' claims for failure to plead a cognizable injury for each category of the relief they seek: (1) Plaintiffs' request for medical monitoring damages fails because

Plaintiffs do not allege a manifest physical injury to their persons; (2) Plaintiffs' claims for diminution of value fail because they do not allege physical injury to Plaintiffs' property, but are premised on an alleged injury to public groundwater; and (3) Plaintiffs' private nuisance claims fail because they are based on alleged public harm. (Ex. E, Mem. in Supp. of Mot. to Dismiss at 31-40.)[4]

C. The District Court's Order

The district court granted in part and denied in part Defendants' motion to dismiss and *sua sponte* certified its ruling for interlocutory appeal. The district court granted Defendants' motion to dismiss private nuisance claims by Plaintiffs on municipal water (Order at 21-24), but otherwise denied the motion.

As to medical monitoring, the district court recognized that under *Caronia*, "plaintiffs may [only] receive medical monitoring damages as consequential damages for an 'already existing tort,'" which requires a "physical injury." (Order at 25 (quotation omitted).) Yet the district court did not decide the primary issue presented in the parties' briefing:

[4] Defendants moved to dismiss the injunctive claims in deference to the remediation being conducted by state and federal agencies (Mot. to Dismiss at 14-15, 18), which led to the agreed stay noted above.

whether the court was bound to follow *Caronia*'s rejection of medical monitoring claims for asymptomatic plaintiffs. (*See* Ex. F, Pls. Opp. at 34-42; Ex. G, Defs. Reply at 13-19; Ex. H, Defs. Ltr. Br. at 1-3; Ex. I, Pls. Ltr. Br.) Instead, the district court held that because *Caronia* cited *Askey v. Occidental Chemical Corp.*, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984), and *Abusio v. Consolidated Edison Co. of New York*, 656 N.Y.S.2d 371 (N.Y. App. Div. 1997), with approval for certain propositions, *Caronia* also approved the accumulation theory of injury in those cases. (Order at 26-28.) The district court also suggested that this Court approved the same theory by citing *Caronia*'s quotation of *Abusio*, "albeit in dictum," in *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 758 F.3d 202, 213 (2d Cir. 2014). (Order at 29.)[5]

As to the "property-related damages claimed by Plaintiffs" under negligence and strict liability, the district court agreed that "the only substantive allegations in the Complaint concerning contamination [of

[5] The district court further held that Plaintiffs could seek medical monitoring under *Caronia* based solely on allegations of property damage. (Order at 26.) As the district court recognized, this theory would pose numerous questions of administration. (*See id.* at 31-34.) Nevertheless, it is immaterial here because Plaintiffs do not seek medical monitoring on the basis of property damage, but rather based on PFOA accumulation. (*See* Compl. ¶ 135.)

property] refer to the pollution of the Village's groundwater." (*Id.* at 14.) Moreover, the district court did not dispute that alleged contamination of groundwater was not an injury to real property. (*Id.* at 16.) Nevertheless, it held that a plaintiff may state a claim for diminution of property value without alleging physical injury to the subject property. (*Id.* at 19.)[6] The district court concluded that the rule of *532 Madison*, which rejects liability for economic loss without physical harm, was limited to its facts and did not "announce a talismanic requirement for plaintiffs to allege physical injury to their property." (*Id.* at 16.) Accordingly, the court asserted it could, as a matter of "sensible public policy," recognize tort recovery for diminution of value from alleged contamination of drinking water not owned by the plaintiff. (*Id.* at 18.)

Finally, the district court *sua sponte* certified its Order for interlocutory appeal under section 1292(b). (*See id.* at 36-38.) It stated

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[6] In contrast to its negligence and strict liability ruling, the district court held that Plaintiffs alleged injury to real property for trespass claims from contamination of private wells. (Order at 20.) It likewise held that Plaintiffs on private wells could state claims for private nuisance. (*Id.* at 22-24.) Plaintiffs did not allege that their wells were harmed or contaminated, but rather that the groundwater drawn through them was contaminated. (Compl. ¶¶ 169-70, 178.)

that the motion to dismiss raised "several complex and novel issues of New York law as to which the existing case law is significantly muddled." (*Id.* at 37.) Thus, the district court correctly recognized that a decision on "which claims are viable under New York law could significantly impact the classes to be certified, the scope and focus of discovery, any subsequent motion for summary judgment, and the issues to be presented at trial." (*Id.*) Equally important, "an early resolution of the applicable law could significantly improve the efficiency of this litigation and reduce its cost for both Defendants and the putative classes." (*Id.*)

This timely Petition follows.

STANDARD FOR GRANTING REVIEW

Permission to file an interlocutory appeal of a district court's order pursuant to 28 U.S.C. § 1292(b) is appropriate where: (1) the order to be appealed "involves a controlling question of law"; (2) "as to which there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The district court certified that its Order satisfies each of these requirements. (Order at 36-38.)

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW AS TO WHETHER, UNDER *CARONIA*, ASYMPTOMATIC PLAINTIFFS MAY SEEK MEDICAL MONITORING BASED ON ALLEGED ACCUMULATION OF A SUBSTANCE

A. The Medical Monitoring Ruling Presents a Controlling Question of Law

A question of law is "controlling" if its resolution "may importantly affect the conduct of an action." *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978). Resolution "need not necessarily terminate an action in order to be 'controlling.'" *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). Questions of law are controlling where their resolution would "significantly narrow the scope of discovery … and the proof that the parties would be able to present at trial, saving the parties and the public time and money." *Fed. Housing Fin. Agency v. UBS Am., Inc.*, 858 F. Supp. 2d 306, 338 (S.D.N.Y. 2012). Certification is especially appropriate where the issue involves "a purely legal question about which there are no triable issues of fact," *In re Air Crash Off Long Island, N.Y. on Jul. 17, 1996*, 27 F. Supp. 2d 431, 435 (S.D.N.Y. 1998), and where its resolution would have important application to other cases. *See Klinghoffer*, 921 F.2d at 24; *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000).

Whether asymptomatic Plaintiffs can state a tort claim for medical monitoring damages based on accumulation of a substance in their blood presents a controlling question of law. Because this issue arises on a Rule 12(b)(6) motion to dismiss, it presents a pure question of law of whether Plaintiffs' factual allegations are sufficient to state a claim under New York law. The question is controlling because it will determine whether an entire category of the relief Plaintiffs seek—medical monitoring—is barred as a matter of law. A ruling by this Court on that question will control not only this case, but also other related cases that allege similar claims for medical monitoring.[7] Moreover, the ruling here allowing medical monitoring for asymptomatic plaintiffs has profound policy implications, undermines existing New York law, and may be invoked as authority for current and future claims in New York courts.

B. There Are Substantial Grounds to Dispute the Medical Monitoring Ruling

"There is substantial ground for difference of opinion when the authority on a point of law is in conflict, or when there is a relative lack

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[7] *See, e.g.*, *Benoit*, 16-cv-00930; *Jensen*, 16-cv-00932; *Ormsbee*, 16-cv-00949; *Rios*, 16-cv-00959; *Campbell*, 16-cv-01057; *Church*, 16-cv-01058; *Van Der Kar*, 16-cv-01061.

of authority on the precise question." *In re Fosamax Prods. Liab. Litig.*, 2011 WL 2566074, at *5 (S.D.N.Y. Jun. 29, 2011) (internal quotation marks and citation omitted); *Klinghoffer*, 921 F.2d at 25. As the district court recognized, its Order is "one of the first seeking medical monitoring since *Caronia* was decided" (Order at 26), yet its decision departs from, rather than follows, the existing law that *Caronia* clarified on certification from this Court. This Court should grant review to ensure that New York law is followed and does not become distorted after *Caronia*. There are at least three substantial grounds to dispute the district court's decision concerning medical monitoring.

First, the district court's interpretation of *Caronia* as authorizing claims for asymptomatic Plaintiffs based solely on accumulation is contrary to *Caronia*'s holding. In reiterating the "physical harm" requirement as "a fundamental principle of our state's tort system," *Caronia* instructs that the harm must be present and manifest, and that "[a] threat of future harm is insufficient to impose liability." 22 N.Y.3d at 446. There is no difference between the theory of medical monitoring raised and rejected in *Caronia* for "asymptomatic plaintiffs" with a "longtime heavy" smoking history "of 20 pack-years or more," 22

N.Y.3d at 445-46, 451; *accord Caronia*, 748 F.3d at 455-56, and Plaintiffs' theory of medical monitoring for asymptomatic plaintiffs with "blood serum tests disclosing a PFOA level … above the recognized background level." (Compl. ¶ 135.) Nor can Plaintiffs transform their accumulation theory into a manifest physical injury by alleging "injury and damage at the cellular and genetic level by the accumulation of PFOA." (*Id.* ¶ 165.) This is so because *Caronia* held that no physical injury was alleged by plaintiffs whose pleadings likewise expressly alleged "sub-clinical and/or sub-cellular injury and damage" from cumulative tobacco exposure. (*See* Ex. H, Defs. Ltr. Br. at 1-3.) Thus, while *Erie* required the court "to rule upon state law as it presently exists and not to surmise or suggest its expansion," *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (quotation omitted), the district court construed *Caronia* as authorizing the very theory of liability the New York Court of Appeals rejected.

Second, the district court's allowance of damages for medical monitoring for asymptomatic plaintiffs is contrary to *Caronia*'s express policy rationale. The district court stated that "requiring plaintiffs to manifest physical symptoms before receiving medical monitoring" was

"absurd," reasoning that "[t]he entire point of medical monitoring is to provide testing that would detect a patient's disease before she manifests an obvious symptomatic illness." (Order at 30.) Yet *Caronia* specifically considered the value of preventive testing, which it rejected because "it is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease." *Caronia*, 22 N.Y.3d at 451; *accord Caronia*, 748 F.3d at 455-56. While the district court was concerned with providing potential detection to asymptomatic plaintiffs (Order at 30), *Caronia* was concerned that allowing relief for those individuals would "inequitabl[y]" divert resources from "those who *have actually sustained an injury* as a result of the exposure." *Caronia*, 22 N.Y.3d at 451 (emphasis added); *accord Caronia*, 748 F.3d at 455-56. Citing the U.S. Supreme Court, *Caronia* observed that such a rule "could permit 'tens of millions' of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." 22 N.Y.3d at 451 (quoting *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997)). The district court's ruling would create the very problems *Caronia* sought to avoid on public policy grounds.

Third, the district court's interpretation of *Caronia* as leaving prior New York caselaw undisturbed is irreconcilable with *Caronia*'s actual holding. For example, the district court suggested that comments in *Caronia* regarding *Askey*, 477 N.Y.S.2d 242, mean that *Caronia* endorsed *Askey*'s holding that medical monitoring damages are recoverable where "the plaintiff 'establish[es] with a degree of reasonable medical certainty through expert testimony' that medical monitoring expenses must be incurred as a result of the exposure." (Order at 27 (quoting *Askey*, 477 N.Y.S.2d at 246-47).) Yet *Caronia* specifically rejected this aspect of *Askey*, stating that its equation of exposure with injury, while "understandable," was limited to the statute of limitations and did not question "this State's long-held physical harm requirement." *Caronia*, 22 N.Y.3d at 448. Likewise, by citing *Abusio* for the proposition "that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven," *id.*, the *Caronia* court did not endorse all aspects of *Abusio*, such as its dictum that medical monitoring could be predicated on a "clinically demonstrable presence of [toxins] in the plaintiff's body." *Id.* at 448-49 (quoting *Abusio*, 238 A.D.2d at 454-55). Nor did this Court,

quoting *Abusio* in *World Trade Center* , 758 F.3d at 213, rewrite the well-settled "physical injury" requirement of New York tort law, as the district court suggested.

C. Immediate Appeal of the Medical Monitoring Ruling May Materially Advance the End of Litigation

An immediate appeal of this issue would materially advance the termination of this litigation by saving the "'trial court time by avoiding fruitless litigation.'" *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22953644, at *4 (S.D.N.Y. Dec. 16, 2003) (quoting *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996)). Section 1292(b) is intended to "minimiz[e] the total burdens of litigation on parties and the judicial system by accelerating … trial court proceedings." 16 Charles A. Wright et al., Federal Practice & Procedure § 3930 (3d ed. Update 2016). Here, as the district court held, "where the question of which claims are viable under New York law could significantly impact the classes to be certified, the scope and focus of discovery, any subsequent motion for summary judgment, and the issues to be presented at trial," interlocutory review is warranted. (Order at 37.) "[A]n early resolution of the applicable law" in order to "significantly improve the efficiency of this litigation and reduce its cost for both

Defendants and the putative classes." (*Id.*) If Plaintiffs are permitted to pursue a remedy that is ultimately fruitless, significant judicial resources would be unnecessarily expended in discovery, class certification motions, and other proceedings in this putative class action. This Court should therefore grant review.

II. THE COURT SHOULD GRANT REVIEW AS TO WHETHER, UNDER *532 MADISON*, A PLAINTIFF MAY RECOVER DAMAGES FOR ECONOMIC HARM ALONE WITHOUT ALLEGING A PHYSICAL INJURY

A. The Diminution of Value Ruling Presents A Controlling Question of Law

The district court's authorization of Plaintiffs' diminution of value claims presents a controlling question of law. As with medical monitoring, the district court's ruling presents "a purely legal question about which there are no triable issues of fact," *Air Crash Off Long Island*, 27 F. Supp. 2d at 435, and which "may importantly affect the conduct" of this litigation. *Duplan*, 591 F.2d at 148 n.11. On Defendants' motion under Rule 12(b)(6), the viability of Plaintiffs' claims depends on whether the facts they allege are sufficient to plead a legal injury, which presents a pure question of law, one that will determine the availability of an entire category of claimed damages. Interlocutory review of this issue will thus "importantly affect the

conduct" of this litigation and "significantly narrow the scope of discovery … and the proof that the parties would be able to present at trial." *Duplan*, 591 F.2d at 148 n.11; *Fed. Housing Fin. Agency*, 858 F. Supp. 2d at 338. That ruling will be controlling not only for this case, but for the many related cases in the district court that seek diminution in value without physical injury to property.[8]

B. There Are Substantial Grounds to Dispute the Diminution in Value Ruling

There are substantial grounds for a difference of opinion as to the district court's diminution in value ruling because "the authority on [this] point of law is in conflict." *Fosamax*, 2011 WL 2566074, at *5 (quotation marks and citation omitted). Here, the district court acknowledged that "the uniform source" of Plaintiffs' alleged harm to property was the alleged "contamination of the drinking water in Hoosick Falls." (Order at 9.) Nor did the district court dispute for purposes of its ruling that groundwater is not private property. (*Id.* at

[8] *See Benoit*, 16-cv-00930; *Jensen*, 16-cv-00932; *Holmstedt*, 16-cv-00933; *White*, 16-cv-00934; *Ormsbee*, 16-cv-00949; *Smith*, 16-cv-00952; *Bullinger*, 16-cv-00954; *Putnam*, 16-cv-00955; *Rios*, 16-cv-00959; *Campbell*, 16-cv-01057; *Church*, 16-cv-01058; *Cross*, 16-cv-01060; *Van Der Kar*, 16-cv-01061; *Frommer*, 16-cv-01063; *Baker*, 16-cv-01066; *Bodenstab*, 16-cv-01367.

16.) Instead, the district court's decision turned on its finding that the landmark ruling in *532 Madison* limiting tort duties to those who have "suffered personal injury or property damage," *see* 96 N.Y.2d at 291-92, does not apply in environmental tort litigation, such that Plaintiffs here may recover for diminution in property value without alleging physical harm to their property. (Order at 19.) There is substantial doubt whether this ruling was correct for at least three reasons.

First, the district court relied on *532 Madison* for its invocation of the multi-factor "balancing" test for legal duty, which the district court applied to find a duty here. (Order at 17.) Yet the district court disregarded the application of that test in *532 Madison*, which announced a bright-line rule affirming that there is no general duty in tort to protect "against purely economic losses." *532 Madison*, 96 N.Y.2d at 290. That rule was not grounded in fact-specific considerations concerning construction accidents, but rather as a matter of "[p]olicy-driven line drawing." *Id.* at 291. That is, in what courts "historically … have done" in *all* tort cases, by limiting recovery

to cases of physical harm to afford "a principled basis for reasonably apportioning liability." *Id.* at 291-92.[9]

Second, the district court concluded that *532 Madison* did not "announce a talismanic requirement for plaintiffs to allege physical injury" to recover in tort, but was rather limited to its facts. (Order at 16.) Yet *Caronia* provides substantial ground to dispute this conclusion, having reaffirmed in 2013 that the requirement of "physical harm" to person or property is a "fundamental principle" of New York law. 22 N.Y.3d at 446 (citation omitted). That is consistent with the treatment of *532 Madison* by other New York courts, which have applied its bright-line rule regarding physical injury and economic harm in many contexts unrelated to construction accidents. *See e.g.*, *Black v. George Weston Bakeries, Inc.*, 2008 WL 4911791, at *3 (W.D.N.Y. 2008) (applying *532 Madison* in case alleging mold physically harmed

[9] Indeed, other jurisdictions have widely adopted the bright-line rule against tort damages for economic harm in the absence of a physical injury. *See Adams v. Star Enters.*, 51 F.3d 417, 424-25 (4th Cir. 1995); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 969, 980 (D. Wyo. 1998); *Path to Health, LLP v. Long*, 383 P.3d 1220, 1226 (Idaho 2016); *Smith v. Kan. Gas Serv. Co.*, 169 P.3d 1052, 1062 (Kan. 2007); *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 46-47 (Mass. 2009); *Plourde Sand & Gravel v. JGI E., Inc.*, 917 A.2d 1250, 1254 (N.H. 2007); *Walsh v. Cluba*, 117 A.3d 798, 808 (Vt. 2015).

property in addition to financial loss); *A & L Gift Shop v. Asa Waterproofing Corp.*, 2005 WL 6738195 (N.Y. Sup. Ct. Dec. 2, 2005) (applying *532 Madison* to toxic spill); *Aracelis On v. BKO Exp. LLC*, 45 N.Y.S.3d 68, 73 (N.Y. App. Div. 2017) (applying *532 Madison* to taxi accident).[10]

Third, in holding that "[h]owever a party's duty is ultimately defined in pollution cases, this policy determination must include a duty not to pollute a plaintiff's drinking water" (Order at 17), the district court appeared to assume what it had previously stated it did not dispute: that Plaintiffs do not own the groundwater. (Order at 16.) The assumed premise of the district court's ruling is therefore contrary to New York law, which holds that groundwater is not private property,

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[10] The district court relied on several authorities, nearly all of which predated *532 Madison*, to support its conclusion that Plaintiffs may seek damages for diminution in property value without physical injury. (Order at 18-19.) Most of those cases involved a physical injury to property and are thus consistent with the rule of *532 Madison*. *See 87th St. Owners Corp. v. Carnegie Hill-87th St. Corp.*, 251 F. Supp. 2d 1215, 1223 (S.D.N.Y. 2002) ("stigma damages" from physical injury to property); *Cottonaro v. Southtowns Indus., Inc.*, 213 A.D.2d 993, 993 (N.Y. App. Div. 1995) ("[d]amages from the diminished market value of real property" invaded by formaldehyde); *Halliday v. Norton Co.*, 265 A.D.2d 614, 615-17 (N.Y. App. Div. 1999) (chemicals from landfill physically injured plaintiffs' land). To the extent these cases held otherwise, they were overruled by *532 Madison.*

but rather "a natural resource entrusted to the state by and for its citizens." *Ivory*, 116 A.D.3d at 130. The New York Court of Appeals has long recognized that, "[l]ike air, light, or the heat of the sun, [water] has none of the attributes commonly ascribed to property," such that "[n]either sovereign nor subject can acquire anything more" than a right to use the water, and not to own it. *Sweet v. City of Syracuse*, 129 N.Y. 316, 335, *on reh'g sub nom. Comstock v. City of Syracuse*, 129 N.Y. 643 (1891). Because groundwater is a natural resource protected by the State, not owned by private parties, the proper channel of redress is through the State and its agencies, which have already established an extensive remedial program in Hoosick Falls through a consent decree with Defendants. *See supra* at 7. By conferring standing on private Plaintiffs to sue in relation to a natural resource, the district court contravened New York law and created conflict with the precedents above.

C. Immediate Appeal of the Diminution in Value Ruling May Materially Advance the End of Litigation

The final prerequisite for certification under § 1292(b) is also satisfied here because an immediate appeal will "'vindicate the final [goal] of saving trial court time by avoiding fruitless litigation.'"

WorldCom, 2003 WL 22953644, at *4 (quoting *Koehler*, 101 F.3d at 866). For the same reasons outlined above regarding medical monitoring, an immediate appeal as to diminution in value will determine at the inception of this litigation whether an entire category of damages sought by Plaintiffs are viable under New York law. (*See* Order at 36-37.) Were this Court to hold that *532 Madison* requires the Plaintiffs to plead a physical injury to their property, the termination of the litigation would be materially advanced, saving an enormous amount of discovery and motion practice in both this complex putative class action and in the related proceedings assigned to the district court.

CONCLUSION

For the foregoing reasons, permission to appeal should be granted.

Dated: February 16, 2017

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CERTIFICATE OF COMPLIANCE

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I further certify that this brief has been scanned for viruses and that it is virus free.

Dated: February 16, 2017

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17-____

United States Court of Appeals for the Second Circuit

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-versus-

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC.,

Defendants-Petitioners.

Petition for Review of an Order of the United States District Court
for the Northern District of New York (Kahn, J.)
Case No. 1:16-cv-00917

MEMORANDUM IN SUPPORT OF MOTION TO STAY

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PRELIMINARY STATEMENT

Defendants-Petitioners Saint-Gobain Performance Plastics Corporation and Honeywell International, Inc. respectfully submit this memorandum of law in support of their motion, pursuant to 28 U.S.C. § 1292(b), to stay proceedings in the Northern District of New York pending this Court's consideration of Defendants' Petition for permission to appeal the district court's February 6, 2017 Order on Defendants' motion to dismiss. (*See* Pet. Ex. A.) The district court certified the Order for interlocutory appeal *sua sponte* but ordered that "any such appeal will not delay proceedings in this Court absent a stay granted by the circuit." (*Id.* at 38.)

As set forth in the Petition, the Order turns on controlling questions concerning the "fundamental principle" of New York law that a plaintiff must "sustain physical harm before being able to recover in tort[.]" *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013) (citation omitted). Resolution of these questions at the outset, before any discovery or other proceedings have taken place, will determine the viability of Plaintiffs' claims in a complex tort litigation including this putative class action and at least 17 related actions pending in the

district court. Defendants accordingly request that this Court stay proceedings in this action while it considers the Petition for appeal and continue that stay for the duration of an interlocutory appeal if one is permitted to proceed.

BACKGROUND

The relevant facts and procedural history are set forth in the Petition (at 5-12) and incorporated here by reference.

ARGUMENT

This Court should stay proceedings in the district court pending interlocutory appeal, since an immediate appeal of the Order will determine the viability of Plaintiffs' claims as a matter of law. In particular, immediate appeal would determine (1) whether, under *Caronia*, asymptomatic plaintiffs may state a claim for medical monitoring damages based on the alleged accumulation of an allegedly harmful substance in their blood; and (2) whether, under *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280 (2001), a plaintiff may state a claim for pure economic harm in the form of diminution of property value without alleging physical injury to the subject property. Because immediate appeal will potentially spare years of wasteful litigation in the district court, a stay should be

granted to ensure that such litigation does not occur while this appeal is being resolved.

Although the district court has indicated it will not stay proceedings pending appeal, this Court has discretion to stay proceedings in the district court pending resolution of an interlocutory appeal. 28 U.S.C. § 1292(b). Such stays are often granted pending interlocutory appeal. *See, e.g.*, *U.S. S.E.C. v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 169 (2d Cir. 2012) (granting stay to hear interlocutory appeal and petition for mandamus involving ruling based on novel issue of law); *see also Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784, 2015 WL 585641, at *2 (S.D.N.Y. Feb. 10, 2015) (granting stay pending interlocutory appeal where substantial grounds exist for differences of opinion regarding "a difficult legal question about which reasonable minds can differ") (citation omitted); *John and Vincent Arduini, Inc. v. NYNEX*, 129 F. Supp. 2d 162, 175 (N.D.N.Y. 2001) (issuing stay of "all proceedings in the current case" to permit interlocutory appeal of question of law where there was a strong basis for differences of opinion); *Maestri v. Westlake Excavating Co.*, 894 F. Supp. 573, 579 (N.D.N.Y. 1995) (issuing stay to permit interlocutory

appeal of ruling of first impression on pollution exclusion clauses in insurance dispute involving clean-up site).

This Court balances four factors in considering a request for a stay pending appeal: (i) whether the movant has shown a substantial possibility (although less than a likelihood) of success on appeal, (ii) whether the movant will suffer irreparable injury absent a stay, (iii) whether the opposing party will suffer substantial injury if a stay is granted, and (iv) the public interests that may be affected. *See, e.g., Citigroup Global Mkts.*, 673 F.3d at 169 (balancing factors and granting stay); *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006) (same). The degree to which a factor must be demonstrated varies with the strength of the other factors, meaning that "more of one excuses less of the other." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (internal quotation marks omitted). For example, the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[ ] will suffer absent the stay." *Id.* Thus, a stay may be granted where the possibility of success is high and "some injury" has been shown. *Id.* In this regard, the criteria operate "somewhat like a sliding scale[.]" *Thapa*, 460 F.3d at 334.

There is good cause for a stay in this matter. The district court's denial of Defendants' motion to dismiss was based on novel interpretations of controlling decisions of New York law from the New York Court of Appeals. That controlling law, if resolved correctly, would likely end or substantially reduce the scope of this litigation. And, absent a stay, this putative class action is likely to require extensive discovery, motions practice, class certification hearings, and other burdensome litigation that will burden both parties and require the substantial investment of judicial resources.

1. Defendants Have Shown a Substantial Possibility of Success on Appeal

A stay is warranted because there is a substantial possibility Defendants will prevail on an interlocutory appeal to this Court. The district court certified its Order for interlocutory appeal *sua sponte* in recognition of the fact that the Order "involves a controlling question of law as to which there is substantial ground for difference of opinion[.]" (Order at 36.) Thus, as the district court recognized, and for the reasons set forth briefly below and more fully in the Petition, there is a substantial possibility that Defendants' appeal will be successful.

First, with respect to medical monitoring, the district court allowed asymptomatic Plaintiffs to pursue tort claims for medical monitoring based on the alleged accumulation of an allegedly harmful substance in their blood. As discussed more fully in the Petition, that question is controlled by the New York Court of Appeals' decision in *Caronia*, which dictates that damages for medical monitoring are not proper for asymptomatic plaintiffs, but rather "only after a physical injury has been proven." *Caronia*, 22 N.Y.3d at 448. *Caronia* was decided on certification from this Court, and it led to this Court's dismissal of medical monitoring claims by asymptomatic plaintiffs. *Caronia v. Philip Morris USA, Inc.*, 748 F.3d 454, 455 (2d Cir. 2014).

The district court nonetheless held that New York law permits medical monitoring based on "accumulation" of a substance as a "physical injury" under *Caronia*. (Order at 26.) In doing so, the district court disregarded the facts and holding of *Caronia.* "Accumulation" is no different from the cumulative exposure theory of injury that *Caronia* rejected as contrary to New York tort law and public policy. *See Caronia*, 22 N.Y.3d at 445-46. Asymptomatic plaintiffs without manifest physical injuries cannot seek recovery in tort. *See id.* By

allowing the "accumulation" theory to proceed, the district court here erroneously construed *Caronia* as authorizing the very theory of liability the New York Court of Appeals rejected. This clear error alone demonstrates that Defendants have a substantial possibility of success on appeal.

Second, the district court authorized claims for diminution of property value where the only alleged physical injury was to groundwater, which is not damages to Plaintiffs' property. Notably, the district court did not dispute that groundwater is a "natural resource" that "does not belong to the owners of real property." *Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 130 (3d Dep't 2014). Under *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 N.Y.2d 280, 292 (2001), tort duties are limited to those who have "suffered personal injury or property damage," and do not extend to "purely economic losses" such as those alleged by Plaintiffs here. *Id.* at 291.

Nevertheless, the district court held that *532 Madison* was limited to its facts and that as a matter of "sensible public policy," *532 Madison* would not "prevent[] a person whose water supply was contaminated ... from recovering in tort, even if she seeks economic damages." (Order at

18.) But *532 Madison* was decided as a matter of "[p]olicy-driven line-drawing" to require a physical injury before a plaintiff may recover for economic harm. 96 N.Y.2d at 291-92. The bright-line rule of *532 Madison* has been applied in many factual contexts. Because the district court did not apply the rule here, there is a substantial possibility of Defendants' success on appeal.

2. Defendants Will Suffer Injury Absent a Stay

In the absence of a stay, Defendants face the prospect of extensive document and electronic discovery, depositions, motions practice, class certification hearings, the preparation of expert reports, expert depositions, summary judgment motions, and, ultimately trial, all on issues that, if the district court's Order is erroneous, may be resolved at the motion to dismiss stage.

At issue is more than just the cost of such extensive litigation proceedings. These proceedings will likely require substantial time and effort on the part of Defendants and their employees, including those involved in carrying out the remediation consent orders with New York's Department of Environmental Conservation (DEC) discussed below.

The proceedings will also subject the Defendants to potentially unnecessary discovery, with all of the administrative, preservation, and other burdens that accompany that discovery. For example, Plaintiffs specifically exclude from their putative class individuals who have "filed a lawsuit for personal injury for a PFOA-related illness related to exposure to municipal or private well water." (Compl. ¶ 137.) Consequently, if this Court agrees on appeal that the Order contravenes the controlling *Caronia* ruling that asymptomatic plaintiffs cannot seek damages for medical monitoring, extensive fact and expert discovery related to medical issues, and class certification proceedings regarding the putative biomonitoring class, will be rendered moot. Once this litigation occurs, it cannot be undone. Especially where, as here, the possibility of success on appeal is substantial and granting a stay "would not impose substantial hardship" on the plaintiffs, such extensive and unnecessary litigation warrants a stay. *Flo & Eddie*, Inc., 2015 WL 585641 at *4 (staying action pending appeal where "granting a stay now, rather than proceeding with cumbersome class-wide discovery, a motion for certification, and ultimately a decision on damages, is very likely to save time and money for the litigants");

Mohammed, 309 F.3d at 101 (noting a stay may be granted where the possibility of success is high and "some injury" has been shown). Here, the District Court specifically found that the questions on appeal could "significantly impact" the classes to be certified and the scope and focus of discovery, among other things. (Order at 37.) A stay is therefore warranted to avoid the likely burdens of potentially unnecessary litigation.

3. Plaintiffs Will Not Suffer Substantial Injury If a Stay Is Granted

Plaintiffs will not suffer substantial injury if proceedings are stayed pending appeal. Because the Order concerns solely damages claims, a modest stay of the litigation will not cause them irreparable harm. *See Caronia*, 22 N.Y.3d at 448 (holding that medical monitoring is damages, not injunctive relief). A stay that does nothing more than "maintain the status quo existing prior to the district court's order" does not cause appreciable harm to either side. *See Citigroup Global Markets*, 673 F.3d at 168.

Although Plaintiffs also sought injunctive relief in their Complaint, they voluntarily agreed to stay those claims in the district court in light of the remediation of local groundwater undertaken and

completed by state and federal environmental agencies in cooperation with Defendants. (*See* Pet. at 7.) Indeed, even while investigations were and are still pending, Saint-Gobain voluntarily offered a number of remedial measures for Hoosick Falls, including:

- Providing residents with interim bottled water;
- Funding the installation of a temporary granulated activated carbon (GAC) treatment system for the municipal water system to remove PFOA from drinking water; and
- Designing, installing, operating and maintaining a long term full capacity GAC treatment system for the municipal supply wells.

(*See id.*) These remedial measures have now been finalized in a consent decree between Saint-Gobain, Honeywell, and DEC. (Compl. ¶ 125.) Pursuant to that decree, a permanent GAC filtration system has been installed on the village water supply, in which PFOA is no longer detected.[1] In addition, various state agencies and the Defendants have installed private water treatment systems, known as POETs, on private

[1] *See* Village of Hoosick Falls Municipal Water News (Feb. 7, 2017) (announcing new, permanent GAC system "replac[ing] interim system that has been providing clean drinking water since March 2016"), *available at* http://www.villageofhoosickfalls.com/Water/news.html.

wells in the Hoosick Falls vicinity.[2] Thus, "the installation of filtration systems on both the municipal water supply and on private wells," which continue to provide clean drinking water (*id.*) and which the district court noted in its Order (Order at 2 n.2), would not be affected by stay. For all of these reasons, Plaintiffs would not suffer a substantial injury if a stay for the duration of the appeal were to be granted.

4. The Public Interest in Judicial Economy Supports a Stay

Finally, judicial economy generally "strongly favors staying the proceedings pending resolution of the legal question at the core of [an] action," as in the case here. *Flo & Eddie*, *Inc.*, 2015 WL 585641, at *4 (S.D.N.Y. February 10, 2015). As courts recognize, "[w]hether or not the Court's judgment on appeal is affirmed, granting a stay now, rather than proceeding with cumbersome class-wide discovery, a motion for certification, and ultimately a decision on damages, is very likely to save time and money for the litigants[.]" *Id.* Here, the district court has already determined that "the question of which claims are viable under New York law could significantly impact the classes to be

[2] *Id.*

certified, the scope and focus of discovery, any subsequent motion for summary judgment, and the issues to be presented at trial, an early resolution of the applicable law could significantly improve the efficiency of this litigation and reduce its cost for both Defendants and the putative classes." (Order at 37.) It would be contrary to the interests of judicial efficiency to proceed with the very discovery, motions practice, and class certification proceedings that the district court has identified as likely being materially impacted by the outcome of any appeal, only to later find some or all of those proceedings mooted by a successful appeal. *See, e.g.*, *Flo & Eddie*, *Inc.* 2015 WL 585641, at *4. This factor, too, strongly favors a stay pending appeal.

CONCLUSION

For the foregoing reasons, the motion to stay should be granted.

Dated: February 16, 2017

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I further certify that this brief has been scanned for viruses and that it is virus free.

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER, *et al.*,

Plaintiffs,

-against- 1:16-CV-0917 (LEK/DJS)

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., *et al.*,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

This case stems from the contamination of groundwater in the Village of Hoosick Falls with perfluorooctanoic acid, or PFOA. E.g., Dkt. No. 9 ("Complaint") ¶ 1. While many suits concerning this contamination have been filed in this district, this case is a consolidated class action whose putative classes include all individual owners or renters of real property within the Village, as well as anyone who consumed water from Hoosick Falls and exhibits a heightened blood-serum level of PFOA. Id. ¶ 135.[1]

In the Complaint, Plaintiffs allege that Defendants—Saint-Gobain Performance Plastics Corp and Honeywell International Inc.—were responsible for this contamination, which came from one or more manufacturing facilities they operated at various times within the Village. Id. ¶¶ 60–86. Because of this groundwater contamination, Plaintiffs claim that the drinking water of

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[1] Because class certification is not at issue in this Memorandum-Decision and Order, the Court has summarized these classes for brevity. The full proposed class definitions, and other class-related allegations, can be found in the Complaint. Compl. ¶¶ 134–53.

Hoosick Falls became nonpotable,[2] causing loss of property value and other damages. E.g., id. ¶¶ 163–66. Additionally, the past consumption of contaminated water has caused PFOA to accumulate in Plaintiffs' blood serum and bodies. E.g., id. ¶¶ 9, 127, 165–66.

Currently before the Court is Defendants' motion to dismiss for failure to state a claim, which raises several complex and relatively novel questions of state law concerning private claims for water contamination and for ingesting potentially harmful substances. Dkt. No. 13 ("Motion"); see also Dkt. Nos. 13-1 ("Memorandum"), 17 ("Opposition"), 23 ("Reply").[3] For the following reasons, Defendants' Motion is granted in part and denied in part.

II. BACKGROUND

The following facts are taken from the allegations in the Complaint, which are assumed to be true when deciding a motion to dismiss for failure to state a claim. E.g., Bryant v. N.Y. State Dept. of Educ., 692 F.3d 202, 210 (2d Cir. 2012).

A. PFOA

"PFOA is a fluorinated organic chemical" originally manufactured by the 3M Company. Compl. ¶¶ 33, 35. Among other things, PFOA is used "to achieve water, oil, and grease repellency," and thus has been used to manufacture "carpets, clothing, fabric for furniture, paper packaging for food and other materials such as cookware that are resistant to water, grease or

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[2] As discussed further below, Defendants, the Village, and state and federal agencies have been working to address the contamination. These efforts include the installation of filtration systems on both the municipal water supply and on private wells. Compl. ¶¶ 121, 123.

[3] While Defendants also moved to dismiss or to stay Plaintiffs' claims for injunctive relief pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and the primary jurisdiction doctrine, Mem. at 14–30, these claims were stayed until April 28, 2017, by a stipulation and order, Dkt. No. 18.

stains." Id. ¶¶ 37–38. Perhaps most notably, "PFOA was also a key component in the manufacturing of Teflon"—or PTFE—a material used as a nonstick coating and in several other applications. Id. ¶ 39; What Is Teflon?, Chemours, https://www.chemours.com/Teflon/en_US/products/safety/what_is_it.html (last accessed Jan. 19, 2017).

"PFOA is biologically and chemically stable in the environment," and can remain in soil and water for extended periods of time. Compl. ¶ 41. This is problematic, Plaintiffs allege, because of the toxic effects of exposure to PFOA. E.g., id. ¶ 43. "PFOA is readily absorbed after ingestion," has a human biological half life of two to nine years, and causes health risks even at low levels of ingestion (less than one part per billion, or ppb). Id. ¶¶ 43–44. PFOA binds to serum albumin in the blood, id. ¶ 44, and nationwide blood concentrations average at 2.08 µg/L, id. ¶ 9.

Plaintiffs claim that "PFOA is associated with increased risk in humans" of various cancers, along with several other conditions. Id. ¶ 45. "[T]he EPA Science Advisory Board stated that PFOA cancer data are consistent with guidelines suggesting exposure to the chemical is 'likely to be carcinogenic to humans,'" id. ¶ 46, and the Complaint also points to animal studies showing a connection with other cancers "not yet associated with human exposure," id. ¶ 45.

Plaintiffs cite no studies and make no allegations concerning the dose dependency of these conditions or the threshold levels of exposure associated with them, but do note that the U.S. Environmental Protection Agency ("EPA") recently issued both a health advisory for drinking water of seventy parts per trillion (or ppt)[4] and a reference dose of 0.000002 mg/kg/day.

[4] This may also be expressed as approximately 70 ng/L.

Id. ¶¶ 49, 53. The health advisory level (70 ppt) suggests that drinking-water sources with greater levels of PFOA should undergo remediation efforts, while the reference dose represents a conservative estimate of the maximum continuous daily exposure likely to be without "an appreciable risk" of negative health effects. Id.[5] Following the EPA's actions concerning PFOA, several states have established similar health advisories and guidelines. Id. ¶¶ 50–52.

B. The Contamination of Hoosick Falls

The Village of Hoosick Falls is located in upstate New York near the Vermont border and has a population of approximately 3,500. Id. ¶ 55. Since as early as the late 1950s, PFOA has been used in manufacturing facilities in and around Hoosick Falls. Id. ¶ 60. One of these facilities—a small factory at 14 McCaffrey Street—appears to be the main source of the Village's PFOA contamination. Id. ¶ 61. Through various acquisitions, the McCaffrey Street site came to be owned by AlliedSignal in 1986, which later adopted Honeywell's name after a merger. Id. ¶¶ 62–64. In 1996, Honeywell sold the site to another company called Furon, but Saint-Gobain acquired Furon in 1999 and continues to own the facility to this day. Id. ¶¶ 65–67.

At the McCaffrey Street site, Saint-Gobain and Honeywell manufactured stain- and water-resistant fabric, applying a PFOA solution to the fabric in large trays. Id. ¶¶ 68–70. As the fabrics dried, some of the PFOA would vaporize and leave the site by air as particulate matter. Id.

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[5] The reference dose, or RfD, is calculated by taking the estimated "no observed adverse effect level" or NOAEL of the substance—"the 'highest tested dose at which no statistically significant elevation over background in the incidence of the adverse effect was observed'"—and dividing it by one or several factors of ten to account for uncertainty. Matthew D. Adler, Against "Individual Risk": A Sympathetic Critique of Risk Assessment, 153 U. Pa. L. Rev. 1121, 1161–62 (2005) (quoting Lorenz R. Rhomberg, A Survey of Methods for Chemical Health Risk Assessment Among Federal Regulatory Agencies, 3 Hum. & Ecological Risk Assessment 1029, 1105 (1997)). This means that doses equal to and lower than the reference dose "do not (it can be said with great confidence) produce an incremental risk of death." Id. at 1162.

¶ 71. Employees would also wash the trays and pour the resulting discharge down floor drains in the facility. Id. ¶ 72. This in turn would cause PFOA to flow into the soil and ultimately the aquifer. Id.

Saint-Gobain and Honeywell also used solid PFOA to manufacture Teflon-coated materials and other products in large ovens at the McCaffrey Street site. Id. ¶¶ 76–77. As part of the coating process, a sticky residue containing PFOA would adhere to internal tubing or "stacks" within the ovens, which would be cleaned on a rotating schedule. Id. ¶¶ 78–79. These stacks were cleaned in a large sink, the waste water from which was discharged down a drain, ultimately migrating into the soil and then the aquifer. Id. ¶ 80.

The Complaint identifies other sites in Hoosick Falls operated by one or both defendants at various times that may also have contributed to the PFOA contamination. Id. ¶¶ 81–84. Additionally, PFOA has been found in leachate emanating from the former municipal landfill, where Defendants allegedly sent waste containing PFOA. Id. ¶¶ 85, 108.

Approximately 95% of Hoosick Falls residents receive drinking water from the municipal water system, which in turn gathers its water from a well. Id. ¶¶ 57, 87. In 2007, a new well for the municipal system was constructed about five hundred yards from the McCaffrey Street site. Id. ¶¶ 87–88. Additionally, some residents of Hoosick Falls and the surrounding Town of Hoosick receive drinking water from private wells instead of the municipal supply. Id. ¶¶ 58–59.

From late 2014 to the middle of 2015, the Village conducted testing and received results showing high levels of PFOA in the municipal water system. Id. ¶¶ 89–92. These tests showed PFOA concentrations ranging from 151 to 662 ppt (as noted above, the EPA ultimately advised against using water supplies with concentrations greater than 70 ppt). Id. ¶¶ 53, 93. The Village

also oversaw testing of certain private wells, and received results showing PFOA concentrations "significantly above any safe level." Id. ¶ 94.

Despite these test results, Village officials maintained that the water was safe to drink. Id. ¶ 95. In October 2015, the EPA Regional Administrator for New York learned of the test results, and in November, the EPA contacted the village and recommended the use of an alternative water source. Id. ¶¶ 96–97. Even then, the New York State Department of Health released a fact sheet the following month stating that "[h]eath effects are not expected to occur from normal use of the water," and "Village officials further minimized the potential risk of PFOA." Id. ¶¶ 98–99.

After learning of the Village's laissez-faire response, the EPA repeated its recommendation on December 17, 2015. Id. ¶ 100. Shortly thereafter, Saint-Gobain began to provide free bottled water to Village residents on the municipal water system, and agreed to fund the installation of a filter system on the municipal supply. Id. ¶ 102. After some debate with Town and Village residents, the state agreed to provide testing of private wells. Id. ¶¶ 105–07.

On January 27, 2016, Governor Cuomo and other state officials announced that the McCaffrey Street facility would be classified as a state superfund site, and that PFOA would be classified as a hazardous substance. Id. ¶¶ 110–11. The following day, the EPA advised homeowners with private wells to use bottled water if their wells showed PFOA at concentrations greater than 100 ppt, or if their wells had not yet been tested. Id. ¶ 112.[6] In late February, results from private wells showed that 42 out of 145 wells tested had PFOA concentrations above this 100 ppt threshold, and in early March, tests from the Hoosick Falls Water Treatment Plant included a peak result of 983 ppt. Id. ¶¶ 122, 124.

[6] This warning came before the 70 ppt advisory was issued in May 2016. Compl. ¶ 53.

Around this time, municipal and state officials began remediation efforts both for municipal and private well users. Id. ¶¶ 121, 123. A temporary carbon filter system was installed at the municipal water treatment plant, and a permanent filter was scheduled for later installation. Id. ¶ 121.[7] Additionally, the New York State Department of Environmental Conservation ("DEC") announced that it would install point-of-entry treatment ("POET") systems at homes with private wells. Id. ¶ 123. Plaintiffs allege that Hoosick Falls residents were forced "to deal with frustrations relating to installation and upkeep of POET systems" and that they "must remain installed for the foreseeable future and will require regular maintenance." Id.

In February 2016, the Department of Health also began to offer blood testing to Hoosick Falls residents, and over 3,000 individuals have used this program to date. Id. ¶ 120. The median blood level of those tested is 64.2 μg/L, over thirty times higher than the national average of 2.08 μg/L. Id. ¶ 127. According to Plaintiffs, "the vast majority of residents and former residents of Hoosick Falls have been exposed to PFOA at a level that meets or exceeds some health-based comparison value," though again, Plaintiffs do not specify the precise characteristics of these values or the expected consequences thereof. Id. ¶ 130.

In addition to heightened blood levels of PFOA, the contamination has had collateral effects on homeowners in Hoosick Falls. As alleged in the Complaint, "[t]he presence of PFOA in the municipal water supply and the local aquifer immediately stigmatized the community and has adversely impacted . . . property values." Id. ¶ 7. These property values "experienced a

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[7] Plaintiffs claim that despite the installation of this filter system, "residents continue to rely on bottled water for drinking." Compl. ¶ 121. But cf. New York State Announces Water from Village of Hoosick Falls Municipal Water System Is Safe to Drink, Village Hoosick Falls (Mar. 30, 2016), http://www.villageofhoosickfalls.com/Water/news.html (noting that water "show[ed] non-detectable levels of PFOA" after passing through the temporary filtration system).

significant decline since the presence of PFOA was disclosed," which "persists to this day and is expected to continue." Id. ¶ 115. Hoosick Falls residents have also faced difficulty obtaining financing for their homes, as banks would not write mortgages for homes on the municipal water supply, and would not do so for homes with private wells unless testing revealed low levels of PFOA. Id. ¶¶ 113–14.[8] While the Complaint admits that financing has since "resumed," the interest rates subsequently offered to borrowers "were much less favorable . . . than the rates offered in late 2015." Id. ¶ 114.

C. Plaintiffs' Injuries

There are two main sources of harm to the named plaintiffs alleged in the Complaint: damage to the Plaintiffs' property and personal injury from their ingestion of PFOA.[9] These are discussed in turn below.

1. Property Damage

As a part of the injury alleged for Plaintiffs' negligence and strict liability claims, id. ¶¶ 164, 166, 184, and as the sole source of injury for their nuisance and trespass claims, id. ¶¶ 170, 172, 178, Plaintiffs claim that the PFOA pollution caused harm to real property they

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[8] According to the Complaint, an employee of Trustco Bank "indicated that lenders typically require that homes have access to potable water before financing is approved." Compl. ¶ 113.

[9] As noted in Defendants' brief, Mem. at 14, "[t]he fact that the Plaintiff has asserted a putative class action does not affect the Court's analysis of the validity of the named Plaintiff's claims," DiGangi v. Gov't Emp'rs. Ins. Co., No. 13-CV-5627, 2014 WL 3644004, at *2 (E.D.N.Y. July 22, 2014); accord Garcia v. Does, 779 F.3d 84, 87 n.1 (2d Cir. 2014); Patchen v. Gov't Emp'rs Ins. Co., 759 F. Supp. 2d 241, 244 (E.D.N.Y. 2011); see also Lewis v. Casey, 518 U.S. 343, 357 (1996) ("[E]ven named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20 (1976))).

either own or rent. Throughout the Complaint, the uniform source of this harm is the contamination of the drinking water in Hoosick Falls, either through the municipal water supply or through private wells on their land. E.g., id. ¶¶ 163–64, 169–70, 178, 182. Plaintiffs' alleged damages include the cost to remediate the contamination of their property, the loss of their use and enjoyment of the property, and a loss in their quality of life. Id. ¶ 186; see also id. ¶ 166 (alleging "damages associated with the investigation, treatment, remediation, and monitoring of drinking water and the contamination of [Plaintiffs'] property," among other sources of injury).

Most significant for the Motion, however, is Plaintiffs' perhaps largest source of damages: a loss in their property values. E.g., id. ¶ 115. As noted before, Plaintiffs allege a precipitious drop in "property values in and around Hoosick Falls," a "decline [that] persists to this day." Id. The Complaint seeks "monetary damages for the diminution of the value of the plaintiffs' property," and also lists these damages as an alternative to the cost of remediation mentioned above. Id. ¶ 186. Of course, these damages are applicable only to the plaintiffs who own real property in Hoosick Falls, and the interaction between this theory of injury and Plaintiffs' ability to state their claims is discussed later in this opinion.

Also relevant in deciding the Motion is the distinction between plaintiffs who use the municipal water supply from the Village and those who own private wells. For example, the Complaint asserts trespass claims only on behalf of those with private wells. See id. ¶ 174 ("This Claim is brought . . . on behalf of the Private Well Water Property Damage Class."). For ease of reference, the named plaintiffs on the municipal water supply are Pamela Forrest, Michael Hickey (individually and on behalf of his child, O.H.), Kathleen Main-Lingener, Kristin Miller (on behalf of her child, K.M.), James Morier, Jennifer Plouffe, Silvia Potter (individually and on

behalf of her child, K.P.), and Daniel Schuttig (collectively, the "Municipal Water Plaintiffs"), and the named plaintiffs with private wells are Michele Baker, Charles Carr, and Angela Corbett (collectively, the "Private Well Plaintiffs"). Id. ¶¶ 10–20.

2. Personal Injury

Plaintiffs also seek relief stemming from their consumption of the PFOA-contaminated water. According to the Complaint, the residents of Hoosick Falls "have been exposed for years, if not decades, to PFOA at concentrations well above a safe drinking level," an exposure that resulted in "concentrations of PFOA in their blood that is, on average, over 30 times higher than the typical American." Id. ¶ 9. Plaintiffs combine this allegation with claims that PFOA is associated with increased risk of several cancers and other diseases, noting advised limits on PFOA exposure established by regulators. Id. ¶¶ 45–53. They also claim that this exposure causes them "to suffer injury and damage at the cellular and genetic level by the accumulation of PFOA in their bodies." Id. ¶ 165. In response to this risk, Plaintiffs seek consequential damages and injunctive relief to either fund or provide "a biomonitoring program that is reasonably tailored to the exposure risks posed by PFOA." Id. ¶¶ 187, 189.[10]

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[10] Medical monitoring or biomonitoring is the provision of "regular medical testing . . . intended to detect the onset of latent injuries or diseases and to facilitate early diagnosis and treatment." Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 536 (S.D.N.Y. 2007), abrogated in part by Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11 (N.Y. 2013); see also Chistopher P. Guzelian et al., A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring, 79 Ind. L.J. 57, 58 (2004) (defining medical monitoring as "periodic diagnostic medical examinations and medical tests intended to diagnose illness or medical conditions before they would be diagnosed in the course of ordinary medical care"). "The object of [medical] monitoring is to find a disease before symptoms arise that would prompt the patient to seek medical care resulting in a typical clinical diagnosis," allowing earlier treatment when swift intervention would allow for better outcomes. Guzelian et al., supra, at 64, 76–77; see also ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA, 60 Fed. Reg. 38,840, 38,841–42 (July 28, 1995) ("[Medical] monitoring should

Not every Plaintiff claims an increased level of PFOA in their blood. Plaintiffs Charles Carr, Michael Hickey (individually), Kathleen Main-Lingener, K.M. (the son of Kristin Miller), James Morier, Silvia Potter, and K.P. (the daughter of Silvia Potter) (collectively, the "Accumulation Plaintiffs") all allege heightened blood-serum levels of PFOA. Id. ¶¶ 10–20. On the other hand, Michele Baker, Angela Corbett, Pamela Forrest, O.H. (the son of Michael Hickey), Jennifer Plouffe, and Daniel Schuttig (collectively, the "Nonaccumulation Plaintiffs") do not personally allege any heightened blood concentration of PFOA. Id. Importantly, Plaintiffs do not allege any current manifestation of disease or symptoms related to PFOA exposure. Id.; cf. id. ¶ 137 (excluding "any individual . . . who has filed a lawsuit for personal injury for a PFOA-related illness related to exposure to municipal or private well water" from the proposed class definitions).

D. Defendants' Motion

After the consolidated complaint was filed in this action, Saint-Gobain and Honeywell moved to dismiss the Complaint for failure to state a claim. Mot.[11] The core of Defendants' argument is that Plaintiffs have not suffered a legally cognizable injury—either to their property or to their bodies—sufficient to allege a tort under New York law. Mem. at 30–40.

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be directed at detecting adverse health effects that are . . . amenable to prevention or intervention measures. . . . [T]he adverse health effects . . . should be such that early detection and treatment or intervention interrupts the progress to symptomatic disease, improves the prognosis of the disease, improves the quality of life of the individual, or is amenable to primary prevention.").

[11] Again, Plaintiffs' claims for injunctive relief have been stayed under a stipulation and order. Dkt. No. 18. The Court accordingly delays decision on the propriety of and its jurisdiction over those claims in light of the ongoing regulatory and remediation efforts in Hoosick Falls. See id. at 1 (noting the "ongoing efforts by state and federal agencies in cooperation with Defendants").

First, Defendants argue that all of Plaintiffs' property damage claims are based on injury to groundwater, but because groundwater in New York is "a public resource held by the State for the benefit of the public," Plaintiffs lack standing to sue and cannot claim a cognizable injury to their own property. Id. at 31–32. Additionally, Defendants argue that claims for economic injury alone—here, a loss in property value—are not allowed under New York law. Id. at 32–35. Finally, Defendants argue that Plaintiffs' nuisance claims fail as a matter of law because the injury alleged is common across thousands of people, yet a private nuisance must "threaten[] one person or a relatively few." Id. at 35–36 (emphasis omitted) (quoting Caldarola v. Town of Smithtown, No. 09-CV-272, 2010 WL 6442698, at *15 (E.D.N.Y. July 14, 2010), adopted, 2010 WL 1336574 (E.D.N.Y. Apr. 4, 2011)).

Next, Defendants argue that Plaintiffs' personal injury claims essentially assert a separate cause of action for medical monitoring, a claim that has been expressly forbidden by the New York Court of Appeals. Id. at 36–38 (citing Caronia, 5 N.E.3d at 18–19). Instead, under New York law, the availability of medical monitoring damages depends on the existence of an independent tort, which in turn requires a present physical injury. Id. Because, under Defendants' view, the Complaint alleges only "the possibility of future injury," Plaintiffs cannot state a claim for personal injury under either a negligence or strict liability theory, and thus cannot recover damages for medical monitoring. Id. at 38–40 (quoting Remson v. Verizon Commc'ns, Inc., No. 07-CV-5296, 2009 WL 723872, at *3 (E.D.N.Y. Mar. 13, 2009)).

III. LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a "complaint must contain sufficient factual matter, accepted as

true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of the plaintiff. Allaire Corp. v. Okumus, 433 F.3d 248, 249–50 (2d Cir. 2006). Plausibility, however, requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." Twombly, 550 U.S. at 556.

The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. (quoting Twombly, 550 U.S. at 555). Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that she is entitled to relief and the action is subject to dismissal. Id. at 678–79.

IV. DISCUSSION

A. Negligence and Strict Liability

Plaintiffs' first enumerated claim is negligence. In support of this claim, they argue that Honeywell and Saint-Gobain knew or should have known that PFOA "was potentially hazardous to human health," that Defendants' method of disposal caused it to enter the environment and ultimately Plaintiffs' water supply, and that such actions together were unreasonable and negligent. Compl. ¶¶ 154–63. As an alternative theory, Plaintiffs argue that Defendants' manufacture and handling of PFOA constituted an abnormally dangerous activity, and thus that

Honeywell and Saint-Gobain may instead be held strictly liable. Id. ¶¶ 179–84.[12] While discussed more extensively above, the property-related damages claimed by Plaintiffs include the loss in their property value, the expense of remediation, the loss of their use and enjoyment of the property, and a decline in their quality of life. Id. ¶ 186.[13] These property damage claims are brought only on behalf of plaintiffs who own real property. See id. ¶¶ 135, 155 (noting that the claims are brought "on behalf of the Municipal Water Property Damage Class [and] the Private Well Water Property Damage Class," which are in turn limited to "owners of real property").

The familiar elements of negligence under New York law are duty, breach, causation, and damages. E.g., Aegis Ins. Servs., Inc. v. 7 World Trade Co., 737 F.3d 166, 177 (2d Cir. 2013); Pasternack v. Lab. Corp. of Am. Holdings, 59 N.E.3d 485, 490 (N.Y. 2016); Luina v. Katharine Gibbs Sch. N.Y., Inc., 830 N.Y.S.2d 263, 264 (App. Div. 2007). In their Motion, Defendants focus on the last of these elements. Mem. at 31–35. Specifically, they argue that the Complaint fails to allege a cognizable injury to property, and thus, Plaintiffs' negligence and strict liability claims must be dismissed. Id.

Under Defendants' view, the only substantive allegations in the Complaint concerning contamination refer to the pollution of the Village's groundwater. Id. at 31. While this groundwater constituted the source of Plaintiffs' drinking water (either through the municipal water supply or private wells), Plaintiffs themselves cannot be said to own this groundwater. Id.

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[12] Defendants do not argue in the Motion that their alleged activities were not abnormally dangerous, Mem., a question left for later resolution in this case. Accordingly, while the discussion here is primarily phrased in terms of negligence, these issues are applicable to both theories of liability.

[13] Plaintiffs' claimed personal injury damages—namely, the cost of medical monitoring, Compl. ¶¶ 187, 189—are discussed later in this opinion.

at 31–32. Thus, because what was injured—the aquifer—is not owned by the Plaintiffs, they did not suffer an injury sufficient to raise a negligence claim, which Defendants argue requires a physical injury to their property. Id. at 31–35.

In support of this view, Defendants point to Ivory v. International Business Machines Corp., 983 N.Y.S.2d 110, 117 (App. Div. 2014), in which the Third Department discussed the availability of trespass claims based on groundwater contamination. While the court ultimately allowed the trespass claims because the groundwater "apparently flowed through [and contaminated] the soil under the [plaintiffs'] homes," it noted that contamination of groundwater alone cannot support a trespass claim. Id. This was because "groundwater does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens." Id.

There are two important differences between Ivory and this case. First, the quote from Ivory relied on by Defendants concerned a trespass claim, and not a negligence claim. Id.[14] Second, while Ivory seemed to reject claims based on groundwater contamination alone, it did not consider the contamination of the plaintiffs' drinking water supply (an issue discussed later in connection with the Private Well Plaintiffs' trespass claims). Id. Additionally, the cases cited by Ivory all in turn relied on the definitions section of New York's oil spill statute to settle insurance disputes, and none of these (save for Ivory) held that a private party could not state a claim for negligence when its injuries are rooted in the contamination of groundwater. See Castle Vill. Owners Corp. v. Greater N.Y. Mut. Ins. Co., 878 N.Y.S.2d 311, 315 (App. Div. 2009) (discussing exceptions to an "owned property" exclusion in an insurance policy when a cleanup

[14] Ivory in fact upheld the plaintiffs' negligence claims, but it is unclear what role—if any—the groundwater issue had in this. 983 N.Y.S.2d at 114–16.

of oil from the insured's property was necessary to remedy groundwater contamination); State v. N.Y. Cent. Mut. Fire Ins. Co., 542 N.Y.S.2d 402, 403–04 (App. Div. 1989) (citing N.Y. Nav. Law §§ 170, 172(12), (18)) (same). For purposes of the Motion, however, the Court assumes that Plaintiffs cannot state a claim for relief if the only injury alleged is harm to the groundwater. Thus, the question is whether Plaintiffs have alleged any other property-based injury sufficient to maintain a negligence claim.

Arguing that Plaintiffs do not present such an injury, Defendants point to the Court of Appeals' decision in 532 Madison Avenue Gourmet Foods, Inc v. Finlandia Center, Inc., 750 N.E.2d 1097 (N.Y. 2001). In that case, a consolidation of two lawsuits concerning separate but similar incidents, several shopkeepers and business owners in midtown Manhattan sued after construction collapses blocked access to their buildings. Id. at 1099–100. The issue was whether the plaintiffs, whose property was not itself damaged by the collapses, could state a claim for negligence in an attempt to recover for lost business and other economic damages. Id. at 1100–01. The Court of Appeals found that they could not, and limited recovery to those plaintiffs who "suffered personal injury or property damage" as opposed to those who suffered only a reduction in profits. Id. at 1103.

532 Madison did not, however, announce a talismanic requirement for plaintiffs to allege physical injury to their property (with courts left to determine what constitutes a physical injury). Instead, the decision concerned the existence of a legal duty between the plaintiffs and defendants. Id. at 1101. While recognizing that "[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them," the court found that the expansion of this duty to

protect additional shopkeepers who lost profits due to road closures—shopkeepers whose properties were not themselves reached by the collapse—would unreasonably expand the scope of negligence. Id. at 1102–03; see also id. at 1103 (noting that the limitation imposed "affords a principled basis for reasonably apportioning liability").

The Court of Appeals has repeatedly described how courts should determine the extent of this duty:

> The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability."

Id. at 1101 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001)); accord In re September 11 Litig., 280 F. Supp. 2d 279, 290 (S.D.N.Y. 2003). Such a duty "do[es] *not* rise from mere foreseeability of the harm," Hamilton, 750 N.E.2d at 1062 (citing Pulka v. Edelman, 358 N.E.2d 1019, 1022–23 (N.Y. 1976)), but instead comes from an analysis "of the wrongfulness of a defendant's action or inaction" combined with "an examination of an injured person's reasonable expectation of the care owed," Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 192 (N.Y. 1994).

However a party's duty is ultimately defined in pollution cases, this policy determination must include a duty not to pollute a plaintiff's drinking water. Society has a reasonable expectation that manufacturers avoid contaminating the surrounding environment, an expectation that extends to the pollution of an area's water supply. See, e.g., In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 80–83, 87, 117–19 (2d Cir. 2013) (noting a duty

of care to avoid chemical leaks and water contamination under New York law); Leone v. Leewood Serv. Station, Inc., 624 N.Y.S.2d 610, 612 (App. Div. 1995) (per curiam) (finding "a duty to use reasonable care to maintain . . . underground tanks in a reasonably safe condition"). It is sensible public policy to require that manufacturers avoid polluting the drinking water of the surrounding community, and nothing in 532 Madison prevents a person whose water supply was contaminated by such conduct from recovering in tort, even if she seeks economic damages. Plaintiffs' Complaint sufficiently states a claim for negligence.

In fact, several courts applying New York law have found that loss-of-value damages constitute a sufficient injury in contamination suits when the plaintiff's property is directly affected by the defendant's conduct. As noted by the Southern District of New York, "'stigma damages' have been recognized as a valid category of damages by the New York courts in environmental cases." 87th Street Owners Corp. v. Carnegie Hill–87th Street Corp., 251 F. Supp. 2d 1215, 1223 (S.D.N.Y. 2002); see also Cottonaro v. Southtowns Indus., Inc., 625 N.Y.S.2d 773, 774 (App. Div. 1995) ("Damages from the diminished market value of real property as a result of public fear of exposure to a potential health hazard constitute consequential damages."); cf. Criscuola v. Power Auth. of the State of N.Y., 621 N.E.2d 1195, 1197 (N.Y. 1993) (allowing stigma-based damages in takings cases when plaintiffs "establish some prevalent perception of a danger emanating from the objectionable condition"). Such a fear or stigma, however, must be traceable to the conduct of the defendant, and that conduct must in turn be connected with the property in question. See Halliday v. Norton Co., 696 N.Y.S.2d 549, 551 (App. Div. 1999) (affirming the dismissal of claims for diminished property values when the alleged stigma was from "adverse publicity associated with [a contaminated] landfill," but there had not been actual

contamination of the plaintiffs' property or water supply); Nalley v. Gen. Elec. Co., 630 N.Y.S.2d 452, 457 (Sup. Ct. 1995) (noting that "the land or water of the plaintiffs" must have actually been "contaminated by toxic substances" in order for their property damage claims to survive).

Here, where Plaintiffs allege that the water supply for their property has been contaminated by the acts of Defendants and that the contaminant in question causes negative health consequences, the stigma causing a decline in Plaintiffs' property values is directly traceable to Defendants' conduct. Furthermore, 532 Madison was not a contamination or toxic tort case, and reading it—as Defendants' do—as foreclosing such recovery in contamination suits would upend the New York courts' past holdings in those cases.

Finally, the nonstigmatic injuries claimed by Plaintiffs provide an independent reason why Plaintiffs' negligence claims survive even under Defendants' interpretations of Ivory and 532 Madison. The root injury complained of by Plaintiffs is the loss of their potable water supply, see, e.g., Compl. ¶ 164 ("These unsafe levels of PFOA have deprived and continue to deprive Plaintiffs and the classes of potable water . . . ."), an injury that is not fairly categorized as purely economic in nature. Plaintiffs allege a reduction in property values due to this injury, id., but they also seek compensatory damages for the cost of remediating the contamination to their property and restoring a long-term potable water supply, e.g., id. ¶ 186. While some or all of these damages might later be mitigated by Defendants' outside remediation efforts, see id. ¶ 125 (discussing Defendants' consent decree with the DEC), Plaintiffs certainly have not pleaded themselves out of court with respect to this issue. Accordingly, Plaintiffs' claims for negligence and strict liability based on property damage survive Defendants' Motion.

B. Trespass

In addition to Plaintiffs' negligence and strict liability claims, the Complaint also alleges a cause of action for trespass on behalf of the Private Well Plaintiffs. Compl. ¶¶ 173–78. Defendants' argument in regard to the trespass claims is fundamentally the same as their argument on the negligence and strict liability front: Plaintiffs' property was not injured by the PFOA contamination. Mem. at 33. Defendants rely on Ivory, which again held that "groundwater does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens," and thus cannot form the basis of a private trespass claim. 983 N.Y.S.2d at 117.

Defendants are correct that "[p]ossession is an essential element of a trespass action." Mem. at 33 (quoting Niagara Falls Redevelopment, LLC v. Cerrone, 814 N.Y.S.2d 427, 428 (App. Div. 2006) (per curiam)). But New York courts have indicated the availability of a trespass action to remedy the contamination of a plaintiff's private well, demonstrating that it is the possessory interest in the well itself that is invaded. See Kiley v. State, 426 N.Y.S.2d 78, 78 (App. Div. 1980) (per curiam) (sustaining a claim of trespass based on the contamination of a private well from salt stored on a neighboring property); see also Phillips v. Sun Oil Co., 121 N.E.2d 249, 250–51 (N.Y. 1954) (contemplating the availability of a trespass action provided that the defendant knew or should have known that the plaintiff's well would be affected), pattern); Meehan v. State, 408 N.Y.S.2d 652, 653–54 (Ct. Cl. 1978) ("[E]ven absent negligence there may be liability for pollution of subterranean waters under trespass or nuisance theories.").

Defendants' reference to Ivory and the theory that groundwater is not private property sufficient to sustain a trespass claim does not undo this conclusion, since the groundwater in this

case was simply the medium through which the Private Well Plaintiffs' property was invaded; the property in question is in fact the well. See Phillips, 121 N.E.2d at 251 (describing the claim as based upon "the underground movement[] of noxious fluids" into the plaintiff's well). The contamination of private wells was not discussed in the Ivory case, and the quote relied on by Defendants concerned only a claim based solely on the contamination of groundwater beneath a home. 983 N.Y.S.2d at 117. In fact, Ivory ultimately sustained the plaintiffs' trespass claims because the groundwater there was the medium through which the contaminant entered the homeowners' soil (similar to the contamination of the Private Well Plaintiffs' wells here). Id. Accordingly, Defendants' motion to dismiss the Private Well Plaintiffs' trespass claims is denied.

C. Nuisance

Defendants' argument fares better when it comes to private nuisance. Instead of suggesting that Plaintiffs did not suffer an injury, they argue that the injury alleged was too widespread to constitute a private nuisance. Mem. at 35–36. This is because private nuisance is limited to "that which 'threatens one person or a relatively few.'" Id. at 36 (emphasis omitted) (quoting Caldarola, 2010 WL 6442698, at *15). Thus, since Plaintiffs here claim a harm suffered by "all renters and owners in Hoosick Falls," id., these allegations fail to state a claim for private nuisance and instead constitute a public nuisance, for which only the state or one of its subdivisions has standing to bring suit.

Under New York law, a private nuisance—"actionable by the individual person or persons whose rights have been disturbed"—must affect a relatively small number of people. Copart Indus., Inc. v. Consol. Edison Co. of N.Y., 362 N.E.2d 968, 971 (N.Y. 1977); accord

Scribner v. Summers, 84 F.3d 554, 559 (2d Cir. 1996); see also 81 N.Y. Jur. 2d Nuisances § 6 (2013) ("A private nuisance has been defined as one which violates only private rights and produces damages to but one or a few persons."). If not, the wrong becomes a public nuisance. E.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir. 1985). While the former gives rise to a private right of action, the latter is remedied through governmental action or litigation. Shore Realty, 759 F.2d at 1050; 532 Madison, 750 N.E.2d at 1104; see also 81 N.Y. Jur. 2d, supra, § 4 ("The difference between a public and a private nuisance is significant, primarily because . . . only the public, through the proper officer, may sue to enjoin or abate a public nuisance whereas only a private individual may sue to abate a private nuisance.").

When the injury in question "is 'so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn'" and a private nuisance is precluded. 532 Madison, 750 N.E.2d at 1105 (quoting William L. Prosser, Private Action for Public Nuisance, 52 Va. L. Rev. 997, 1015 (1966)). Indeed, as stated by then-Chief Judge Cardozo, the number affected need not be "very great"; an injury is sufficiently widespread to constitute a public nuisance whenever it may "[]reasonably be classified as a wrong to the community." People v. Rubenfeld, 172 N.E. 485, 486 (N.Y. 1930).

But there is an exception to this private-public divide. Even a public nuisance can permit a private suit for damages when an individual or smaller group "sustains a special loss" that is different in kind from the harm suffered by the rest of the community. 532 Madison, 750 N.E.2d at 1104–05. In this way, a private wrong may be distinguished from a common injury to the public, and a private right of action is restored. See Kavanagh v. Barber, 30 N.E. 235, 235 (N.Y. 1892) ("The public nuisance as to the person who is specially injured thereby in the enjoyment or

value of his lands becomes a private nuisance also."); 81 N.Y. Jur. 2d, supra, § 6 ("[A] public nuisance becomes also a private nuisance as to any person who is specially injured by it to any extent beyond the injury to the public.").

In this case, the Municipal Water Plaintiffs cannot state a claim for private nuisance, and they have not suffered a unique wrong compared to the rest of the community sufficient to sustain a private action for an otherwise public nuisance. As the Complaint alleges, "[t]he Village's municipal water system has approximately 1,300 service connections" and "provides water to nearly 95 percent of the Village's residents." Compl. ¶ 57. This widespread injury clearly fits the definition of public nuisance, and the kind of harm suffered is common among the thousands of residents connected to the municipal water supply.

On the other hand, the Private Well Plaintiffs have suffered "a special loss" sufficient to maintain a nuisance action. 532 Madison, 750 N.E.2d at 1104. Their use of private wells required the installation of POET systems on their property, Compl. ¶¶ 10–12, 123, which in turn necessitates upkeep and maintenance "for the foreseeable future," id. ¶ 123. While the number of private wells in the broader Town of Hoosick is quite high, id. ¶ 59, this does not itself eliminate a private right of action. The harm in question—the contamination of a personal well and the need for remediation on the plaintiff's property—lacks the public character of the contamination of a municipal water supply. Furthermore, even if a certain number of wells would foreclose a claim for private nuisance (or special harm from a public nuisance), the level of contamination among wells described in the Complaint varies so significantly as to prevent such a determination on a motion to dismiss, since only some of these well users may have suffered this special injury. See Compl. ¶¶ 10–12 (discussing well contamination ranging from 67 to 390 ppt).

The Appellate Division's decision in Baity v. General Electric Co., 927 N.Y.S.2d 492 (App. Div. 2011), squarely confirms this outcome:

> [I]t is well settled that the seepage of chemical wastes into a public water supply constitutes a public nuisance. Nevertheless, "[a] public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large." We conclude that defendant failed to meet its burden of establishing that the contamination of plaintiffs' private water wells did not constitute a special injury beyond that suffered by the public at large.

Id. at 495–96 (second alteration in original) (citations omitted) (quoting 532 Madison, 750 N.E.2d at 1104). The Court finds the Baity decision controlling. See Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc., 344 F.3d 211, 221 (2d Cir. 2003) (holding that federal courts must generally follow decisions of the Appellate Divisions).

While the Municipal Water Plaintiffs' injuries are common to the community (or a substantial portion of it) so as to preclude private recovery under a nuisance theory, the Private Well Plaintiffs allege a special harm that sufficiently differs from that suffered by the rest of the area's population. Thus, the nuisance claims of the Municipal Water Plaintiffs are dismissed, but the Private Well Plaintiffs' nuisance claims survive Defendants' Motion.

D. Medical Monitoring

The last argument in Defendants' Motion concerns the availability of medical monitoring damages. Plaintiffs claim that they ingested PFOA-laced water as a result of the contamination, and several of them (the Accumulation Plaintiffs) have elevated levels of PFOA in their blood. Compl. ¶¶ 10–20. Because PFOA is associated with an increased risk of cancer and other diseases, e.g., id. ¶ 45, Plaintiffs seek funding for "a biomonitoring program that is reasonably

tailored to the exposure risks posed by PFOA," id. ¶ 187; see also id. ¶ 189 (outlining Plaintiffs' demand for injunctive relief mandating the creation of a medical monitoring program to "diagnose at an early stage any ailments associated with exposure, inhalation or ingestion of PFOA").

Importantly, Defendants do not argue in their Motion that sufficient exposure to and accumulation of PFOA do not cause adverse health effects (or, more accurately, that Plaintiffs did not plausibly allege such effects). See, e.g., Hill v. City of New York, 45 F.3d 653, 663 (2d Cir. 1995) ("We decline to address this argument because defendants did not raise this defense in their motion to dismiss . . . ."); Universal Entm't Events, Inc. v. Classic Air Charter, Inc., No. 15-CV-1104, 2016 WL 951534, at *4 n.2 (E.D.N.Y. Mar. 8, 2016) ("The Moving Defendants failed to raise the argument in their Memorandum of Law in Support of their Motion to Dismiss, and therefore the argument is not considered at this stage of the judicial proceedings."). Nor do they argue that Plaintiffs' allegations fail to show how medical monitoring could successfully improve their health outcomes following the ingestion of PFOA.

Instead, Defendants assert that Plaintiffs are not entitled to medical monitoring damages as a matter of law, pointing to the New York Court of Appeals' 2013 decision in Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11. In Caronia, the Second Circuit asked the Court of Appeals whether New York would recognize an independent equitable cause of action for medical monitoring for plaintiffs who cannot establish all of the elements of a separate, more traditional tort. Id. at 13–14. The court answered no, holding that plaintiffs may receive medical monitoring as consequential damages only for an "already existing tort." Id. at 18–19. This case represents

one of the first seeking medical monitoring since Caronia was decided, requiring the Court to determine what constitutes such a preexisting tort under New York law.

Defendants interpret Caronia as foreclosing medical monitoring damages absent a present physical injury, and they define physical injury as the manifestation of symptoms or disease. Mem. at 38. Thus, because Plaintiffs do not allege any present symptoms, they cannot state an independent tort—a requirement for medical monitoring damages under New York law.

Defendants' view is incorrect for two reasons. First, under case law cited favorably by Caronia, a plaintiff may show an injury sufficient to seek medical monitoring damages through the accumulation of a toxic substance within her body. Second, Caronia appears to allow medical monitoring damages even if the only tort with a present "injury" involves harm to property, which, as discussed above, Plaintiffs have sufficiently alleged. Defendants' request to dismiss the claims for medical monitoring damages must therefore be denied.

1. Availability of Medical Monitoring Damages

As used in this opinion, medical monitoring refers to a remedy granted after exposure to a toxic substance that provides testing used for early detection of the signs of disease, which in turn allows for earlier and more effective treatment. E.g., Abbatiello, 522 F. Supp. 2d at 536. While the cost of medical testing that is necessary for treatment of a present disease is obviously recoverable as consequential damages, see, e.g., Pilgrim v. Wilson Flat, Inc., 973 N.Y.S.2d 738, 739 (App. Div. 2013) (noting that medical expenses are permitted damages if they are "supported by competent evidence which establishes the need for, and the cost of, [the] medical care"), the availability of an award for medical testing before a disease manifests is a far more challenging question.

The history of medical monitoring cases in New York is discussed more extensively in Abbatiello v. Monsanto Co., 522 F. Supp. 2d at 536–39, but two early Appellate Division cases are especially important. The first is Askey v. Occidental Chemical Corp., 477 N.Y.S.2d 242, 244 (App. Div. 1984), in which plaintiffs sought to certify a class of plaintiffs who resided near a sister landfill of the infamous Love Canal site in the Town of Niagara. Even though the plaintiffs in question did not allege present illnesses caused by exposure, the Appellate Division directed the certification of a class seeking medical monitoring. Id. at 246. The Askey court found that "there is a basis in law to sustain a claim for medical monitoring as an element of consequential damage," provided that the plaintiff "establish[es] with a degree of reasonable medical certainty through expert testimony" that medical monitoring expenses must be incurred as a result of the exposure. Id. at 246–47.

Following Askey was Abusio v. Consolidated Edison Co. of New York, 656 N.Y.S.2d 371 (App. Div. 1997) (per curiam), in which the Second Department reviewed the requirements for medical monitoring damages. In affirming the trial court's decision, the court noted that medical monitoring costs are available when the plaintiff has shown "that he or she was in fact exposed to [a] disease-causing agent and that there is a 'rational basis' for his or her fear of contracting the disease," the same formulation used in New York cases generally allowing suits for fear of future disease. Id. at 372 (quoting Wolff v. A-One Oil, Inc., 627 N.Y.S.2d 788, 789 (App. Div. 1995). The Fourth Department later concurred in this view, reinstating claims seeking medical monitoring damages on summary judgment. Allen v. Gen. Elec. Co., 821 N.Y.S.2d 692, 694–95 (App. Div. 2006) (per curiam).

All this sets the stage for Caronia v. Philip Morris USA, Inc., a cigarette case first filed in 2006. No. 06-CV-224, 2011 WL 338425 (E.D.N.Y. Jan. 13, 2011), aff'd on other grounds, 748 F.3d 454 (2d Cir. 2014). In Caronia, the plaintiffs sought medical monitoring after smoking Marlboro cigarettes "that delivered an excessive and dangerous level of . . . 'tar.'" Id. at *1. While the district court ultimately dismissed the plaintiff's claims, id. at *10–12, it did so only after first finding that there is an independent cause of action for medical monitoring in New York, id. at *4–7.

Through an appeal and subsequent certification, the case found its way to the New York Court of Appeals, which was tasked with determining whether New York law recognizes "an independent equitable cause of action for medical monitoring." 5 N.E.3d at 14. The court answered this question in the negative, finding that in order to obtain medical monitoring damages, a plaintiff must allege "an already existing tort cause of action," which in turn requires an allegation of existing "physical injury or damage to property." Id. at 14, 16, 18–19.

In arriving at this conclusion, Caronia embraced the Appellate Division cases discussed above, noting that they "consistently found that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven, i.e., that it is a form of remedy for an *existing* tort." Id. at 16. Thus, in adopting the Appellate Divisions' view, the Court of Appeals rejected the district court's independent cause of action, which it viewed as permitting recovery even "where the plaintiff alleges absolutely no injury at all." Id. (citing Beckley v. United States, No. 92-CV-8137, 1995 WL 590658, at *4 (S.D.N.Y. Oct. 5, 1995), and Gibbs v. E.I. DuPont de Nemours & Co., 876 F. Supp. 475, 478–79 (W.D.N.Y. 1995), two other cases in which federal district courts found an independent cause of action under New York law).

But Caronia did not upend the definition of injury espoused by Abusio and seemingly championed in its own text. See Stephen J. Riccardulli et al., A Need for Additional Clarity in Medical Monitoring, N.Y. L.J., May 23, 2016, at S2 ("The [Caronia] court, however, did not define what constitutes such a 'present physical injury' in toxic exposure cases . . . ."). Instead, the Caronia court quoted Abusio's language that accumulation coupled with a rational fear of contracting disease was an injury sufficient to receive medical monitoring damages, and noted the Appellate Divisions' use of "the test enunciated in Abusio" as further support for its decision. 5 N.E.3d at 16. Thus, while Caronia does not expressly define physical injury, its adoption of Abusio's reasoning strongly indicates that this definition at least includes the accumulation-based injury described in that case.

Indeed, the Second Circuit, albeit in dictum, endorsed the continued viability of Abusio's standard for medical monitoring damages before the manifestation of symptoms. Under the circuit's interpretation of Caronia, while "[m]edical monitoring is not an independent cause of action under New York law," a plaintiff may still "establish entitlement to damages for fear of cancer" by "show[ing] a '"rational basis" for [the] fear[,] . . . i.e., . . . a "clinically demonstrable presence of toxins in the plaintiff's body, or some indication of toxin-induced disease, i.e., some physical manifestation of toxin contamination."'" In re World Trade Ctr. Lower Manhattan Disaster Site Litig., 758 F.3d 202, 213 (2d Cir. 2014) (last four alterations in original) (quoting Caronia, 5 N.E.3d at 16). Following the Second Circuit's lead, the Court finds that the blood accumulation of PFOA—as alleged by the Accumulation Plaintiffs in this case—is sufficient to permit a claim for negligence seeking medical monitoring damages.

While Defendants categorize this accumulation as exposure without injury, e.g., Reply at 15, this view of the law promotes an absurdity: requiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy. The entire point of medical monitoring is to provide testing that would detect a patient's disease *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment that carries a better chance of success. Abbatiello, 522 F. Supp. 2d at 536; Guzelian et al., supra, at 64, 76–77. "Medical monitoring" provides small comfort to someone already suffering outwardly apparent symptoms if the only benefit is to track the continued advance of the disease. Further, the cost of testing necessary to provide treatment would already be recoverable as a component of damages arising from the illness itself.

Finally, even if the accumulation of PFOA in the blood were not enough to constitute an injury within a preexisting tort, Caronia also allows plaintiffs to seek medical monitoring as consequential damages for a tort alleging injury to property. In that case, the Court of Appeals repeatedly said medical monitoring damages require either "physical injury *or damage to property*" that amounts to some "already existing tort cause of action." Caronia, 5 N.E.3d at 14–19 (emphasis added); see also id. at 16 n.2 (emphasizing the requirement for plaintiffs to allege some "physical injury or property damage" to state a claim seeking medical monitoring); Riccardulli et al., supra ("Caronia acknowledged that a plaintiff may seek medical monitoring relief for property damage . . . ."). The Third Department's decision in Ivory expressly recognized this principle, since it permitted the plaintiffs who alleged trespass claims to seek medical monitoring damages at trial on that basis. See 983 N.Y.S.2d at 118 ("Caronia also indicates that medical monitoring can be recovered as consequential damages associated with a

separate tort alleging property damage. . . . Accordingly, . . . plaintiffs could pursue medical monitoring damages consequential to the trespass cause of action." (citation omitted)).[15]

As discussed earlier in this opinion, Plaintiffs have sufficiently alleged claims for negligence and other torts concerning property. This constitutes "an already existing tort cause of action," Caronia, 5 N.E.3d at 18–19, and so Plaintiffs cannot be denied medical monitoring damages on this motion to dismiss. It is also for this reason that the Nonaccumulation Plantiffs' medical monitoring claims survive Defendants' Motion, though Plaintiffs may have intended to exclude them from their "Biomonitoring Class," Compl. ¶ 135, and it is unclear what they must prove to ultimately receive medical monitoring as consequential damages.

2. Clarifying Caronia

While the Court's reading of Caronia in light of Abusio may open the door to recovery in this case, it is worth noting the potential difficulties of applying Caronia in other settings. This stems from Caronia's apparent holding that the need for medical monitoring alone is not a legally cognizable injury,[16] and thus that there must be some other injury in order to state a tort claim. Caronia, 5 N.E.3d at 14 (noting that "[t]he physical harm requirement . . . defines the class of persons who actually possess a cause of action," and that because the complaint "alleged no

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[15] Insofar as Ivory turns on whether the injury to property constitutes *damage*, see 983 N.Y.S.2d at 118 ("As private nuisance does not require any 'present . . . damage to property,' . . . no plaintiff here has a claim for medical monitoring damages consequential to a nuisance cause of action." (first alteration in original) (quoting Caronia, 5 N.E.3d at 18)), this distinction is at odds with Caronia. Caronia expressly allowed plaintiffs to seek medical monitoring damages "so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action." 5 N.E.3d at 18–19. Any complete tort cause of action, regardless of the legal theory involved, would seem to meet this requirement.

[16] By "need," the Court means that the requested monitoring is medically indicated.

physical injury or damage to property," only a new cause of action could permit legal recovery). The requirement for "an already existing tort cause of action," id. at 18–19, independent of the need for medical monitoring, divorces the damages sought from the nature of the injury incurred, possibly allowing recovery in cases where it is unwarranted and almost certainly denying recovery in some cases where medical monitoring is justified.

As discussed above, Caronia allows a plaintiff to seek medical monitoring damages even when the only present tort alleged involves damage to property. 5 N.E.3d at 14–19, 16 n.2; Ivory, 983 N.Y.S.2d at 118. While the Court of Appeals did not specify what a plaintiff must prove at trial to receive medical monitoring damages (as opposed to some other relief), the decision could nevertheless allow a request for medical monitoring based on property damage alone to survive a motion to dismiss, despite the absence of allegations concerning its medical and scientific appropriateness. See Riccardulli et al., supra ("One can imagine various scenarios where, although a property is impacted by a contaminant, the impact to the property does not result in human exposure—particularly in the case of a subsurface intrusion. Under Caronia and Ivory, however, plaintiffs can still seek medical monitoring costs for this alleged injury." (footnote omitted)).

More significantly, among plaintiffs who have suffered exposure and for whom medical monitoring could improve their prognoses, Caronia bases the availability of medical monitoring on whether they suffered some separate injury to property. If instead of the water supply of her home, a plaintiff consumed a toxic chemical through the water source of a third-party (such as a restaurant), she would lack the damage to property seemingly required by Caronia. Thus, unless this plaintiff also could show bodily accumulation of the offending compound, her suit would be

dismissed for failure to state a claim, despite an absence of difference between the two cases in terms of the defendant's duty, its breach, and the cause of the plaintiff's injury.

Even the accumulation-nonaccumulation dichotomy adds potential complication (though certainly less so than basing the availability of medical testing on whether there was an injury to property). Consider two substances, both of which, through exposure, cause the same increased risk of a disease that can be successfully treated if detected before symptoms become outwardly apparent. One of these has a lengthy biological half-life and accumulates in the blood. The other is rapidly excreted, though its ingestion causes the same exact damage as the accumulating compound. Under Caronia (and in the absence of property damage), it seems that only exposure to the first substance would permit recovery of medical monitoring costs, even though both the harm incurred and the benefits of the remedy are the same in both examples.

The potential for arbitrary outcomes and the denial of medically indicated testing invites further clarification of Caronia. The foundation of that decision's holding is that the award of medical monitoring damages requires "an already existing tort cause of action." 5 N.E.3d at 18–19. In the contamination context (and in this case as well), this most likely means the tort of negligence. Cf., e.g., Aegis, 737 F.3d at 177 (listing the elements of negligence under New York law). If a plaintiff can show duty, breach, and causation, it seems incredible that there would not be a legal injury when the defendant has forced her into a lose-lose situation: she must choose to either bear the cost of medical testing herself, which could end up saving her life, or wait to recover from the defendant until she is already sick, which could be too late to provide effective treatment.

This understanding of injury hinges upon the existence of a dilemma like the one discussed above, but it is hard to see the benefit of medical monitoring outside of such a context. In contrast, damage to property alone—though certainly a tort, and apparently enough to satisfy Caronia's requirements—cannot be enough to warrant this remedy. Thus, a better view of the present injury requirement is one that is independent of accumulation or property damage, instead turning on whether, because of the defendant's actions, the monitoring requested is medically indicated in the plaintiff's situation. See Allen T. Slagel, Note, Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims, 63 Ind. L.J. 849, 872 (1987) ("In order to recover medical surveillance damages, the plaintiff must prove . . . exposure to a hazardous substance[,] . . . [a]s a proximate result of exposure an increased risk of manifesting a serious latent disease requiring her to undergo medical surveillance examinations[,] . . . [and] [t]he existence of a medical test which [makes] early detection of the latent diseases possible and a treatment which can alter the natural history of the disease."); id. at 863 ("The test for the compensability of medical surveillance expenses is whether future testing is necessary to detect the early warning signs of latent ailments.").

Later in this decision, the Court permits the parties to take an interlocutory appeal from the questions of law decided today. The Second Circuit may in turn choose to certify these issues of state law to the New York Court of Appeals. If this comes to pass, either now or on a later appeal, the Court of Appeals could assist the lower courts by clarifying Caronia and rooting its present-injury requirement in the potential effects on the plaintiff's health (such as the quantum of exposure and the dose-dependency of the resultant disease) and the resulting need for medical testing, as opposed to potentially arbitrary distinctions in damage to property or accumulation in

the blood. While the Court recognizes the concern about a deluge of frivolous litigation, Caronia, 5 N.E.3d at 18 & n.3, the judiciary should not retreat from a flood of litigation when the claims it carries have merit.

3. Proof of Damages

Finally, it is worth noting that this decision does not determine what Plaintiffs must prove at trial to receive consequential medical monitoring damages. The Court of Appeals' decision in Caronia did not address this question, but the district court—in articulating the elements of its proposed but ultimately reversed medical monitoring claim—found that an award of these damages requires the availability of a monitoring procedure "that makes early detection possible" and is different from the normal preventive care prescribed in the absence of exposure, and that this monitoring program be "reasonably necessary according to contemporary scientific principles." 2011 WL 338425, at *7; accord Abbatiello, 522 F. Supp. 2d at 539; Redland Soccer Club, Inc. v. Dep't of the Army, 696 A.2d 137, 145–46 (Pa. 1997); see also In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 852 (3d Cir. 1990) (requiring that the "increased risk [of disease] make[] periodic diagnostic medical examinations reasonably necessary" and that "[m]onitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial"); Acevedo v. Consol. Edison Co. of N.Y., 572 N.Y.S.2d 1015, 1018 (Sup. Ct. 1991) ("[M]edical monitoring allowing for early detection and treatment . . . may be sought . . . provided proper proof is adduced at trial supporting the need for such recovery."), abrogated in part by Caronia, 5 N.E.3d 11. Indeed, Askey suggests a similar requirement, finding that "[t]he future expense of medical monitoring[] could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures

are 'reasonably anticipated' to be incurred by reason of their exposure," and that this medical monitoring "would permit the early detection and treatment of maladies." 477 N.Y.S.2d at 247, quoted in Abbatiello, 522 F. Supp. 2d at 539; see also Slagel, supra, at 875–76 ("Unless a sufficiently sensitive and specific medical tests exists to detect the future ailment, no future medical surveillance testing should be performed and no damages awarded. . . . A damage award is appropriate only if early detection allows for a treatment that can ultimately alleviate the ailment.").

The costs of medical monitoring may not be imposed on a defendant at the expense of good medicine, but there is no doubt that medical monitoring damages can be obtained in some cases—this was expressly stated in Caronia. 5 N.E.3d at 18–19. It follows that there must be some way for Plaintiffs to prove their entitlement to them. While the Court need not decide now what must be shown to establish prospective medical monitoring damages, it is worth mentioning this issue to help shape an important component of discovery and future motion practice. Cf., e.g., Redland, 696 A.2d at 146 (noting the necessity of expert testimony in determining the suitability of medical monitoring).

E. Interlocutory Appeal

While not raised by either party, 28 U.S.C. § 1292 allows the district court, when issuing an otherwise unappealable order, to permit an interlocutory appeal to the appropriate circuit court. Specifically, § 1292(b) states that, when a district judge is "of the opinion that [an interlocutory] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."

The requirements of § 1292 are met in this case. As discussed above, Defendants' Motion raises several complex and novel issues of New York law as to which the existing case law is significantly muddled. When a denial of a motion to dismiss (or, as in this case, a grant in part and denial in part) "'involves a new legal question or is of special consequence,' then the district court 'should not hesitate to certify an interlocutory appeal.'" Balintulo v. Daimler AG, 727 F.3d 174, 186 (2d Cir. 2013) (quoting Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009)). This is especially true given the Second Circuit's power to certify questions of state law to the New York Court of Appeals. See Joseph v. Athanasopoulos, 648 F.3d 58, 61, 67–68 (2d Cir. 2011) (certifying question to the New York Court of Appeals after an interlocutory appeal from the district court); cf. 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., 634 F.3d 112, 125–26 (2d Cir. 2010) (listing factors favoring certification to the New York Court of Appeals, including when "decisions by New York courts are insufficient to predict how the Court of Appeals would resolve" a dispute and when the question involves "value judgments and important public policy choices" (quoting Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 42 (2d Cir. 2010))).

In this case, where the question of which claims are viable under New York law could significantly impact the classes to be certified, the scope and focus of discovery, any subsequent motion for summary judgment, and the issues to be presented at trial, an early resolution of the applicable law could significantly improve the efficiency of this litigation and reduce its cost for both Defendants and the putative classes. Furthermore, an interlocutory appeal could benefit either or both parties, since both sides incurred a partially adverse decision through this Memorandum-Decision and Order.

Therefore, the Court certifies this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Any party seeking to appeal pursuant to this certification must apply to the Second Circuit for leave to appeal within ten (10) days of the filing date of this Memorandum-Decision and Order, and any such appeal will not delay proceedings in this Court absent a stay granted by the circuit. § 1292(b).

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion (Dkt. No. 13) is **GRANTED IN PART and DENIED IN PART**; and it is further

ORDERED, that the Municipal Water Plaintiffs' nuisance claims are **DISMISSED**; and it is further

ORDERED, that Plaintiffs' negligence and strict liability claims related to property, the Private Well Plaintiffs' trespass and nuisance claims, and Plaintiffs' negligence and strict liability claims related to PFOA ingestion survive Defendants' Motion; and it is further

ORDERED, that the questions of law decided in this Memorandum-Decision and Order are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and any party may apply for leave to appeal with the United States Court of Appeals for the Second Circuit within **ten (10) days** of the filing date of this Memorandum-Decision and Order;[17] and it is further

ORDERED, that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties pursuant to the Local Rules.

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[17] See also Fed. R. App. P. 5 (providing rules governing petitions for permission to appeal).

IT IS SO ORDERED.

DATED: February 06, 2017
Albany, New York

Lawrence E. Kahn
U.S. District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAIN-LINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC.,

Defendants.

Civ. No. 1:16-CV-917 (LEK/DJS)

MASTER CONSOLIDATED CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiffs, individually and on behalf of the putative classes of similarly situated persons defined herein, file this Master Consolidated Complaint pursuant to the Court's Decision and Order dated July 27, 2016. Dkt. No. 1 at 16. Plaintiffs file suit against Defendants Saint-Gobain Performance Plastics Corp. and Honeywell International Inc. f/k/a Allied-Signal Inc. and/or AlliedSignal Laminate Systems, Inc. (collectively, "Defendants"), and allege as follows:

INTRODUCTION

1. Residents of Hoosick Falls, New York receive their drinking water from groundwater from either the Hoosick Falls municipal water supply or from private wells. Although unknown to them, for years residents have been drinking water laced with a dangerous chemical

called perfluorooctanoic acid, commonly referred to as PFOA. When consumed, PFOA can cause numerous and serious negative health outcomes.

2. The United States Environmental Protection Agency (EPA) recently issued a health advisory for PFOA (and a related chemical, perfluorooctanesulfonic acid, or PFOS), advising against ingesting water with PFOA and PFOS in excess of 70 parts per trillion (ppt). Separately, a panel of scientists studying the health impacts from PFOA-contaminated drinking water in and around Parkersburg, West Virginia found negative health outcomes associated with exposure to drinking water containing PFOA at 50 ppt. Certain states have also promulgated advisory exposure levels lower than the EPA's advisory level, including the State of New Jersey at 40 ppt and the State of Vermont at 20 ppt.

3. The level of PFOA in Hoosick Falls' municipal water supply exceeded 600 ppt when it was tested in 2014 and 2015. Upon information and belief, the concentration of PFOA in the municipal water supply had been this high or higher for years, if not decades. In addition, as of January 2016, numerous private wells in and around Hoosick Falls contained dangerous concentrations of PFOA in excess of any safe drinking standard.

4. The State of New York has identified Defendants Saint-Gobain Performance Plastics Corp. (Saint-Gobain) and Allied Signal Inc. and/or AlliedSignal Laminate Systems, Inc., now doing business as Honeywell International Inc. (Honeywell), as two of the parties, if not the only parties, potentially responsible for the contamination of the groundwater in Hoosick Falls with PFOA.

5. Defendants, in whole or in part, contaminated the aquifer beneath Hoosick Falls with PFOA.

6. On January 27, 2016, New York Governor Andrew Cuomo declared the primary Saint-Gobain facility in Hoosick Falls a state Superfund site and directed New York state agencies to use Superfund money to address PFOA in the municipal water system and in private wells. The State has since described this Saint-Gobain facility, located at 14 McCaffrey Street, as a "significant threat to public health or the environment." Officials have also initiated the process to have the area declared a federal Superfund site.

7. The presence of PFOA in the municipal water supply and the local aquifer immediately stigmatized the community and has adversely impacted and continues to adversely impact property values in the Village and the Town.

8. The PFOA contamination has also adversely impacted, and continues to adversely impact, individuals' ability to use and enjoy their properties, negatively impacted and continues to negatively impact businesses, caused significant annoyance, inconvenience, and hardship, and caused and continues to cause fear and uncertainty among Hoosick Falls residents regarding the safety of their water even after temporary filtration systems were installed. For each of these reasons, as well as those described in more detail below, residents of Hoosick Falls are entitled compensation under the law.

9. Furthermore, the people living in and around Hoosick Falls have been exposed for years, if not decades, to PFOA at concentrations well above a safe drinking level. These residents had no way to know they were consuming water contaminated with PFOA until the contamination was disclosed by state and federal officials. What is more, blood testing has now demonstrated that individuals in the community have concentrations of PFOA in their blood that is, on average, over 30 times higher than the typical American. While PFOA is found in individuals nationwide at an average concentration of 2.08 ug/L (and only 5 percent of the population has PFOA in their

in a concentration of 5.68 ug/L), the median blood level among Hoosick Falls residents who have been tested to date is 64.2 ug/L. Virtually all residents who have lived in and around the Village for several years have PFOA in their blood at alarming concentrations. PFOA has thus placed the people of Hoosick Falls at significant risk of developing health conditions linked to PFOA exposure, and they are entitled to biomonitoring to safeguard against such outcomes.

PARTIES

Plaintiffs

10. Plaintiff Michele Baker is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Baker is a homeowner who obtains her water from a private well. In late January 2016, Ms. Baker commenced refinancing her mortgage with a bank in Hoosick Falls. Over the course of the next several months, Ms. Baker received multiple home appraisals, each of which appraised her home at a lower value than the previous appraisal. A bank representative informed Ms. Baker that the bank was no longer providing financing to residents of Hoosick Falls. Another bank representative told Ms. Baker that the bank could not provide financing to individuals who lacked potable water. The New York State Department of Environmental Conservation (DEC) tested water from Ms. Baker's well and determined that PFOA was present at 67 ppt. In the spring of 2016, DEC installed a Point-of-Entry Treatment (POET) system on Ms. Baker's private well, which reduced, but did not eliminate, the concentration of PFOA in her drinking water. Ms. Baker will require use of the POET indefinitely to filter PFOA from her water. After several months, and only after installation of her POET system, Ms. Baker was ultimately able to secure financing on terms that were much less favorable than they had been prior to disclosure of the PFOA contamination. Upon information and belief,

Ms. Baker's residential property has lost value since PFOA contamination in Hoosick Falls was disclosed.

11. Plaintiff Charles Carr is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Mr. Carr is a homeowner who obtains his water from a private well. He has lived at his current residence since 1993. In 2016, Mr. Carr's private well was tested for the presence of PFOA. He later learned that PFOA was present in his private well at a concentration of at least 390 ppt. Following this discovery, DEC installed a POET system on Mr. Carr's private well that has reduced the concentration of PFOA in his home's drinking water. Mr. Carr will require use of the POET indefinitely to filter PFOA from his water. In the spring of 2016, Mr. Carr had his blood tested at the Hoosick Falls Armory by representatives from the New York State Department of Health (DOH). In June 2016, he was informed that PFOA was present in his blood at a level of 186 ug/L. Mr. Carr routinely drank water from the tap at his residence until he learned that PFOA was contaminating the groundwater in and around Hoosick Falls. To this day, he continues to use bottled water for drinking purposes despite the presence of the POET system.

12. Plaintiff Angela Corbett is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Corbett is a homeowner who obtains her water from a private well. She has lived at her current residence and owned her home since approximately 1992. In 2016, Ms. Corbett's private well was tested for the presence of PFOA. She later learned that PFOA was present in her private well at a concentration of 160 ppt. Following this discovery, DEC installed a POET system on Ms. Corbett's private well that has reduced the concentration of PFOA in her home's drinking water. Ms. Corbett will require use of the POET indefinitely to filter PFOA from her water. Until she was informed in late 2015 that PFOA was contaminating the

groundwater in and around Hoosick Falls, Ms. Corbett routinely drank water from the tap at her residence.

13. Plaintiff Pamela Forrest is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Forrest is a homeowner who obtains her water from the Village of Hoosick Falls municipal water system. She has lived in her current residence since 1996. In the years prior to 2016, Ms. Forrest's home was appraised on multiple occasions. In June 2016, following disclosure of the widespread PFOA contamination in and around Hoosick Falls, Ms. Forrest's home was appraised again, this time showing substantial loss of value compared to multiple prior appraisals. Upon information and belief, this substantial loss of property value is due in whole or in significant part to the disclosure of PFOA contamination and its impact on property values Village-wide.

14. Plaintiff Michael Hickey, individually and as parent and natural guardian of O.H., infant, is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Since 2011, Mr. Hickey has lived at a home in the Village of Hoosick Falls along with his son. They obtain their water from the Village of Hoosick Falls municipal water system. Prior to that, and since 2003, Mr. Hickey has lived at various properties in the Village of Hoosick Falls. At each of these locations, Mr. Hickey obtained his water from the Village of Hoosick Falls municipal water system. In the spring of 2016, Mr. Hickey had his blood tested at the Hoosick Falls Armory by representatives from the DOH. In June 2016, he was informed that PFOA was present in his blood at a level of 24.6 ug/L. Mr. Hickey routinely drank water from the tap at each of his residences until he learned that the municipal water system was contaminated with PFOA.

15. Plaintiff Kathleen Main-Lingener is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Main-Lingener is a homeowner who obtains her

water from the Village of Hoosick Falls municipal water system. She has lived at her residence for nine years. Prior to that, she rented a home in Hoosick Falls for ten years that received its drinking water from the Village of Hoosick Falls municipal water system. In the spring of 2016, Ms. Main-Lingener had her blood tested at the Hoosick Falls Armory by representatives from the DOH. In June 2016, she was informed that PFOA was present in her blood at a level of 95.4 ug/L. Ms. Main-Lingener routinely drank water from the tap at both of her residences in Hoosick Falls until she learned that the municipal water system was contaminated with PFOA.

16. Plaintiff Kristin Miller, as parent and natural guardian of K.M., infant, is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Miller is a homeowner who lives with her seven-year-old son, K.M., at a residence that obtains its water from the municipal water system. Ms. Miller has resided at this property since 2008 and K.M. has lived there for his entire life. In the spring of 2016, K.M.'s blood was tested at the Hoosick Falls Armory by representatives from the DOH. In June 2016, Ms. Miller was informed that PFOA was present in her son's blood at a level of 108 ug/L. Until she learned in late 2015 that PFOA was contaminating the municipal water system of Hoosick Falls, Ms. Miller and K.M. routinely drank water from the tap at their residence, and K.M. has been exposed to the contamination his entire life.

17. Plaintiff James Morier is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Mr. Morier is a homeowner who obtains his water from the Village of Hoosick Falls municipal water system. He has lived at his current residence since 1995. In the spring of 2016, Mr. Morier had his blood tested at the Hoosick Falls Armory by representatives from the DOH. In June 2016, he was informed that PFOA was present in his blood at a level of

79.1 ug/L. Mr. Morier routinely drank water from the tap at both of his residences in Hoosick Falls until he learned that the municipal water system was contaminated with PFOA.

18. Plaintiff Jennifer Plouffe is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Plouffe is a homeowner who obtains her water from the Village of Hoosick Falls municipal water system. In October 2015, Ms. Plouffe moved to Hoosick Falls from out of state. At this time, she did not know that the municipal water system was dangerously contaminated with PFOA. The following month, she purchased her current home. At this time, she remained unaware of the PFOA contamination in and around Hoosick Falls. Within a month of her closing date, however, the state and federal government disclosed the extent of PFOA contamination in the Village and Town. Ms. Plouffe immediately found herself owner of a home worth less than she paid for it with no means of obtaining financing to move elsewhere because lending institutions had ceased providing financing to homeowners on municipal water.

19. Plaintiff Silvia Potter, individually and as parent and natural guardian of K.P., infant, is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Ms. Potter is a homeowner who obtains her water from the Village of Hoosick Falls municipal water system. Although Ms. Potter would like to refinance her home, she is skeptical that she could do so on reasonable terms now that state officials have disclosed the presence of PFOA in the municipal water supply. In the spring of 2016, Ms. Potter had her blood tested at the Hoosick Falls Armory by representatives from the DOH. In June 2016, she was informed that her PFOA level is 120 ug/L. Ms. Potter routinely drank water from the tap at her residence prior to learning that the municipal water was contaminated with PFOA. Ms. Potter's minor daughter, K.P., also had her blood tested in the spring of 2016. Ms. Potter was informed in June 2016 that her daughter's blood level is 28.6 ug/L.

20. Plaintiff Daniel Schuttig is a citizen and resident of Hoosick Falls, New York, with a mailing zip code of 12090. Mr. Schuttig owns his home in Hoosick Falls and lives there with his wife and two young children. He has owned the home since 2006, refinancing it in 2011, and the home is on municipal water. Neither Mr. Schuttig nor his children have yet had their blood tested for the presence of PFOA. Until he learned in late 2015 that PFOA was contaminating the groundwater in and around Hoosick Falls, Mr. Schuttig and his family routinely drank water from the tap at their residence.

21. Collectively, Plaintiffs Michele Baker, Charles Carr, Angela Corbett, Pamela Forrest, Michael Hickey, individually and as parent and natural guardian of O.H., infant, Kathleen Main-Lingener, Kristin Miller, as parent and natural guardian of K.M., infant, James Morier, Jennifer Plouffe, Silvia Potter, individually and as parent and natural guardian of K.P., infant, and Daniel Schuttig are referred to as "Plaintiffs."

Defendants

22. Defendant Saint-Gobain Performance Plastics Corporation is and was at all times relevant hereto a corporation organized under the laws of California with its principal executive office located at 750 East Swedesford Road, Valley Forge, Pennsylvania. Saint-Gobain is registered to do business as a foreign corporation in the State of New York.

23. Saint-Gobain's global headquarters are located in Curbevoie, France, and it is a multinational corporation with more than 350 years of engineered materials expertise. It is one of the 100 largest industrial companies in the world with € 43.2 billion in sales and 193,000 employees in 64 countries.

24. Saint-Gobain is the world's leading producer of engineered, high-performance polymer products, serving virtually every major industry across the globe.

25. Defendant Honeywell International, formerly known as Allied-Signal Inc. and/or AlliedSignal Laminate Systems, Inc., is a Delaware corporation with its principal executive office located at 115 Tabor Road, Morris Plains, New Jersey. Honeywell is registered to do business as a foreign corporation in the State of New York.

26. Honeywell is a Fortune 100 company with a global workforce of approximately 130,000. It serves a variety of industries, including the specialty chemicals industry.

27. In 1999, Allied-Signal Inc. (Allied-Signal) acquired Honeywell. The combined company adopted Honeywell's name because of superior name recognition.

28. Allied-Signal was an aerospace, automotive, and engineering company that was created through the 1985 merger of Allied Corp. and Signal Companies. Together, these companies had operated in the United States since at least the early 1920s. Prior to the merger, a significant portion of Allied Corp.'s business was concerned with the chemical industry.

29. At all relevant times, AlliedSignal Laminate Systems, Inc. was a unit of Allied-Signal.

30. Defendants, at various times relevant herein, and as described more fully below, operated a manufacturing facility at or around 14 McCaffrey Street, Hoosick Falls, New York, and 1 Liberty Street, Hoosick Falls, New York. Defendant Honeywell also operated facilities on John Street/3 Lyman Street in Hoosick Falls, New York, and on River Road in Hoosick Falls, New York.

JURISDICTION AND VENUE

31. Jurisdiction is proper in this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because members of the proposed Plaintiff classes are citizens of states different

from Defendants' home states, and the aggregate amount in controversy exceeds $5,000,000, exclusive of interest and costs.

32. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because Defendant Saint-Gobain conducts substantial business in this District, and both Defendants have caused harm to class members residing in this District. Plaintiffs also reside in this District.

GENERAL FACTUAL ALLEGATIONS

Background Regarding PFOA

33. PFOA is a fluorinated organic chemical that is part of a larger group of chemicals referred to as perfluoroalkyl substances (PFASs).

34. PFOA is a derivative of a man-made chemical Ammonium perfluroctoanoate (APFO), which is not found in nature. For purposes of this complaint, PFOA and APFO will be referred to as "PFOA."

35. Minnesota Mining and Manufacturing Company (3M) is the original manufacturer of PFOA.

36. A number of other companies have manufactured PFOA within the United States. Those companies include Arkema, Asahi, BASF Corp., Clariant, Daikin, DuPont and Solvay Solexis.

37. Historically, PFOA was used as a polymerization aid and as a dispersion and wetting agent in the manufacturing of fluoropolymers. PFOA is also used in a variety of consumer products to achieve water, oil, and grease repellency.

38. Companies utilized PFOA to make, among other things, carpets, clothing, fabrics for furniture, paper packaging for food and other materials such as cookware that are resistant to water, grease or stains.

39. PFOA was also a key component in the manufacturing of Teflon®. In this process, PFOA was used as a surfactant, dispersing and wetting agent.

40. PFOA is a white solid at ambient temperature, but exists as a vapor when heated during the process of coating and Teflon® manufacturing. The vapor exits through stacks in manufacturing facilities. When hot PFOA vapor exits through the stacks, it tends to condense and, within minutes, it coagulates and forms micro-sized particulates ranging from 0.1 um to 1 um in diameter.

41. Due to its chemical structure, PFOA is biologically and chemically stable in the environment and resistant to environmental degradation processes. It is particularly persistent in water and soil and, because PFOA is water-soluble, it can migrate readily from soil to groundwater. PFOA, in short, remains present in the environment long after it is initially discharged.

42. In 2006, EPA implemented a global stewardship program that included eight major perfluoroalkyl manufacturing companies. The stewardship program's goal was (i) to achieve a 95% reduction of global facility emissions of PFOAs and chemicals that degrade to PFOA by 2010, and (ii) to eliminate PFOAs from emissions and products by 2015. According to EPA, all eight companies that participated in the program have attested that they phased out PFOAs, and chemicals that degrade to PFOAs, from emissions and products by the end of 2015.

43. There are a number of health risks associated with exposure to PFOA, and these risks are present even when PFOA is ingested at seemingly low levels (less than 1.0 parts per billion (ppb)).

44. Toxicology studies show that PFOA is readily absorbed after ingestion or inhalation exposure. PFOA has a half-life in the human body of 2 to 9 years. PFOA binds to albumen in the serum and is concentrated in the liver and kidneys. Indeed, PFOA is especially

concerning from a human health standpoint precisely because it can stay in the environment and in the human body for long periods of time.

45. PFOA is associated with increased risk in humans of testicular cancer, kidney cancer, prostate cancer, non-Hodgkin's lymphoma, pancreatic cancer and ovarian cancer, as well as thyroid disease, high cholesterol, high uric acid levels, elevated liver enzymes, ulcerative colitis, and pregnancy-induced hypertension, as well as other conditions. Epidemiological studies of PFOA exposure in animals has shown the ability to cause other cancers not yet associated with human exposure. EPA has also advised that exposure to PFOA may result in developmental effects to fetuses during pregnancy or to breastfed infants, liver damage, and various immunological effects.

46. In May 2006, the EPA Science Advisory Board stated that PFOA cancer data are consistent with guidelines suggesting exposure to the chemical is "likely to be carcinogenic to humans."

47. The health conditions set forth above can arise months or years after exposure to PFOA.

48. In 2009, the EPA identified PFOA as an emerging contaminant of concern and issued a provisional health advisory stating that lifetime exposure to PFOA at a concentration of 400 ppt can cause human health effects. The provisional health advisory stated that the discovery of PFOA in water above the advisory level should result in the discontinued use of the water for drinking or cooking.

49. Moreover, EPA also established a Reference Dose (RfD) of 0.000002 mg/kg/day. The Reference Dose is defined by EPA as an "estimate[] (with uncertainties spanning perhaps an order of magnitude) of the daily exposure to the human population (including sensitive subgroups)

that is likely to be without an appreciable risk of deleterious effects during a lifetime." United States EPA, *Draft Health Effects Document for Perfluorooctanoic Acid (PFOA)*, p. 5-1 (Feb. 2014).

50. Following EPA's action in 2009, the State of Minnesota established a chronic health risk limit for PFOA in drinking water of 0.3 ppb (300 ppt).

51. In 2013, the State of New Jersey established a preliminary health-based guidance level of 0.04 ppb (40 ppt) in drinking water.

52. In 2016, the State of Vermont established a drinking water advisory of 0.02 ppb (20 ppt).

53. In May 2016, EPA replaced its 2009 provisional health advisory with a new lifetime advisory. The 2016 lifetime health advisory established that the presence of PFOA in drinking water at a concentration greater than 70 ppt should require water systems to undertake remediation and public health officials to promptly notify consumers about the health risks associated with exposure to PFOA. EPA health advisories are non-enforceable on the states.

54. Prior to January 2016, PFOA was an unregulated contaminant within the State of New York.

The Village of Hoosick Falls and the Town of Hoosick

55. The Village of Hoosick Falls has a population of approximately 3,500 individuals and is located approximately 30 miles northeast of Albany, New York.

56. The Village of Hoosick Falls operates and maintains the municipal water system.

57. The Village's municipal water system has approximately 1,300 service connections. The Village estimates that its system provides water to nearly 95 percent of the Village's residents.

58. The Village is near the center of the Town of Hoosick, located along Route 22 in Rensselaer County. The Town of Hoosick has a population of approximately 6,900 individuals.

59. There are over 800 private wells that provide drinking water to those living in the Town of Hoosick.

PFOA Use in and around Hoosick Falls

60. For several decades beginning as early as the late 1950s, PFOA was used in manufacturing processes at facilities in and around Hoosick Falls.

61. One of these facilities is a small factory located at 14 McCaffrey Street ("McCaffrey Street Site"). New York State has identified the McCaffrey Street Site as a probable source for the presence of PFOA in the Village municipal water supply and local aquifer. Indeed, the State has characterized the McCaffrey Street Site as a "significant threat to public health or the environment."

62. The McCaffrey Street Site began operation in or about 1955. A company called Dodge Fibers Corporation owned and operated the factory at that time.

63. Upon information and belief, in or about 1967 Oak Materials Group, Inc. purchased the assets and liabilities of Dodge Fibers, including the McCaffrey Street Site.

64. Upon information and belief, in or about 1986, Defendant Honeywell, f/k/a Allied-Signal purchased Oak Materials Group, Inc., which included the assets and liabilities of the McCaffrey Street Site. Allied-Signal operated the McCaffrey Street Site until 1996.

65. Upon information and belief, in or about 1996, Defendant Honeywell (f/k/a Allied-Signal) sold the assets and liabilities of the McCaffrey Street Site to Furon Company (Furon).

66. Upon information and belief, in or about 1999, Defendant Saint-Gobain purchased the assets and liabilities of Furon, including the McCaffrey Street Site.

67. Defendant Saint-Gobain has continuously owned and operated the McCaffrey Street Site from the time it purchased the Furon Company to the present.

68. Throughout the operation of the McCaffrey Street Site, each company manufactured stain and water resistant fabric and/or Teflon® at the factory.

69. In manufacturing stain-resistant fabric, each company coated the fabric with a liquid solution containing PFOA (the "PFOA Solution").

70. Saint-Gobain, Furon, Allied-Signal, and Oak Materials utilized trays for the application of the PFOA Solution to the fabric. Employees added the solution to the trays during production runs and recovered a portion of the solution at the end of the run each shift.

71. During the drying process, heat would vaporize a portion of the PFOA, which was discharged from the facility as fine particulate matter that was then transported by wind to the community.

72. Defendants' employees, at the direction of corporate officers, washed out and discharged the remaining PFOA Solution from the trays into drains on a daily basis during each shift. Those floor drains resulted in the discharge of PFOA into the soil and, in turn, into the aquifer.

73. On average, Saint-Gobain ran three shifts, five days a week at the McCaffrey facility.

74. Saint-Gobain also utilized PFOA in other processes at the McCaffrey Street Site between 1999 and approximately 2004. Among other things, Saint-Gobain produced PTFE (polytetrafluoroethylene) film, adhesive tapes and silicone rubber for aeronautical, automotive, food processing and energy applications.

75. Saint-Gobain claims that it halted the use of PFOA in its fabric coating operations at the McCaffrey plant around 2004, and began using another fluorinated carbon chemical as a surfactant in manufacturing. Saint-Gobain continued to use PFOA in its silicone rubber operations at the plant until approximately 2014.

76. Throughout the period during which Oak Materials, Allied-Signal, Furon, and Saint-Gobain owned the McCaffrey facility, each company also used PFOA in a solid form as a part of a separate process to manufacture, *inter alia*, pressure-sensitive tapes, Teflon®-coated fabrics, and Teflon® sheet, tape and laminates.

77. Oak Materials, Allied-Signal, Furon and Saint-Gobain utilized six large, approximately three-story ovens as a part of their manufacturing process.

78. The use of the ovens produced a sticky residue that would adhere to the internal tubing or "stacks" within the oven, and PFOA comprised a part of that residue.

79. Each company established a rotation by which each oven and its stacks were cleaned once every six weeks, with a different oven cleaned every Monday.

80. Defendants' employees removed the residue in the stacks by washing the stacks in a large sink that measured approximately 3 feet by 3 feet by 20 feet in size. At the end of each cleaning, the waste water from the cleaning was discharged down a drain and may have been released into a septic system or catch basin near the McCaffrey plant. Those floor drains and other discharge points resulted in the discharge of PFOA into the soil and, in turn, into the aquifer.

81. New York State has identified at least three additional sites in and around Hoosick Falls that are potential sources of PFOA contamination.

82. One of those sites is located at 1 Liberty Street ("Liberty Street Site"). Saint-Gobain currently owns this site and Allied-Signal (Honeywell) previously owned and operated

this facility. The New York DEC has classified the Liberty Street Site as a "p-site," meaning that preliminary information suggests the site and surrounding areas may be contaminated but further investigation is required.

83. Saint-Gobain claims that from 1999 through 2014, its extruded tape department at the Liberty Street Site used raw materials that contained PFOA.

84. DEC has identified two additional sites, both formerly operated by Oak Materials and Allied-Signal, located on John Street/3 Lyman Street and River Road. DEC has classified both of these sites as p-sites and further investigation is ongoing.

85. DEC has also stated that its preliminary investigation has identified PFOA within the leachate coming from the former municipal landfill, and it has stated that it anticipates classifying the former landfill as a p-site in the near future. DEC has measured PFOA levels of 21,000 ppt within the leachate. The landfill is adjacent to the Hoosic River and leachate from the landfill continues to migrate towards and into the river.

86. Upon information and belief, Defendants discharged PFOA into the environment through other means and at other sites that will be revealed through the discovery process.

Disclosure of PFOA Contamination

87. In or around 2007, the Village completed the construction of a new production well to supply municipal water to many of the residents of Hoosick Falls.

88. The production well lies approximately 500 yards away from the McCaffrey Street Site.

89. The Village conducted testing in fall 2014 that confirmed high levels of PFOA in the municipal water.

90. In June 2015, the Hoosick Falls Water Department conducted tests on the effluent from its production well(s) in order to discern whether PFOA existed within the water supply.

91. Shortly thereafter, the Village received the results from its production well(s) tests.

92. Those tests again confirmed the presence of high concentrations of PFOA within the municipal water system.

93. Testing of municipal water produced detections of 612 ppt, 618 ppt, 620 ppt, 151 ppt and 662 ppt for PFOA.

94. Similarly, the Village oversaw the testing of certain private wells within the Village in the summer of 2015, and received results that included detections that were significantly above any safe level.

95. The Village's response to these test results was to reassure individuals within the community that the water was safe to drink.

96. In October 2015, EPA Region 2 administrator Judith Enck learned of the PFOA test results taken in and around Hoosick Falls.

97. On November 25, 2015, the EPA contacted the Village and recommended the use of an alternative drinking water source. EPA further recommended that residents not use the municipal water for drinking and cooking.

98. In early December 2015, the DOH released a fact sheet for the Village. That fact sheet stated, in part, "Health effects are not expected to occur from normal use of the water."

99. Village officials further minimized the potential risk of PFOA in the municipal water.

100. The EPA repeated its recommendation to the Village on December 17, 2015, after learning that Village officials were downplaying the first EPA notice and suggesting that whether or not an individual used municipal water was a matter of personal choice.

101. Unbeknownst to the community at the time, Saint-Gobain was privately negotiating with Village elected officials in an effort to minimize its liability.

102. Shortly after the EPA's December 17 warning, Saint-Gobain began providing free bottled water to Village residents dependent on municipal water. Saint-Gobain also agreed to fund the installation of a granulated activated carbon filter system on the municipal water system to reduce the level of and/or remove PFOA from drinking water.

103. On January 14, 2016, Healthy Hoosick Water, a local community group, sponsored a public meeting with personnel from the EPA, the DOH and the DEC.

104. At that meeting, New York officials announced that New York State had submitted a letter that day seeking the designation of the McCaffrey Street Site as a state Superfund site.

105. During the mid-January meeting, residents dependent on private wells questioned state officials about whether their wells may also be contaminated. State officials indicated that the DOH would test the private wells of any individual upon request.

106. In fact, DOH put off testing most of the private wells in and around the Town of Hoosick and instead focused its resources on the wells nearest the McCaffrey Street Site.

107. The DOH avoided providing private well testing for several more weeks. In response to growing public outcry, however, the state finally reversed course and began testing the private well of anyone requesting it.

108. In mid-January, a consultant hired by the state sent an email to DOH employees stating that "all of the manufacturing in the village went to the 'dump.' Although the landfill was

decommissioned and capped several years ago all of the potential PFOA rich leachate goes to the treatment plant and eventually out to the Hoosic River. It may be alarmingly high and we need to get at least a baseline level." Testing later confirmed that wells and soil in close proximity to the Hoosick landfill were contaminated with PFOA. Indeed, one water sample taken from the landfill showed PFOA at a concentration above 21,000 ppt. Upon information and belief, Defendants discarded PFOA-laden waste at the landfill for years before it was decommissioned.

109. The Hoosick Falls school district announced on January 22, 2016, that testing identified PFOA within the well water at its transportation center.

110. On January 27, 2016, Governor Cuomo directed state agencies to use state Superfund money to address PFOA in the Hoosick Falls municipal water system. The State Health Commissioner said that the Saint-Gobain plant would be deemed a state Superfund site and designated it a Class 2 site.

111. That same day, the governor announced an emergency regulation to classify PFOA as a hazardous substance. This designation is temporary pending promulgation of a final agency rule.

112. On January 28, 2016, the EPA advised that home owners with private wells should use bottled water if testing had uncovered PFOA level in their water at 0.1 ppb (100 ppt) or higher. The EPA further recommended that home owners with private wells should use bottled water if no one has yet tested their well water.

113. At that time, one or more local banks indicated that they would not advance funds for the purchase or refinancing of a home in Hoosick Falls. Indeed, the Treasurer of Trustco Bank, Kevin Timmons, publicly confirmed that the bank was not writing new mortgages for any home

on the Village's municipal water supply. Timmons indicated that lenders typically require that homes have access to potable water before financing is approved.

114. Timmons further stated that financing would not be approved for homes on private wells until the water supply was tested for the presence of PFOAs and showed the absence (or a very low level) of PFOAs. Homeowners with private wells would later be required to prove that their water was not contaminated as a prerequisite to acquiring financing. Even when financing resumed, lenders offered interest rates that were much less favorable to borrowers than the rates offered in late 2015, prior to disclosure of PFOA contamination.

115. As a result of the presence of PFOA within the aquifer, the municipal water system and private wells, the property values in and around Hoosick Falls have experienced a significant decline since the presence of PFOA was disclosed in December 2015. That decline persists to this day and is expected to continue.

116. On or around February 1, 2016, United States Senator Charles Schumer called on Saint-Gobain to disclose immediately the full extent of the pollution it caused. Senator Schumer stated, "Saint-Gobain did this. They've got to first come clean as to what happened, where they put the stuff, and then work on a plan to quickly clean it up."

117. On February 5, 2016, news outlets reported that some Village residents were bathing by sponge because they were afraid of inadvertently ingesting water during a shower.

118. On February 11, 2016, DEC identified Saint-Gobain and Honeywell as the parties potentially responsible for PFOA contamination at one or more properties in Hoosick Falls, including the McCaffrey Street Site.

119. The DEC demanded at that time that each company enter into an enforceable Consent Order to characterize and investigate the extent of the contamination, to provide interim

remedial measures to protect public health and drinking water supplies, to analyze alternatives for providing clean and safe drinking water and, ultimately, to design and implement a comprehensive clean-up and remediation protocol.

120. On February 13, 2016, DOH began offering blood testing to any Hoosick Falls residents who wished to have their blood tested for the presence of PFOA. Over 3,000 individuals have participated in this program to date.

121. By February 24, 2016, a newly installed carbon filtration system at the municipal water treatment plant became fully operational. This carbon filtration system is temporary, with a permanent filter to be installed by December 2016. Although the temporary filter has been in place since February 2016, residents continue to rely on bottled water for drinking.

122. On February 26, 2016, state officials disclosed results from tests performed at private wells. Of 145 wells tested, 42 showed PFOA contamination above 100 ppt.

123. The DEC also announced at this time that it had commenced installation of POET systems for homes with private wells. DEC stated at that time that it had received 281 requests for POETs. Throughout the spring, residents in and around Hoosick Falls would continue to deal with frustrations relating to installation and upkeep of POET systems. Requests for POET systems continued to mount, and as of the date of this Complaint the state has installed over 800 POET systems on private wells in and around Hoosick Falls. These POET systems must remain installed for the foreseeable future and will require regular maintenance.

124. In early March 2016, the state disclosed results from water samples taken from the Hoosick Falls Water Treatment Plant in or around February 2016. The highest sample showed PFOA at a concentration of 983 ppt.

125. On June 3, 2016, DEC announced that it had reached agreement on two Consent Orders with Saint-Gobain and Honeywell. These Consent Orders require Defendants to, *inter alia*, conduct further study of the Liberty Street Site and the sites at John Street and River Road—each of which was classified as a p-site under New York law.

126. Around the same time as DEC's announcement, state officials began releasing the results of blood testing performed in February and March of 2016. Over the course of the following two months, DOH officials would release data gathered from testing over 3,000 individuals.

127. Numerous residents, including several Plaintiffs, received blood tests indicating that PFOA was present in their blood at alarming levels. According to the DOH, the median blood level among those tested is 64.2 ug/L, a level that is 30 times higher than the national average level of 2.08 ug/L. The median for men 60 and over was 91 ug/L.

128. The 95th percentile of Americans has 5.68 ug/L of PFOA in their blood.

129. Virtually all of the long-time residents of Hoosick Falls had blood levels an order of magnitude or more above background levels of PFOA in their blood serum. Almost all of these long-time residents also had blood levels significantly above the 95th percentile of Americans.

130. Moreover, the vast majority of residents and former residents of Hoosick Falls have been exposed to PFOA at a level that meets or exceeds some health-based comparison value.

131. The results of the state's blood testing led to shock and fear among the residents of Hoosick Falls. Since the results were mailed, the State has been unable to provide any reasonable health guidance to those with elevated blood levels.

132. On July 8, 2016, United States Senator Kirsten Gillibrand echoed these concerns at a town hall meeting in Hoosick Falls. Senator Gillibrand emphasized the need for and creation of

a biomonitoring program similar to the protocol implemented for first responders following the 9/11 World Trade Center attacks. To date, neither the Defendants nor the State has taken any action to implement such a program.

CLASS ACTION ALLEGATIONS

133. Plaintiffs incorporate the foregoing paragraphs as though the same were set forth at length herein.

134. Plaintiffs bring this lawsuit as a class action on their own behalf and on behalf of all other persons similarly situated as members of the proposed classes pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(2), and (b)(3). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those provisions.

135. Plaintiffs bring this class action on behalf of the following classes, as set forth below:

> **Municipal Water Property Damage Class**
> All individuals who, as of December 1, 2015, are or were owners of real property located in the Village of Hoosick Falls, New York and/or are or were owners of real property with a mailing zip code of 12090 or 12089, and who receive or received their drinking water from the municipal water system.
>
> **Private Well Water Property Damage Class**
> All individuals who, as of December 1, 2015, are or were owners of real property located in the Village of Hoosick Falls, New York and/or are or were owners of real property with a mailing zip code of 12090 or 12089, and who obtain or obtained their drinking water from a privately owned well.
>
> **Municipal Water Nuisance Class**
> All individuals who, as of the time a class is certified in this case, are owners or lessors of real property located in the Village of Hoosick Falls, New York and/or are owners or lessors of real property with a mailing zip code of 12090 or 12089, and who receive their drinking water from the municipal water system.
>
> **Private Well Water Nuisance Class**

All individuals who, as of the time a class is certified in this case, are owners or lessors of real property located in the Village of Hoosick Falls, New York and/or are owners or lessors of real property with a mailing zip code of 12090 or 12089, and who receive their drinking water from a privately owned well.

Biomonitoring Class
All individuals who, as of the time a class is certified in this case, have ingested PFOA-contaminated water from the Village water supply or from a contaminated private well in or around Hoosick Falls and who have suffered accumulation of PFOA in their bodies as demonstrated by (i) blood serum tests disclosing a PFOA level in their blood above the recognized background levels, or (ii) documentation of an increased opportunity for exposure, as defined in ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA.[1]

136. For purposes of the classes set forth above, the phrase "municipal water system" refers to the water system operated by the Village of Hoosick Falls.

137. Excluded from the classes set forth above are: (a) Defendants, any entity or division in which Defendants have a controlling interest, and their legal representatives, officers, directors, assigns, and successors; (b) the Judge to whom this case is assigned and the Judge's staff; (c) any class counsel or their immediate family members; (d) any State or any of its agencies; (e) the Village of Hoosick Falls and the Town of Hoosick; and (f) any individual who otherwise would be included under one or more of the class descriptions above but who has filed a lawsuit for personal injury for a PFOA-related illness related to exposure to municipal or private well water.

138. Plaintiffs reserve the right to amend the class definitions set forth above if discovery and/or further investigation reveals that any class should be expanded, divided into subclasses or modified in any way.

[1] *See* ATSDR's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA, https://www.gpo.gov/fdsys/pkg/FR-1995-07-28/pdf/95-18578.pdf.

Numerosity

139. Although the exact number of class members is uncertain and can be ascertained only through appropriate discovery, the number is great enough such that joinder is impracticable. Indeed, there are approximately 3500 individuals who live in the Village of Hoosick Falls and over 6000 that live in the Town of Hoosick. Nearly all of the Village residents are dependent on the municipal water system. In the Town, there are over 800 private wells. Each of the classes set forth above is sufficiently numerous to warrant class treatment, and the disposition of the claims of these class members in a single action will provide substantial benefits to all parties and to the Court.

140. Further, class members are readily identifiable from publically available information regarding property ownership and/or residential history.

Typicality

141. Plaintiffs' claims are typical of the claims of the classes in that Plaintiffs, like all class members, are owners or lessors of real property that have experienced a diminution in value and/or nuisance due to the actions of the Defendants. Further, Plaintiffs, like the Biomonitoring Class, have been exposed to drinking water contaminated with PFOA, as evidenced by blood serum tests and/or documentation of an increased opportunity for exposure. Plaintiffs and the Biomonitoring class are at significant risk of developing medical conditions associated with exposure to PFOA.

142. Moreover, the factual bases of Defendants' misconduct are common to all class members and represent a common thread of misconduct resulting in injury to all members of the classes.

Adequate Representation

143. Plaintiffs will fairly and adequately represent and protect the interests of the classes. Plaintiffs have retained counsel with substantial experience litigating both environmental torts and class actions, including actions, like this one, representing putative classes whose property has been devalued by the actions of a polluter and/or who have been exposed to dangerous chemicals and are in need of biomonitoring. This Court has also determined that undersigned counsel have the skill and experience necessary to litigate this action on behalf of the classes.

144. Plaintiffs and their counsel are committed to vigorously prosecuting this action on behalf of the classes and have the financial resources to do so. Neither Plaintiffs nor their counsel has interests adverse to the classes.

Predominance of Common Questions

145. Plaintiffs bring this action under Rule 23(b)(3) because there are numerous questions of law and fact common to Plaintiffs and the class members that predominate over any question affecting only individual class members. The answers to these common questions will advance resolution of the litigation as to all class members. These common legal and factual issues include:

a. Whether Defendants owed a duty to Plaintiffs and members of the classes to refrain from conduct reasonably likely to cause contamination of class members' drinking water;

b. Whether Defendants knew or should have known that it was unreasonably dangerous to dispose of PFOA into the environment;

c. Whether Defendants knew or should have known that disposing of PFOA in the manner alleged herein was reasonably likely to cause contamination of class members' drinking water;

d. Whether Defendants breached a legal duty to Plaintiffs and the classes by disposing of PFOA in the manner described herein;

e. Whether Defendants' breach of a legal duty caused class members' drinking water to become contaminated with PFOA;

f. Whether it was foreseeable that Defendants' use of PFOA would cause class members' drinking water to become contaminated and/or unreasonably dangerous for normal and foreseeable human consumption or use;

g. Whether the PFOA contamination described herein substantially interfered with Plaintiffs' and class members' use and enjoyment of their property;

h. Whether the PFOA contamination described herein caused, and continues to cause, a continuous invasion of the property rights of Plaintiffs and the classes;

i. Whether Defendants caused the devaluation of Plaintiffs' and class members' property;

j. Whether Defendants caused PFOA to enter, invade, intrude upon or injure the property rights of Plaintiffs and the classes.

k. Whether Plaintiffs, Infant Plaintiffs, and the classes are at increased risk of illness and harm as a result of the PFOA accumulation they have sustained in their bodies from drinking municipal or private well water;

l. Whether biomonitoring and surveillance is reasonable and necessary to assure early diagnosis and treatment of PFOA-related illnesses and conditions;

m. Whether early diagnosis and treatment of the conditions caused by PFOA will be beneficial to Plaintiffs, Infant Plaintiffs, and the Biomonitoring Class; and

n. Whether Defendants' conduct warrants the imposition of punitive damages.

Superiority

146. Plaintiffs and members of the classes have all suffered and will continue to suffer harm and damages as a result of Defendants' unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

147. Absent a class action, most class members would likely find the cost of litigating their claims to be prohibitively high and, therefore, would have no effective remedy at law. Further, without class litigation, class members will continue to incur damages.

148. Class treatment of common questions of law and fact will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication.

Rule 23(b)(2) Injunctive or Declaratory Relief

149. In addition to the above, Plaintiffs bring this class action under Rule 23(b)(2) because Defendants have acted or refused to act on grounds that apply generally to the classes, such that final injunctive relief or declaratory relief is appropriate with respect to each class as a whole. Such injunctive relief includes, but is not limited to, an injunction to require a biomonitoring program sufficient to monitor class members' health to ensure they are adequately protected from the deleterious effects of PFOA on the human body, and an order requiring Defendants to institute remedial measures sufficient to permanently prevent PFOAs from contaminating class members' drinking water and/or properties.

150. Accordingly, Plaintiffs seek an injunction requiring Defendants to implement a biomonitoring program to aid the Biomonitoring Class and to institute remedial measures to prevent further PFOA contamination of class members' drinking water and properties.

151. Finally, Plaintiffs and the classes seek a declaration that Defendants acted with negligence, gross negligence, and/or willful, wanton, and careless disregard for the health, safety, and property of Plaintiffs and members of the classes.

Rule 23(c)(4) Certification of Particular Issues

152. In the alternative to certification under Rule 23(b)(2) or 23(b)(3), Plaintiffs and the classes seek to maintain a class action with respect to particular issues under Rule 23(c)(4).

153. Specifically, the liability of each Defendant, or the Defendants jointly, is suitable for issue certification under Rule 23(c)(4).

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Negligence

154. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint as if they were set forth at length herein.

155. This Claim is brought under New York law on behalf of the Municipal Water Property Damage Class, the Private Well Water Property Damage Class, and the Biomonitoring Class.

156. Defendants knew or should have known that use of PFOA Solution and/or PFOA and/or the discharge of PFOA into the air, ground and sewer system was potentially hazardous to human health and the environment and required Defendants to take adequate safety precautions to ensure that PFOA was not released into the surrounding environment.

157. Defendants further knew or should have known that it was unsafe and/or unreasonably dangerous to wash out and/or discharge filters or trays containing PFOA Solution

and/or PFOA onto the ground within floor drains in, and in close proximity to, the McCaffrey Street Site and/or the p-sites identified herein.

158. Defendants further knew or should have known that it was unsafe and/or unreasonably dangerous to wash out and/or discharge into the environment the residue from the manufacturing ovens and their stacks.

159. Defendants further knew or should have known that it was unsafe and/or unreasonably dangerous to permit PFOA vapors to exit from stacks at the McCaffrey Street Site and/or the p-sites identified herein without adequate control measures.

160. Defendants had a duty to take all reasonable measures to ensure that PFOA Solution and/or PFOA would be effectively contained and not discharged into the surrounding environment.

161. Defendants further had a duty to ensure that the manufacturing processes they chose to employ did not unreasonably endanger the drinking water relied upon by residents of Hoosick Falls and the surrounding area.

162. Defendants breached the above-stated duties by unreasonably disposing of PFOA Solution and/or PFOA in a manner that guaranteed PFOA would enter the environment, including the groundwater.

163. As a result of Defendants' breach, the drinking water in and around Hoosick Falls, New York has become contaminated with unsafe levels of PFOA. Indeed, Defendants, through the negligent, reckless and/or intentional acts and omissions alleged herein, have contaminated both the municipal drinking water system and the drinking water of private wells in Hoosick Falls and the surrounding area.

164. These unsafe levels of PFOA have deprived and continue to deprive Plaintiffs and the classes of potable water and have reduced class members' property values.

165. Further, by exposing Plaintiffs, Infant Plaintiffs, and the Biomonitoring Class to unsafe levels of PFOA, Defendants have caused and continue to cause Plaintiffs, Infant Plaintiffs, and the Biomonitoring Class to suffer injury and damage at the cellular and genetic level by the accumulation of PFOA in their bodies.

166. As a direct and proximate result of Defendants' actions and omissions described herein, Plaintiffs and the classes have suffered and continue to suffer damages, including personal injury due to the accumulation of PFOA in their bodies; the loss of property value; monetary damages associated with the investigation, treatment, remediation, and monitoring of drinking water and the contamination of their respective property; as well as compensatory and consequential damages set forth below.

SECOND CLAIM FOR RELIEF

Private Nuisance

167. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint as if they were set forth at length herein.

168. This Claim is brought under New York law on behalf of Plaintiffs and the Municipal Water Nuisance Class and Private Well Water Nuisance Class.

169. Defendants, through the negligent, reckless and/or intentional acts and omissions alleged herein, have contaminated both the municipal drinking water system and drinking water of private wells in Hoosick Falls and the surrounding area.

170. The contamination of class members' drinking water has interfered with the rights of Plaintiffs and the classes to use and enjoy their property. Indeed, this interference is substantial in nature. It has caused and is causing Plaintiffs and the classes to, *inter alia*, refrain from using water to drink, cook, or bathe, which has, in turn, caused significant inconvenience and expense.

Defendants' conduct has also substantially interfered with class members' ability to enjoy their property, to avail themselves of their property's value as an asset and/or source of collateral for financing, and to use their property in the manner that each class member so chooses.

171. Defendants' negligent, reckless and/or intentional acts and omissions were unreasonable and constitute a continuous invasion of the property rights of Plaintiffs and the classes.

172. As a direct and proximate result of Defendants' acts and omissions as alleged herein, Plaintiffs and the classes have incurred, and will continue to incur, costs and expenses related to the investigation, treatment, remediation, and monitoring of drinking water and the contamination of their respective properties, as well as the damages set forth below.

THIRD CLAIM FOR RELIEF

Trespass

173. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint as if they were set forth at length herein.

174. This Claim is brought under New York law on behalf of the Private Well Water Property Damage Class.

175. Plaintiffs and the Private Well Water Property Damage Class members are owners of real property with the right of possession.

176. Defendants negligently, recklessly, and/or intentionally failed to properly control, apply, use and/or dispose of PFOA Solution and/or PFOA or other waste containing PFOA, such that Defendants proximately caused PFOA contaminants to enter, invade, intrude upon and injure the right of Plaintiffs and the Private Well Water Property Damage Class to possess their property.

177. Plaintiffs and the Private Well Water Class have not consented, and do not consent, to the contamination alleged herein. Defendants knew or reasonably should have known that Plaintiffs and the Private Well Water Class would not consent to this trespass.

178. As a direct and proximate result of Defendants' acts and omissions as alleged herein, the drinking water of Plaintiffs and the Private Well Water Property Damage Class has been contaminated with PFOA, causing significant property damage, including actual, consequential, and nominal damages, as well as those set forth in more detail below.

FOURTH CLAIM FOR RELIEF

Strict Liability for Abnormally Dangerous Activity

179. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint as if they were set forth at length herein.

180. In the alternative to the First Claim for Relief, set forth above, Plaintiffs bring this Claim under New York law.

181. Defendants' manufacturing processes and negligent, reckless, and/or intentional handling of PFOA Solution and/or PFOA constituted an abnormally dangerous activity for which Defendants are strictly liable.

182. Defendants' use and disposal of PFOA Solution, PFOA or other waste containing PFOA, as described herein, was inappropriate to the place where it was carried out, especially given the close proximity of the McCaffrey Street Site and the p-sites identified herein to sources of drinking water relied upon by residents of Hoosick Falls.

183. Furthermore, Defendants' use and disposal of PFOA, and reckless disregard for the consequences of those actions, carried a high degree of risk of harm to others and a likelihood that any such harm would be great. Indeed, the result of Defendants' conduct is all too clear. The State

of New York has, *inter alia*, declared the McCaffrey Street Site a Superfund site, it may designate other facilities in the Village as Superfund sites, and it has activated emergency funds to remediate the situation.

184. As a result of Defendants' abnormally dangerous activities, Plaintiffs and the class members have suffered and continue to suffer harm to their property and injuries to their bodies and have been forced to mitigate damages as set forth herein, as well as below.

DAMAGES SOUGHT BY THE CLASS

185. Plaintiffs hereby incorporate by reference the allegations contained in the preceding paragraphs of this Complaint as if they were set forth at length herein.

186. Plaintiffs and the classes have sustained and will continue to sustain damages to their property and health as a result of Defendants' actions. As a result, Plaintiffs and the classes seek monetary damages for each violation of the First through Fourth Claims for Relief. In particular, Plaintiffs and the classes seek (i) monetary damages reflecting the cost to remediate class members' property of the contamination caused by Defendants' conduct or, in the alternative, to compensate class members for the diminution in value of their property caused by Defendants' conduct; (ii) monetary damages to compensate class members for the loss of the use and enjoyment of their properties caused by Defendant's conduct; (iii) monetary damages for the diminution of the value of the plaintiffs' property, and (iv) monetary damages to compensate class members for the loss of quality of life caused by Defendants' conduct.

187. Plaintiffs and the classes also seek consequential damages sufficient to fund a biomonitoring program that is reasonably tailored to the exposure risks posed by PFOA.

188. Further, because Defendants' acts were done maliciously, oppressively, deliberately, and in reckless disregard of Plaintiffs and the classes, Defendants' conduct warrants an assessment of punitive damages in an amount sufficient to deter such conduct in the future.

189. In addition to the above, Plaintiffs and the classes seek injunctive relief including, but not limited to, implementation of a mandatory testing protocol requiring Defendants to regularly test the wells of all Private Well Water Property Damage Class members for the presence of PFOA and to continue that testing until it is determined that the risk of PFOA contamination in private wells has ceased; to install permanent filtration devices on any private well testing positive for the presence of PFOA, and to maintain those filtration devices pursuant to industry best practices; to establish a biomonitoring protocol for Biomonitoring Class Members to monitor their health and diagnose at an early stage any ailments associated with exposure, inhalation or ingestion of PFOA; and to take additional steps, to be proven at trial, that are determined necessary to remediate all class members' properties and/or residences to eliminate the presence of PFOA.

PRAYER FOR RELIEF

Plaintiffs, on behalf of themselves and all others similarly situated, request the Court to enter judgment against the Defendants, as follows:

A. an order certifying the proposed Municipal Water Property Damage Class, Private Well Water Property Damage Class, Municipal Water Nuisance Class, Private Well Water Nuisance Class, and Biomonitoring Class, designating Plaintiffs as the named representatives of the respective classes, and designating the undersigned as Class Counsel;

B. a declaration that Defendants acted with negligence, gross negligence, and/or willful, wanton, and careless disregard for the health, safety, and property of Plaintiffs and members of the classes;

C. an order requiring Defendants (i) to implement a testing protocol to test the wells belonging to each member of the Private Well Water Property Damage Class; (ii) to install permanent filtration devices on any private well testing positive for the presence of PFOA and to maintain those filtration devices until the risk of PFOA contamination in the groundwater has ceased; (iii) to establish a biomonitoring protocol for Plaintiffs and Biomonitoring Class Members to monitor their health and diagnose at an early stage any ailments associated with exposure, inhalation or ingestion of PFOA, and (iv) to take all necessary steps to remediate the property and/or residences of Plaintiffs and the classes to eliminate the presence of PFOA;

D. an award to Plaintiffs and class members of compensatory, exemplary, and consequential damages, including interest, in an amount to be proven at trial;

E. an award of attorneys' fees and costs, as permitted by law;

F. an award of pre-judgment and post-judgment interest, as provided by law;

G. leave to amend this Complaint to conform to the evidence produced at trial; and

H. such other relief as may be appropriate under the circumstances and/or permitted by law or as the Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by jury of any and all issues in this action so triable of right.

Dated: August 26, 2016
Albany, New York

Respectfully submitted,

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EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated, Plaintiffs, v. SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC., Defendants.	Civ. No. 1:16-CV-917 (LEK/DJS) Hon. Lawrence E. Kahn Magistrate Judge Daniel J. Stewart

STIPULATION AND ORDER STAYING INJUNCTIVE CLAIMS

WHEREAS on September 26, 2016, Defendants moved to dismiss the Consolidated Class Action Complaint;

WHEREAS Defendants' motion asserted, among other points, that the Court should stay or dismiss the Complaint's claims for injunctive relief pursuant to 42 U.S.C. § 9613(h) and the primary jurisdiction doctrine;

WHEREAS the parties agree that ongoing efforts by state and federal agencies in cooperation with Defendants may have an impact on Plaintiffs' claims for injunctive relief;

WHEREAS the parties agree that, in the interests of avoiding unnecessary motion practice and in promoting the efficient disposition of this action, Plaintiffs' claims for injunctive relief should be stayed for six months; and

WHEREAS the parties agree that, following this six-month stay, the parties and the Court will be in a better position to discuss the appropriate treatment of Plaintiffs' claims for injunctive relief;

NOW THEREFORE, it is hereby STIPULATED AND AGREED, by and between the parties and their undersigned counsel, as follows:

1. Plaintiffs' claims for injunctive relief should be STAYED for six months from the date this stipulation is entered as an Order;

2. Discovery regarding prospective remedial measures as set forth in paragraphs 149 and 189 of the Master Consolidated Compliant should be STAYED for six months from the date this stipulation is entered as an Order;

3. The parties shall confer no later than three weeks prior to the expiration of this stay to discuss Plaintiffs' claims for injunctive relief, and the need to decide some or all portions of the pending motion to dismiss directed at Plaintiffs' claims for injunctive relief, at the expiration of this six-month stay, and shall provide a joint report to the Court on that issue no later than one week prior to the expiration of the stay.

4. The parties do not waive and expressly reserve all of their rights and defenses with respect to any challenges to Plaintiffs' claims for injunctive relief that may be brought upon the expiration of the stay. Moreover, the parties agree that if the stay is lifted without an agreement between the parties that moots the stayed portions of the pending motion to dismiss, the stay will not convert the stayed portions of the pending motion to dismiss into a request for

summary judgment.

Dated: October 25, 2016

Respectfully submitted,

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Honeywell International Inc.

IT IS SO ORDERED.

October 26, 2016
Albany, New York

Lawrence E. Kahn
U.S. District Judge

Daniel J. Stewart, U.S.M.J.

Dated:

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER, ANGELA CORBETT, and DANIEL SCHUTTIG, *individually and on behalf of all others similarly situated*,

Plaintiffs,

- v -

Civ. No. 1:16-CV-0220 (LEK/DJS)

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC.,

Defendants.

LISA TIFFT and MARILYN PECKHAM, *individually and on behalf of all others similarly situated*,

Plaintiffs,

- v -

Civ. No. 1:16-CV-0292 (LEK/DJS)

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC.,

Defendants.

MICHAEL HICKEY, *individually, and as parent and natural guardian of O.H., infant, individually and on behalf of all others similarly situated*,

Plaintiffs,

- v -

Civ. No. 1:16-CV-0394 (LEK/DJS)

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC.,

Defendants.

BRYAN SCHROM and KARY SCHROM, *individually and on behalf of all others similarly situated,*

Plaintiffs,

- v -

Civ. No. 1:16-CV-0476 (LEK/DJS)

SAINT-GOBAIN PERFORMANCE PLASTICS CORP. and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC.,

Defendants.

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DANIEL J. STEWART
United States Magistrate Judge

DECISION and ORDER

The Plaintiffs in these four related actions, each acting on behalf of a putative class, have asserted various claims relating to water contamination in the Hoosick Falls area. *See Baker, et al. v. Saint-Gobain, et al.*, Civ. No. 1:16-CV- 220 (LEK/DJS) ("*Baker*"); *Tifft, et al. v. Saint-Gobain, et al.*, Civ. No. 1:16-CV-292 (LEK/DJS) ("*Tifft*"); *Hickey, et al. v. Saint-Gobain, et al.*, Civ. No. 1:16-CV-394 (LEK/DJS) ("*Hickey*"); *Schrom, et al. v. Saint-Gobain, et al.*, Civ. No. 1:16-CV-476 (LEK/DJS) ("*Schrom*").[1] Currently before the Court are Motions seeking to consolidate the above-captioned actions and to have the Court appoint interim class counsel. *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 39; *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 35.[2] For the reasons set forth below, I **grant** the requests to consolidate the four actions and to appoint interim class counsel; specifically, I appoint the Law Firms of Weitz & Luxenberg and Faraci Lang, LLP as Co-Lead Interim Class Counsel, and I appoint the Law Firm of Powers & Santola as Liaison Counsel.

I. BACKGROUND

On February 24, 2016, Plaintiffs Michele Baker, Angela Corbett, Michelle O'Leary, and Daniel Schutting, by their attorneys Weitz & Luxenberg, P.C., filed the first water contamination

[1] A fifth action was also filed, which was recently deemed to be related to the four actions noted hereinabove. *See Hoosick Falls Assoc. v. Saint-Gobain, et al.*, Civ. No. 1:16-CV-596 (LEK/DJS). Currently, a Motion to Remand is pending before the assigned District Judge, *id.* at Dkt. No. 31, and, therefore, this case is not included in my consideration of the pending Motions to Consolidate and Appoint Class Counsel.

[2] The *Hickey* Plaintiffs joined in the Motion that was filed in the *Baker* action. *See Baker*, Civ. No. 1:16-CV-220, Dkt. No. 39. The *Schrom* and *Tifft* Plaintiffs also filed subsequent Letter-Motions regarding their respective proposals for appointing interim lead class counsel. *See Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 39; *Schrom*, Civ. No. 1:16-CV-476, Dkt. No. 10.

lawsuit in this District on behalf of themselves and all others similarly situated. *Baker*, Civ. No.1:16-CV-220, Dkt. No. 1, Compl. According to the *Baker* Amended Complaint,[3] residents of the Village of Hoosick Falls have for years been drinking water "laced with a dangerous chemical called perflurooctanoic acid, commonly referred to as PFOA." Dkt. No. 6, Am. Compl., at ¶ 1. The Amended Complaint further alleges that Defendants Saint-Gobain and Allied Signal Inc., the latter now doing business as Honeywell International, caused the contamination of the groundwater from a facility located in Hoosick Falls (the "McCaffrey Street Facility"). *Id*. at ¶¶ 2 & 39. The *Baker* Plaintiffs claim that the contamination subjected Plaintiffs to numerous health issues as well as a resultant devaluation of their property. *Id.* at ¶ 1.

The Village of Hoosick Falls has a population of approximately 3,500 inhabitants, and operates its own municipal water system.[4] *Id.* at ¶¶ 60 & 61. The Hoosick Falls Water Department conducted tests on their water in June of 2015, which confirmed the presence of PFOA in the municipal water system.[5] *Id.* at ¶¶ 67-70. As a result of these findings, various actions were taken, including a request to designate Hoosick Falls as a federal Superfund site. *Id*. at ¶ 80. All of this is alleged to have negatively impacted the property values of the community, with banks refusing to advance funds for the purchase or refinancing of homes in Hoosick Falls. *Id*. at ¶¶ 87-88.

The *Baker* class action asserts claims on behalf of two subclasses, one for all current owners of real property located in the Village of Hoosick Falls connected to the municipal water system,

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[3] The Complaint was amended as of right on February 26, 2016, and Michele O'Leary was removed as a named Plaintiff. *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 6, Am. Compl.

[4] Residents that do not utilize the municipal system obtain their water through wells. *See Baker*, Civ. No. 1:16-CV-220, Am. Compl. at ¶ 98.

[5] Other testing allegedly confirmed PFOA contamination in private wells. *See Baker*, Civ. No. 1:16-CV-220, Am. Compl. at ¶ 72.

and a second subclass for current owners of real property in the Village who utilize private well water.

Id. at ¶ 98. Jurisdiction of the *Baker* action is premised upon the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). *Id.* at ¶ 19. The Amended Complaint seeks monetary damages to compensate class members for the cost of remediating property of contamination, diminution of property value, and loss of use and enjoyment of property and quality of life, as well as punitive damages, and the implementation of a mandatory testing protocol. *Id.* at ¶¶ 147-50.

On March 10, 2016, the *Tifft* lawsuit was commenced by Lisa Tifft and Marilyn Peckham, by and through their attorneys Finkelstein, Blankinship, Frei-Pearson, & Garber, LLP, on behalf of themselves and on behalf of all others similarly situated. *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 1, Compl. The two named Plaintiffs allege various physical ailments that they maintain were proximately caused by PFOA exposure, in addition to the loss of value of Plaintiff Peckham's property. *Id.* at ¶¶ 52-54. The proposed class action in that suit is brought on behalf of two subclasses, one, all residents of Rensselaer County who consumed water supplied by Hoosick Falls, and second, all persons who own or have owned real property in Hoosick Falls. *Id.* at ¶ 55.

On April 6, 2016, Plaintiff Michael Hickey and his child, O. H., by and through their attorneys, Faraci Lange, LLP,[6] commenced the third action in this District on behalf of themselves and on behalf of all others similarly situated. *Hickey*, Civ. No. 1:16-CV-394, Dkt. No. 1, Compl. In that action, Plaintiffs identify two proposed subclasses, one, all current owners of real property in the Village of Hoosick Falls who receive their water from the Village water supply, and second, all individuals who drank or bathed in contaminated water and have accumulated PFOA in their

[6] Several law firms are noted on the *Hickey* Complaint, however, it appears that Faraci Lange, LLP is proceeding as the lead counsel for that action. *See Hickey*, Civ. No. 1:16-CV-394, Dkt. No. 1, Compl., at p. 17.

bodies. *Id.* at ¶ 40.

Finally, on April 26, 2016, Plaintiffs Bryan and Kary Schrom, by and through their attorneys Powers & Santola, LLP, and Napoli Shkolnik PLLC, commenced a fourth action against the Defendants on behalf of themselves and on behalf of all others similarly situated. *Schrom*, Civ. No. 1:16-CV-476, Dkt. No. 1, Compl. The *Schrom* Plaintiffs also seek to bring the action on behalf of two proposed subclasses, one, all residents of Hoosick Falls who have consumed water from the municipal water supply, and second, all owners of real property in Hoosick Falls. *Id.* at ¶ 81.

On May 27, 2016, counsel for the *Baker* and *Hickey* Plaintiffs jointly filed a Motion seeking to Consolidate the pending actions and to have interim class counsel appointed. In seeking appointment of lead counsel, they also sought adoption of the case management and billing protocol plan. *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 39. Thereafter, a request was made by counsel in the *Tifft* action for consolidation and for appointment of interim class counsel. *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 35. On June 10, 2016, the Court held an initial hearing on the Motions currently pending, and subsequent filings have been received and reviewed by the Court. *See Baker*, Civ. No. 1:16-CV-220, Dkt. No. 45; *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 39; *Schrom*, Civ. No. 1:16-CV-476, Dkt. No. 10.

II. CONSOLIDATION

As an initial matter, the Court will deal with the requests to consolidate these actions. As indicated during the June 10th hearing, the request to consolidate is warranted and appropriate. Indeed, each of the cases contained in the caption above have been deemed related for purposes of this District's General Order 12(G). *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 11; *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 8; *Hickey*, Civ. No. 1:16-CV-394, Dkt. No. 7; *Schrom*, Civ. No. 1:16-CV-476,

Dkt. No. 6. The named Defendants are the same in each case, and the cases arise out of the same common nucleus of operative fact and involve common questions of law. Upon review of the matter and in the interest of judicial economy, it is hereby **ORDERED** that the cases are consolidated in accordance with General Order 12(G)(7).[7]

III. INTERIM CLASS COUNSEL PROPOSALS

Next, the Court deals with the competing requests for appointment of interim class counsel. According to the Motions before the Court, the *Baker* and *Hickey* Plaintiffs propose appointment of co-lead interim class counsel comprised of Weitz & Luxenberg, P.C., and Faraci Lange, LLP (the "Weitz-Faraci Group"). *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 39. In support of their Motion, counsel note that they have extensive experience in mass tort litigation in general, as well as specific experience in water contamination class actions in New York State. *Id.*, Dkt. No. 39-1 at pp. 3-4. The two law firms have been actively involved in identifying and investigating potential claims from the contamination in Hoosick Falls since the earliest possible stage, conducting meetings, advising residents, and consulting with experts. *Id*. at pp. 8-10. At the time they filed their Motion to consolidate and be appointed lead interim class counsel, the Weitz-Faraci group had met with over 1000 residents and had been retained by over 500 clients. *Id.* at p. 3. That group of clients had increased to approximately 700 at the time of this Court's initial hearing in June.

A competing proposal was submitted by counsel in the *Tifft* and *Schrom* actions, seeking instead the appointment of Hunter Shkolnik, Esq., of Napoli Shkolnick PLLC, and Jeremiah Frei-

[7] In the interest of judicial efficiency, the Clerk of the Court will be directed to administratively open a new civil action, which shall be deemed the lead case for these consolidated cases. It is in this newly opened lead case wherein a master consolidated complaint will be filed and all further filings related to these consolidated actions shall be filed. If, as anticipated, more cases are brought in this District, the Court will review and determine whether such cases should be added to the consolidated lead civil action.

Pearson, Esq., of Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, as co-lead counsel, and John Powers, Esq., of Powers & Santola, LLP, as liaison counsel (the "Napoli-FBFG Group"). *See Tifft*, Civ. No.1:16-CV-292, Dkt. No. 35-1 at p. 1. The proposal from the Napoli-FBFG Group also notes their experience with mass tort litigation and their involvement with the Hoosick Falls matter in particular. *Id.* at pp. 10-13.

On June 10, 2016, the Court held an initial hearing, and the issues of consolidation and appointment of interim class action counsel were discussed at length.[8] While the Court indicated it would grant the consolidation Motion, the Court urged all counsel to communicate amongst themselves to attempt to voluntarily work out an effective leadership structure and report back to the Court on their efforts by June 24, 2016. *See Baker*, Civ. No.1:16-CV-292, Dkt. No. 44; *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 38; *Hickey*, Civ. No. 1:16-CV-394, Dkt. No. 17; *Schrom*, Civ. No. 1:16-CV-476, Dkt. No. 9. It appears that during the adjourned time period discussions were held amongst counsel, but no consensus was reached. *See Baker*, Civ. No. 1:16-CV-220, Dkt. No. 45; *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 39, *Schrom*, Civ. No. 1:16-CV-476, Dkt No. 10. The alternate proposals provided in each case include a proposal by the Weitz-Faraci Group for a tripartite leadership group made up of the Weitz-Faraci Group and one firm from the Napoli-FBFG Group, with Mr. Powers acting as liaison counsel. *Baker*, Civ. No. 1:16-CV-220, Dkt. No. 45. For its part, the Napoli-FBFG Group proposed a four firm leadership structure, consisting of Weitz, Faraci, Napoli, and FBFG, with Mr. Powers as liaison. *Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 39. A "streamlined" proposal with one member of the Weitz-Faraci Group and one member of the Napoli-

[8] Although the *Schrom* Plaintiffs did not formally move nor join in any of the pending Motions, the Court felt that the early stage of that litigation may have prevented such formal motion practice and nevertheless found it prudent to join them in the hearing before the Court so that their perspective could be voiced.

FBFG Group was also discussed. *Id.* at p. 1. Unable to reach a compromise, the two groups ultimately returned to the Court with their original proposals.

IV. DISCUSSION

When considering the appointment of interim class counsel, this Court considers the same factors that a court appointing lead counsel for a certified class must consider, including the candidates' qualifications and competence, their ability to fairly represent diverse interests, and their ability "to command the respect of their colleagues and work cooperatively with opposing counsel and the court." *Manual for Complex Litigation* § 10.224 (4th ed. 2004); *see* FED. R. CIV. P. 23(g)(1)(A). The Court should also examine anything else that is "pertinent to counsel's ability to fairly and adequately represent the interests of the class," FED. R. CIV. P. 23(g)(1)(B), including "(1) the quality of the pleadings; (2) the vigorousness of the prosecution of the lawsuits; and (3) the capabilities of counsel." *In re Comverse Tech., Inc. Derivative Litig.*, 2006 WL 3761986, at *2-3 (E.D.N.Y. Sept. 22, 2006). Ultimately, the court's task in deciding these motions is "to protect the interests of the plaintiffs, not their lawyers." *In re Parking Heaters Mem. Antitrust Litig.*, 310 F.R.D. 54, 57 (E.D.N.Y. 2015) (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 2006 WL 2038650, at *4 (E.D.N.Y. Feb. 24, 2006)). It is this last point that is of particular importance in the present case.

There appears to be no question that the attorneys and law firms that are vying for the position of interim lead counsel are extremely well qualified for that role. The submissions received by the Court to date, and the presentations made, have been top-notch, and speak to an extraordinarily high level of competence. Thus, the Court is faced with a series of good alternatives.

As a starting point, there is no question that the Weitz-Faraci Group has been retained by the

largest number of clients in this matter, has worked closely with the community and public officials, they have the financial resources to effectively prosecute the matter, and was the first to file a lawsuit. *See Baker*, Civ. No. 1:16-CV-220, Dkt. No. 39-1 at pp. 8-17. Of even more significance to the Court, however, is the work of the Weitz and Faraci law firms in previous groundwater contamination cases in Broome County and Monroe County New York. *See id.* at pp. 3-4. For these reasons, the Court finds that it is appropriate to appoint Weitz and Faraci as Co-Lead Interim Class Counsel.

The Court has considered at length the proposals of the Napoli-FBFG Group regarding lead representation in the matter. Having decided that Weitz-Faraci should be involved as lead counsel, the question for the Court is whether the Napoli-FBFG Group should also play a part in the leadership structure. Through the course of negotiations it appears that the offer to have a single member of the Napoli-FBFG Group join together with Weitz and Faraci has been rejected. *See Tifft*, Civ. No. 1:16-CV-292, Dkt. No. 39 at p. 2. The Court understands the reason for this and that the only proposal that would likely be acceptable is one in which the Napoli-FBFG Group has an equal voting role in a two firm or four firm grouping.

It is the Court's considered opinion that such an evenly weighted leadership structure could and would likely lead to dissension and delay, and this has been evidenced by what has occurred to date. The inability to reach a compromise on the single issue of the management structure bodes poorly for a combined leadership team with equal voting to promote the efficiency and economy of the case for all the clients. Nor does the Court feel that the facts and breadth of this particular case requires a four-firm leadership structure. Nothing in the foregoing should be considered as a criticism of any particular attorney or firm, and simply because a group of clients does not have their

attorneys in the leadership structure does not mean that they will not be active participants in the case. Certainly the Court's expectation is that Co-Lead Interim Class Counsel will seek out and consider the input of all counsel in progressing this matter towards class certification. When and if a class-action is certified by the assigned United States District Judge, he will no doubt review the status and makeup of class counsel.

While the Court is not adopting a four-firm management group, the Court does believe that appointment a Liaison Counsel would be helpful and appropriate. On this point, all involved agree that Powers & Santola should act as Liaison Counsel, and the Court adopts that suggestion.

V. CONCLUSION

For the reasons set forth above, I find that consolidation of all the cases noted in the above caption is appropriate. I further appoint Weitz & Luxenberg and Faraci Lang as Co-Lead Interim Class Counsel in this matter, and Powers & Santola as Liaison Counsel. And, accordingly, I deny the request seeking appointment of others as interim lead class counsel.

WHEREFORE, it is hereby

ORDERED, that pursuant to Federal Rule of Civil Procedure 42(a)(2), the above-captioned cases, which have been deemed related pursuant to General Order 12(G)(2), are consolidated. The Clerk of the Court is directed to administratively open a new civil action, designated Civ. No. 1:16-CV-917 (LEK/DJS), which shall be deemed the Lead Case for these consolidated actions, and shall designate all four civil actions noted in the caption above as Member Cases. The newly opened Lead Case shall list as Plaintiffs "Michele Baker, Angela Corbett, Daniel Shuttig, Lisa Tifft, Marilyn Peckham, Michael Hickey, *individually, and as parent and natural guardian of O.H., infant*, Bryan Schrom, and Kary Schrom, *all individually and on behalf of all others similarly situated*," and shall

list as Defendants "Saint-Gobain Performance Plastics Corp. and Honeywell International Inc., f/k/a Allied-Signal Inc." The decision to include all individually named Plaintiffs in the caption in no way affects Co-Lead Interim Class Counsels' ability to advocate, in a motion for class certification, which of the plaintiff(s) would be properly noted as a class representative. All filings related to the consolidated action shall be filed in this Lead civil case only. Any filings placed in the Member cases will not be considered and shall be stricken by the Court; and it is further

ORDERED, that any new civil action filed in this District that involves the alleged contamination of water sources in and around Hoosick Falls, New York, with the chemical PFOA will be reviewed by the Court on a case-by-case basis in order to determine, at the time of its filing, whether it should be consolidated into the Lead civil action; and it is further

ORDERED, that the Court appoints Weitz & Luxenberg, P.C. and Faraci Lange, LLP as Co-Lead Interim Class Counsel, with Powers & Santola LLP as Liason Counsel, and, accordingly, the Court acts on the pending Motions before me as follows:

1. *Baker*, Civ. No. 1:16-CV-220, Motion to Consolidate and Appoint Counsel (Dkt. No. 39) is **GRANTED**;

2. *Tifft*, Civ. No. 1:16-CV-292, Motion to Consolidate and Appoint Counsel (Dkt. No. 35) is **GRANTED IN PART AND DENIED IN PART** consistent with the above discussion;

3. *Tifft*, Civ. No. 1:16-CV-292, Lt.-Mot. (Dkt. No. 39) is **GRANTED IN PART AND DENIED IN PART** consistent with the above discussion;

4. *Schrom*, Civ. No. 1:16-CV-476, Lt.-Mot. (Dkt. No. 10) is **GRANTED IN PART AND DENIED IN PART** consistent with the above discussion; and it is further

ORDERED, that Plaintiffs' Co-Lead Interim Class Counsel, Weitz & Luxenberg, P.C. and

Faraci Lange, LLP, will be responsible for and have plenary authority to prosecute any and all claims of the Plaintiffs and the putative class and to provide general supervision of all Plaintiffs' Counsel in the Consolidated Actions. Specifically, Co-Lead Interim Class Counsel shall have the following responsibilities, duties, and sole authority:

1. Draft and file a master consolidated complaint and have final authority regarding what claims and parties are to be included;

2. Determine and present in pleadings, briefs, motions, oral argument, or such other fashion as may be appropriate, personally or by a designee, to the Court and opposing parties the position of Plaintiffs and the putative class on matters arising during the pretrial proceedings;

3. Coordinate and conduct discovery on behalf of Plaintiffs and the putative class consistent with the requirements of the Federal Rules of Civil Procedure and the Local Rules of Practice for the Northern District of New York;

4. Consult with and employ expert witnesses;

5. Draft and file the motion for class certification on behalf of Plaintiffs and the putative class;

6. Enter into stipulations with Defendants;

7. Sign all papers filed on behalf of Plaintiffs, as necessary;

8. Conduct settlement negotiations with Defendants, and if there is a settlement, propose a claims protocol and/or plan of allocation;

9. Maintain an up-to-date service list of all Plaintiffs' counsel for all Consolidated Actions, and promptly advise the Court and Defendants' counsel of changes thereto;

10. Receive and distribute to all Plaintiffs' counsel, as appropriate, discovery, pleadings,

correspondence, and other documents from Defendants' counsel or the Court that are not electronically filed;

11. Appear at Court-noticed conferences;

12. Delegate specific tasks to other Plaintiffs' counsel in a manner to avoid duplicative efforts and ensure that pretrial preparation for Plaintiffs and the putative class is conducted effectively, efficiently, and economically;

13. Maintain and collect time and expense records for work performed, time billed, costs incurred and other disbursements made by all Plaintiffs' counsel whose work Co-Lead Interim Class Counsel has specifically authorized, and submit at the Court's request in writing, *ex parte* and *in camera* reports to the Court regarding time billed in the prosecution of this action; and

14. Otherwise coordinate the work of all Plaintiffs' counsel, and perform such other duties as the Co-Lead Interim Class Counsel deem necessary, in order to advance the litigation or as authorized by further Order of the Court; and it is further

ORDERED, that Powers & Santola, LLP, is appointed as Interim Liaison Counsel and in that role shall provide assistance to Co-Lead Interim Class Counsel and will be the designated contact person regarding communications with the Court on behalf of the Plaintiffs and putative class; and it is further

ORDERED, that all other Plaintiffs' counsel are prohibited from taking any action on behalf of the Plaintiffs and putative class in this Consolidated Action without advance authorization from Co-Lead Interim Class Counsel, except for application to modify or be relieved from this Decision and Order; and it is further

ORDERED, that the mere communication of otherwise privileged information among and between Plaintiffs' counsel shall not be deemed a waiver of the attorney-client privilege or the attorney work product immunity, as the Court recognizes that cooperation by and among counsel is essential for the orderly and expeditious resolution of this litigation; and it is further

ORDERED, that, pursuant to Federal Rule of Civil Procedure 1, counsel for all parties are directed to cooperate with one another, wherever possible, to promote the expeditious handling of pretrial proceedings in the Consolidated Action, and related civility principles governing lawyers in the State of New York; and it is further

ORDERED, that a master consolidated complaint be filed in the newly opened Lead Case, Civ. No. 1:16-CV-917, by Co-Lead Interim Class Counsel within thirty days of the filing date of this Decision and Order; and it is further

ORDERED, that Defendants shall answer or otherwise respond to the master consolidated complaint within thirty days of the filing of that pleading; and it is further

ORDERED, that upon receipt of the Defendants' response to the master consolidated complaint, the undersigned will schedule a conference with the parties in order to set pretrial deadlines; and it is further

ORDERED, that this Decision and Order be docketed in each of the above-captioned cases, including the newly opened Lead Case.

IT IS SO ORDERED.

Date: July 27, 2016
Albany, New York

Daniel J. Stewart
U.S. Magistrate Judge

EXHIBIT E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated, Plaintiffs, v. SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC., Defendants.	Civ. No. 1:16-CV-917 (LEK/DJS)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR STAY THE MASTER CONSOLIDATED CLASS ACTION COMPLAINT

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Defendants Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") and Honeywell International, Inc. ("Honeywell") respectfully submit this memorandum of law in support of their motion to grant the following relief with regard to the Consolidated Class Action Complaint: (1) dismiss or stay the Complaint's injunctive relief claims; and (2) dismiss the Complaint's damages claims with prejudice.

PRELIMINARY STATEMENT

This putative class action Complaint was filed pursuant to this Court's order consolidating four putative class actions concerning the presence of perfluorooctanoic acid ("PFOA") in groundwater in Hoosick Falls, New York. (Dkt. 1.) PFOA is a compound that repels oil, grease, and water, and was widely used by many companies for many years to manufacture numerous products, including food packaging, clothing, furniture fabrics, and cookware. (Compl. ¶¶ 37-38.) Plaintiffs allege that PFOA is present in groundwater due to its use by Honeywell and Saint-Gobain at various facilities in Hoosick Falls. During the time PFOA manufacturers phased it out from 2004 to 2015 pursuant to voluntary agreements with regulators, PFOA was not designated or regulated as a hazardous substance under New York or federal law. PFOA was first designated a hazardous substance by the New York Department of Environmental Conservation ("DEC") earlier this year.

Following discovery of PFOA in groundwater in Hoosick Falls, federal and state agencies have been working in cooperation with Saint-Gobain and Honeywell to provide various remedial measures, many of which have been memorialized in consent orders. In addition, private plaintiffs have filed several putative class actions seeking various relief from Saint-Gobain and Honeywell, due to the alleged use of materials containing PFOA by Saint-Gobain and Honeywell in Hoosick Falls. Those actions have been consolidated in the Complaint at issue here. (*See* Dkt. 1.) Plaintiffs purport to represent five putative classes and seek relief including abatement of the alleged contamination, damages for alleged diminution of property value, and medical monitoring. As set forth below, Plaintiffs' injunctive relief claims should be dismissed or stayed and Plaintiffs' damages claims should be dismissed with prejudice.

Dismissal of Claims for Injunctive Relief

Plaintiffs' requests for injunctive relief must be dismissed because they constitute challenges to removal actions by the United States Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Under CERCLA, "[n]o Federal court shall have jurisdiction ... to review any challenges to removal or remedial action selected under [CERCLA]." 42 U.S.C. § 9613(h). Here, EPA is conducting ongoing removal actions in Hoosick Falls, including soil and groundwater testing, and has recently proposed the designation of a facility in Hoosick Falls as a CERCLA Superfund Site as a high priority for remediation. For several months, EPA has been conducting testing in Hoosick Falls to assess environmental conditions. Because EPA's actions in Hoosick Falls constitute removal actions under CERCLA, Plaintiffs' demands for remediation different from or in addition to that being provided by federal agencies are impermissible challenges barred under CERCLA. Plaintiffs' injunctive claims should therefore be dismissed for lack of jurisdiction.

In addition, in the interest of judicial economy, the Court should dismiss or stay Plaintiffs' claims for injunctive relief under the primary jurisdiction doctrine in deference to the ongoing remedial work of both federal and state agencies in cooperation with Defendants. Since the presence of PFOA in local groundwater was brought to their attention, Defendants have engaged in a number of remedial measures for the benefit of the Hoosick Falls community, even while the source of PFOA has not been determined. These measures include providing free bottled water to residents of Hoosick Falls, purchasing and installing a filtration system for the municipal water supply, and providing individual point-of-entry treatment systems (POETs) for Village residents who obtain water from private wells. Those remedial measures have now been memorialized in a consent order issued by DEC and executed by Saint-Gobain and Honeywell, pursuant to which a full-capacity filtration system for the municipal water supply is due to be delivered and installed later this year. The New York Department of Health ("NYDOH") is also involved in testing in Hoosick Falls and coordinating on other remedial measures. Saint-Gobain

and Honeywell continue to cooperate with state and federal regulators with respect to implementing remedial measures regarding PFOA in Hoosick Falls.

In light of this ongoing multi-agency response, parallel litigation of the same issues in federal court poses more likelihood of conflicting determinations or, at best, unnecessary duplication of effort, than it does of prompt adjudication of individuals' claims. The substantial remedial activities that have already been completed, the installation of additional measures later this year, and the pending federal Superfund designation may each substantially moot or bar Plaintiffs' claims before they can be heard. Accordingly, in deference to administrative expertise and the interests of judicial and party efficiency, this Court should dismiss or stay the Plaintiffs' claims for injunctive relief under the primary jurisdiction doctrine.

Dismissal of Claims for Damages

The Court should dismiss the Complaint's damages claims under Rule 12(b)(6) due to failure to allege facts sufficient to state a plausible claim for relief. Plaintiffs plead three broad categories of alleged damages—property damage, damages for interference with use and enjoyment of property, and damages to fund a medical monitoring program. They purport to allege each of these on behalf of corresponding putative classes and under a variety of causes of action. Yet they fail to plead facts that plausibly establish a cognizable injury to support any of this relief under New York tort law, and their claims must therefore be dismissed.

First, Plaintiffs cannot recover for property damage because, quite simply, they plead no damage to property. Plaintiffs' fundamental factual allegation is that the groundwater in Hoosick Falls is contaminated with PFOA. Yet groundwater is not real property held by Plaintiffs. Rather, it is a natural resource held by the State for the benefit of the public. Plaintiffs thus lack standing to sue for an alleged injury to groundwater, and they do not allege any physical injury to their property. Their property damage claims must therefore be dismissed.

Second, Plaintiffs cannot recover for lost use and enjoyment of property under their private nuisance cause of action. This is so because a private nuisance claim requires injury to a

small number of persons, which is flatly inconsistent with Plaintiffs' allegations that the entire Hoosick Falls community has been affected in the same way.

Third, Plaintiffs cannot recover medical monitoring as damages because such relief requires a physical injury that they have not pled. Plaintiffs purport to plead they have each experienced a "physical injury"—but somehow not a personal injury—by alleging increased risk of injury from PFOA, accumulation of PFOA in their blood, and other purported sub-clinical harm. Yet the New York Court of Appeals in *Caronia v. Philip Morris USA, Inc,*, 22 N.Y.3d 439 (2013), has definitively rejected such asymptomatic formulations of injury as contrary to New York law and as insufficient to support medical monitoring. As *Caronia* cautioned, to allow medical monitoring based on the mere presence of a chemical in the human body would authorize millions of new claims based on any alleged exposure allegedly leading to an increased risk of disease, while at the same time depleting resources for those who have actually sustained damage. Plaintiffs' attempt to obtain medical monitoring based on purported sub-clinical injury fails for the same reasons as in *Caronia*.

Accordingly, the Court should stay or dismiss the Complaint for lack of jurisdiction or for failure to state a claim.

FACTUAL BACKGROUND

Plaintiffs allege that PFOA is present in groundwater in the Village of Hoosick Falls and the Town of Hoosick, New York due to the historical use of materials containing PFOA in manufacturing facilities in and around Hoosick Falls. (Compl. ¶ 60.)[1] Plaintiffs assert state-law

[1] The facts taken from the allegations in the Complaint are assumed to be true solely for the purpose of this motion to dismiss. Defendants do not waive their right to challenge any factual allegations in the Complaint. In addition to the factual allegations in the Complaint, the facts cited herein are from sources that the Court may consider for purposes of conducting its analysis under the primary jurisdiction doctrine, *see infra* Section I.B, and/or may be judicially noticed in support of Defendants' motion to dismiss under Rule 12(b)(6), *see infra* Section II. By reciting the facts of various governmental assertions and actions in this motion to dismiss, Defendants do not concede their agreement with all such assertions or actions.

claims against Saint-Gobain, the current owner of a coatings manufacturing operation, including a facility located on McCaffrey Street, and Honeywell, whose corporate predecessor Allied-Signal previously also conducted coatings operations there. (*Id.* ¶¶ 61-64.) Plaintiffs do not allege that either Saint-Gobain or Honeywell was a manufacturer of PFOA, but rather purchased compounds containing PFOA from other companies.[2] Although Defendants used materials containing PFOA, PFOA was not designated or regulated as a hazardous substance under New York or federal law until 2016. (*Id.* ¶¶ 53-54.)

Saint-Gobain and Honeywell have been cooperating and working actively with regulators to identify, assess, and implement specific remedial measures with respect to PFOA in Hoosick Falls. They have been doing so both before and since entering into Consent Orders with DEC in June 2016, which direct the continued investigative and remedial activities. (*See id.* ¶ 118.)

A. PFOA Detection in Hoosick Falls and Response by Saint-Gobain and Honeywell

The Village of Hoosick Falls first detected PFOA in its municipal water supply in October 2014. (Compl. ¶¶ 89, 94.) Saint-Gobain was advised on December 12, 2014 that PFOA had been detected at elevated levels in the Village's municipal water supply, and on December 30, 2014, Saint-Gobain voluntarily reported the presence of PFOA in the Village's water supply to EPA.[3] Saint-Gobain conducted voluntary sampling of groundwater at the McCaffrey Street facility in September 2015, which reported PFOA at elevated levels.[4] While investigations were

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[2] U.S. manufacturers of PFOA include the Minnesota Mining and Manufacturing Company ("3M"), Arkema, Asahi, BASF Corp., Clariant, Daikin, DuPont, and Solvay Solexis. (Compl. ¶¶ 35-36.)

[3] *See* Ex. 1, Letter from David G. Sarvadi to EPA at 1 (Dec. 30, 2014), *available at* http://www.villageofhoosickfalls.com/Water/Documents/Saint-GobainLetterToEPA_Re_TSCA.pdf. All Exhibits are attached to the Declaration of Dale Desnoyers submitted herewith.

[4] *See* Ex. 2, Letter from David Borge, Mayor of Village of Hoosick Falls to Residents of Village of Hoosick Falls (Dec. 1, 2015), *available at* http://www.villageofhoosickfalls.com/Media/PDF/WaterLetter-12012015.pdf.

and are still pending, Saint-Gobain has voluntarily offered a number of remedial measures for Hoosick Falls, including:

- Providing residents of Hoosick Falls with bottled water (Compl. ¶ 102);
- Funding the installation of a "temporary" granulated activated carbon (GAC) treatment system for the municipal water system to remove PFOA from drinking water (Compl. ¶ 103);
- Design, installation, operation and maintenance of a long term full capacity GAC treatment system for the municipal supply wells;[5]
- Funding of installation of POETs for Village residents who obtain their water from private wells, rather than the municipal supply;[6] and
- Ongoing work with Hoosick Falls and NYDOH to evaluate additional concerns related to the presence of PFOA in the vicinity of the McCaffrey Street facility.[7]

As Plaintiffs' Complaint acknowledges, in February 2016, DEC began working with Saint-Gobain and Honeywell to enter into "an enforceable Consent Order to characterize and investigate the extent of the contamination, to provide interim remedial measures to protect health and drinking water supplies, to analyze alternatives for providing clean and safe drinking water and, ultimately, to design and implement a comprehensive clean-up and remediation protocol." (Compl. ¶ 119.) A Consent Order relating to the McCaffrey and Liberty Street sites was finalized and issued in June 2016. (*Id.* ¶ 125.)[8] A second Consent Order involving only

[5] *See* Ex. 3, Letter from Basil Seggos, N.Y. Dep't of Envtl. Conservation to Mayor David Borge, Hoosick Falls (Mar. 8, 2016), *available at* http://www.villageofhoosickfalls.com/Water/Documents/DECLetterToMayor-03082016.pdf.

[6] *See* Ex. 4, Letter from Mayor David Borge to Residents of Village of Hoosick Falls (June 2016), *available at* http://www.villageofhoosickfalls.com/Water/Documents/LettertoResidents-062316.pdf.

[7] *See id.*

[8] Ex. 5, Executed Consent Order dated June 3, 2016 regarding McCaffrey and Liberty Street Sites ("McCaffrey/Liberty Street Consent Order").

Honeywell, also issued in June 2016, provides for environmental investigation into potential PFOA presence at additional sites in Hoosick Falls. (*Id.*)[9]

Pursuant to the Consent Order involving both companies, Saint-Gobain and Honeywell will, among other things:

- Share funding for Saint-Gobain's environmental investigations of the McCaffrey and Liberty Street Plants;
- Share costs for providing residents with bottled water and for upgrading the existing water treatment system to a full capacity system;
- Evaluate alternative water supply options for area residents; and
- Reimburse the state for costs associated with water and soil sampling, including water sampling of private wells, and other various administrative costs.[10]

Environmental testing is currently being conducted pursuant to these Consent Orders.[11] Alteration of the Consent Orders requires DEC approval.[12]

B. Recent Test Results and Lifting of Water Use Restrictions

By February 26, 2016, the temporary GAC treatment system at the municipal water treatment plant, paid for by Saint-Gobain, had been installed and was fully operational (Compl. ¶ 121), such that NYDOH found that no detectable level of PFOA exists in the municipal water supply.[13] On September 6, 2016, NYDOH reported that results from the testing of the Village municipal water supply "show that the GAC filters are effectively and consistently removing PFOA and other PFCs from the water, and that the PFOA levels at locations in the Village

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[9] Ex. 6, Executed Consent Order dated June 3, 2016 regarding River Road and John Street Sites ("River Road/John Street Consent Order").

[10] Ex. 5, McCaffrey/Liberty Street Consent Order § III.B.

[11] *Id.* at 6; Ex. 6, River Road/John Street Consent Order at 3.

[12] Ex. 5, McCaffrey/Liberty Street Consent Order at App. A. § XVI.E; Ex. 6, River Road/John Street Consent Order at App. A. § XVI.E.

[13] Ex. 7, Letter from H. Zucker, N.Y. Dep't of Health to Mayor D. Borge, Hoosick Falls (Mar. 30, 2016), https://www.health.ny.gov/environmental/investigations/hoosick/docs/lettter_to_mayor_tesing_results.pdf.

distribution system are non-detectable."[14] NYDOH has approved the design for the long-term, full-capacity GAC treatment system, which is to be installed by December 2016 (Compl. ¶ 121), with all costs paid by Saint-Gobain and Honeywell.[15]

In addition, NYDOH and DEC have been testing private wells on which POETs have already been installed and have reported that, as of March 2016, "[p]reliminary sampling results of tap water from eight private wells with treatment systems installed show the systems effectively remove PFOA to non-detect levels."[16] DEC also installed and tested POET systems on the private wells of residents of Hoosick Falls, including for several of the named Plaintiffs, which Plaintiffs acknowledge have "reduced the concentration of PFOA" in their drinking water. (Compl. ¶¶ 10-12.)

C. New York Regulatory Efforts to Address PFOA in Hoosick Falls

In addition to the above remedial measures implemented in connection with Saint-Gobain and Honeywell, New York state agencies maintain an active presence in Hoosick Falls. Personnel from NYDOH and DEC provide technical advice and assistance to the Village and maintain regular hours several days each week at the local armory to meet with Hoosick residents.[17] NYDOH also offers Hoosick Falls residents the opportunity to participate in a blood sampling program. (*See* Compl. ¶ 120.)

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[14] Ex. 8, Letters from Lloyd R. Wilson, Ph.D., NYSDOH, to Mayor David Borge (Sept. 6, 2016).

[15] *See* Ex. 5, McCaffrey/Liberty Street Consent Order.

[16] Ex. 9, Press Release, New York State, Governor Cuomo Announces PFOA No Longer Detected At Hoosick Falls Municipal Water Filtration System, (Mar. 13, 2016), https://www.governor.ny.gov/news/governor-cuomo-announces-pfoa-no-longer-detected-hoosick-falls-municipal-water-filtration.

[17] Ex. 10, Press Release, DEC, DEC and DOH Meet with Local Officials on Actions to Address PFOA Contamination at Hoosick (Feb. 26, 2016), http://www.dec.ny.gov/press/105254.html; Ex. 11, NYDOH Website, PFOA in Drinking Water in the Village of Hoosick Falls and Town of Hoosick, http://www.health.ny.gov/environmental/investigations/hoosick/ (last updated as of Sept. 14, 2016).

DEC added the McCaffrey Street facility to the State "Superfund" list on January 27, 2016 and directed New York state agencies to use Superfund money to address PFOA in the municipal water system and in private wells. (*See id.* ¶ 6.) In connection with its inclusion on the State Superfund list, the State announced an emergency regulation to classify PFOA as a hazardous substance, pending promulgation of a final agency rule. (*See id.* ¶ 111.) DEC and NYDOH have asked EPA to provide uniform guidance regarding the levels at which to regulate PFOA.[18]

D. Federal Regulatory Efforts

Parallel to the state's efforts have been the federal efforts by EPA to address PFOA in Hoosick Falls. PFOA has not been designated a hazardous substance under federal law. Following Saint-Gobain's reports to EPA regarding PFOA in Hoosick Falls groundwater, EPA's regional office for New York provisionally recommended that Hoosick Falls residents not drink private-well water with PFOA levels above 100 parts per trillion (ppt). (Compl. ¶ 112.) EPA's efforts to study PFOA are ongoing, and are being actively monitored by state regulators. For example, on January 14, 2016, the DEC and NYDOH requested, among other things, that EPA "act expeditiously to adopt a protective maximum contaminant level for PFOA" in drinking water.[19] In May 2016, EPA issued a lifetime health advisory level of 70 ppt for PFOA in drinking water, a lower level than the prior advisory of 400 ppt. (Compl. ¶¶ 2, 53.)

Federal officials initiated the process to have the McCaffrey Street facility declared a federal Superfund site under CERCLA. (Compl. ¶ 6.) In April 2016, EPA installed groundwater monitoring wells near the McCaffrey Street facility and in mid-May conducted groundwater

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[18] Ex. 12, Letter from Dr. Howard Zucker (NYDOH) and Basil Seggos (DEC) to EPA Administrator Gina McCarthy (Jan. 14, 2016), *available at* http://www.dec.ny.gov/docs/administration_pdf/hoosickmccarthy2016.pdf.

[19] *Id.*

sampling at and around that facility.[20] After such testing, "EPA determined that inclusion in the federal Superfund program was an effective course of action to address the contamination,"[21] and on September 9, 2016, EPA proposed to add the McCaffrey Street facility—including areas where PFOA "has been deposited, stored, disposed of, or placed, or otherwise come to be located"[22]—to the federal Superfund National Priorities List, which would provide eligibility for funding to conduct EPA-supervised cleanup.[23]

EPA has also sampled soil in a park and ballfield near the McCaffrey Street facility and has reported its results showing no detection of PFOA or minimal levels, well below EPA's threshold for action for PFOA in soil.[24] EPA accordingly determined that these areas were "OK to Use" and that there was no "need for cleanup work in any of the areas sampled."[25]

E. Plaintiffs' Consolidated Class Action Complaint

On August 26, 2016, Plaintiffs filed a consolidated class action complaint alleging that improper disposal of PFOA by Saint-Gobain and Honeywell has caused PFOA contamination of groundwater in Hoosick Falls. (*See, e.g.*, Compl. ¶¶ 5-6.) They assert causes of action for negligence, nuisance, trespass, and strict liability for abnormally dangerous activities on behalf of five putative classes.

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[20] *See* Ex. 13, EPA, Press Release, EPA Proposes to Add Saint-Gobain Performance Plastics Site in Hoosick Falls, N.Y. to the Federal Superfund List at 2, *available at* https://www.epa.gov/newsreleases/corrected-epa-proposes-add-saint-gobain-performance-plastics-site-hoosick-falls-ny.

[21] *Id.*

[22] *See* 42 U.S.C. § 9601 (defining "facility" to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located").

[23] *See* Ex. 14**,** National Priorities List, 81 Fed. Reg. 62,428, at 62,432, *available at* https://www.federalregister.gov/documents/2016/09/09/2016-21626/national-priorities-list.

[24] Ex. 15, EPA, Hoosick Falls Community Update No. 3 (Spring 2016), at 1, *available at* https://www.epa.gov/sites/production/files/2016-04/documents/hoosick_falls_fact_sheet_no_3.pdf.

[25] *Id.*

1. Claims for Injunctive Relief

Plaintiffs request injunctive relief requiring Saint-Gobain and Honeywell to remediate PFOA in Hoosick Falls as follows:

- an order "to institute remedial measures sufficient to permanently prevent PFOAs from contaminating class members' drinking water and/or properties";
- "implementation of a mandatory testing protocol requiring Defendants to regularly test the wells of all Private Well Water Property Damage Class members for the presence of PFOA and to continue that testing until it is determined that the risk of PFOA contamination in private wells has ceased";
- an order "to install permanent filtration devices on any private well testing positive for the presence of PFOA, and to maintain those filtration devices pursuant to industry best practices"; and
- a biomonitoring program to monitor putative class members' health.[26]

(Compl. ¶¶ 149, 189.) Much of the injunctive relief that Plaintiffs demand is already occurring or has been completed at the direction of DEC and NYDOH, and pursuant to enforceable Consent Orders, such as the installation of filtration treatment systems in municipal and private water supplies, the institution of maintenance and monitoring of those systems, and other "remedial measures." (*Id.*. ¶¶ 107, 119, 125.) Furthermore, in light of the proposed federal Superfund site designation, EPA may direct additional remedial measures.

2. Damages Claims

Plaintiffs' requests for damages correspond to the five putative classes they plead:

Property Damage: On behalf of two classes of property owners (one class for those on municipal supply, and one for private wells, together, the "Property Damage Classes") (*see* Compl. ¶ 135), Plaintiffs assert claims for negligence, strict liability, and trespass, and seek recovery for alleged diminution of property value which they attribute to alleged contamination of groundwater with PFOA. (*E.g.*, *id.* ¶¶ 115, 141, 143.) Although the Complaint contains many conclusory references to property damage (*see, e.g.*, *id.* ¶¶ 166, 178), the only factual allegations

[26] Although Plaintiffs couch their request for medical monitoring in the form of injunctive relief (Compl. ¶ 189), medical monitoring relief is only available as damages under New York law. *See Caronia*, 22 N.Y.3d at 449.

of actual damage it asserts are with regard to groundwater. As Plaintiffs summarize, "the drinking water ... has been contaminated with PFOA, causing significant property damage." (*Id.* ¶ 178.)

Nuisance Damage: On behalf of two classes of property owners and renters (one class for those on municipal supply, and one for private wells, together, the "Nuisance Classes"), Plaintiffs seek recovery of nuisance damages—that is, damages for interference with the use and enjoyment of property. (Compl. ¶¶ 135, 170.) Plaintiffs assert recovery under a cause of action for private nuisance, which they purport to assert on behalf of all owners and renters of property in Hoosick Falls. (*Id.* ¶¶ 135, 167-72.)

Medical Monitoring: Plaintiffs seek consequential damages sufficient to fund a medical monitoring program on behalf of one putative class of individuals who have ingested allegedly contaminated water in or around Hoosick Falls and who have experienced "accumulation of PFOA in their bodies" (the "Biomonitoring Class"). (Compl. ¶¶ 135, 187.) Plaintiffs do not allege that they have experienced personal injuries as a result of PFOA exposure, and they specifically exclude from their putative class individuals who have "filed a lawsuit for personal injury for a PFOA-related illness related to exposure to municipal or private well water." (*Id.* ¶ 137.) Instead, Plaintiffs allege that they have experienced an increased risk of "human health effects" due to the "accumulation of PFOA in their bodies," and, in turn, "injury and damage at the cellular and genetic level." (*Id.* ¶¶ 48, 165-66.)

Defendants now move to dismiss.

LEGAL STANDARDS

A. Subject Matter Jurisdiction

A claim is properly dismissed pursuant to Rule 12(b)(1) "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Because jurisdiction is a threshold issue, a court's "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998)

(citation omitted). As a result, "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction over the subject matter it must affirmatively dismiss the action." *Farmers Against Irresponsible Remediation (FAIR) v. EPA*, 165 F. Supp. 2d 253, 257 (N.D.N.Y. 2001) (citation omitted).

B. Primary Jurisdiction

The doctrine of primary jurisdiction "promot[es] proper relationships between the courts and administrative agencies" and avoids courts and agencies working "at cross-purposes." *Ellis v. Tribune Television Co.*, 443 F.3d 71, 81 (2d Cir. 2006) (internal quotation marks and citations omitted). In deciding whether to dismiss or stay an action under the primary jurisdiction doctrine, courts consider (1) whether the issues raised by the litigation involve technical or policy considerations within the agency's particular field of expertise, (2) whether the issues are particularly within the agency's discretion, (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether the agency is already involved in addressing the issues. *See id.* at 82-83.

On a motion to dismiss or stay an action under the primary jurisdiction doctrine, courts are not limited to the allegations of the complaint, but also may consider extrinsic evidence. *See Nat'l Commc'ns Ass'n, Inc. v. Am. Tele. & Tele. Co.*, 46 F.3d 220, 223-24 (2d Cir. 1995); *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 340, 351 n.49 (S.D.N.Y. 2004). In addition, federal courts may take judicial notice of facts not subject to reasonable dispute that can readily be determined from sources whose accuracy cannot reasonably be questioned, such as administrative actions, agency orders, press releases, and other matters in the public record. *See, e.g.*, Fed. R. Evid. 201(b); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010); *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1191 n.1, 1197 (N.D. Cal. 2014).

C. Dismissal Under Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For a putative

action, the court must determine whether the allegations asserted by the class representatives state a plausible claim for relief. *See Garcia v. Does*, 779 F.3d 84 (2d Cir. 2015). "The fact that the plaintiffs have asserted putative class claims does not affect the Court's analysis of the validity of the individual plaintiffs' claims." *Patchen v. Gov't Emp'rs Ins. Co.*, 759 F. Supp. 2d 241, 244 (E.D.N.Y. 2011) (citation omitted). To withstand a motion to dismiss, the named Plaintiffs must establish the "facial plausibility" of their claims by pleading sufficient factual material to permit "the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717-18 (2d Cir. 2013). Thus, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. "'[U]nwarranted deductions of fact' need not be accepted as true," *MPM Silicones, LLC v. Union Carbide Corp.*, 931 F. Supp. 2d 387, 392 (N.D.N.Y. 2013) (Kahn, J.) (quotation omitted), and a "naked assertion ... without some further factual enhancement [] stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Twombly*, 550 U.S. at 555 (quotation omitted).

ARGUMENT

I. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED, OR IN THE ALTERNATIVE, STAYED

A. This Court Lacks Subject Matter Jurisdiction To Hear Plaintiffs' Claims for Injunctive Relief

This Court lacks subject matter jurisdiction to grant Plaintiffs' requested injunctive relief because it would interfere with and thus challenge EPA's ongoing implementation of removal actions in Hoosick Falls. "To ensure that the cleanup of contaminated sites will not be slowed or halted by litigation," *Razore v. Tulalip Tribes of Washington*, 66 F. 3d 236, 239 (9th Cir. 1995), Congress expressly removed jurisdiction from courts to hear challenges to EPA's remedial decisions pursuant to CERCLA, prior to completion of the cleanup. Specifically, CERCLA provides that "[n]o Federal court shall have jurisdiction ... to review any challenges to removal or remedial action selected under [CERCLA]." 42 U.S.C. § 9613(h). Congress enacted this

provision "so that the EPA would have the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up." *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991). This provision thus "make[s] clear that the statute preclude[s] preenforcement judicial review," *In re Combustion Equip. Assocs.*, 838 F.2d 35, 37 (2d Cir. 1988), providing "a 'blunt withdrawal of federal jurisdiction' over challenges to ongoing CERCLA removal actions." *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003) (quoting *McClellan Ecological Seepage Situation ("MESS") v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995)).

This jurisdictional bar is triggered when (1) EPA has commenced a "removal action" under CERCLA; and (2) Plaintiffs' request for injunctive relief is a "challenge" to those efforts. Both requirements are satisfied here.

1. EPA's Efforts to Date Are "Removal Actions" that Trigger CERCLA's Statutory Bar

CERCLA sets forth a comprehensive scheme for the cleanup of hazardous waste sites. As part of that scheme, EPA has authority to undertake response actions where there is a release or threatened release of hazardous substances. 42 U.S.C. § 9604. Such response actions fall into two categories: (1) removal actions, which include actions to study and clean up contamination, and (2) remedial actions, which are actions that are "consistent with [a] permanent remedy." 42 U.S.C. § 9601(23)-(24).

CERCLA defines a removal action to include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). Such actions include those that are designed to "prevent, minimize, or mitigate damage to the public health or welfare or to the environment," including, but not limited to, installing "security fencing or other measures to prevent access, provision of alternative water supplies, [and] temporary evacuation." *Id.* Thus, EPA was considered to have initiated a removal action where it had "already taken several steps toward determining how it will address the contamination" including conducting a preliminary assessment of the property, compiling

historical records, conducting interviews, performing site surveys, and planning a site inspection. *Cannon v. Gates*, 538 F.3d 1328, 1333 (10th Cir. 2008). Similarly, conducting a remedial investigation, during which data are collected to determine the nature of the waste and assess potential risk to human health and environment, has also been found to constitute a "removal action." *See Razore*, 66 F.3d at 239; *see also Boarhead*, 923 F.2d at 1014; *S. Macomb Disposal Auth. v. EPA*, 681 F. Supp. 1244, 1246 (E.D. Mich. 1988) (stating that "[i]t is clear ... that a [remedial investigation] taken by the EPA is a 'removal action' within the meaning of the statute"); *see also Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1477 (9th Cir. 1995) (concluding that health assessment and surveillance activities conducted by government agency were removal actions). Thus, in *Smith v. Potter*, 208 F. Supp. 2d 415, 420 (S.D.N.Y. 2002), *aff'd sub nom. APWU v. Potter*, 343 F.3d 619 (2d Cir. 2003), the United States Postal Service's investigatory and precautionary measures taken in the wake of reports of anthrax in the mail—such as providing postal workers with protective gloves and masks, conducting testing of employees for anthrax, and providing instructional safety meetings—were deemed to qualify as removal actions.

Here, EPA has "already undertaken several steps toward determining how it will address the contamination" in Hoosick Falls. *Cannon*, 538 F.3d at 1334. These steps include:

- Provisionally recommending that Hoosick Falls residents not drink private-well water when PFOA levels are above 100 ppt (Compl. ¶ 112);
- Initiating the process to have the McCaffrey Street facility declared a federal Superfund site under CERCLA (*Id.* ¶ 6), including proposing to add those areas to the federal Superfund National Priorities List, which would provide eligibility for funding to conduct EPA-supervised cleanup; and
- Sampling of groundwater, drinking water, and soil in Hoosick Falls for elevated levels of PFOA.[27]

Because, according to EPA, such actions were "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and were designed to "prevent,

[27] Ex. 13; Ex. 15.

minimize, or mitigate damage to the public health or welfare or to the environment," 42 U.S.C. § 9601(23), they are "removal actions" that trigger CERCLA's jurisdictional bar.

2. Plaintiffs' Request for Injunctive Relief Amounts to a "Challenge" of EPA's Removal Action

Plaintiffs' claims for injunctive relief are barred by CERCLA because they challenge EPA's removal action. Courts construe the term "challenge" broadly, *Camillus Clean Air Coal. v. Honeywell Int'l, Inc.*, 947 F. Supp. 2d 208, 211 (N.D.N.Y. 2013). "An action constitutes a challenge if it is related to the goals of the cleanup," *Razore*, 66 F.3d at 239, or "if it will interfere with a 'removal' or a 'remedial action.'" *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014). "In other words, a suit challenges a removal action if it 'interferes with the implementation of a CERCLA remedy' because 'the relief requested will impact the [removal] action selected.'" *Cannon*, 538 F.3d at 1335 (alteration in original) (quoting *Broward Gardens Tenants Ass'n v. U.S. E.P.A.*, 311 F.3d 1066, 1072 (11th Cir. 2002)).

Thus, courts have found a challenge to a removal action where plaintiffs "attempt[ed] to dictate specific remedial actions and to alter the method and order for cleanup." *Razore*, 66 F.3d at 239. Suits have been barred where adjudication of plaintiffs' claims would create "new requirements for dealing with the inactive sites that are now subject to the CERCLA cleanup [and] clearly interfere with the cleanup." *MESS*, 47 F.3d at 330. Likewise, where plaintiffs seek injunctive relief that would "change the nature of the ... cleanup," adopt stricter standards than implemented by EPA, or otherwise "modify or replace the remedial plan," such action "clearly is a challenge" triggering CERCLA's jurisdictional bar. *Broward Gardens*, 311 F.3d at 1073.

Here, Plaintiffs' suit seeks broad injunctive relief that would require Defendants to implement specific remedial measures to address PFOA in Hoosick Falls. These include remedial measures "sufficient to permanently prevent PFOAs from contaminating class members' drinking water and/or properties," the "implementation of a mandatory testing protocol" requiring Defendants to regularly test private wells for the presence of PFOA, and the installation of permanent filtration devices on any private well testing positive for the presence of

PFOA. (Compl. ¶¶ 149, 189.) Such relief "undoubtedly relate[s] to the goals of the clean up of the Site," and, as such, impermissibly "challenges" EPA's removal action. *Camillus*, 947 F. Supp. 2d at 213. In essence, Plaintiffs' action amounts to a "dispute[] about who is responsible for a hazardous site, what measures actually are necessary to clean-up the site and remove the hazard, or who is responsible for its costs"—disputes that Congress determined should be "dealt with after the site has been cleaned up." *Boarhead*, 923 F.2d at 1019. Accordingly, because Plaintiffs' request for injunctive relief constitutes a challenge to the removal action by EPA, this Court lacks subject matter jurisdiction to hear those claims. They must therefore be dismissed.

B. The Court Should Dismiss or Stay the Injunctive Relief Claims Under the Primary Jurisdiction Doctrine

In addition to the mandatory dismissal of the injunctive claims for lack of jurisdiction, the Court should in its discretion dismiss or stay those claims under the primary jurisdiction doctrine in deference to the ongoing administrative process of federal and state agencies. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956). To promote proper relationships between courts and administrative agencies, the doctrine of primary jurisdiction permits "the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). The central aim of the doctrine is to ensure that courts and agencies "do not work at cross-purposes." *Ellis*, 443 F.3d at 81 (internal quotation marks and citation omitted). It also "seeks to produce better informed and uniform legal rulings" by allowing courts to utilize an agency's specialized knowledge and expertise. *Id.* at 82 (internal quotation marks and citation omitted).

The Second Circuit considers the following four factors in determining whether courts should abstain from addressing plaintiffs' claims:

> (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;

(3) whether there exists a substantial danger of inconsistent rulings; and

(4) whether a prior application to the agency has been made.

Ellis, 443 F.3d at 82-83. All four of these factors favor abstention here. This case implicates the experience of not just one, but three, state and federal agencies with authority over these issues. Those agencies are actively investigating and addressing the issues in this case at the local level and in addressing PFOA more generally. Litigation at this time, considering the same issues simultaneously under the rubric of New York tort law, would simply duplicate efforts, invite inconsistent determinations with regard to injunctive relief, and risk interrupting ongoing remedial work. The Court should therefore dismiss or stay Plaintiffs' claims for injunctive relief under the primary jurisdiction doctrine.

1. Plaintiffs' Claims Involve Technical and Policy Considerations Within the Agencies' Expertise

The first *Ellis* factor weighs heavily in favor of dismissing this action. Courts have repeatedly held that the sorts of technical and policy-based questions raised by Plaintiffs' groundwater contamination and remediation claims are uniquely within the specialized expertise of federal and state environmental agencies. In such cases, courts often "first obtain the benefit of [the] agency's expertise before undertaking to resolve the issues on [their] own." *Oasis Petroleum Corp. v. U.S. Dep't of Energy*, 718 F.2d 1558, 1564 (Temp. Emer. Ct. App. 1983).

For example, the court in *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.* invoked the primary jurisdiction doctrine when confronted with tort claims alleging groundwater contamination. *See* 857 F. Supp. 838, 841-42 (D.N.M. 1994). There, as here, EPA had proposed listing the site at issue on the National Priorities List. *Id.* at 841. Pursuant to a consent order, the defendant was engaged in investigation and cleanup efforts under agency supervision. *Id.* The court recognized that, to address plaintiffs' groundwater contamination claims, it would have to assess the adequacy of the investigation at the site, the tolerability of contamination levels there, the adequacy of proposed remedial measures, and "myriad other technical matters." *Id.* at 842. Moreover, if plaintiffs were to prevail, the court "would have to fashion an appropriate investigatory and remediation order," including "the proper number and placement of monitoring

wells, how deep the wells should be drilled, [and] the adequacy of various proposed sampling methods." *Id.* While acknowledging it could receive extensive expert testimony or appoint a special master to address these issues, the court found that those methods would "represent a serious drain of judicial resources" and "largely duplicate" EPA and the state agency's efforts. *Id.* Instead, the court concluded that "[e]valuating the proper components of such a plan is best left to EPA, a body that is far better suited to resolve such issues by reason of specialization, by insight gained through experience, and by more flexible procedure." *Id.* at 842 (internal quotation marks and citation omitted); *see also B.H. v. Gold Fields Mining Corp.*, 506 F. Supp. 2d 792, 803-04 (N.D. Okla. 2007); *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990, 997 (D. Kan. 1997).

Similarly, a federal court recently held, in *Jones v. Halliburton Energy Services, Inc.*, that deference to a state environmental agency was warranted where plaintiffs' claims concerned a threat of potential perchlorate in groundwater, raising questions regarding whether remedial measures were required and, if so, what measures would be most appropriate. 2016 WL 1212133, at *1-3 (W.D. Okla. Mar. 25, 2016). Likewise, in *McCormick v. Halliburton Co.*, 2012 WL 1119493, at *2 (W.D. Okla. Apr. 3, 2012), where plaintiffs' claims concerned "the extent of the threat posed by the perchlorate in the groundwater at and around the Site, whether immediate remediation is required to protect health or the environment, and what type of remedy is best suited to the Site," the court held that such claims "unquestionably" raised issues "outside the conventional experience of judges" but within "the special expertise" of the state agency, which was charged by statute "with the responsibility for investigating hazardous waste problems" and "protecting human health and the environment." *Id.* Despite having subject matter jurisdiction, the court found that its own involvement "would likely cause further delay of the investigation of the Site and would result in substantial duplication" of the agency's work. *Id.*

Here too, Plaintiffs' claims for recovery based on groundwater contamination involve technical matters and policy considerations within the authority and expertise of EPA, DEC, and NYDOH, to which the Court should defer:

1. **EPA.** EPA "has been charged with protecting the public's health and welfare." *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (internal quotation marks and citation omitted). Under CERCLA, EPA is authorized to designate hazardous substances and regulate what quantities of each substance are reportable. *See* 42 U.S.C. § 9602(a). EPA is further authorized "to remove or arrange for the removal of, and provide for remedial action[,] relating to such hazardous substance[s]," *id.* § 9604(a)(1), and to "issu[e] such orders as may be necessary to protect public health and welfare and the environment" "in addition to any other action taken by a State or local government," *id.* § 9606(a). That authority is clearly manifest in CERCLA's jurisdictional bar on challenges to EPA remedies, which also supports abstention under the primary jurisdiction doctrine.

2. **DEC.** DEC has authority and specialized expertise in the issues central to Plaintiffs' groundwater contamination claims. Specifically, DEC is charged with coordinating and developing policies and programs related to the environment in New York, *see* N.Y. Envtl. Conserv. Law § 3-0301(1), such as "prevention and abatement of all water, land or air pollution including ... that related to hazardous substances."[28] *Id.* § 3-0301(1)(i). DEC is authorized to investigate such environmental concerns, *see id.* § 27-1305(2)(a), and "require the development and implementation" of DEC-approved remedial plans. *See id.* § 27-1313(1)(b). Notably, DEC is entrusted with "develop[ing] a strategy to address contaminated groundwater and implement[ing] a program to remediate and manage groundwater resources." *See id.* § 15-3105.

3. **NYDOH.** Similarly, NYDOH is responsible for regulating sanitary aspects of New York's water supplies, including "the pollution of waters of the state."[29] *See* N.Y. Pub. Health

[28] "To further assist" in carrying out these objectives, DEC is authorized to "[a]dopt, amend or repeal environmental standards" and "criteria to carry out the purposes and provisions" of the Environmental Conservation Law. N.Y. Envtl. Conserv. Law § 3-0301(2)(a). In particular, it may "[e]stablish new, or alter, modify, change or amend existing standards of quality and purity of the waters of the state applicable to the classification of waters." *Id.* § 15-0313(2)(c).

[29] Regulation of the public water supply in New York is "a field in which the environmental responsibilities given to DEC and the health responsibilities given to the State Department of

Law § 201(1)(l). Accordingly, NYDOH is authorized to "make rules and regulations for the protection from contamination of any or all public supplies of potable waters and water supplies of the state." *Id.* § 1100(1). In the event of possible contamination, NYDOH is responsible for assessing health problems in the immediate vicinity of, or related to conditions at, the site, *id.* § 1389-b(1)(a), and for (a) monitoring the site, (b) approving proposed remedial programs for the site and (c) certifying the completion of those programs, *see id.* § 1389-b(2).

In this action, Plaintiffs claim injury from, and seek remediation of, alleged groundwater contamination. Their claims raise questions over which EPA, DEC, and NYDOH have exercised their expertise, such as the extent of PFOA in Hoosick Falls, whether PFOA has effects on human health and property, the selection of appropriate remedial measures for the area, and the proper implementation of such remedial measures. These are precisely the types of technical and policy considerations that have prompted federal courts to apply the doctrine, and which favor deference to the agencies' expertise here. *See, e.g.*, *Jones*, 2016 WL 1212133, at *2; *McCormick*, 2012 WL 1119493, at *2; *Schwartzman*, 857 F. Supp. at 842.

2. EPA, DEC, and NYDOH Have Discretion and Authority to Administer the Testing for and Remediation of PFOA

Application of the primary jurisdiction doctrine is also appropriate where, as here, matters raised by plaintiffs' claims are particularly within the agencies' discretion. For example, in *Collins v. Olin Corp.*, a putative class alleging soil and groundwater contamination sought injunctive relief requiring defendants to investigate and remediate the contamination. 418 F. Supp. 2d 34, 38 (D. Conn. 2006). The Connecticut Department of Energy and Environmental Protection and defendants had agreed to a consent order requiring defendants to investigate and remediate any contamination. *Id.* at 40-41. The court found the first two *Ellis* factors to be satisfied because "[d]eciding what remedy is appropriate for varying levels of contamination,

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Health ('DOH') frequently overlap." George A. Rodenhausen, *Water Supply and Stream Protection, in* 9 New York Practice Series- Environmental Law and Regulation in New York § 7:1 (Philip Weinberg et al. eds., 2d ed. updated Oct. 2015).

and overseeing that remedial effort, is a matter more properly within the technical expertise and experience of the [agency]." *Id.* at 45. Here also, questions raised by Plaintiffs' claims are "particularly within" the agencies' discretion and authority, individually and collectively, as demonstrated by their active involvement in remediation at this time. *See Ellis*, 443 F.3d at 83.

1. **EPA.** EPA has broad powers to remove or provide for remedial action it "deems necessary to protect the public health or welfare or the environment" when there is a release, or threat of release, into the environment of any hazardous substance or any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. *See* 42 U.S.C. § 9604(a)(1), (a)(4). It may also require actions necessary to abate "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility," including through the issuance of administrative orders. *See id.* § 9606(a). EPA has proposed a Superfund site designation and is gathering information to address concerns about potential environmental or health matters posed by PFOA in Hoosick Falls.[30]

2. **DEC.** DEC likewise has considerable discretion in protecting the state's resources (including state waters) and responding to environmental incidents. *See, e.g.*, N.Y. Envtl. Conserv. Law § 15-0103(12). Specifically, DEC is authorized to investigate and assess the need "to remedy environmental and health problems resulting from the presence of hazardous wastes," *id.* § 27-1305(2)(b), and has broad authority to develop and implement inactive hazardous waste disposal site remedial programs, *id.* § 27-1313(5)(d); *see also id.* § 27-1313(1)(a), (b). DEC has led the investigation into the sources and the extent of PFOA in the Hoosick Falls groundwater and water supply and is overseeing provision of POETs to individual homeowners.[31]

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[30] *See* Ex. 16, Letter from Judith Enck, EPA Regional Administrator, to Mayor David B. Borge, at 2 (Apr, 6, 2016), *available at* https://www.epa.gov/sites/production/files/2016-04/documents/20160406_-_112016_-_ocr-_scan.pdf; Ex. 13.

[31] Ex. 16; Ex. 5, McCaffrey/Liberty Street Consent Order §§ II.C, II.E.

3. **NYDOH.** NYDOH is afforded significant discretion in working with DEC to address environmental concerns.[32] NYDOH's role includes commenting on proposed remediation plans, reviewing remedial investigation results, and assisting in identifying appropriate cleanup levels.[33] At its discretion, NYDOH may request that DEC order responsible parties to design and implement remedial programs (if not yet developed), or that DEC develop such a program itself. *See* N.Y. Pub. Health Law § 1389-b(3). NYDOH has worked with Saint-Gobain and Honeywell on the installation and testing of both short-term and long-term filtration systems for the municipal water supply.[34] NYDOH is also conducting blood testing of Hoosick Falls residents.[35]

Resolution of Plaintiffs' claims by the Court would require the Court to make judgments regarding the adequacy of investigative efforts and remedial measures. Such regulatory decisions should be made by the agencies currently investigating, monitoring, and responding to the presence of PFOA in Hoosick Falls. Indeed, the Second Circuit has cautioned courts to be "particularly reluctant to second guess agency choices involving scientific disputes that are in the agency's province of expertise." *Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski*, 899 F.2d 151, 160 (2d Cir. 1990), *abrogated on other grounds by Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82 (2d Cir. 2006). The second *Ellis* factor therefore also weighs in favor of staying this action under the primary jurisdiction doctrine. *See, e.g.*, *Collins*, 418 F. Supp. 2d at 44-45; *Schwartzman*, 857 F. Supp. at 842; *see also Jones*, 2016 WL 1212133, at *2.

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[32] *See* David Freeman et al., *Hazardous Waste*, *in* 9 New York Practice Series- Environmental Law and Regulation in New York § 9:154 (Philip Weinberg et al. eds., 2d ed. updated Oct. 2015) ("[T]he DOH serves as an advisor to the DEC on all matters related to the public health effects of [an inactive hazardous waste disposal] site.").

[33] *See id.*; N.Y. Pub. Health Law § 1389-b.

[34] Ex. 5, McCaffrey/Liberty Street Consent Order, ¶¶ 4.B, 12, & § II.E.

[35] Ex. 11; *see also* Compl. ¶ 120.

3. Plaintiffs' Claims Present a Substantial Risk of Inconsistent Rulings

The third factor, "whether there exists a substantial danger of inconsistent rulings," *Ellis*, 443 F.3d at 83, weighs in favor of invoking the doctrine as well. Courts have found this factor satisfied where agencies' investigations are ongoing and particularly where, as here, government agencies actively are designing and implementing investigative or remedial plans or actions.

For example, in *Jones*, the court applied primary jurisdiction where there was risk that the court and state agency "would approve of different work plans and/or remediation plans, subjecting [defendant] to conflicting remediation responsibilities and potentially delaying remediation." 2016 WL 1212133, at *2. Likewise, in *Collins*, the court found that granting plaintiffs' requested injunctive relief "could create a situation where [defendants] may be substantially complying with their obligations under the consent order ... yet they may also need to conduct additional or different remedial actions on those same assigned pieces of property pursuant to an injunction issued by th[e] Court." 418 F. Supp. 2d at 45. Moreover, the *Schwartzman* court made this finding even when EPA's Superfund designation for the site was still pending, concluding that litigation may contradict aspects of the pending regulatory remedial investigation and feasibility study and thereby "subject [the defendant] to conflicting obligations." 857 F. Supp. at 842. In addition to these cases, several other courts have followed similar reasoning and applied the primary jurisdiction doctrine when the relief requested in the litigation could result in conflicting orders issued by the court and the agency overseeing remediation. *See, e.g.*, *Stratford Holding, LLC v. Foot Locker Retail Inc.*, 2013 WL 5550461, at *6 (W.D. Okla. Oct. 8, 2013); *Gold Fields Mining Corp.*, 506 F. Supp. 2d at 804; *McCormick*, 2012 WL 1119493, at *2; *Davies*, 963 F. Supp. at 998; *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1350 (D.N.M. 1995).

The same result is warranted here, where the broad relief Plaintiffs seek may be inconsistent with or duplicative of the relief provided by the Consent Orders. As Plaintiffs recognize, the purpose of the Consent Orders between Defendants and DEC is "to characterize and investigate the extent of the contamination, to provide interim remedial measures to protect

public health and drinking water supplies, to analyze alternatives for providing clean and safe drinking water and, ultimately, to design and implement a comprehensive clean-up and remediation protocol." (Compl. ¶ 119.) Thus, much of what Plaintiffs seek has already been, or is being, implemented under the oversight of DEC and NYDOH. Saint-Gobain, Honeywell, and the agencies also are in the process of assessing and designing additional investigative and remedial plans. And as in *Schwartzman*, there is a significant likelihood that EPA will become more involved in remedial planning during the course of its consideration of Hoosick Falls as a federal Superfund site. The relief Plaintiffs seek here would therefore significantly interfere with or duplicate the efforts already being taken under agency oversight and would invite rulings inconsistent with the Consent Orders to which Saint-Gobain and Honeywell are bound.

For example, Plaintiffs ask this Court to order Defendants to institute remedial measures "sufficient to permanently prevent PFOAs from contaminating class members' drinking water and/or properties." (Compl. ¶ 149.) However, Saint-Gobain has already designed and installed a temporary municipal water filtration system that the agencies have concluded is "fully operational" (*Id.* ¶ 121), and is "removing PFOA to non-detectable levels,"[36] with a full-capacity long-term system expected to be fully operational by December 31, 2016.[37] Thus, if this Court were to conclude, as Plaintiffs allege, that the NYDOH-approved treatment system was not "sufficient to permanently prevent PFOAs from contaminating class members' drinking water" (Compl. ¶ 149), and instead order Defendants to install a different filtration system on the same municipal water supply, Saint-Gobain and Honeywell would be at risk of having to choose between violating DEC's Consent Orders or violating the Court's order. This type of conflict

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[36] *See* Ex. 17, Press Release, DEC, New York State Announces Additional Progress in Addressing PFOA Contamination (March 22, 2016), *available at* https://www.health.ny.gov/press/releases/2016/2016-03-23_nys_addressing_pfoa_contamination.htm.

[37] *See* Ex. 5, McCaffrey/Liberty Street Consent Order § II.C.1.b.

and second-guessing is precisely what primary jurisdiction seeks to avoid. *See Browning-Ferris*, 899 F.2d at 160; *Davies*, 963 F. Supp. at 998; *Friends of Santa Fe Cty.*, 892 F. Supp. at 1349-50.

Similarly, Plaintiffs ask this Court to impose "a mandatory testing protocol requiring Defendants to regularly test the wells of all Private Well Water Property Damage Class members ... until ... the risk of PFOA contamination in private wells has ceased," and to order the installation of "permanent filtration devices on any private well testing positive for the presence of PFOA" to be maintained "pursuant to industry best practices." (Compl. ¶ 189.) But DEC and NYDOH have already taken the lead in directing the testing and monitoring of private wells and the installation of filtration systems on those wells, and these agencies have been actively sampling private wells for PFOA in and around the Town of Hoosick.[38] DEC already has "installed POET systems on many of these wells,"[39] including "for any resident who requests a system,"[40] and DEC and NYDOH continue to sample and install POET systems.[41] Were this Court to order the relief Plaintiffs seek—mandatory testing of private wells and installation of permanent filtration devices on "any private well" testing positive for PFOA—Defendants would be directed to take duplicative actions and/or actions that directly interfere with these agencies' ongoing monitoring of private wells in Hoosick Falls. Moreover, the unspecified "industry best practices" that Plaintiffs demand for the installation and maintenance of filtration systems on private wells (Compl. ¶ 189) may conflict with the standards being applied within the agencies' "province of expertise." *See Browning-Ferris*, 899 F.2d at 160.[42]

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[38] Ex. 5, McCaffrey/Liberty Street Consent Order § II.E.

[39] *Id.*

[40] *Id.* ¶ 4.b.

[41] *Id.* § II.E.

[42] Unlike cases involving well-understood and regulated contaminants such as lead, this case does not implicate any statutory standards that a court could apply. *Cf. Concerned Pastors for Soc. Action v. Khouri*, 2016 WL 3626819 (E.D. Mich. July 7, 2016). For example, the litigation over lead contamination in Flint, Michigan involves a determination of whether state and city actors violated requirements for monitoring and reporting the presence of lead at levels in excess

Granting Plaintiffs' requested relief could create a situation where Saint-Gobain and Honeywell may be substantially complying with their obligations under the Consent Order, but are then required to conduct conflicting remedial action on the same water supplies pursuant to a court order. *See Collins*, 418 F. Supp. 2d at 45; *see also Jones*, 2016 WL 1212133, at *2, *Schwartzman*, 857 F. Supp. at 842. This would substantially interfere with both the agencies' and Defendants' ongoing remedial efforts adopted pursuant to the active administrative process. The third *Ellis* factor also supports application of the primary jurisdiction doctrine.

4. EPA, DEC, and NYDOH Are Actively Involved in Testing for and Remediating PFOA in Hoosick Falls

The final factor—"whether a prior application to the agency has been made"—also favors application of the primary jurisdiction doctrine. *See Ellis*, 443 F.3d at 83. Deference under the doctrine of primary jurisdiction is particularly appropriate where, as here, the investigation of the relevant issues by the agencies is ongoing and the planning and implementation of remedial measures are underway.[43] In short, "[t]he advisability of invoking primary jurisdiction is greatest when the issue is already before the agency." *Miss. Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 420 (5th Cir. 1976).

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of those statutorily defined by the Safe Water Drinking Act. *See id.* at *7. The court in that case declined to abstain because resolution of plaintiff's claims would "not require reviewing environmental impact reports or considering the content of lead in the drinking water," but instead would "merely require[] determining whether defendants complied with the statute." *Id.* (declining to apply primary jurisdiction doctrine). In this case, however, PFOA was not a regulated substance before January 2016, and it is still being studied. As a result, deference to agency expertise is warranted here.

[43] *See, e.g.*, *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 692 (3d Cir. 2011) (factor satisfied where state environmental agency had "previously considered [the] contamination" at issue); *McCormick*, 2012 WL 1119493, at *2 (same, where agency entered into a consent order with defendant providing for remediation of potential contamination); *Davies*, 963 F. Supp. at 998 (same); *Schwartzman*, 857 F. Supp. at 842 (same, where "EPA ha[d] already begun the process of initiating a remedial investigation and feasibility study"); *Jones*, 2016 WL 1212133, at *2 (deference to state agency warranted where agency had been actively overseeing on-site and off-site investigation and had entered into a consent order under which the defendant agreed to develop remedial plans subject to agency approval and oversight).

Here, as set forth above, EPA, DEC, and NYDOH are all actively investigating and remediating the presence of PFOA in Hoosick Falls at issue in Plaintiffs' claims. Because these agencies are "already act[ing] to ensure that Defendants investigate and contain" potential PFOA groundwater contamination in Hoosick Falls, and are "continu[ing] to exercise regulatory oversight," *Friends of Santa Fe Cty.*, 892 F. Supp. at 1350, the fourth and final factor supports application of the primary jurisdiction doctrine.

5. At a Minimum, A Temporary Stay of At Least 90 Days Is Warranted

As set forth above, both the jurisdictional bar of section 9613(h) and the primary jurisdiction doctrine warrant dismissal of Plaintiffs' injunctive claims in light of the extensive involvement of the federal and state agencies. In the alternative, however, if the Court should wish to revisit this issue on a more fully developed record, it should temporarily stay the injunctive relief claims. Courts routinely stay civil suits in deference to ongoing agency-supervised remediation or active regulatory efforts. *See, e.g.*, *Gold Fields Mining Corp.*, 506 F. Supp. 2d at 803; *Schwartzman*, 857 F. Supp. at 851. The Court and all the parties will benefit from the agencies' continuing investigatory and remedial actions.

Here, Defendants accordingly ask this Court to stay the injunctive relief claims for at least 90 days, which is appropriate for several reasons. First, the installation of the full capacity treatment system is expected to be completed by December and may significantly affect, and may ultimately resolve, some or all of Plaintiffs' claims.

Second, Defendants have already submitted to DEC pursuant to the Consent Order an investigation plan and have commenced implementing that work plan.[44] At the conclusion of a 90-day stay, both the Court and the parties here will have a better sense of what investigation remains and consider whether an additional 90-day stay is warranted.

[44] Ex. 5, McCaffrey/Liberty Street Consent Order § II.A-B.

Third, during the requested stay, EPA will proceed with its proposed administrative process for designating areas in Hoosick Falls as a federal Superfund site. If the facility is added to the National Priorities List, as EPA has proposed to do, it would increase EPA's level of involvement in and oversight of investigative and remedial efforts, and would bar this court's jurisdiction over any claims that would affect the ongoing administrative remedial efforts pending completion of those efforts. *See* 42 U.S.C. § 9613(h). Thus, factual and jurisdictional issues underlying many of Plaintiffs' claims may change dramatically in light of these regulatory actions.

Even a temporary stay would allow the Defendants to focus on their ongoing work with the agencies to actively investigate PFOA levels to the benefit of all Hoosick Falls residents, and would avoid the risk of disrupting ongoing efforts to investigate and implement effective remedial measures. Accordingly, as an alternative to dismissal or an indefinite stay, the Court should temporarily stay Plaintiffs' injunctive relief claims for 90 days.

II. THE DAMAGES CLAIMS SHOULD BE DISMISSED

Plaintiffs' damages claims should be dismissed for failure to state a claim under Rule 12(b)(6). Plaintiffs seek to recover for three general categories of damage, each of which corresponds to a putative class or classes: (A) property damage, asserted on behalf of the Property Damage Classes; (B) damage for interference with use and enjoyment of property, asserted on behalf of the Nuisance Classes; and (C) medical monitoring, asserted on behalf of the Biomonitoring Class. (*See* Compl. ¶¶ 135, 164-66, 170-72, 176-78, 186-87.)[45] Here, Plaintiffs do not plead a cognizable injury sufficient to support recovery of any of these damages for three principal reasons: (A) Plaintiffs' property damage claims fail because they are premised on an alleged injury to groundwater, which is a public resource that Plaintiffs do not own; (B) Plaintiffs'

[45] Although Plaintiffs seek this relief on behalf of putative classes, the Court must determine the sufficiency of the Complaint based on the claims of the named Plaintiffs only. *See Garcia*, 779 F.3d at 87 n.1.

private nuisance claims fail because they are based on alleged public harm; and (C) Plaintiffs' request for medical monitoring fails because Plaintiffs do not allege a physical injury. Plaintiffs' damages claims must therefore be dismissed.

A. Plaintiffs' Property Damage Claims Fail as a Matter of Law

Plaintiffs allege that Defendants' actions have resulted in contamination of groundwater with PFOA (*see* Compl. ¶¶ 5, 72, 80), for which they seek recovery in tort on behalf of two Property Damage Classes—one for persons on the municipal supply, and one for private well owners. (*See id.* ¶¶ 135.) Yet under New York law, groundwater is not private property, but is rather a public resource held by the State for the benefit of the public. As a result, Plaintiffs have failed to plead an injury to private property sufficient to support any of their property damage tort claims—trespass, nuisance, and strict liability. Those claims should therefore be dismissed as a matter of law.

1. Alleged Groundwater Contamination Is Not Injury to Real Property

The central factual allegation of the Complaint is that Defendants "contaminated *the aquifer* beneath Hoosick Falls with PFOA." (Compl. ¶ 5 (emphasis added).) The criteria for membership in the Property Damage Classes is the source of a property owner's water supply from the aquifer—i.e., municipal supply or private wells. (*Id.* ¶ 135.) The Complaint alleges that Plaintiffs have experienced "significant property damage" because "the drinking ***water*** of Plaintiffs and the Private Well Water Property Damage Class has been contaminated with PFOA." (*Id.* ¶ 178 (emphasis added).) Thus, the only purported damage they allege is purely economic, rather than physical: that groundwater contamination "adversely impacted and continues to adversely impact property values in the Village and the Town." (*Id.* ¶ 7.)

This alleged groundwater contamination is not a cognizable injury to real property under New York tort law. The Court of Appeals long ago explained that "no absolute property can be acquired in flowing water," because "[l]ike air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control." *Sweet v. City of Syracuse*, 129 N.Y. 316, 335, *on reh'g sub nom. Comstock v. City of*

Syracuse, 129 N.Y. 643 (1891). "'Water is a movable, wandering thing, and must of necessity continue common by the law of nature,'" such that "[n]either sovereign nor subject can acquire anything more" than a right to use the water, and not to own it. *Id.* (quoting 2 Blackstone, Commentaries on the Laws of England 18).

Because of water's unique characteristics, New York law does not treat groundwater as property. As the Third Department held in rejecting tort claims based on alleged groundwater contamination, groundwater "does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens." *Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 130 (3d Dep't 2014). Because groundwater is "a natural resource protected by [the State] as trustee for its people," allegations of harm to groundwater do not implicate "the [landowner's] property, but rather property entrusted to [New York] by its citizens." *State v. New York Cent. Mut. Fire Ins. Co.*, 147 A.D.2d 77, 79 (3d Dep't 1989). The State and its municipalities are empowered to address alleged injuries to that public resource.[46] As set forth above, the State has been working closely with Defendants to effect both temporary and permanent remedies for PFOA in groundwater in the Hoosick Falls area. Although Plaintiffs have an interest in the *use* of water, *see Pilchen v. City of Auburn, N.Y.*, 728 F. Supp. 2d 192, 197-98 (N.D.N.Y. 2010), they do not own that groundwater. *See Ivory*, 116 A.D.3d at 130. Without such an interest, their tort claims seeking recovery on behalf of the Property Damage Classes fail as a matter of law.

2. Property Damage Claims Fail Without Physical Injury to Property

Plaintiffs seek recovery for alleged property damage under three causes of action: trespass, negligence, and strict liability for abnormally dangerous activities. (*See* Compl. ¶¶ 166,

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[46] *See, e.g.*, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 105 (2d Cir. 2013) (action by New York City for alleged contamination of municipal groundwater); *New York v. Union Fork & Hoe Co.*, 1992 WL 107363, at *1 (N.D.N.Y. May 8, 1992) (action by state and local authorities under CERCLA and common law for alleged groundwater contamination); *State v. Fermenta ASC Corp.*, 238 A.D.2d 400, 403 (2d Dep't 1997) (action by state and county to abate alleged groundwater contamination).

178, 184.) Yet because the alleged groundwater contamination is not a physical injury to property, Plaintiffs ultimately plead claims only for diminution of property value. "[T]he widely accepted if not universal view among the courts in this country is that causing the value of another's property to diminish is not in and of itself a basis for tort liability." *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F. Supp. 2d 179, 188 (W.D.N.Y. 1999), *aff'd in pertinent part sub nom. Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.*, 216 F.3d 1072 (2d Cir. 2000). "Something more," such as "physical invasion or damage," is required. *Id.* at 188, 193. Plaintiffs fail to allege anything more here, and thus their claims for property damage must be dismissed.

Trespass: Plaintiffs' allegations of harm to a publicly held natural resource cannot state a claim for trespass; by its very nature, trespass presumes physical intrusion into the Plaintiffs' legal property interest. "[P]ossession is an essential element of a trespass action," *Niagara Falls Redevelopment, LLC v. Cerrone*, 28 A.D.3d 1138, 1139 (4th Dep't 2006) (citation omitted), and thus "failure to specifically plead and prove the right to possession is fatal" to a trespass claim. *Cornick v. Forever Wild Dev. Corp.*, 240 A.D.2d 980, 981 (3d Dep't 1997); *see also Residents for Sane Trash Sols., Inc. v. U.S. Army Corps of Eng'rs*, 31 F. Supp. 3d 571, 598 (S.D.N.Y. 2014) (licensee not permitted to assert trespass claim).

The Third Department rejected trespass claims in another environmental litigation involving the same Plaintiffs' counsel as here. In *Ivory*, a group of Plaintiffs alleged contamination of the groundwater at their real property. 116 A.D.3d at 129-130. The appeals court held that the plaintiffs could not state "trespass claims based on contaminated groundwater, because groundwater does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens." 116 A.D.3d at 130; *accord New York Cent. Mut. Fire Ins. Co.*, 147 A.D.2d at 79. The plaintiffs in *Ivory*, like Plaintiffs here, had a right to ***use*** groundwater, but that right to use a public resource was insufficient to state a claim for trespass, which requires legal title. *See Ivory*, 116 A.D.3d at 130. Without an intrusion on a legal property interest, Plaintiffs have failed to allege a trespass, and those claims should be dismissed with prejudice.

Negligence: Negligence requires not just a breach of duty but a "resulting injury to plaintiff." *Hidden Meadows Dev. Co. v. Parmelee's Forest Prods. Inc.*, 289 A.D.2d 642, 643 (3d Dep't 2001). It is black-letter New York law that this injury must be a *physical* injury to the plaintiff or the plaintiff's property, and thus a plaintiff "may not recover damages for negligently caused *financial* harm without accompanying physical injury." *Rebecca Moss, Ltd. v. 540 Acquisition Co.*, 285 A.D.2d 416, 416 (1st Dep't 2001) (emphasis added). New York law thus imposes no duty in negligence to protect "against purely economic losses," such as the diminution of value claims that Plaintiffs assert under the label of "property damage." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 290 (2001).

Plaintiff's negligence claim is squarely foreclosed under the New York Court of Appeals' holding in *532 Madison*. There, several businesses in the vicinity of a crane collapse brought negligence claims for pure economic harm, alleging loss of income due to street closures following the incident. 96 N.Y.2d at 286-87. The Court of Appeals held that such claims must be dismissed, because there is no legal duty to protect against foreseeable economic harm. *Id.* at 292. As the Court of Appeals explained, "foreseeability of harm does not define duty," because New York does not subject defendants to "unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act." *Id.* at 289. Instead, the Court limited the defendants' duty to those who "suffered personal injury or property damage—as historically courts have done," to "afford[] a principled basis for reasonably apportioning liability." *Id.* at 291-92. Here also, without any duty supporting Plaintiff's allegations of pure economic harm, Plaintiff's negligence claim fails as a matter of law.

Consistent with these principles of New York law, courts considering negligence claims alleging groundwater contamination under other states' laws have held that "contamination alone does not constitute an 'injury' sufficient to substantiate a negligence claim." *Rowe v. E.I. Dupont De Nemours & Co.*, 262 F.R.D. 451, 465 (D.N.J. 2009); *accord Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir. 2011). "[T]he release of contaminants into the groundwater aquifer does not itself generate damages, unless Plaintiffs can show that they

suffered harm." *Player v. Motiva Enters. LLC*, 2006 WL 166452, at *9 (D.N.J. Jan. 20, 2006) (alleged contamination of groundwater with MTBE), *aff'd*, 240 F. App'x 513 (3d Cir. 2007). Because Plaintiffs here do not allege physical harm to their property, the negligence claims they purport to assert on behalf of the Property Damage Classes must be dismissed for failure to state a claim.

Strict Liability: Claims for strict liability for abnormally dangerous activities also require a physical injury, which is not alleged in relation to Plaintiffs' property damage claims here. Under New York law, a claim for strict liability requires "harm *to the person or property of another*." *55 Motor Ave. Co. v. Liberty Indus. Finishing Corp.*, 885 F. Supp. 410, 423 (E.D.N.Y. 1994) (quoting *Rosenblatt v. Exxon Co., U.S.A.*, 335 Md. 58, 75 (1994)) (emphasis added). Thus, "[t]he doctrine of strict liability, by its express language and traditional application, is aimed at protecting against harm to person or property which arises from the dangerous activity" and does not extend to purely economic losses. *Rosenblatt*, 335 Md. at 75. Accordingly, courts dismiss strict liability claims that do not plead physical harm. *Remson v. Verizon Commc'ns, Inc.*, 2009 WL 723872, at *4 (E.D.N.Y. Mar. 13, 2009), *overruled in part on other grounds by Caronia*, 22 N.Y.3d 439. As the *Remson* court explained, where plaintiffs do not allege "the element of physical injury ... [,] they fail to allege an element essential to the stating of a claim for ... strict liability," and "those claims must be dismissed." *Id.*

In sum, Plaintiffs' property damage claims are premised on a harm to a public resource rather than private property belonging to the Plaintiffs, and thus Plaintiffs have alleged no property damage sufficient to support their claims. In the absence of any such property damage, Plaintiffs cannot recover for purely economic harm. Plaintiffs have, therefore, failed to state claims for trespass, negligence, and strict liability based on alleged property damage.

B. Plaintiffs' Nuisance Claims Fail as a Matter of Law

Plaintiffs purport to assert two Nuisance Classes on behalf of owners and lessors of property—one for those on municipal water, and one for those on private wells. (Compl. ¶ 135.) These nuisance claims are predicated on an alleged classwide injury, and are, therefore,

internally contradictory: Plaintiffs cannot state a claim for *private* nuisance based on an alleged *public* harm. A private nuisance is that which "'threatens *one person* or a *relatively few*.'" *Caldarola v. Town of Smithtown*, 2010 WL 6442698, at *15 (E.D.N.Y. July 14, 2010) (emphasis added) (quoting *Copart Indus., Inc. v. Con. Edison Co. of New York, Inc.*, 41 N.Y.2d 564, 568 (1977)), *report and recommendation adopted*, 2011 WL 1336574 (E.D.N.Y. Apr. 4, 2011). Plaintiffs' allegations of widespread harm to the enjoyment of a public resource in Hoosick Falls are inconsistent with that cause of action. Thus, to the extent Plaintiffs allege that these public issues with public groundwater impact all renters and owners in Hoosick Falls, those allegations are "common to the entire … community" and thus cannot support "a legally cognizable claim of a private nuisance." *City of New York v. Gowanus Indus. Park, Inc.*, 20 Misc. 3d 1110(A), 867 N.Y.S.2d 373, 2008 WL 2572853, at *8 (N.Y. Sup. Ct. Kings Cty. 2008), *aff'd*, 65 A.D.3d 1071 (2d Dep't 2009). Accordingly, the private nuisance claims Plaintiffs purport to assert on behalf of the Nuisance Classes should be dismissed with prejudice.

C. Plaintiffs' Request for Medical Monitoring Fails as a Matter of Law

Just as Plaintiffs' failure to plead injury to property is fatal to their property damage claims, Plaintiffs' failure to plead injury to their persons is fatal to their negligence and strict liability claims seeking medical monitoring on behalf of the Biomonitoring Class. The Court of Appeals has held "that medical monitoring is an element of damages that may be recovered *only after a physical injury has been proven*." *Caronia*, 22 N.Y.3d at 448 (emphasis added). Plaintiffs attempt to plead a classwide "physical injury" to their persons based on a purported increased risk of "human health effects," the "accumulation of PFOA in their bodies," and, in turn, "injury and damage at the cellular and genetic level." (Compl. ¶¶ 45, 49, 135, 165-66.) Yet such allegations do not amount to cognizable injuries under New York law, and Plaintiffs' negligence and strict liability claims seeking medical monitoring must therefore be dismissed.

1. New York Law Requires a Physical Injury for Medical Monitoring

To sustain their request for medical monitoring premised on claims of negligence or strict liability, Plaintiffs *must* plead a physical injury. The New York Court of Appeals made this clear

when it reiterated in *Caronia* that "[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system." 22 N.Y.3d at 446 (citation omitted). Because the plaintiffs in *Caronia* did "not claim to have suffered physical injury or damage to property," the court held that their "only potential pathway to relief is for this Court to recognize a new tort, namely, an equitable medical monitoring cause of action." *Id.* at 446-47. After accepting certification from the Second Circuit as to whether New York law recognized a standalone cause of action for medical monitoring, the court held that it did not, explaining that "[a]llowance of such a claim … would constitute a significant deviation from our tort jurisprudence." *Id.* at 452; *accord Ivory v. Int'l Bus. Machs. Corp.*, 37 Misc. 3d 1221(A), 2012 WL 5680180, at *11 (N.Y. Sup. Ct. Broome Cty. 2012), *aff'd*, 116 A.D.3d 121 (3d Dep't 2014).

The *Caronia* court explained in detail the reasons for insisting on a physical injury as a predicate for medical monitoring damages. Relying on the Supreme Court's rejection of a federal medical monitoring cause of action, the court stated that "dispensing with the physical injury requirement could permit 'tens of millions' of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." 22 N.Y.3d at 451 (quoting *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 442 (1997)). As the Supreme Court explained in *Buckley*, allowing recovery without physical harm would have disastrous consequences, since countless "individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Buckley*, 521 U.S. at 442. Those risks are particularly acute with regard to PFOA, a substance that Plaintiffs allege can be detected in the blood of an average American, the mere accumulation of which they say causes subclinical harm. Compl. ¶¶ 127, 166. The "physical injury" requirement, in contrast, provides meaningful limits as it "defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims." *Caronia*, 22 N.Y.3d at 446.

New York courts are mindful of issuing decisions that will have "foreseeable and unforeseeable consequences, most especially the potential for vast, uncircumscribed liability." *Madden v. Creative Servs., Inc.*, 84 N.Y.2d 738, 746 (1995). "As a general rule, New York courts have been reluctant to embrace claims that rely on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages." *Ortega v. City of New York*, 9 N.Y.3d 69, 81 (2007). Yet as the Supreme Court explained in *Buckley*, "the systemic harms that can accompany 'unlimited and unpredictable liability'" from abandonment of the physical injury requirement would create "uncertainty as to the amount of liability," and "threaten … a 'flood' of less important cases." 521 U.S. at 442.

Based on these principles and concerns, *Caronia* treated medical monitoring as an element of damages and limited the remedy to circumstances in which "plaintiffs … have in fact sustained [a] physical injury." 22 N.Y.2d at 452. Physical injury is essential to both of Plaintiffs' causes of action under which they assert a right to medical monitoring. To establish negligence, a plaintiff must demonstrate "resulting injury" of defendant's tortious conduct, *Hidden Meadows*, 289 A.D.2d at 643, and "even in strict liability, the [d]efendant's activities must have been the proximate cause of some harm." *Wanich v. Bitter*, 12 Misc. 3d 1165(A), 2006 WL 1547566, at *7 (N.Y. Sup. Ct., Nassau Cty. 2006). Plaintiffs have failed to allege such an injury.

2. Plaintiffs Do Not Allege a Physical Injury

Plaintiffs' allegations of increased risk of harm from PFOA exposure do not constitute a physical injury under New York law. *Caronia* so held, stating that "[a] threat of future harm is insufficient to impose liability against a defendant in a tort context," and rejecting a request to establish a medical monitoring cause of action predicated on an alleged increased risk. *Caronia*, 22 N.Y.3d at 446, 452. Injury is the "condition on which the claim is based," the "resulting illness," the "discernible bodily symptoms," the "manifestations of exposure," and the "manifestations or symptoms of the latent disease that the harmful substance produced"—it is not the contingent risk that exposure might create. *In re N.Y. Cnty. DES Litig.*, 89 N.Y.2d 506, 508, 512-14 (1997). Therefore, failure to allege more than "the possibility of future injury"

warrants dismissal of a plaintiff's cause of action. *Remson v. Verizon Commc'ns, Inc.*, 2009 WL 723872, at *3-4 (E.D.N.Y. Mar. 13, 2009) (dismissing claims for negligence and strict liability where they were based on only an "increased risk" of future disease); *accord Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (1st Dep't 2002) (dismissing tort claims where plaintiff alleged only the risk of injury, rather than any actual personal injuries or property damage). As a result, increased risk cannot "in and of itself support a tort action in New York." *Ivory*, 37 Misc. 3d 1221(A), 2012 WL 5680180, at *11. In short, "[t]here is no doubt but that New York law requires an injury to sustain a tort cause of action, rather than the possibility of some future injury." *Id.* (citation omitted).

Nor can allegations of PFOA accumulation and "cellular and genetic" damage support Plaintiffs' request for medical monitoring. (Compl. ¶¶ 136, 165-66.) *Caronia* considered and rejected such notions of subclinical injury. There, the plaintiffs argued that they had experienced "subcellular harm" from smoking the defendant's cigarettes and sought to establish a medical monitoring cause of action on that basis. Br. for Plaintiffs-Appellants at *4, *38 n.33, *56, *Caronia v. Philip Morris USA, Inc.*, 2013 WL 8023761 (N.Y. July 29, 2013). Yet the *Caronia* decision characterized these allegations as "not claim[ing] to have suffered physical injury," but only "an 'increased risk' for developing lung cancer." *Caronia*, 22 N.Y.3d at 446. Such allegations of subclinical harm are simply increased risk by another name, and thus do not constitute a cognizable injury in tort.

The same argument was advanced in *Ivory*, where Plaintiffs' counsel from this action argued that chemical exposures caused "damage to chromosomes" that might "grow into a cancer." 2012 WL 5680180, at *10. Yet the court dismissed those claims, given the plaintiffs' failure to establish a present disease, its physical effects, or a reasonable certainty of its eventual development. *See id.* at *11, *12 n.8. As in *Ivory*, Plaintiffs' "attempt[] to steer the injury discussion … away from the phrase 'increased risk of disease' … is unavailing"; in reality, "that is the only plausible description of the injury alleged by the asymptomatic plaintiffs," since they "suffer from no current actual physical injury." *Id.* at *11.

Likewise, the Fourth Circuit rejected an attempt to plead negligence based solely on PFOA accumulation in an environmental action. *Rhodes*, 636 F.3d at 95. "The presence of PFOA ... in the plaintiffs' blood does not, standing alone, establish harm or injury for purposes of proving a negligence claim." *Id.* Rather, the "plaintiff also must produce evidence of a *detrimental effect to the plaintiffs' health* that actually has occurred or is reasonably certain to occur due to a present harm." *Id.* (emphasis added).

At bottom, whether characterized as increased risk, chemical accumulation, or cellular and genetic damage, these allegations are "speculative, at best," as to "whether asymptomatic plaintiffs will ever contract a disease." *Caronia*, 22 N.Y.3d at 451. As the Ninth Circuit has keenly observed, "not every alteration of the body is injury. … All life is change, but all change is not injurious." *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570 (9th Cir. 2008). "'DNA damage and cell death' … creates only a ***possibility*** of clinical disease," and, for this reason "courts have not reasoned that subclinical injuries from a toxic agent are *bodily* or *physical* injuries." *June v. Union Carbide Corp.*, 577 F.3d 1234, 1249 (10th Cir. 2009) (first emphasis added).

The facts that Plaintiffs plead do not constitute a cognizable injury in tort, and thus cannot support Plaintiffs' request for medical monitoring damages in negligence and strict liability. Those claims should therefore be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should: (1) dismiss or stay the Complaint's injunctive relief claims; and (2) dismiss the Complaint's damages claims with prejudice.

Dated: September 26, 2016

Respectfully submitted,

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EXHIBIT F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAIN-LINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated, Plaintiffs, v. SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC., Defendants.	Civ. No. 1:16-CV-917 (LEK/DJS)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STAY THE MASTER CONSOLIDATED COMPLAINT

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For decades, defendants Saint-Gobain Performance Plastics Corp. ("Saint-Gobain") and Honeywell International Inc. ("Honeywell") improperly discharged a toxic, man-made chemical called perfluorooctanoic acid, or PFOA, into the air and soil in and around Hoosick Falls, New York. Over time, PFOA contaminated the Village drinking water and private drinking wells throughout the Town. Residents drank, cooked with, and showered in water containing levels of PFOA significantly in excess of appropriate safety standards. These exposures caused PFOA to accumulate in residents' blood in quantities far greater than those observed in the national population. Children, including some of Plaintiffs' children, received blood test results showing PFOA present at over 50 times the national average. As one State Assembly Member observed, the widespread PFOA contamination in Hoosick Falls is "New York's most serious public health crisis since Love Canal."[1]

The polluters responsible for this public health crisis now move to dismiss the Master Consolidated Complaint ("Complaint"), contending that Plaintiffs are unable to state any plausible claims for relief under New York's common law. They are wrong. The common law of this state has never foreclosed tort remedies to those whose property has been unlawfully contaminated, and who have been exposed to toxic chemicals that flowed out of their pipes, taps, and showerheads in their homes. Furthermore, these exposures—the invasion of Plaintiffs' blood with dangerous, measurable quantities of PFOA—constitute actionable injuries under New York law. Accordingly, and for the reasons that follow, the motion to dismiss Plaintiffs' Complaint, filed by defendants Saint-Gobain and Honeywell (collectively, "Defendants"), pursuant to Federal Rule of Civil Procedure 12(b)(6) should be denied. Plaintiffs do not, however, oppose a

[1] Karen DeWitt, *Hoosick Falls Rep "Furious" That Health Dept. Held Back Toxic Water Data*, NCPR, June 10, 2016, http://www.northcountrypublicradio.org/news/story/31992/20160610/hoosick-falls-rep-furious-that-health-dept-held-back-toxic-water-data

limited stay only of their claims for injunctive relief. The parties have therefore submitted a joint stipulation and proposed order staying injunctive relief for 180 days. (*See* Dkt. 15.) Plaintiffs respectfully request that the Court enter this proposed order, and defer ruling on Defendants' motion to dismiss or stay pursuant to Rule 12(b)(1) at this time.

FACTS ALLEGED IN THE COMPLAINT

For decades, Defendants used the man-made chemical PFOA at multiple manufacturing facilities in and around Hoosick Falls, New York. (Compl. ¶¶ 60-61, 81.) During these manufacturing processes, PFOA became vaporized, exited Defendants' facilities through stacks, condensed, and formed particulate matter. (*Id.* ¶¶ 40, 71.) This particulate matter was carried by wind onto soil throughout the community, including soil on Plaintiffs' properties. (*Id.* ¶ 71.) In addition, Defendants' employees discarded PFOA into floor drains that discharged into the soil around Defendants' facilities. (*Id.* ¶ 72.) PFOA discharged in this manner was then carried by rain water and runoff into the groundwater. (*Id.* ¶¶ 72, 80.)

The New York Department of Environmental Conservation (DEC) has identified at least four manufacturing facilities that contributed or are likely to have contributed to the PFOA contamination in Hoosick Falls. (*Id.* ¶¶ 61, 81.) The first is a site at 14 McCaffrey Street, which has been labeled a "significant threat to public health or the environment" and named a state Superfund site. (*Id.* ¶ 6.) Three additional sites have been designated "p-sites," meaning that preliminary information suggests the site and surrounding areas may be contaminated and/or a cause of contamination. (*Id.* ¶¶ 81-82.) DEC is also investigating whether PFOA is migrating into the soil from the municipal landfill that sits adjacent to the Hoosic River. (*Id.* ¶ 85.)

PFOA is water-soluble, allowing it to migrate from soil to groundwater. (*Id.* ¶ 41.) It is also chemically stable, meaning that PFOA remains present in the environment for years after its

initial discharge. (*Id.*) Over time, PFOA discharged into the environment by Defendants contaminated the aquifer. (*Id.* ¶ 5.) By 2014, Village officials were aware that the municipal water supply contained dangerous levels of the chemical; testing resulted in multiple detections in excess of 600 parts per trillion (ppt). (*Id.* ¶¶ 89, 93.) Village officials also learned that several private wells were testing above any level considered at the time to be safe for consumption. (*Id.* ¶ 94.)

In late 2015, the Environmental Protection Agency (EPA) issued an advisory warning residents of Hoosick Falls not to drink or cook with water from the municipal water supply. (*Id.* ¶¶ 97, 100.) This warning was subsequently extended to include water drawn from any private well testing above 100 ppt for PFOA.[2] (*Id.* ¶ 112.) In January 2016, Saint-Gobain began providing bottled water to Hoosick Falls' residents whose homes were supplied by municipal water. (*Id.* ¶ 102.) Residents on private wells later became eligible to receive bottled water, as well. To this day, many residents of Hoosick Falls continue to cook with and drink only bottled water. Furthermore, some residents were also bathing by sponge for a period because they were afraid of inadvertently ingesting contaminated water during a shower. (*Id.* ¶ 117.)

These defensive measures were necessary because residents were being exposed to PFOA contamination in their homes and on their properties. For all residents whose homes were

[2] The EPA's recommendation not to drink or cook with water containing more than 100 ppt of PFOA by no means indicates that levels below 100 ppt are safe for consumption. Indeed, in May 2016, EPA released a provisional health advisory that recommended against drinking water containing PFOA at a concentration greater than 70 ppt. (Compl. ¶ 53.) EPA's advisory is not binding on the states, and each state is entitled to set its own safe drinking standards. In 2013, New Jersey established a preliminary health-based guidance level of 40 ppt. (*Id.* ¶ 51.) On September 12, 2016, a state-appointed committee of New Jersey researchers recommended that the state reduce that level even further to 14 ppt. Kyle Bagentose, *NJDEP Subgroup Recommends Lower Limit for PFOA than EPA*, The Intelligencer, Sept. 13, 2016, http://www.theintell.com/news/horsham-pfos/njdep-subgroup-recommends-lower-limit-for-pfoa-than-epa/article_eadec3e2-79bf-11e6-8427-d3df3d33d28b.html. Vermont established its own drinking water advisory of 20 ppt in 2016. (*Id.* ¶ 52.)

supplied with municipal water, including Plaintiffs Pamela Forrest, Michael Hickey, Kathleen Main-Lingener, Kristin Miller, James Morier, Jennifer Plouffe, Silvia Potter, and Daniel Schuttig, PFOA contaminant was entering Plaintiffs' pipes, taps, and showerheads in their homes. (*See id.* ¶¶ 13-20.) Similarly, many private well owners, including Plaintiffs Michele Baker, Charles Carr, and Angela Corbett, were exposed to PFOA after the contaminant entered their private well, pipes, taps, showers, and homes. (*See id.* ¶¶ 10-12.) DEC ultimately installed over 800 semi-permanent Point-of-Entry Treatment (POET) systems on private wells in and around Hoosick Falls, including those belonging to Plaintiffs Michele Baker, Charles Carr, and Angela Corbett. (*Id.* ¶¶ 10-12, 123.)

The contamination of Hoosick Falls' water supply is especially concerning because of the toxicity of PFOA. PFOA is readily absorbed after ingestion or inhalation, and remains present in the human body for years after exposure. (*Id.* ¶ 44.) PFOA is associated with, *inter alia*, increased risk to humans of testicular cancer, kidney cancer, prostate cancer, non-Hodgkin's lymphoma, pancreatic cancer, ovarian cancer, thyroid disease, high cholesterol, high uric acid, elevated liver enzymes, ulcerative colitis, and pregnancy-induced hypertension. (*Id.* ¶ 45.) The EPA's Science Advisory Board has stated that PFOA cancer data are consistent with guidelines indicating that exposure to the contaminant is "likely to be carcinogenic." (*Id.* ¶ 46.) PFOA can cause these negative health outcomes months or years after exposure. (*Id.* ¶ 47.)

In February 2016, the New York Department of Health (DOH) began offering blood testing to any Hoosick Falls residents who wished to have their blood tested for PFOA. (*Id.* ¶ 120.) Over 3,000 individuals have participated in this program to date. (*Id.*) Numerous residents, including several Plaintiffs, received test results indicating that PFOA is present in their blood at alarmingly high levels. (*Id.* ¶ 127.)

PFOA is found in individuals nationwide at an average concentration of 2.08 ug/L. (*Id.* ¶ 9.) In the spring of 2016, Plaintiff Charles Carr was informed PFOA is present in his blood at a level of 186 ug/L—roughly 90 times the national average. (*Id.* ¶ 11.) In addition, at or around the same time, Plaintiff Michael Hickey's blood tested at 24.6 ug/L—12 times the national average. (*Id.* ¶ 14.) Plaintiff Kathy Main-Lingener's blood tested at 95.4 ug/L—roughly 45 times the national average. (*Id.* ¶ 15.) Plaintiff James Morier's blood tested at 79.1 ug/L—roughly 40 times the national average. (*Id.* ¶ 17.) Plaintiff Silvia Potter's blood tested at 120 ug/L—60 times the national average. (*Id.* ¶ 19.) Ms. Potter's minor daughter, K.P., received results indicating her blood level was 28.6 ug/L—14 times the national average. (*Id.*) Perhaps most alarming, the young child of Kristin Miller, K.M., who is not even five years old, received a result indicating that PFOA was present in his blood at a level of 108 ug/L, over 50 times the national average. (*Id.* ¶ 16.)

Plaintiffs are not unique among the Hoosick Falls community. Indeed, virtually all long-time residents of Hoosick Falls have PFOA in their blood at an order of magnitude or more above the national average levels. (*Id.* ¶ 129.) According to the DOH, the median blood level among those tested in Hoosick Falls was 64.2 ug/L, a level 30 times the national average.[3] (*Id.* ¶ 127.) This is especially concerning given PFOA's persistence in the human body. The half-life of PFOA (the amount of time it takes the body to rid itself of half of its PFOA content) in humans is 2-9 years, (*id.* ¶ 44), meaning it will take many years—and for some residents, decades—for their bodies to be rid of PFOA.

[3] The 95th percentile of Americans has 5.68 ug/L of PFOA in their blood. (Compl. ¶ 128.) Thus, virtually all long-time Hoosick Falls residents also have PFOA blood levels significantly above the 95th percentile of Americans. (*Id.* ¶ 129.)

On August 26, 2016, Plaintiffs filed the Complaint, seeking to hold Defendants accountable for contaminating their homes and properties with PFOA, and causing them to ingest and inhale this dangerous chemical. (*See* Dkt. 9.) Defendants moved to dismiss the Complaint, contending that the common law of New York provides Plaintiffs no remedy for the contamination of their property, for being forced to use alternative sources of water, and for their exposure to and accumulation of high levels of PFOA in their bodies.[4] (Dkt. 13.) For the reasons that follow, Defendants' arguments are without merit, and the Court should deny Defendants' motion to dismiss.

ARGUMENT

Defendants move to dismiss the Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(1) requires a court to dismiss an action for lack of subject matter jurisdiction when it is without the constitutional or statutory power to adjudicate the matter. *Murtaugh v. New York*, 810 F. Supp. 2d 446, 464 (N.D.N.Y. 2011); *see also Fountain v. Karim*, --- F.3d ---, 2016 WL 5335021, at *4 (2d Cir. Sept. 23, 2016) (setting forth Rule 12(b)(1) standard). A Rule 12(b)(6) motion requires the court to assess the legal feasibility of the claims pled, but not the weight of the evidence offered. *Johnson v. Wala*, No. 9:14-CV-115 (LEK/RFT), 2015 WL 4542344, at *2 (N.D.N.Y. July 27, 2015). When the complaint "raise[s] a right to relief above the speculative level," the court should deny a motion to dismiss for failure to state a claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[4] As discussed below, Defendants also moved to dismiss or stay Plaintiffs' claims for injunctive relief. The parties have stipulated to a temporary stay of litigation regarding these claims, and have submitted a proposed order for the Court's consideration reflecting this joint stipulation. (*See* Dkt. 15.) Entry of this proposed order would allow the Court to defer ruling on Defendants' Rule 12(b)(1) motion at this time.

After Defendants filed their motion to dismiss or stay, the parties met and conferred and reached a joint agreement to temporarily stay litigation on Plaintiffs' claims for injunctive relief. Accordingly, if the Court enters the parties' proposed order, there is no need to resolve Defendants' motion to dismiss or stay pursuant to Rule 12(b)(1) at this time. The Court should deny Defendants' motion to dismiss Plaintiffs' common law claims pursuant to Rule 12(b)(6), however, because the Complaint sufficiently states claims for negligence, private nuisance, trespass, and strict liability under New York law.

I. THE PARTIES HAVE AGREED TO TEMPORARILY STAY PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF.

A. The Court Need Not Address the CERCLA or Primary Jurisdiction Issues at this Time Because the Parties Have Agreed to a Temporary Stay.

The parties met and conferred after Defendants filed their motion to dismiss and agree that a temporary stay of the requested injunctive relief is appropriate at this juncture. Accordingly, the Court need not address these issues at this time.[5] To this end, Plaintiffs and Defendants have entered a joint stipulation to stay injunctive relief claims for six months.[6] Although Defendants sought only a 90-day stay, the parties agree that a stay of 180 days from the date of the stipulation, recognizing the time it likely will take for regulatory bodies to address appropriate remedial measures. The stipulation includes a process to brief issues relating to the stay if the regulatory process fails to provide the full protection Plaintiffs seek through the Complaint's demands for injunctive relief.

B. Notwithstanding the Parties' Stipulation, CERCLA Does Not Preempt Plaintiffs' Injunctive Relief Claims.

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[5] The filing of Defendants' motion was the first time that Plaintiffs learned Defendants believe CERCLA and the primary jurisdiction doctrine warranted dismissal and/or a stay of the injunctive relief claims.

[6] The proposed stipulation was filed on October 25, 2016, (Dkt. 15), a copy of which is attached as Exhibit A.

Even if the parties had not entered a joint stipulation staying Plaintiffs' claims for injunctive relief, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not prevent this Court from exercising its jurisdiction over those claims. Section 113 of CERCLA divests federal courts of jurisdiction when a court action seeks judicial review of "removal or remedial action selected under [CERCLA section 104.]" *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003) (quoting 42 U.S.C. § 9613(h)). "Removal actions" consist of studies or investigations "to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment." 42 U.S.C. § 9604(b).

Plaintiffs' injunctive relief claims do not interfere with, or challenge, the ongoing state and federal regulatory activities relating to contamination of the soil and groundwater with PFOA in and around Defendants' facilities in Hoosick Falls, and other contaminated sites in Hoosick Falls, such as the Village landfill. Plaintiffs primarily seek in-home relief—remedial actions to clean up or rectify contamination-related issues in Plaintiffs' homes and properties—to ensure that those with private drinking wells do not further risk their health by consuming PFOA-contaminated water in the future. Specifically, Plaintiffs demand regular testing of their private wells, as well as installation and lifetime maintenance of permanent filtration systems on those private wells. (Compl. ¶ 189.) In addition, the Biomonitoring Class Plaintiffs seek an order establishing a biomonitoring protocol to monitor their health and diagnose PFOA-related ailments at any early, treatable stage. (*Id.*) These requests for injunctive relief do not interfere

with or challenge any CERCLA action by EPA and do not overlap with the state and federal agencies' remedial focus.[7]

Plaintiffs seek injunctive relief that will remediate their homes and properties to ensure they no longer consume PFOA in their drinking water. These remedies are sought exclusively under the New York common law, and do not interfere with a removal action. *See* 42 U.S.C § 9652(d) (clarifying that nothing in the CERCLA statutory framework "shall affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law"); *United States v. Hooker Chems. & Plastics Corp.*, 722 F. Supp. 960, 964 n.1 (W.D.N.Y. 1989) (explaining that a finding of CERCLA liability precludes recovery under state law of "compensation for the *same* removal costs or damages," but does not preempt additional liabilities under state law (quoting 42 U.S.C. § 9614(b)); *see also MSOF Corp. v. Exxon Corp.*,

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[7] The legislative history of CERCLA Section 113(h), which Defendants cite throughout their brief, illustrates that the Section is designed to address actions brought by a potentially responsible party who is challenging the EPA's selected cleanup or citizen suits challenging the selected remedy under CERCLA. Section 113(h)'s purpose is to prevent litigants from delaying the cleanup:

> The courts have expressly recognized the importance of § 113(h)'s primary objective: to prevent the delay of EPA ordered cleanups at ongoing CERCLA sites. This was a common principle whether the plaintiff was a [potentially responsible party] or a citizen asserting a claim with a citizen suit, and whether the court concluded that §113(h) barred the plaintiff from bringing suit or permitted the suit to proceed.

Jonathan N. Reiter, Comment, *CERCLA Section 113(h) & RCRA Citizen Suits: To Bar or Not to Bar?,* 17 UCLA J. Envtl. L. & Pol'y 207, 219 (1999). Plaintiffs here are not suing the EPA, and this lawsuit is not a citizen suit under CERCLA. Moreover, Plaintiffs are not challenging EPA's selected mode of cleanup—indeed, no mode of cleanup has even been selected yet—and this litigation, and the injunctive relief sought here, will not delay any remedy EPA ultimately implements.

295 F.3d 485, 490-91 (5th Cir.) (finding CERCLA does not preempt state tort liability for the release of hazardous substances), *cert. denied*, 537 U.S. 1046 (2002).

Defendants make no attempt to explain how an order requiring in-home testing and maintenance of POET systems would interfere with any CERCLA remedy that might ultimately be agreed to among the government entities and Defendants. The current consent orders, by Defendants' own admission, do not *require* Defendants to provide the protection Plaintiffs seek through injunctive relief. Indeed, Defendants acknowledge that, to the extent in-home remedies are being provided now, Defendants are doing so "voluntarily." (Def. Br. at 6 (stating, "[w]hile investigations were and are still pending, Saint-Gobain has *voluntarily* offered a number of remedial measures for Hoosick Falls, including . . . [f]unding and installation of POETs [Point of Entry Treatment] for Village residents who obtain their water from private wells, rather than the municipal supply").[8]) That is cold comfort for the residents of Hoosick Falls who are faced with the prospect of lifetime expenses to maintain their newly-required filtration systems. Of course, Defendants have also not agreed, voluntarily or otherwise, to monitor and pay for well tests to ensure PFOA has not broken through the POET system or contaminated a private well that previously did not show the presence of PFOA. Nor have they agreed to fund a biomonitoring program to safeguard the health of Hoosick Falls residents.

C. The Doctrine of Primary Jurisdiction also Does Not Warrant Dismissal.

Primary jurisdiction is a judicially-created doctrine that courts apply narrowly in circumstances where "enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed with the special competence of an administrative body." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE II*"), 476 F. Supp. 2d 275,

[8] "Def. Br." refers to Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss or Stay the Master Consolidated Class Action Complaint. (Dkt. 13-1.)

278 (S.D.N.Y. 2007) (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE I*"), 175 F. Supp. 2d 593, 616 (S.D.N.Y. 2001)).[9] After analyzing the 4-part analysis for application of primary jurisdiction under Second Circuit law,[10] and in circumstances nearly identical to those presented here, the district court in the Southern District of New York, in two separate water contamination cases, found that application of the doctrine was inappropriate. Because the plaintiffs in the MTBE cases were not seeking remediation of the spills themselves, but rather remediation of contamination *in their wells* and other injunctive relief to protect against future MTBE intrusion *of their wells*, the court reasoned:

> [W]here there is "ample room for injunctive relief beyond [the DEC's] efforts," a court need not defer to the administrative process. Here the DEC's remedial measures may not go far enough and there remains "ample room" for this Court's involvement. While the DEC plays a significant role in crafting an overall response to a petroleum release and the resulting contamination, the DEC's activities are largely focused on abatement and remediation at the spill source and surrounding areas—rather than remediation of plaintiffs' wells or protecting those wells from future contamination.

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[9] The court addressed primary jurisdiction in both the *MTBE I* and *MTBE II* cases. In *MTBE I*, plaintiffs, like here, were plaintiffs whose drinking water wells, and therefore their in-home taps, were contaminated with MTBE and they were seeking the costs associated with removing MTBE from their drinking water. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE I*"), 175 F. Supp. 2d 593, 599 (S.D.N.Y. 2001). In *MTBE II*, the plaintiffs were municipal water providers seeking well treatment and operation and maintenance costs for that treatment from defendant petroleum companies to pay for the costs of removing MTBE, rather than having to pass that cost to the consumers. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE II*"), 476 F. Supp. 2d 275, 277-78 (S.D.N.Y. 2007).

[10] The four factors are (1) whether the question is particularly within the agency's discretion; (2) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether prior application to the agency has been made." *MTBE I*, 175 F. Supp. 2d at 617 (citing *Nat'l Comm. Assoc. v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995)).

MTBE II, 476 F. Supp. 2d at 281-82 (citations omitted).[11] Just as in *MTBE I* and *MTBE II*, the primary jurisdiction doctrine would not require dismissal of Plaintiffs' claims for injunctive relief. Nor does the doctrine dictate a stay, as the court concluded in *MTBE I* and *MTBE II*. Plaintiffs nonetheless have agreed to a temporary stay of their injunctive relief claims because Defendants are at this time providing some (but not all) of the injunctive relief Plaintiffs request, albeit voluntarily.

II. THE COMPLAINT PLEADS COGNIZABLE CLAIMS FOR PROPERTY DAMAGE UNDER NEW YORK COMMON LAW.

Plaintiffs plead claims seeking property damage under common law theories of negligence, nuisance, trespass, and strict liability. The allegations in the Complaint far surpass the requirements of Rule 12 and raise a plausible right to relief on these claims, to wit: Defendants' conduct caused PFOA to be present in and contaminate the municipal water supply and Plaintiffs' private wells. (Compl. ¶¶ 3-5, 7, 10-12, 61, 62, 80, 89, 92-94.) This contaminant entered Plaintiffs' properties through their pipes, taps, and showers. (*Id.* ¶¶ 1, 11-12, 14-17, 19.) PFOA that was emitted from Defendants' facilities through the air has also dispersed and settled into the soil, including the soil on Plaintiffs' properties. (*Id.* ¶¶ 41, 71.) Ultimately, due to this pervasive contamination, PFOA entered Plaintiffs' bodies because they unwittingly drank water and cooked with water from their taps, in their homes. (*Id.* ¶¶ 9, 97, 100, 112, 127-29.)

Plaintiffs' property was (and still is) physically contaminated: PFOA traveled through the air onto Plaintiffs' properties and through the aquifer into Plaintiffs' drinking water, into their

[11] The *MTBE II* court further reasoned that "[m]uch of the relief plaintiffs are seeking such as the installation of sentinel or recovery wells does not require this Court to engage in a level of detailed technical and policy analysis for which it is not particularly well-suited. While remediation at the well site may be best left to the expertise of the DEC and its sister agencies, this fact need not concern the Court because plaintiffs are not seeking remediation of spill sites." 476 F. Supp. 2d at 282-83. So too here.

homes, and into Plaintiffs' bodies. Not only has PFOA contaminated Plaintiffs' properties, but this contamination also caused Plaintiffs' properties to decrease in value. (*Id.* ¶¶ 7-8, 10, 13, 18, 113-15.) Where a contaminant unlawfully enters and contaminates a party's property, and negatively impacts the property value, as is alleged here, New York common law provides for tort recoveries in trespass, negligence, nuisance, and strict liability. Defendants' arguments to the contrary are without merit.

A. Plaintiffs' Allegations of Property Contamination are Not Precluded Simply Because Defendants First Contaminated a Public Water Source.

Defendants contend Plaintiffs cannot bring claims alleging that their properties have been damaged—even though contaminated water was pumped into their homes and Plaintiffs unwittingly drank, cooked with and bathed in that contaminated water for years—because Defendants' chemical waste was first dumped onto the ground before it migrated into the groundwater and contaminated the aquifer, a public resource. (Def. Br. at 31-32.) This contention is absurd. The Complaint alleges that Defendants inappropriately discharged PFOA at multiple locations in and around Hoosick Falls, including the McCaffrey Street Site, three p-sites, and the Village landfill, where PFOA-contaminated waste was discarded. (*Id.* ¶ 108.) Plaintiffs also allege that Defendants released PFOA into the air that was then dispersed onto soil throughout the community, including Plaintiffs' properties, where it dissolved with rainwater and traveled to the groundwater below. (*Id.* ¶¶ 41, 71.) PFOA that Defendants released entered Plaintiffs' private wells, pipes, taps, and showers before Plaintiffs ingested it in their homes.

Even if Defendants' air discharges had not contaminated the soil on Plaintiffs' properties, Defendants are not absolved of tort liability simply because they first polluted the drinking water aquifer, which carried their contaminant throughout the Village and Town. To the contrary, PFOA-contaminated drinking water entered Plaintiffs' property and harmed Plaintiffs in their

homes. Indeed, this is precisely why the EPA warned Plaintiffs to avoid drinking or cooking with water from their taps lest they subject themselves to exposure to the dangerous contaminant Defendants caused to be present on their properties. (*See id.* ¶¶ 97, 100.)

New York law has long permitted plaintiffs to bring common law claims when their drinking water is contaminated by the tortious actions of a polluter. *See, e.g.*, *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE III*"), 568 F. Supp. 2d 376, 379-81 (S.D.N.Y. 2008) (finding that defendant may be liable for property damage where gasoline additive leaked onto defendant's property and migrated through the ground into plaintiff's drinking water wells); *Murphy v. Both*, 84 A.D.3d 761, 762 (2d Dep't 2011) (finding that a defendant may be liable in negligence where she permits harmful contaminants to migrate from tanks on her property into the drinking water of neighboring property); *Flick v. Town of Steuben*, 199 A.D.2d 970, 970 (4th Dep't 1993) (holding that plaintiff alleged a claim of property damage where contaminant stored on defendant's property dissolved into the soil and migrated into plaintiff's drinking water well); *Fetter v. DeCamp*, 195 A.D.2d 771, 773 (3d Dep't 1993) (explaining that a plaintiff may pursue negligence liability against a defendant "in cases involving the pollution of underground waters"—specifically, drinking water wells on plaintiff's property); *Cornell v. Exxon Corp.*, 162 A.D.2d 892, 894 (3d Dep't 1990) (permitting property damage claims where plaintiffs alleged that harmful chemicals leaked from storage tank on defendant's property, traveled underground, and contaminated plaintiff's drinking water well); *see also Abbo-Bradley v. City of Niagara Falls*, No. 13-CV-487-JTC, 2013 WL 4505454, at *7 (W.D.N.Y. Aug. 22, 2013) (permitting plaintiffs to bring claims for negligence, nuisance, trespass, and strict liability to seek relief from the release of toxic chemicals into the environment).

In addition, New York's statute of limitations provision for latent injuries specifically recognizes a viable tort action based on a party's property interest in contaminated drinking water. Section 214-c of the Civil Practice Law and Rules (CPLR) states, in relevant part:

> [T]he three-year period within which an action to recover damages for personal injury or *injury to property* caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.

CPLR § 214-c(2) (emphasis added). In *Jensen v. General Electric Co.*, 82 N.Y.2d 77 (1993), the Court of Appeals applied this statutory provision to nuisance and trespass claims resulting from groundwater contamination.

In *Jensen*, General Electric (GE) improperly disposed of hazardous waste between 1958 and 1969 at various waste sites, resulting in a groundwater contamination plume of the chemical trichloroethylene (TCE). *Id.* at 81-82. GE entered into a consent order with the DEC in 1980 with respect to the TCE plume, undertook remediation efforts between 1984 and 1986, and advised affected property owners in 1986 of the TCE plume. *Id.* at 82. By this point, the plume had migrated onto the plaintiff's property, but she waited until four years later to commence action against GE for property damage. *Id.* Although *Jensen* dismissed the plaintiff's trespass and nuisance causes of action as untimely under § 214-c, the court expressly recognized the availability of common law tort claims based on the contamination of the groundwater on a plaintiff's property. *Id.* at 83-84; *see also Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 264 A.D.2d 503, 505-06 (2d Dep't 1999) (permitting claims for negligence, trespass, and nuisance where property owner caused contamination of neighboring owner's groundwater). There is

simply no basis to contend that a party is without a tort remedy when a polluter causes groundwater contamination that then impacts his or her drinking water.

Defendants' reliance on *Sweet v. City of Syracuse*, 129 N.Y. 316 (1891), a case concerning the state's right to divert water from a lake for local use, does not compel deviation from the above-referenced authorities. In *Sweet*, a private citizen argued that a bill was unconstitutional where it authorized the city of Syracuse to utilize water from a lake for delivery to the city and its inhabitants. *Id.* at 332-33. Such use, the citizen argued, allowed the city to appropriate public property (water) for private use. *Id.* at 334. In soaring Blackstonian language, the *Sweet* court stated, "Neither sovereign nor subject can acquire anything more than a mere usufructuary right [to the lake water], and in this case the state never acquired, or could acquire, the ownership of the aggregated drops that comprised the mass of flowing water in the lake and outlet, though it could and did acquire the right to its use." *Id.* This decision has no relevance here. *Sweet* is not a decision concerning groundwater contamination; it concerns government's right to appropriate water for public use. Plaintiffs do not assert any property rights over the aquifer in Hoosick Falls. They do not question whether the state or local government has a right to control public waters in or around Hoosick Falls. Rather, Plaintiffs' property damage claims center upon the contaminants that Defendants caused to enter Plaintiffs' property, pipes, taps, and showers through either contaminated municipal drinking water or contaminated private well water. Defendants' attempt to avoid liability in this case, and to preclude Plaintiffs from asserting tort claims when Defendants have caused PFOA contamination to invade their property, draws no support from *Sweet*.

Similarly unavailing is Defendants' reliance on *Ivory v. International Business Machines Corp.*, 116 A.D.3d 121 (3d Dep't 2014). In *Ivory*, the defendant contaminated the groundwater

aquifer beneath its property with TCE, an industrial solvent, which pooled at the base of the aquifer. *Id.* at 125. That contaminant then mixed with the groundwater and migrated off of defendant's property. *Id.* The contaminated groundwater flowed underneath the plaintiffs' homes, but the groundwater was not a source of the plaintiffs' drinking water. *Id.* at 125-26. Instead, the contaminated solvent was released from the groundwater in vapor form and invaded the homes above. *Id.* Thus, the *Ivory* plaintiffs did not contend that their drinking water was contaminated or that contaminated water was entering their homes; rather, the contaminated groundwater only flowed beneath their properties. *Id.*; *see also id.* at 130. Under these facts, the court held that contamination of groundwater, *per se*, did not constitute a trespass on property owned by the plaintiffs because they did not own the groundwater. *Id.* at 130. However, where the contaminated groundwater passed through the plaintiffs' soil and contaminated the soil, the plaintiffs had a right to make a claim for trespass.[12] *Id.*

Accordingly, *Ivory* does not hold, as Defendants' suggest, that private plaintiffs are always, in all circumstances, foreclosed from bringing property damage claims for contaminated drinking water. (*See* Def. Br. at 32.) Rather, *Ivory* simply rejected *trespass* claims where the plaintiffs had not shown that contaminated groundwater was entering their homes or properties. Once the contaminant entered the plaintiffs' properties, however, and caused contamination of the soil, the plaintiffs were permitted to pursue property damage claims related to their soil. *Id.* at 130. Here, as in *Ivory*, contaminated groundwater is impacting private wells and soil on Plaintiffs' properties. Furthermore, unlike *Ivory*, the contaminated groundwater has entered all

[12] The procedural posture in which *Ivory* was decided—summary judgment—is important. After development of the record, the court was able to differentiate contaminants that entered or invaded the plaintiffs' properties and those that did not. In contrast, and in spite of the allegations of the Complaint, Defendants here ask this Court to find that Plaintiffs' properties have not been contaminated on the basis of the pleadings. The Complaint pleads otherwise, and Defendants' invitation is not the proper application of Rule 12.

Plaintiffs' homes, through their pipes; it has flowed out of Plaintiffs' taps and showerheads, and was used to water their lawns and gardens. This is a tangible invasion of property with contaminated water, unlike the facts at issue in *Ivory*.[13]

Simply put, the PFOA contamination in this case was and is a physical invasion of Plaintiffs' real property.[14] Such an event triggers common law tort liability under New York law; polluters are not immunized from liability simply because the medium by which a contaminant is carried and deposited onto a party's real property is groundwater.

B. Plaintiffs' Claims for Trespass, Negligence, and Strict Liability Allege Physical PFOA Contamination and Loss of Property Value, and are Cognizable Under New York Law.

Plaintiffs plead property damage arising from their common law claims of negligence, private nuisance, trespass, and strict liability—theories that "have long been recognized by the New York courts as a basis for recovery from parties found to be responsible for . . . property damage occurring as a result of the release of toxic chemical wastes or other hazardous substances into the environment." *Abbo-Bradle*, 2013 WL 4505454, at *7. Again, Defendants contend that these damages are not cognizable because Plaintiffs have not experienced "physical invasion or damage" to their properties. (Def. Br. at 33.) This contention ignores the allegations of the Complaint.

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[13] In *Ivory*, the court expressly permitted property damage claims where the contaminant was shown to have entered the plaintiffs' property—*i.e.*, through the soil or as vapors intruding into the home. *See Ivory v. Int'l Bus. Machs. Corp.*, 116 A.D.3d 121, 130-31 (3d Dep't 2014). Therefore, and as set forth in more detail below, *Ivory* supports the viability of Plaintiffs' claims here. Plaintiffs have suffered a tangible invasion of their properties by the PFOA contaminant and, just as in *Ivory*, once the contaminant has been shown to invade a party's property (in any tangible form), New York's common law recognizes a viable cause of action.

[14] Defendants' reliance on *State of New York v. New York Central Mutual Fire Insurance Co.*, 147 A.D.2d 77 (3d Dep't 1989), is also misplaced. There, the Third Department made the common-sense finding that the state was entitled to seek oil spill damages for pollution of a public waterway. *See id.* at 79. This decision has no bearing here.

Plaintiffs allege that a contaminant, PFOA, physically entered their properties, contaminated their wells and soil, traveled through their pipes, and flowed out of their taps and showerheads. (Compl. ¶¶ 3, 5, 8, 10-12, 14-17, 19, 41, 71-72, 80, 91-95, 115, 163-64, 178.) For years, Plaintiffs were exposed to this contaminant *in their homes* when they drank from the tap, used tap water to cook, and bathed. In November and December 2015, the EPA advised Plaintiffs to stop cooking with or drinking water from their tap. (*Id.* ¶¶ 97, 100.) The EPA's advisory was necessary because PFOA had entered Plaintiffs' homes and properties—it had, in other words, physically invaded and damaged Plaintiffs' properties. This Court should reject Defendants' assertion that no such invasion occurred and it should deny Defendants' motion to dismiss the trespass, negligence, and strict liability claims for the reasons set forth below.

Trespass. "To prevail on a trespass claim under New York law, a plaintiff must show an 'interference with [its] right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 119 (2d Cir. 2013) (quoting *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989)). Here, Defendants argue that there has been no "physical intrusion into the Plaintiffs' legal property interest," (Def. Br. at 33), even though, as explained above, PFOA has contaminated Plaintiffs' private wells, it is in and upon the soil on Plaintiffs' properties, in Plaintiffs' pipes, taps, and showerheads, and on their lawns and gardens. Not only does Defendants' position defy common sense, it is at odds with relevant case law.

New York courts have found trespass claims to be viable where a defendant causes a contaminant to unlawfully enter another individual's property. *See, e.g.*, *Scribner v. Summers*, 84 F.3d 554, 557-58 (2d Cir. 1996) (finding polluter liable for trespass where contaminant migrated through water onto plaintiff's property); *Fitzgibbons v. City of Oswego*, No. 5:10-CV-1038

(FJS/ATB), 2011 WL 6218208, at *15-16 (N.D.N.Y. Dec. 13, 2011) (finding trespass claim viable where contaminants from landfill migrated onto plaintiff's property). In *Phillips v. Sun Oil Co.*, the Court of Appeals held that a defendant who places "polluting material" onto its own property is liable in trespass if it "had good reason to know or expect that subterranean and other conditions were such that there would be passage [of the pollutant] from defendant's to plaintiff's land." 307 N.Y. 328 (1954). A significant body of case law has subsequently recognized that trespass claims may arise "from the movement of noxious liquids from one property to another." *Scribner*, 84 F.3d at 557 (relying upon *Phillips*); *see also Emerson Enters., LLC v. Kenneth Crosby New York, LLC*, 781 F. Supp. 2d 166, 181 (W.D.N.Y. 2011) ("Under the law of New York State, a party may be liable for trespass for allowing noxious liquids to move from one property to another."); *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 542 (S.D.N.Y. 2007) (denying motion to dismiss where complaint alleged that contaminant migrated from defendant's to plaintiffs' property). In short, the unlawful entry of contaminants onto another's property constitutes an invasion or interference with a property right sufficient to support a trespass claim under New York law.

Defendants do not dispute the validity of this case law; rather, they rely on the Third Department's *Ivory* decision to contend that groundwater contamination cannot constitute a trespass. (*See* Def. Br. at 33 (citing *Ivory*, 116 A.D.3d at 129-30).) However, as explained above, *Ivory* upheld the plaintiffs' claims of trespass based upon the invasion of the TCE contaminant that was carried by groundwater into the soil.[15] *See Ivory*, 116 A.D. at 130. In the present matter, not only did groundwater carry PFOA into the soil beneath Plaintiffs' properties, the air has also carried PFOA to the soil at the surface, and PFOA-contaminated water was pumped into the

[15] In *Ivory*, the contaminated water was not a source of the plaintiffs' drinking water.

Plaintiffs' homes. In short, the allegations here comport with the Court of Appeals' decision in *Phillips*, which found that trespass claims involving the "underground movement of noxious fluids" were viable under New York law. *Phillips*, 307 N.Y. 331.[16] This Court should reach a similar result here and deny Defendants' motion, which is based only on the erroneous contention that PFOA did not invade Plaintiffs' properties.

Negligence. Plaintiffs also assert property damage claims arising from Defendants' negligence. In particular, the Complaint alleges that Plaintiffs' properties and private wells have been contaminated with PFOA, (*id.* ¶¶ 10, 11, 12, 89-94, 98, 100, 108, 163), permanent or semi-permanent fixtures have been installed on their properties in an attempt to address this contamination, (*id.* ¶¶ 10, 11, 12, 123), and Plaintiffs have suffered financial injury because their properties have decreased in value, (*id.* ¶¶ 7, 10, 13, 18, 19, 113-15, 164). In spite of these allegations, Defendants claim that Plaintiffs have suffered no injury recognized by the New York common law. This contention is without merit.

New York courts have long recognized that polluting or causing contaminants to enter upon another individual's property may amount to a harm recognized by the law of negligence. *See, e.g.*, *Murphy*, 84 A.D.3d at 762 (holding that a defendant is subject to negligence liability where fuel leaking from a storage tank migrates onto neighboring property); *Leone v. Leewood Serv. Station Inc.*, 212 A.D.2d 669, 671 (2d Dep't 1995) (finding that a defendant may be liable in negligence where leaking fuel tanks contaminate neighboring property); *see also Fetter*, 195

[16] Defendants cite only one other case purportedly in accord with *Ivory* on this point: *State of New York v. New York Central Mutual Fire Insurance Co.*, 147 A.D.2d 77 (3d Dep't 1989). This decision, which concerns the state's right to recover cleanup costs incurred following a petroleum spill, does not hold that a private property owner is foreclosed from pursuing a trespass claim when a polluter causes contaminants to enter his or her home. Rather, *New York Central* stands for the provision that the state has a right to pursue cleanup costs incurred following an oil spill on public waterways. *Id.* at 79.

A.D.2d at 773 (recognizing that a defendant may be liable in negligence for causing contaminants to enter neighboring landowner's drinking water well). Indeed, the *Ivory* decision, which Defendants rely upon heavily in their brief, held that the plaintiffs' negligence claims based upon the intrusion of harmful vapors emanating from contaminated groundwater onto the plaintiffs' properties were viable and could proceed to a jury. *See Ivory*, 116 A.D.3d at 127. In the instant matter, Plaintiffs seek to hold Defendants accountable for contaminating their properties, including their wells, soil, pipes, taps, and showerheads, with PFOA. This contamination has harmed their property physically; it has required Plaintiffs to install permanent filters on their properties;[17] and it has *also* caused their property value to diminish.

The damages sought herein—compensation for property damage and contamination, as well as lost property value—are expressly available under New York law. *See MTBE III*, 568 F. Supp. 2d at 381 (explaining that property damages may take the form of, *inter alia*, "necessary restoration and repairs, lost rental value or property devaluation"). Indeed, where a defendant's negligence causes permanent harm to real property, "damages can 'place the wronged victim in the same position as it was prior to the wrongdoing.'"[18] *In re Sept. 11 Litig.*, 802 F.3d 314, 328

[17] A contamination that requires a plaintiff to install a permanent treatment system to filter his or her water constitutes physical property damage under New York law. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.* ("*MTBE III*"), 568 F. Supp. 2d 376, 382 (S.D.N.Y. 2008). Defendants, of course, ignore the fact that hundreds of residents of Hoosick Falls are now saddled with POET systems indefinitely to filter PFOA from their drinking water.

[18] "Permanent harm," in the context of property damage, may obviously constitute pollution that cannot be remediated. In addition, a contaminant may cause an increased health risk and, therefore, also constitute "permanent harm." *See, e.g.*, *In re Paoli R.R. Yard PCB Litig.* ("*Paoli II*"), 35 F.3d 717, 796 (3d Cir. 1994) (holding that PCB contamination that increased the risk of cancer may constitute permanent damage to property). So too may a property's loss of market value also constitute "permanent harm." *See In re Paoli R.R. Yard PCB Litig.* ("*Paoli III*"), 113 F.3d 444, 462-63 (3d Cir. 1997) (quoting *Paoli II*, 35 F.3d at 798). Plaintiffs here allege that their properties and homes are contaminated with PFOA; that the PFOA poses

(2d Cir. 2015) (quoting 36 N.Y. Jur.2d *Damages* § 6). Damages may be ascertained in one of two ways: "One possibility is to award the plaintiff 'the difference between the value of the land before the injury and its value after the injury . . . sometimes called the diminution-in-value rule.'" *Id.* (quoting 36 N.Y. Jur.2d *Damages* § 75). The second method awards "'the cost of restoration,' plus the 'reasonable worth' of the property's use while the plaintiff 'is deprived of' the property." *Id.* (quoting *Scribner*, 138 F.3d at 472, and 36 N.Y. Jur.2d *Damages* § 113). Regardless of the method ultimately used to calculate damages, lost property value is recoverable.

Even if Plaintiffs were seeking *only* the loss of property value caused by Defendants' misconduct, this Court has previously held that New York law recognizes claims for diminished property value caused by environmental pollution. *See Nashua Corp. v. Norton Co.*, No. 90-CV-1351 (RSP/RWS), 1997 WL 204904, at *6 (N.D.N.Y. Apr. 15, 1997) (explaining that the Court of Appeals has permitted diminished property value claims based on the public perception that contamination of property poses a danger or health risk); *see also Scribner*, 138 F.3d at 473 (stating that "the New York Court of Appeals acknowledged the existence of stigma from environmental contamination"); *Turnbull v. MTA New York City Transit*, 28 A.D.3d 647, 649-50 (2d Dep't 2006) (holding that a determination of property's diminution in value caused by pollution requires a calculation of whether the pollution caused the property value to decrease). Furthermore, as the Court of Appeals has observed, "[E]nvironmental contamination can depress a parcel's true value." *Commerce Holdings Corp. v. Bd. of Assessors of the Town of Babylon*, 88 N.Y.2d 724, 727 (1996). It is simply not possible to compute a property's diminution in value

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significant health risks; and that their properties have decreased in value. Plaintiffs therefore meet any relevant definition of "permanent harm."

without accounting for lost market value.[19] *See In re September 11 Litig.*, 802 F.3d at 328 (explaining that property damages may be calculated by comparing the value of the land before and after the injury).

Defendants' reliance on *532 Madison Ave. Gourmet Foods v. Finlandia Center* is misplaced. In *532 Madison*, a construction accident forced New York City officials to close multiple city blocks. 96 N.Y.2d 280, 286 (2001). Several businesses filed suit, arguing that the defendant's negligence caused them to lose income. *Id.* (stating that "plaintiffs' sole injury is lost income"). In other words, the *532 Madison* plaintiffs conceded that they had suffered neither personal injury nor property damage. The court held that in the absence of such injury, there was no way in which to define a duty on the part of the defendant to prevent economic harm. *Id.* at 288-89. Indeed, the court explained:

> A landowner who engages in activities that may cause injury to persons on adjoining properties surely owes those persons a duty to take reasonable precautions to avoid injuring them. We have never held, however, that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses.[20]

Id. at 289 (internal citations omitted). To further illustrate its point, the *532 Madison* court cited to the Fourth Department's decision in *Dunlop Tire & Rubber Corp. v. FMC Corp.*, 53 A.D.2d

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[19] Not only are Defendants wrong regarding the availability of damages under New York law, but their argument is also premature. On a Rule 12 motion to dismiss, the only question for the Court is whether Plaintiffs have plausibly stated common law property damage claims. Plaintiffs easily meet that burden. Questions of damages are better left for a developed fact record.

[20] This passage of *532 Madison* demonstrates its inapplicability to the case at hand. Defendants constitute "landowner[s] who engage[] in activities that may cause injury to persons on adjoining premises"—a class that, in the words of the Court of Appeals, "surely owes" the injured parties a duty of care. *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 289 (2001). The *532 Madison* court's concern was in holding defendants liable for losses they had no duty to prevent. That concern is not present here. Indeed, Defendants' motion does not dispute that they owed a duty to the residents of Hoosick Falls to refrain from negligently disposing of hazardous chemicals such as PFOA.

150, 154-55 (4th Dep't 1976), which reinforced the principle that once any property damage is established, a plaintiff can recover all its economic losses, including lost income.[21] *532 Madison*, 96 N.Y.2d at 290 (citing *Dunlop Tire*, 53 A.D.2d at 154-55).

Unlike in *532 Madison*, the Complaint in this case expressly alleges that Defendants damaged Plaintiffs' property by contaminating their wells, soil, pipes, and taps with PFOA. Thus, like the plaintiffs in *Dunlop Tire*, the instant Plaintiffs have alleged a physical injury to their property and can therefore recover for all economic losses that flow from Defendants' negligent conduct. Defendants' attempt to avoid liability by relying on *532 Madison* should be rejected.

Strict Liability. Finally, Plaintiffs seek property damages under a theory of strict liability. As the Court of Appeals has explained, "strict liability will be imposed upon those who engage in an activity which poses a great danger of invasion of the land of others." *Doundoulakis v. Town of Hempstead*, 42 N.Y.2d 440, 449 (1977). Such liability is justified because "those who engage in activity of sufficiently high risk of harm to others, especially where there are reasonable even if more costly alternatives, should bear the cost of harm caused the innocent." *Id.* at 448 (citing Restatement (Second) of Torts § 519 (1977)).

Here, Defendants do not dispute that their manufacturing activities and use of PFOA were ultrahazardous; rather, Defendants only contend that strict liability claims require "harm *to the person or property of another*" that is not present here. (Def. Br. at 35 (emphasis in

[21] The *Dunlop Tire* decision and another discussed in *532 Madison*, *Beck v. FMC Corp.*, 53 A.D.2d 118 (4th Dep't 1976), arose out of an explosion at a nearby chemical plant that disabled power to both Beck's and Dunlop's facilities and caused temporary closure and lost revenue. The *Dunlop Tire* facility was near enough to the explosion to suffer actual physical damage from flying debris, while the *Beck* facility was not. As explained by the *532 Madison* court, the *Dunlop Tire* plaintiffs, who sustained physical property damage, were permitted to also recover economic loss caused by the explosion, even though the physical damage to *Dunlop Tire*'s property was not to blame for the power loss. *See 532 Madison*, 96 N.Y.2d at 289-90.

original).) Defendants are incorrect. As discussed extensively above, PFOA has contaminated Plaintiffs' wells, soil, pipes, taps, showerheads, and properties, and as a result, has accumulated in their bodies at alarming levels. There is simply no basis to contend that the pleadings before the Court do not allege "harm to the person and property of another."

Indeed, New York courts have held that a defendant whose ultrahazardous activity causes a contaminant to enter another's property may be held strictly liable for his or her conduct. *See, e.g.*, *Town of New Windsor v. Avery Dennison Corp.*, No. 10-CV-8611 (CS), 2012 WL 677971, at *11-14 (S.D.N.Y. Mar. 1, 2012) (denying motion to dismiss where plaintiffs alleged that defendants improperly discharged hazardous solvents, which migrated into the drinking wells on plaintiffs' properties and contaminated plaintiffs' land); *Abbatiello*, 522 F. Supp. 2d at 533 (denying motion to dismiss where plaintiffs alleged that defendants caused PCBs to migrate onto their properties); *DaCosta v. Trade-Winds Envtl. Restoration, Inc.*, 61 A.D.3d 627, 628-29 (2d Dep't 2009) (denying motion to dismiss where plaintiff alleged that a decontamination process used in her home "involved the use of chemicals and other toxic substances that were extremely hazardous and harmful to personal property"); *see also Hooker Chems. & Plastics Corp.*, 722 F. Supp. at 966-67 (holding that the improper disposal of hazardous wastes may give rise to strict liability where "such wastes have been released into the environment so as to 'endanger or injure the property, health, safety or comfort of a considerable number of persons'" (quoting *Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 (1977))).

The authorities relied on by Defendants do not compel a contrary result. In *55 Motor Ave. Co. v. Liberty Industry Finishing Corp.*, the court was concerned not with the degree of harm necessary to support a strict liability claim, but whether a current property owner could pursue strict liability claims against previous occupants, *see* 885 F. Supp. 410, 422-23 (E.D.N.Y. 1994),

an issue not raised by Defendants' motion. In *Rosenblatt v. Exxon Co., U.S.A.*—a case from the Maryland Court of Appeals interpreting Maryland common law—the parties disputed whether a contaminant was even present on the plaintiff's property. 642 A.D.2d 180, 182-83 (Md. 1989). This disputed fact, however, was ultimately not pertinent to the court's decision; *Rosenblatt* held that strict liability claims could only be pursued against parties that currently own or occupy a property, an issue Defendants have not raised here.[22] *Id.* at 187. Lastly, Defendants rely upon *Remson v. Verizon Communications, Inc.*, a suit seeking medical monitoring for exposure to industrial chemicals, but not property damage. No. CV 07-5296, 2009 WL 723872, at *1 (E.D.N.Y. Mar. 13, 2009). *Remson* dismissed plaintiffs' strict liability claims because, though they alleged exposure to contaminants, they did not allege any present injury. *Id.* at *3-4. Plaintiffs here, unlike the *Remson* plaintiffs, allege present property damage and present physical injury attributable to PFOA contamination.[23] *Remson* is therefore inapposite.

In sum, Plaintiffs have pled viable trespass, negligence, and strict liability claims seeking property damage caused by Defendants' unlawful discharge of PFOA and PFOA contaminants. This Court should deny Defendants' motion to dismiss.

III. PLAINTIFFS' PRIVATE NUISANCE CLAIMS SHOULD NOT BE DISMISSED.

[22] The plaintiff ultimately alleged no personal injury, risk of injury, or property damages resulting from the contamination—facts that also distinguish *Rosenblatt* from the instant matter. *See Rosenblatt v. Exxon Co., U.S.A.*, 642 A.D.2d 180, 188 (Md. 1989) (stating that the plaintiff "alleges no personal injury or property damage resulting from the contamination").

[23] Even if the Court were to find Plaintiffs' allegations of property damage in some way deficient, Plaintiffs also allege they consumed PFOA-contaminated water from the taps in their homes, causing PFOA to be present in elevated levels in their blood. Plaintiffs further allege that these toxic exposures constitute an "injury" under New York law. (Compl. ¶ 183. These allegations, as discussed more fully below, squarely constitute "harm to the person of another" sufficient to support a strict liability claim. The Court should also reject Defendants' motion on this basis.

Plaintiffs allege private nuisance claims on behalf of (i) owners or lessors of real property serviced by municipal water, and (ii) owners or lessors of real property with private drinking water wells. (Compl. ¶ 135.) Defendants assert that these claims must be dismissed because they are "predicated on a class-wide injury," and are therefore "internally contradictory." (Def. Br. at 35-36.) Defendants' argument is apparently premised on their facile misinterpretation of several New York courts' observation that a private nuisance is one that affects "one person or relatively few." (*See* Def. Br. at 36 (referencing, *e.g.*, *Copart Indus., Inc.*, 41 N.Y.2d at 568).) Thus, Defendants contend, since their contamination of an entire community's drinking water harmed a "public resource" (and presumably constitutes a public nuisance), Plaintiffs may not bring private nuisance claims to recover their particular, "special" damages. Defendants are wrong in multiple respects.

For more than a century, New York law has recognized that there is nothing "contradictory" about a private nuisance claimant's assertion that she has been personally damaged in a manner beyond the harm done to a "public resource." In 1903, the Court of Appeals was explicit on the subject:

> [A] nuisance may be both public and private in character, or in other words, a public nuisance becomes also a private nuisance as to any person who is specially injured by it to *any extent* beyond the injury to the public.

Ackerman v. True, 175 N.Y. 353, 360 (1903) (emphasis added). This is so, the court said, for the obvious reason that "a public nuisance as to the person who is specially injured thereby in the enjoyment of his lands becomes also a private nuisance." *Id.*

Moreover, New York law does not impose some mathematical threshold for the number of people affected by a nuisance beyond which it can only be considered "public." To the contrary, "No matter how numerous the persons may be who have sustained peculiar injury or

damage, each is entitled to compensation for his or her injury and has a cause of action against the person erecting or maintaining the nuisance." *Francis v. Schoellkopf*, 53 N.Y. 154, 154-55 (1873). As if anticipating the present Defendants' argument, one New York appellate court found the basis for this rule in fundamental fairness:

> For the interference with the comfortable enjoyment of their homes, for the injury to their property, the owners thereof have an appropriate remedy, if there be nuisance; but, as to each of them, the nuisance is private, and does not become public, merely because a considerable number may be injured, for, otherwise, it would follow that, in case of a special injury, to each of a considerable number, no private nuisance could be maintained.

People v. Cooper, 200 A.D. 413, 417 (2d Dep't 1922). Such an outcome, the Court of Appeals has held, would be "absurd." *Francis*, 53 N.Y. at 154. The articulation set forth in *People v. Cooper* remains the law in New York today. *See, e.g.*, *Seaview at Amagansett, Ltd. v. Trustees of the Freeholders*, No. 09-34714, 2015 WL 3884944 (N.Y. Sup. Ct. June 2, 2015), *aff'd*, 142 A.D.3d 1066 (2d Dep't 2016); *Ivory*, 116 A.D.3d at 128-29; *Citizens of Accord v. Twin Tracks Promotion*, 236 A.D.2d 665, 665-66 (3d Dep't 1997).

To the extent Defendants are suggesting Plaintiffs do not allege "special damages" beyond the harm done to the public's right to clean water, they are mistaken. Plaintiffs allege that Defendants' nuisance-creating conduct has interfered with *their* use and enjoyment of *their* property, with consequential damages.[24] (*See* Compl. ¶¶ 167-172.) By definition, such claims are for harms that other members of the "general public"—for example, resident children who have

[24] Plaintiffs do not claim to own the groundwater of New York. They do, however, own or lease wells, faucets, and/or plumbing systems that utilize and depend on the water and provide Plaintiffs with their domestic water supply, the many uses of which are integral parts of Plaintiffs' property rights. (*See supra*, II.A-B.) Plaintiffs also own or lease homes that they are entitled to enjoy without disturbance by toxic exposure and its consequences.

no ownership interest, and non-resident workers who rely on public water—do not share.[25] Only owners and lessors of real property have suffered the unique harm of having the use of their property disrupted, and their enjoyment of it significantly impaired.[26] As the foregoing authorities make clear, the fact that there are many such victims does not preclude them from bringing private nuisance cases.

Moreover, although the loss of use and enjoyment of property is itself a sufficiently "special" damage to sustain Plaintiffs' nuisance claims, the Complaint also contains allegations of additional damages sustained by Plaintiffs. These include the diminution of their properties' value, as well as past and future costs of remediation and monitoring of their property. (*Id.* ¶¶ 178, 186.) As discussed above, these claims should proceed, and reflect the fact that Plaintiffs have sustained harm beyond that which Defendants have inflicted upon the general community. These harms are redressable in Plaintiffs' private nuisance action, and the Court should deny Defendants' motion to dismiss.

IV. PLAINTIFFS HAVE ADEQUATELY PLED AN *INJURY* UNDER NEW YORK LAW TO SUPPORT NEGLIGENCE AND STRICT LIABILITY CLAIMS AND AN AWARD OF CONSEQUENTIAL MEDICAL MONITORING DAMAGES.

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[25] The fact that private nuisance plaintiffs have suffered a harm not experienced by the public at large has no bearing on whether the claims of private nuisance plaintiffs may be certified as a class. Each homeowner and lessor has suffered sufficiently similar harm as a result of the PFOA contamination to support class certification. But the damages experienced by the private nuisance classes are different than those suffered by the remainder of the general public who do not own or lease property and, as such, are not entitled to bring private nuisance claims under New York law. *See Kavanaugh v. Barber*, 131 N.Y. 211, 213-14 (1892); *Ivory*, 116 A.D.3d 121, 128-29. At any rate, questions of class certification are not currently before the Court and have no bearing on whether the Complaint states a plausible claim for private nuisance relief.

[26] The special harm suffered by Plaintiffs as a result of a nuisance condition does not require an invasion or physical damage to real estate to be actionable. *See, e.g.*, *Schilaci v. Sarris*, 122 A.D.3d 1085, 1087 (3d Dep't 2014).

The Court of Appeals in *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013), held that any plaintiff who has suffered an injury to person or property may recover consequential medical monitoring damages, but increased risk of future illness, by itself, is not sufficient to constitute physical injury sufficient to support a negligence cause of action. As discussed below, the *Caronia* holding was limited by its facts and the question certified to the Court of Appeals to answer. *Caronia* did not overrule Court of Appeals precedent dating back to 1936 establishing that an "injury" occurs at the time of toxic exposure. As such, Plaintiffs' allegations that they ingested PFOA-contaminated water and accumulated this toxic, manmade chemical in their bodies are sufficient to support their negligence and strict liability claims under New York law and entitle them to recover medical monitoring damages pursuant to *Caronia*.[27, 28] (Compl. ¶¶ 9-10, 11-12, 14-17, 19-20, 34, 43-53, 127, 129, 135, 165-166.)

A. Facts and Holding of *Caronia*.

The *Caronia* case originated in the United States District Court for the Southern District of New York and was a putative class action on behalf of people with a long history of heavy smoking who had not yet been diagnosed with a smoking-related disease. Plaintiffs claimed defendants intentionally manufactured cigarettes with higher tar content than was needed, increasing each smoker's risk of future illness and pled, *inter alia*, a separate equitable cause of

[27] Defendants mischaracterize Plaintiffs' allegations regarding injury. (*See* Def. Br. at 36.) Although Plaintiffs allege they are at an increased risk of certain illnesses due to their exposure to unsafe levels of PFOA, Plaintiffs do not allege that this increased risk of harm constitutes their injury. Instead, Plaintiffs allege injury due to ingestion of drinking water with unsafe levels of PFOA and accumulation of that PFOA in their bodies, which constitutes an invasion of their bodies by a toxic agent that causes cellular and genetic damage. (Compl. ¶¶ 11-13, 14-17, 19-20, 129, 135, 165-166.)

[28] The Complaint alleges that Plaintiffs have been injured as a result of Defendants' negligence and under a theory of strict liability. For ease of discussion, this section refers only to the validity of Plaintiffs' negligence claims, but the legal standard is the same for an "injury" under either claim for relief.

action for medical monitoring. Plaintiffs argued that the advent of low dose lung CT scans, which plaintiffs contended was the first available test to safely screen for lung cancer, occurred less than three years before the action was filed, making their equitable medical monitoring claim timely. The district court granted summary judgment dismissing the negligence, products liability and breach of warranty claims as untimely. *Caronia v. Philip Morris USA, Inc.*, No. 06-CV-224 (CBA) (SMG), 2010 WL 520558, at *3-8 (S.D.N.Y. Feb. 11, 2010). With regard to plaintiffs' independent equitable medical monitoring claim, the district court held that it believed the New York Court of Appeals would recognize an independent tort cause of action for medical monitoring, but nonetheless dismissed the claim because plaintiffs failed to plead that absent defendant's allegedly tortious conduct of increasing the tar content of these cigarettes, plaintiffs would not have required the same medical monitoring they were seeking. *Caronia v. Philip Morris USA, Inc.*, No. 06-CV-224 (CBA) (SMG), 2011 WL 338425 (S.D.N.Y. Jan. 13, 2011).

The Second Circuit affirmed the district court's dismissal of plaintiffs' negligence, strict liability and warranty claims on statute of limitations grounds. *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 427-28 (2d Cir. 2013). Before determining whether the district court's dismissal of the equitable medical monitoring claim was appropriate, the Second Circuit certified the following questions to the Court of Appeals for resolution:

> (1) Under New York Law, may a current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?
>
> (2) If New York recognizes such an independent cause of action for medical monitoring,
>
> (A) What are the elements of that cause of action?
>
> (B) What is the applicable statute of limitations, and when does

that cause of action accrue?

Id. at 450.

In addressing the certified questions, the Court of Appeals held: "We answer the first certified question in the negative, and decline to answer the second certified question as academic." *Caronia*, 22 N.Y.3d at 446. Thus, the court held that New York did not recognize an independent equitable cause of action for medical monitoring. In so doing, the court also stated:

> We conclude that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence. That does not prevent plaintiffs who have in fact sustained physical injury from obtaining the remedy of medical monitoring. Such a remedy has been permitted in this State's courts as consequential damages, so long as the remedy is premised on the plaintiff establishing entitlement to damages on an already existing tort cause of action.

Id. at 452.

In its discussion of the law and history of medical monitoring in New York, the *Caronia* majority decision made comments and observations that can only be described as *dicta* because none of these comments or observations explains or directly supports the court's holding that an equitable, independent claim did not exist under New York law.[29] The holding in *Caronia*, however, established that a plaintiff may only pursue medical monitoring damages as consequential to another existing tort claim, such as negligence. *Id.*

B. Plaintiffs' Allegations of Injury.

[29] "*Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself . . . *obiter dicta* are such opinions uttered by the way, not upon the point or question pending . . . as if turning aside for the time from the main topic of the case to collateral subjects." *Rohrbach v. Germania Fire Ins. Co.*, 62 N.Y. 47 (1875) (citations omitted).

Plaintiffs allege they obtained water at their residences from either a private well or the Village of Hoosick Falls municipal water supply wells. (Compl. ¶¶ 10-20.) Plaintiffs allege both the private wells and the Village's municipal wells are contaminated with PFOA, a manmade toxic chemical not found in nature that causes various serious illnesses and conditions. (*Id.* ¶¶ 10-20, 90-94, 122.) Plaintiffs allege they drank municipal water contaminated with unsafe levels of PFOA and/or water from a private well contaminated with unsafe levels of PFOA and, as a result, PFOA invaded and accumulated in their bodies. (*Id.* ¶¶ 10-17, 19-20, 34, 43-53, 127, 129.) Finally, Plaintiffs allege they "suffer[ed] injury and damage at the cellular and genetic levels" as a result of their exposure to unsafe levels of PFOA. (*Id.* ¶ 165.)

Plaintiffs' allegations of injury do not "constitute a significant deviation from [New York's] tort jurisprudence." *Caronia*, 22 N.Y.3d at 452. On the contrary, the injuries alleged in the Complaint are consistent with over 80 years of New York case law holding that an injury occurs upon toxic exposure.

C. New York Courts Have Long Held that an "Injury" Occurs Upon Exposure to a Toxic Substance.

The issue before this Court is whether Plaintiffs' injury allegations from ingestion of unsafe levels of PFOA, which must be taken as true at this stage of the litigation, are sufficient to support a negligence claim and an award of consequential medical monitoring damages. In addressing this issue, the Court must determine whether toxic exposure, and the introduction of a toxic substance into the body in measurable levels 10 to 100 times the national average, continues to constitute sufficient injury to support a cause of action for negligence under the law in New York State. Given the longstanding New York precedent holding that injury occurs at the time of exposure, Plaintiffs' allegations are sufficient, and Defendants' motion should be denied.

In *Schmidt v. Merchants Despatch Transportation Co.*, 270 N.Y. 287, 301 (1936), a negligence case alleging injury from asbestos exposure, the Court of Appeals construed inhaling a toxic substance as an "injury" sufficient for a negligence action to accrue. An "injury," the court held, is "complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust." *Id.* at 301 (emphasis added). As a result of its holding that the injury occurred when the plaintiff was negligently exposed to and inhaled the asbestos, the Court of Appeals dismissed plaintiff's claim as untimely because the suit was commenced more than three years after the plaintiff was exposed to asbestos and suffered the injury.

In a continuous line of cases that followed, this definition of "injury" was repeatedly reinforced. *See Schwartz v. Hayden Newport Chem. Corp.*, 12 N.Y.2d 212, 218 (1963) ("[W]e see no escape from the conclusion that we should follow *Schmidt* in a classic negligence case."); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781 (1979) ("It is well established in this State that when chemical compounds are injected into a person's body, the injury occurs upon the drug's introduction, not when the alleged deleterious effects of its component chemicals become apparent."); *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429 (1993) ("Disease was a consequence of the injury, we said, not the injury itself, and the injury was complete at the moment the dust was inhaled even though plaintiff may not have been aware of it then."); *Consorti v. Owens Corning Fiberglas Corp.*, 86 N.Y.2d 449, 452 (1995) ("[A] bright line, readily verifiable rule was adopted in which, as a matter of law, the tortious injury is deemed to have occurred upon the introduction of the toxic substance into the body."); *Rothstein v. Tennessee Gas Pipeline*, 87 N.Y.2d 90, 92 (1995) ("An unbroken string of this Court's decisions from *Schmidt* in 1936 to *Consorti v. Owens Corning Fiberglas Corp.* this year upheld these benchmarks and consistently barred claims brought more than three years after exposure." (internal citation omitted)).

Thus, under this unbroken line of cases from New York's highest court, Plaintiffs have pleaded a sufficient injury under New York law to support a negligence cause of action by alleging they ingested unsafe levels of PFOA-contaminated drinking water, which resulted in the measurable accumulation of PFOA in their bodies.

D. Courts in New York Recognizing Consequential Medical Monitoring Damages Have Long Held that an "Injury" Occurs Upon Toxic Exposure.

The seminal medical monitoring case in New York was *Askey v. Occidental Chemical Corp*., 102 A.D.2d 130 (4th Dep't 1984). *Askey* was a class action in which plaintiffs sought medical monitoring damages based upon exposure to toxic chemicals. In affirming the denial of the motion to dismiss plaintiffs' claim, the Fourth Department emphasized, in accord with the Court of Appeals' precedent in *Schmidt*, that "[t]he defendant is liable for 'reasonably anticipated' consequential damages which may flow later from that [toxic] invasion although the invasion itself is 'an *injury* too slight to be noticed at the time it is inflicted.'" *Askey*, 102 A.D.2d at 136 (quoting *Schmidt*, 270 N.Y. at 300-01) (emphasis added).

Years after *Askey* recognized consequential medical monitoring damages for plaintiffs exposed to toxic substances, confusion developed regarding the distinction between a consequential medical monitoring damages claim and an emotional distress claim based upon a fear of developing cancer after a toxic exposure. *See Abusio v Consol. Edison Co.*, 238 A.D.2d 454, 454-455 (2d Dep't), *lv denied*, 90 N.Y.2d 806 (1997); *Allen v Gen. Elec. Co.*, 32 A.D.3d 1163 (4th Dep't 2006). The Fourth Department eventually eliminated this confusion in *Baity v. General Electric Co.*, 86 A.D.3d 948 (4th Dep't 2011).

In *Baity*, the panel unanimously affirmed the holding and principle first articulated in *Askey*. Plaintiffs in *Baity* who were exposed to TCE in their drinking water sought, *inter alia*, consequential medical monitoring damages. *Id.* at 948. In upholding the trial court's denial of

defendant's summary judgment motion, *Baity* emphasized that "plaintiffs do not seek damages for emotional distress based upon their 'fear of developing cancer' . . . . Rather, plaintiffs' theory of liability for medical monitoring damages grows out of the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body, setting in motion the forces that eventually result in disease." *Id.* at 949-50 (citing, *inter alia*, *Askey* and *Schmidt*). The court went on to state, "To the extent that our decision in *Allen* holds otherwise, it is no longer to be followed." *Id.* at 950.

Thus, in keeping with *Schmidt* and its progeny, New York law provides that medical monitoring damages can be recovered as a consequence of toxic exposures causing "'an injury too slight to be noticed at the time it is inflicted.'" *Askey*, 102 A.D.2d at 136 (quoting *Schmidt*, 270 N.Y. at 300-01). This is the injury Plaintiffs allege here.

E. Neither the Passage of CPLR § 214-c by the Legislature nor the Dictum in *Caronia* Cited by Defendants Overrules New York's Longstanding Definition of "Injury."

The New York Legislature's passage of CPLR § 214-c did not affect prior precedent regarding when toxic injury is deemed to occur. What the statute changed was the date a cause of action for toxic injury to person or property was deemed to have *accrued*. After the passage of CPLR § 214-c, the statute of limitations in New York is now measured not from the date the injury occurred (the accrual event under the common law), but from the date the plaintiff had actual or constructive knowledge of that injury.[30] Since its enactment in 1986, the Court of

[30] CPLR § 214-c(2) provides, "[n]otwithstanding the provisions of section 214, the three-year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

Appeals has consistently interpreted CPLR § 214-c to *toll* the running of the statute of limitations until *discovery* of the *injury* rather than redefine when the *injury* occurred:

> The legislative history and objectives of section 214-c have been well articulated by this Court (*see e.g. MRI Broadway Rental v United States Min. Prods. Co.*, 92 N.Y.2d 421, 681 N.Y.S.2d 783, 704 N.E.2d 550 [1998]; *Jensen v General Elec. Co.*, 82 N.Y.2d 77, 603 N.Y.S.2d 420, 623 N.E.2d 547 [1993]). As part of its 1986 tort reform package, the Legislature added a new section to CPLR article 2 (L 1986, ch 682) creating a date of discovery statute of limitations for toxic torts. The amendment was intended to remedy the inequities that arose from application of the common-law exposure rule to toxic tort cases. In his Approval Memorandum, Governor Mario Cuomo observed that the existing three-year statute of limitations measured from the date of exposure "fail[ed] to recognize that the adverse effects of many of these toxic substances do not manifest themselves until many years after the exposure takes place," and consequently, many claims were barred even before potential plaintiffs were aware of their injuries (Governor's Approval Mem, Bill Jacket, L 1986, ch 682; *see Matter of Steinhardt v Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 [1981], *mot to amend remittitur granted* 55 N.Y.2d 825, *cert. denied* 456 U.S. 967 [1982]). The adoption of the date of discovery rule therefore results in the tolling of the statute of limitations until a party harmed by a toxic substance discovers or should have discovered the injury.

Germantown Cent. Sch. Dist. v. Clark, Clark, Millis & Gilson, AIA, 100 N.Y.2d 202, 205-06 (2003).

That CPLR § 214-c serves to toll the statute of limitations rather than redefine when the injury was suffered was confirmed years later by the Court of Appeals in *Consorti v. Owens-Corning Fiberglas Corp.*, 86 N.Y.2d 449. There, a husband's action for personal injury arising from his diagnosis with mesothelioma many years after inhaling asbestos was held to be timely under CPLR § 214-c because he brought suit within three years of his mesothelioma diagnosis. The question that the Second Circuit certified to the New York Court of Appeals was whether his spouse could assert a loss of consortium claim when the asbestos inhalation occurred before the

marriage, but the diagnosis of mesothelioma occurred after the marriage. The Court of Appeals concluded that the spouse did not have a timely claim because such a derivative claim "'does not lie if the alleged tortious conduct and resultant *injuries* occurred prior to the marriage." *Id.* at 450 (quoting *Anderson v Lilly & Co.*, 79 N.Y.2d 797, 798 (1991) (emphasis added)). The Court of Appeals reiterated that in New York, "a bright line, readily verifiable rule was adopted in which, *as a matter of law*, the tortious *injury* is deemed to have occurred *upon the introduction of the toxic substance into the body*." *Id.* at 452 (emphasis added). Thus, New York's highest court has held repeatedly that the passage of CPLR § 214-c did not abrogate the longstanding rule that injury occurs upon toxic exposure.

Caronia did not overrule the long line of New York Court of Appeals cases that define "injury" as toxic exposure, or the fundamental principles established by *Askey* and *Baity*. Plaintiffs who suffer injurious toxic exposure remain entitled to medical monitoring damages. Defendants nevertheless argue that the following *dictum* in the *Caronia* majority's decision, authored by Judge Pigott, constitutes a reversal of the "bright line, readily verifiable rule" that the Court of Appeals again restated in *Consorti*:

> Neither *Schmidt* nor *Askey* questioned this State's long-held physical harm requirement; rather, they merely accepted, for accrual purposes, that the injury accrued at the time of exposure. In light of section 214-c's enactment in 1986 (well after *Askey* and *Schmidt*), the *Askey* court's holding that persons who are exposed to toxins may recover all "'reasonably anticipated' consequential damages," including the cost of future medical monitoring to "permit the early detection and treatment of maladies" (*Askey*, 102 A.D.2d 137), must be viewed in its proper context. Given that the injuries in *Askey* and *Schmidt* were deemed (for accrual purposes) to have been sustained at the time of *exposure*, it is understandable why the Courts in those cases would have concluded that any and all damages flowing from those "injuries," including damages for medical monitoring, would be potentially recoverable as consequential damages.

Caronia, 22 N.Y.3d at 448. This paragraph does not reflect *Caronia*'s holding and cannot be said to overrule binding Court of Appeals precedent.

As Judge Pigott himself recently wrote in *Matter of Lewis*, "dicta may be viewed by some as a disguised holding. 'However grievous the errors a court commits when it writes dictum disguised as a holding, those errors would be neutralized if the next court would recognize the prior dictum as non-binding and go on to grapple with and decide the issue.'" 25 N.Y. 3d 456, 464 (2015) (quoting Hon. Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1268-1269 (2006)). This Court should heed Judge Pigott's advice in *Matter of Lewis* when it reviews Defendant's argued interpretation of *Caronia*, particularly when such *dictum* is being advanced to attempt to overrule eighty years of Court of Appeals precedent defining "injury" under New York law.

That Judge Pigott's implied distinction between *injury* "for accrual purposes" and *injury* sufficient to support a negligence cause of action is purely *dicta* is beyond dispute. Plaintiffs in *Caronia* did "not claim to have suffered physical injury or damage to property," and their "only pathway to relief [was for the Court of Appeals] to recognize a new tort, namely, an equitable medical monitoring cause of action." *Caronia*, 22 N.Y.3d at 446-447.[31] Thus, New York's long-standing bright-line rule that injury occurs at the time of toxic exposure was never presented to the Court of Appeals or briefed, argued or challenged by either party. Most importantly, the issue

[31] The reason that a new equitable cause of action was plaintiffs' "only pathway to relief" in *Caronia* was due to the unique facts and procedural posture of the case. Whatever injury plaintiffs' inhalation of toxic components of cigarette smoke had caused, that injury had been occurring for decades in each plaintiff. Thus, plaintiffs did not argue that they had suffered injury when they initially inhaled cigarette smoke because such a claim would have been untimely. After all, the class was defined as smokers with histories of 20 pack-years, meaning that every class member suffered his or her injury at least 20 years prior to commencing suit. *Caronia*, 22 N.Y. 3d at 445. Because their personal injury claims were untimely, plaintiffs advocated for a new tort whose accrual date would be measured not from the date of their exposure to cigarette smoke, but rather, from when appropriate medical monitoring testing became available.

of whether injury occurs at time of exposure was in no way implicated in the court's holding that New York does not recognize an independent equitable cause of action for medical monitoring.[32] *Id.* at 446.

The implied distinction between "injury" for accrual purposes and "injury" sufficient to support a cause of action, is a false one. As the Court of Appeals held in *Aetna Life & Casualty Co. v. Nelson*: "The Statute of Limitations begins to run once a cause of action accrues, that is, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court." 67 N.Y.2d 169, 175 (1986) (internal citations omitted). Accordingly, an "injury" for accrual purposes is by definition an "injury" sufficient to support a cause of action and allow a party to *obtain* relief in court. To treat them otherwise would be to hold that *Schmidt* and its progeny interpreted toxic exposure to be an *injury* sufficient for a cause of action to accrue such that if filed more than three years after exposure, a suit would be dismissed on statute of limitations grounds, but such *injury* would be insufficient to allow the same plaintiff to "obtain relief in court" if a timely action were filed based on this same injury. *Aetna Life*, 67 N.Y.2d 169, 175. It is this nonsensical interpretation of New York law and logic that Defendants ask this Court to adopt.

The fact that the majority in *Caronia* failed to recognize this fundamental contradiction in the above-quoted passage is not surprising when considered in context—gratuitous, nonbinding *dictum* about an issue that was neither briefed nor argued by the parties. As Second Circuit Court of Appeals Judge Leval incisively observed in his article on the subject:

> It is by no means inevitable that rules initially expressed as

[32] Plaintiffs do not ask the Court to recognize a new tort or an independent equitable cause of action. They instead seek to raise claims for negligence and strict liability as a result of their personal injuries, both of which have been available under the common law for at least one hundred years.

> gratuitous, nonbinding dictum would be ultimately adopted when it came time for the court to decide the issue. An important aspect of my point is that courts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, more likely to pronounce flawed rules, when uttering dicta than when deciding cases…. Giving dictum the force of law increases the likelihood that the law we produce will be bad law.

Hon. Pierre N. Leval, Madison Lecture, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. at 1255.

F. The Trial Court Decision in *Ivory* is Without Precedential or Persuasive Value on this Point, as are the Cases Defendants Cite from Other Jurisdictions.

Defendants' contention that the same argument was advanced in *Ivory v. International Business Machines*, 964 N.Y.S.2d 59, 2012 WL 5680180 (Sup. Ct. Broome Cnty. 2012), is incorrect. (*See* Def. Br. at 39.) As a preliminary matter, the Third Department partially overturned the trial court's medical monitoring decision in *Ivory*, after *Caronia* was decided, and importantly, the appellate court did not uphold any of the trial court's pronouncements about what proof was required to pursue medical monitoring damages. *See Ivory*, 116 A.D.3d at 130-31.

In their brief, Defendants quote certain language from the *Ivory* trial court decision granting defendant summary judgment, but exclude a crucial sentence that demonstrates the trial court would likely have reached a different conclusion had the plaintiffs in that case submitted proof they had the toxin in their bodies that caused cellular or genetic damage. (*See* Def. Br. at 39.) This omitted sentence from the *Ivory* trial court decision stated, "[b]ased on this record, the court finds there is simply no medical proof that the asymptomatic plaintiffs *have TCE in their bodies*, have any disease or physical manifestations or symptoms of diseases due to TCE exposure, *nor any cellular changes or physical impact from the alleged TCE exposures.*" *Ivory*,

2012 WL 5680180, at *11 (emphasis added). Here, Plaintiffs allege that their exposure to and accumulation of PFOA (a toxic chemical that does not occur in nature) in their bodies constitutes a physical injury and entitles them to consequential medical monitoring damages. (*See* Compl. ¶¶ 9, 11, 14, 15, 16, 17, 19, 34, 43-53, 127, 135, 145(k).) Additionally, Plaintiffs allege they were exposed to unsafe PFOA levels in their drinking water and that objective blood testing confirms high levels of PFOA in their blood serum. (*Id.* ¶¶ 10-17, 19-20.) Plaintiffs also allege injury associated with accumulation of PFOA in their bodies in their Negligence cause of action:

> 165. Further, by exposing Plaintiffs, Infant Plaintiffs, and the Biomonitoring Class to unsafe levels of PFOA, Defendants have caused and continue to cause Plaintiffs, Infant Plaintiffs and the Biomonitoring Class to suffer *injury and damage at the cellular and genetic level by accumulation of PFOA in their bodies*.
>
> 166. As a direct and proximate result of Defendants' actions, and omissions described herein, Plaintiffs and the classes have continued to suffer damages, *including personal injury due to the accumulation of PFOA in their bodies*…

(*Id.* ¶¶ 165-66 (emphasis added).) For purposes of this motion, the Court must take all of these factual allegations as true. Thus, Plaintiffs herein have pleaded injury as a result of exposure to high levels of PFOA that have accumulated in their bodies, something the plaintiffs in *Ivory* did not and could not plead or prove due to the different chemical properties of the chemical involved in that case (TCE). As such, the trial court's decision in *Ivory* is not relevant or informative.

Finally, Defendants cite to three federal Court of Appeals cases to support their premise that ingestion of high levels of PFOA and accumulation of PFOA in Plaintiffs' bodies does not constitute injury under the common law of New York. However, none of these cases actually interprets New York law and two of the cases are exclusively based upon the interpretation of definitions provided in a specific federal statute that is not implicated in this diversity case.

Dumontier v. Schlumberger Technology Corp., 543 F.3d 567 (9th Cir. 2008), and *June v. Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009), involve actions brought under the Price-Anderson Act, a federal statute giving district courts exclusive jurisdiction over lawsuits arising out of nuclear incidents. In both cases, the courts held that possible radiation exposure and the possibility that such radiation resulted in cell damage did not meet the definition of "bodily injury" under the Act. *Dumontier*, 543 F.3d at 571; *June*, 577 F.3d at 1249. This Court's task is not to interpret the definition of "bodily injury" under the Price-Anderson Act. This Court must determine whether the facts Plaintiffs have pleaded are sufficient to constitute an injury under New York common law for purposes of establishing a negligence claim. Thus, *Dumontier* and *June* are not relevant to this Court's analysis.

Defendants' third case, *Rhodes v. E. I. du Pont de Nemours & Co*, 636 F.3d 88 (4th Cir. 2011), is a diversity case decided under West Virginia common law. According to *Rhodes*, in order to establish harm or injury under West Virginia law, "a plaintiff must produce evidence of a detrimental effect to the plaintiffs' health that actually has occurred or is reasonably certain to occur due to a present harm." 636 F.3d at 95 (citing *Cook v. Cook*, 216 W. Va 353, 358 (W. Va. 2004)). As outlined above, this is not and has never been the law of New York, and as such, despite the similar chemical exposures involved, *Rhodes* has no persuasive value here.

In this diversity case, this Court must apply New York law to the allegations in Plaintiffs' Complaint, all assumed to be true, and determine whether such allegations are sufficient to support a negligence cause of action permitting recovery of consequential medical monitoring damages. The definition of "injury" under the Price-Anderson Act or West Virginia common law is neither binding nor helpful. However, to the extent guidance from other jurisdictions is helpful, medical monitoring damages have been permitted in a significant number of

jurisdictions without proof of a diagnosed illness. *See, e.g.*, *Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 846 (3d Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *Paoli II*, 35 F.3d 717; *Abuan v. Gen. Elec. Co.*, 3 F.3d 329 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984); *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 292 (N.D. Ohio 2007); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313 (D. Conn. 2002); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119-20 (N.D. Ill. 1998); *Day v. NLO,* 851 F. Supp. 869, 881-83 (S.D. Ohio 1994); *Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530, 537-38 (S.D. W. Va. 1993); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 1007-010 (1993); *Petito v. A.H. Robins Co., Inc.*, 750 So.2d 103, 106-07 (Fla. Dist. Ct. App. 1999), *rev. denied*, 780 So.2d 912 (Fla. 2001); *Meyer v. Fluor Corp.*, 220 S.W.3d 712, 717-18 (Mo. 2007); *Ayers v. Twp. of Jackson*, 106 N.J. 557 (1987); *Redland Soccer Club, Inc. v. Dep't of Def.*, 548 Pa. 178, 194-96 (1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977 (Utah 1993); *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 138-40 (1999).

REQUEST FOR LEAVE TO AMEND

To the extent the Court concludes that Plaintiffs have not adequately stated a claim upon which relief may be granted, Plaintiffs respectfully request leave to amend their pleadings consistent with Federal Rule of Civil Procedure 15(a)(2). Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires"); *see also Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999) ("When a motion to dismiss is granted, the usual practice is to grant leave to amend the complaint.").

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss, together with such other relief as the Court deems just and proper.

Dated: October 26, 2016
Albany, New York

Respectfully submitted,

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EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHELE BAKER; CHARLES CARR; ANGELA CORBETT; PAMELA FORREST; MICHAEL HICKEY, individually and as parent and natural guardian of O.H., infant; KATHLEEN MAINLINGENER; KRISTIN MILLER, as parent and natural guardian of K.M., infant; JAMES MORIER; JENNIFER PLOUFFE; SILVIA POTTER, individually and as parent and natural guardian of K.P, infant; and DANIEL SCHUTTIG, individually and on behalf of all others similarly situated, Plaintiffs, v. SAINT-GOBAIN PERFORMANCE PLASTICS CORP., and HONEYWELL INTERNATIONAL INC. f/k/a ALLIED-SIGNAL INC. and/or ALLIEDSIGNAL LAMINATE SYSTEMS, INC., Defendants.	Civ. No. 1:16-CV-917 (LEK/DJS) **ORAL ARGUMENT REQUESTED**

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR STAY THE MASTER CONSOLIDATED CLASS ACTION COMPLAINT

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Defendants Saint-Gobain Performance Plastics Corporation ("Saint-Gobain") and Honeywell International, Inc. ("Honeywell") respectfully submit this reply brief in further support of their motion to dismiss or stay the Consolidated Class Action Complaint.

PRELIMINARY STATEMENT

Following the parties' stipulation (Dkt. 18), the Court need only address the flaws in Plaintiffs' damages claims. Plaintiffs' claims for injunctive relief are stayed for six months, in deference to ongoing remediation efforts, which Plaintiffs concede "may have an impact on Plaintiffs' claim for injunctive relief" and provide some or all of the relief Plaintiffs seek. (*Id.*) Indeed, Defendants voluntarily initiated several remediation efforts before this litigation was commenced. (*See* Defs.' Br. at 2.) As Plaintiffs recognize, Saint-Gobain and Honeywell are already working with state and federal agencies on a variety of environmental testing and remedial measures in Hoosick Falls. (*Id.*) While the agreed-upon stay of Plaintiffs' injunctive claims remains in effect, the Court need not consider the CERCLA or primary jurisdiction issues posed by those claims.

On the sole remaining issue for decision, Plaintiffs' claims for damages must be dismissed under the "fundamental principle" of New York law that a plaintiff must "sustain physical harm before being able to recover in tort." *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 446 (2013) (citation omitted). Plaintiffs do not allege any such injury.

To recover for property damage, a plaintiff must allege physical harm to his or her property. Yet Plaintiffs' claims are predicated on alleged injury to *groundwater*—a public resource for which only the State, not private plaintiffs, has standing to sue, and which the State is addressing through remediation under enforceable consent decrees. Recognizing that alleged groundwater contamination does not constitute physical injury to property under New York law, Plaintiffs' Opposition Brief now advances a theory of injury not alleged in Plaintiffs' Complaint: that because PFOA allegedly was inside their soil, wells, pipes, and taps at some point, they sustained physical harm to their property. (Pls.' Opp. at 12.) As to property damage claims, this fails for two reasons: (1) it is not the theory of injury alleged in the Complaint; and (2) it is not

an injury for which Plaintiffs can sue under New York law. Plaintiffs' Complaint alleges a different injury—alleged contamination of groundwater, not damage to soil or plumbing. Indeed, the Complaint never alleges any damage to "pipes," to "taps," to "showerheads," or to "soil"—those allegations appear only in Plaintiffs' briefing.

Likewise, to recover for medical monitoring, a plaintiff must allege physical harm to their person, as other plaintiffs represented by the same counsel have alleged in related cases pending before this Court. (*See, e.g.*, *Donavan*, No. 16-cv-00924 (N.D.N.Y.).) Plaintiffs' claims here do not allege a physical injury; they are predicated on an alleged "increased risk" of potential *future* harm. Indeed, the Complaint expressly *excludes* from the putative class anyone who alleges a present personal injury from illnesses purportedly related to PFOA (Compl. ¶ 137) and instead seeks to bring claims for a putative class "at significant risk of developing medical conditions" in the future. (*Id.* ¶ 142.) Yet the New York Court of Appeals in *Caronia* specifically rejected Plaintiffs' argument that mere exposure to an allegedly harmful chemical is itself an injury. Plaintiffs now urge this Court to reject *Caronia* and read its teachings as erroneous *dicta*. But New York's highest court considered and rejected Plaintiffs' theory, and the Court of Appeals' views on New York law cannot be ignored.

New York law is not an outlier in these matters. In the Northern District of Alabama, similar claims in a suit alleging PFOA contamination of groundwater were recently dismissed on substantially the same grounds Defendants urge here. *West Morgan-East Lawrence Water & Sewer Auth. v. 3M Co.*, 2016 WL 6584932 (N.D. Ala. Sept. 20, 2016) (to be published in F. Supp. 3d). There, as here, the plaintiffs argued that PFOA entered plaintiffs' soil and their pipes. *Id.* at *4. But there, as should be the case here, the claims were largely dismissed: exposure to PFOA itself was not a sufficient allegation of physical damage to property, and mere PFOA accumulation, without physical symptoms, did not allege a personal injury. *Id.* at *3-4,

For these reasons and those set forth in Defendants' opening brief, Plaintiffs' claims should be dismissed with prejudice.

ARGUMENT

I. THE COURT HAS STAYED PLAINTIFFS' INJUNCTIVE CLAIMS

In their opening brief, Defendants moved to dismiss or stay Plaintiffs' claims for injunctive relief pursuant to Section 113(h) of CERCLA and the doctrine of primary jurisdiction. Dismissal of those claims is warranted in light of the significant, ongoing administrative efforts of various government agencies—in coordination with Defendants—to assess and remediate the potential presence of PFOA in Hoosick Falls. (*See* Defs.' Br. at 14-30.) Among other administrative activity, environmental testing is already being conducted, and interim remedial measures are being implemented. Indeed, before this litigation was commenced, Defendants voluntarily initiated several remediation efforts, including funding a filtration system for the municipal water supply. (*See id.* at 2.) These remedial measures, among others, have since been memorialized in enforceable consent orders issued by the New York Department of Environmental Conservation (DEC). (*See id.* at 5-7.)

Plaintiffs acknowledge that the remediation efforts underway "may have an impact on Plaintiffs' claim for injunctive relief" (Dkt. 18) and that Defendants already are providing some of the very injunctive relief Plaintiffs request. (Pls.' Opp. at 12.) They have accordingly stipulated to a six-month stay of their injunctive relief claims. (*See* Dkt. 18.) Nevertheless, Plaintiffs' opposition briefly addressed Defendants' arguments under CERCLA and the primary jurisdiction doctrine. (Pls.' Opp. at 8-12.) Although Defendants disagree with the arguments and assertions in Plaintiffs' Opposition, the Defendants need not respond to, and the Court need not assess, those arguments at this time. Indeed, the parties' joint Stipulation was entered for the express purpose of avoiding unnecessary motion practice and promoting the efficient disposition of this action. (*See* Dkt. 18.) Defendants expressly reserve their right to respond to Plaintiffs' arguments if and when the temporary stay is lifted.

II. PLAINTIFFS LACK STANDING TO SUE FOR ALLEGED HARM TO A PUBLIC RESOURCE

Plaintiffs do little to dispute either that they lack standing to sue for contamination of groundwater—a resource held not by Plaintiffs, but by the State—or that a physical injury to person or property is a necessary predicate to recovery in tort for economic harm. Instead, their response is primarily a bait-and-switch, contending that the Complaint actually alleges injury because PFOA allegedly entered their soil, wells, pipes, and taps. Yet the Complaint pleads no such thing. Even if the Complaint had contained such allegations, the very same rationalization has been recently rejected by another decision in PFOA litigation as failing to allege physical injury, since there is no claim that PFOA "caused their pipes to erode, or … damaged their grass." *See West Morgan*, 2016 WL 6584932, at * 4. Neither do Plaintiffs have standing to sue under a private nuisance theory for purported interference with public resources such as groundwater, since claims for private nuisance presume the nuisance is "limited in its injurious effects to 'one or a few individuals,'" not, as alleged here, a broad community sharing a public resource. *See id.* at *3. Plaintiffs should be precluded from attempting to turn natural resource rights held and enforced by the State into a private claim for damages, and their property claims should therefore be dismissed with prejudice.

A. Alleged Groundwater Contamination Is Not a Physical Injury to Property

Although Plaintiffs' opposition offers an extensive discussion of Defendants' cases, that discussion barely addresses, let alone disputes, the two critical legal propositions advanced by Defendants: (1) New York law bars recovery in tort for economic harm absent proof of a physical injury to the plaintiff's person or property; and (2) groundwater is not Plaintiffs' property. These two issues were addressed in the Third Department's decision in *Ivory v. Int'l Bus. Machines Corp.*, 116 A.D.3d 121 (3d Dep't 2014), a groundwater contamination case that was argued by Plaintiffs' counsel. In *Ivory*, the Third Department held that "because groundwater does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens," allegations of contaminated groundwater alone did not plead a cognizable injury to the plaintiffs' property to support trespass claims. 116 A.D.3d at 130.

Absent "persuasive evidence that the New York Court of Appeals … would reach a different conclusion," of which there is none here, this Court is bound "to apply the law as interpreted by New York's intermediate appellate courts." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999). Plaintiffs' opposition offers nothing to dispute these principles in *Ivory*, and the Court should therefore follow *Ivory* and dismiss with prejudice Plaintiffs' trespass, negligence, and strict liability claims alleging property damage.

First, Plaintiffs do not attempt to challenge "the widely accepted if not universal view … that causing the value of another's property to diminish is not in and of itself a basis for tort liability," but rather requires "[s]omething more," such as "physical invasion or damage." *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F. Supp. 2d 179, 188, 193 (W.D.N.Y. 1999), *aff'd in pertinent part sub nom. Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.*, 216 F.3d 1072 (2d Cir. 2000). Neither do Plaintiffs dispute that physical harm is essential to each of their property damage theories. They admit that a chemical trespass claim requires passage of the chemical "'from defendant's *to plaintiff's land*.'" (Pls.' Opp. at 20 (quoting *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 (1954)) (emphasis added).) As to negligence, Plaintiffs admit that the Court of Appeals has rejected a duty to avoid "'purely economic losses'" where the plaintiffs have "suffered neither *personal injury nor property damage*." (*Id.* at 24 (quoting *532 Madison Ave. Gourmet Foods v. Finlandia Center*, 96 N.Y.2d 280, 286 (2001)) (emphasis added).)[1] And Plaintiffs do not dispute that they "must sustain injury or damage before being able to recover under a strict products liability theory," *Caronia*, 22 N.Y.3d at 446 (citation omitted), but instead attempt to show that they satisfy that requirement. (Pls.' Opp. at 27.)[2]

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[1] Plaintiffs cite several decisions for the uncontroversial proposition that diminution of value is a proper measure of damages under New York law (*see* Pls.' Opp. at 22-23), but they do not cite a single case permitting tort recovery for such pure economic harm without proof of physical damage to the plaintiff's property.

[2] Plaintiffs' opposition offers a gratuitous—and unfounded—assertion that "Defendants do not dispute that their manufacturing activities and use of PFOA were ultrahazardous" to support their strict liability claims. (Pls.' Opp. at 25.) At the outset, it is hornbook law that a defendant does not admit the complaint's allegations by simply declining to address them in a

Second, Plaintiffs do not contest that groundwater is not their property. Plaintiffs dismiss the statements by the New York Court of Appeals concerning title to groundwater in *Sweet v. City of Syracuse*, 129 N.Y. 316 (1891), as "soaring Blackstonian language" with "no relevance here" because they do not involve "groundwater contamination." (Pls.' Opp. at 16.) Yet Plaintiffs do not address, much less dispute, the critical language in *Sweet* stating that "no absolute property can be acquired in flowing water," which "has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control." 129 N.Y. at 335. Plaintiffs similarly claim that *Ivory* is inapposite because it involved claims of evaporation of contaminants from groundwater rather than transmission through drinking water. (Pls.' Opp. at 17.) But once again, Plaintiffs wholly ignore the critical language of the opinion: that groundwater "does not belong to the owners of real property, but is a natural resource entrusted to the state by and for its citizens." *Ivory*, 116 A.D.3d at 130. Likewise, Plaintiffs dismiss *State v. New York Central Mutual Fire Insurance Co.*, 147 A.D.2d 77, 79 (3d Dep't 1989), as making only the "common-sense finding that the state was entitled to seek oil spill damages for pollution of a public waterway." (Pls.' Opp. at 18.) Yet they ignore the decision's key holding that because groundwater is "a natural resource protected by [the State] as trustee for its people," allegations of harm to that resource do not implicate "the [landowner's] property, but

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pre-answer motion, since such a motion assumes the truth of those allegations. More important, Defendants deny that the historic use of PFOA, which was not regulated by state and federal authorities as a hazardous substance until New York's actions earlier this year, can retroactively be deemed an "ultrahazardous" activity warranting imposition of liability without regard to fault. Indeed, other courts have agreed with this conclusion concerning PFOA and accordingly granted judgment as a matter of law on strict liability claims in PFOA litigation. *See Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 984 (S.D. Ohio 2015) (dismissing claim where the "duly licensed" facility and "its operations and conduct—manufacturing operations, including air emissions, wastewater discharge, and waste disposal—are all subject to a regulatory scheme"); *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 2015 WL 4092866, at *16-17 (S.D. Ohio July 6, 2015) ("To come within the [strict liability] doctrine, courts have found that the activity must have an immediate, high risk of great physical harm to those in close proximity, which high risk cannot be reduced through the exercise of due care. … It is generally something atypical for the area in which it occurs.") (citations omitted).

rather property entrusted to [New York] by its citizens." *State v. New York Cent. Mut. Fire Ins. Co.*, 147 A.D.2d 77, 79 (3d Dep't 1989).

Plaintiffs' only attempt to substantively address these points is a string cite of decisions that they say show "New York law has long permitted plaintiffs to bring common law claims when their drinking water is contaminated by the tortious actions of a polluter." (Pls.' Opp. at 14.) But the decisions do not support the proposition for which they are cited. Not one of those cases holds that plaintiffs have standing to bring claims for contamination of the State's groundwater. In fact, none of those decisions addresses the question.

For example, Plaintiffs rely on a decision from the *In re MTBE* groundwater contamination litigation, but that decision limited its discussion to issues of causation, and did not address whether the plaintiffs had standing to bring private claims for alleged harm to groundwater, a public resource. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 568 F. Supp. 2d 376, 379-81 (S.D.N.Y. 2008). In fact, the defendant at issue in that decision, Sunoco, had not even asserted a groundwater standing defense.[3] Three years later, defendant ExxonMobil filed an amended answer raising a standing defense, and that standing issue has not yet been ruled upon by the *MTBE* court.[4] Likewise, other decisions Plaintiffs cite addressed unrelated legal issues (often resolving them in the defendant's favor), such as sufficiency of causation evidence in *Flick v. Town of Steuben*, 199 A.D.2d 970 (4th Dep't 1993), evidence of negligence in *Fetter v. De Camp*, 195 A.D.2d 771 (3d Dep't 1993), and *Murphy v. Both*, 84

[3] *See* Answer to Complaint by Sunoco, Inc., *In re MTBE Prods. Liab. Litig.*, No. 00-1898, Dkt. 181 (S.D.N.Y. Nov. 14, 2001).

[4] *See* Eighth Amended Answer by ExxonMobil Corp., *In re MTBE Prods. Liab. Litig.*, No. 00-1898, Dkt. 3262 ¶ 44 (S.D.N.Y. Jan. 31, 2011) ("To the extent plaintiffs allege that they own or have the authority to protect groundwater, groundwater resources, water resources, water supplies, water rights, or drinking water wells, or any other right in and to water or groundwater, ExxonMobil denies these allegations and denies that these plaintiffs have standing to bring any claim based on allegations of property damage.").

A.D.3d 761 (2d Dep't 2011), and the statute of limitations in *Jensen v. General Elec. Co.*, 82 N.Y.2d 77 (1993).[5]

Plaintiffs cannot claim affirmative support for their right to sue for damage to a public resource based on cases that do not even address the question. This Court should therefore follow the *Ivory* decision, which directly addresses these issues, and dismiss with prejudice Plaintiffs' property damage claims based on groundwater contamination.

B. Plaintiffs Do Not Plead Physical Damage to Their Property

Because the alleged groundwater contamination that forms the basis of Plaintiffs' claims is not a physical injury to property that can support a private tort action, Plaintiffs' Opposition pivots to a new theory. Although the Complaint refers to "water" more than 170 times, Plaintiffs now argue for the first time in their brief that this case is actually about physical damage to pipes and dirt: their opposition brief asserts that PFOA "physically entered their properties, contaminated their wells and soil, traveled through their pipes, and flowed out of their taps and showerheads." (Pls.' Opp. at 19.) The Complaint, however, does not make these allegations.

At the outset, Plaintiffs' soil is not mentioned anywhere in the Complaint. The Complaint's only references to PFOA in soil refer to the Hoosick landfill and the McCaffrey Street Facility. (Compl. ¶¶ 72, 80, 108.) Even there, soil is mentioned as a conduit "into the aquifer." (*See id.*) In their opposition, Plaintiffs insist that they pled PFOA "was carried by

[5] The remaining decisions cited by Plaintiffs are likewise inapposite because they did not address the issue of standing to sue for groundwater contamination, as well as for other reasons. *Abbo-Bradley v. City of Niagara Falls* did not involve alleged groundwater contamination at all, but rather addressed the existence of federal jurisdiction in environmental litigation over the Love Canal. 2013 WL 4505454, at *7-11 (W.D.N.Y. Aug. 22, 2013). Further, *Cornell v. Exxon Corp.*, unlike this action, involved claims of personal injuries from alleged groundwater contamination. 162 A.D.2d 892 (3d Dep't 1990). And *Hilltop Nyack Corp. v. TRMI Holdings, Inc.* involved alleged damage to the plaintiffs' real property that was transmitted through groundwater, rather than, as here, alleged damage to the water itself. 264 A.D.2d 503 (2d Dep't 1999); *accord Leone v. Leewood Serv. Station, Inc.*, 212 A.D.2d 669, 670 (2d Dep't 1995) ("[G]asoline leaked from Getty's underground storage tanks, seeped into the water table, and entered the home of the plaintiff … through a sump pit located in her basement.").

wind onto soil throughout the community, *including soil on Plaintiffs' properties*." (Pls.' Opp. at 2 (emphasis added).) Yet the allegation they cite in support says nothing whatsoever about soil, much less soil on Plaintiffs' properties. Rather, it states that PFOA was "discharged from the facility as fine particulate matter that was then transported by wind *to the community*." (Compl. ¶ 71 (emphasis added).) These generalized and speculative allegations about "the community" at large fall far short of the burden to allege injury as to the named plaintiffs specifically. The Complaint never alleges that the soil on the named plaintiffs' properties has been damaged, even though the named plaintiffs—not the "community" generally—are the only parties currently at issue. *Garcia v. Does*, 779 F.3d 84, 87 n.1 (2d Cir. 2015) (on motion to dismiss, noting that "[a]lthough plaintiffs bring their suit as a putative class action, no class has been certified," and "[a]ccordingly, we address only the claims made by the ten named plaintiffs").

Likewise, Plaintiffs' opposition contends that they alleged that PFOA that was "emitted from Defendants' facilities through the air has also dispersed and settled into the soil, including the soil on Plaintiffs' properties" (Pls.' Opp. at 12), but this is not alleged in the Complaint. The allegation cited in Plaintiffs' opposition states only that PFOA is "persistent in water and soil and, because PFOA is water-soluble, *it can migrate readily from soil to groundwater*." (Compl. ¶ 41 (emphasis added).) Thus, these allegations simply reinforce that Plaintiffs' claims are about alleged contamination of *groundwater*. The Complaint does not allege anywhere that individual plaintiffs' soil was physically damaged by PFOA, and the relevance of soil to their allegations is solely as a medium through which (they say) PFOA passed to the groundwater.

The same is true for Plaintiffs' assertion in their opposition that they allege PFOA "physically entered their properties, contaminated their wells … traveled through their pipes, and flowed out of their taps and showerheads." (Pls.' Opp. at 19; *accord id.* at 12.) Each of the foregoing items of property—wells, pipes, taps, and showerheads—is relevant only as a vessel or a conduit for allegedly contaminated water, not as an independent item of damage. The Complaint refers to private wells solely as the source by which Plaintiffs draw their water from the aquifer, not as property that has itself been harmed by contact with PFOA. Likewise, the

Complaint's few references to plumbing simply describe the means by which Plaintiffs claim to have been exposed to groundwater containing PFOA. (Compl. ¶¶ 11-12, 14-17, 19-20.) Plaintiffs simply do not allege that contact with PFOA caused their pipes, taps, and showerheads to stop functioning, or that they are required to repair or replace their pipes, taps, and showerheads due to some damage that property sustained. Similarly, while Plaintiffs demand the installation of filtration systems on private wells to treat their water (and admit that many such systems have already been installed) (Pls.' Opp. at 4; Compl. ¶¶ 10-12), they do not allege that the presence of PFOA has caused their wells to stop functioning.[6]

Plaintiffs' attempt to assert physical damage to property based on PFOA merely having been inside these conduits violates the well-settled physical injury requirement of New York law. As the New York Court of Appeals recently explained in *Caronia*, "[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system." 22 N.Y.3d at 446 (citation omitted). Just as *Caronia* rejected the notion that mere exposure to a chemical substance constituted a physical injury to person, *see id.* at 446, 452; *infra* Point III, so also the mere existence of PFOA in Plaintiffs' wells, pipes, taps, and showerheads does not constitute a physical injury to property. New York law rejects the notion that "an invisible invasion without tangible consequences creates a cognizable cause of action in trespass justifying damages." *Celebrity Studios, Inc. v. Civetta Excavating, Inc.*, 72 Misc. 2d 1077, 1086 (Sup. Ct. N.Y. Cnty. 1973).

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[6] Nor can Plaintiffs assert a cognizable injury by noting that the water that came through their pipes and taps exceeded thresholds established by regulatory agencies. (*See* Pls.' Opp. at 3 n.2, 14, 19.) Such assertions fail to allege physical damage to Plaintiffs' property and do not allege an injury in tort. "The distinction between avoidance of risk through regulation and compensation for injuries after the fact is a fundamental one." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 781, 785 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Regulatory agencies "suggest or make prophylactic rules governing human exposure" even in the absence of actual harm based on "the preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances." *Allen v. Pennsylvania Eng'g Co.*, 102 F.3d 194, 198 (5th Cir. 1996).

Notably, the Northern District of Alabama recently applied this principle to reject nearly identical claims in another PFOA groundwater litigation. *West Morgan*, 2016 WL 6584932, at *4. In *West Morgan*, the court held that the plaintiffs failed to plead "substantial" intrusion on their property because there was "no allegation of physical or structural damage" to the allegedly affected property. *Id.* at *4. Specifically, because the plaintiffs did "not allege that the PFOA and PFOS in their domestic water supply … *caused their pipes to erode*, or that the presence of those chemicals in their lawn irrigation systems has *damaged their grass*," there was no physical injury to property in tort. *Id.* (emphases added).[7] Plaintiffs here do not allege that PFOA caused any physical or structural damage to their wells, pipes, taps, or showerheads, but instead refer to that property only with reference to the water that passed through it. Accordingly, for the same reasons noted by the court in *West Morgan*, Plaintiffs have failed to plead a physical injury to their property, and their property damage claims should be dismissed with prejudice.

C. Alleged Interference With a Public Resource Is Not a Private Nuisance

Plaintiffs' claims of private nuisance fail just like their claims of purported property damage. Because a private nuisance is something that impacts "one person or a relatively few," *Copart Indus., Inc. v. Consol. Edison Co. of N.Y.*, 41 N.Y.2d 564, 568 (1977), private parties are not permitted to seek redress for an alleged wrong to a public resource. (Defs.' Br. at 36.) Specifically, Plaintiffs allege that Defendants "have contaminated both the municipal drinking water system and drinking water of private wells in Hoosick Falls and the surrounding area." (Compl. ¶ 169.) Where plaintiffs bring suit "to remedy alleged contamination of [the] drinking water supply" and allege that such "contamination has the potential to injure a public resource and endanger the health of [a town's] residents, a considerable number of people rather than one

[7] To the extent the *West Morgan* court allowed the plaintiffs to seek damages for diminution of value under a negligence theory under Alabama law, *West Morgan*, 2016 WL 6584932, at *3, the result is contrary to New York law, which requires a physical injury to person or property for recovery in negligence. *See 532 Madison Ave.*, 96 N.Y.2d at 290; *Caronia*, 22 N.Y.3d at 446.

person or relatively few people," the claim is "not one for private nuisance." *Town of New Windsor v. Avery Dennison Corp.*, 2012 WL 677971, at *16 (S.D.N.Y. Mar. 1, 2012); *see also West Morgan*, 2016 WL 6584932, at *3 (dismissing private nuisance claim under analogous Alabama law, where plaintiffs brought suit over alleged PFOA contamination of public waterway and alleged that the putative class included thousands of people).

Plaintiffs dispute that a private nuisance is one that affects one person or relatively few, contending that "the articulation set forth in *People v. Cooper*[, 200 A.D. 413, 417 (2d Dep't. 1922),] remains the law in New York today." (Pls.' Opp. at 29.) But the cases on which Plaintiffs rely do not cite, let alone adopt *Cooper*. Nor do those cases address the distinction between private and public nuisance claims,[8] which as recent New York case law holds, "bear little relationship to each other." *State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985). *Cooper* did not involve alleged groundwater contamination, and the language quoted by Plaintiffs is contrary to case law expressly holding that allegations of drinking water supply contamination impacting a considerable number of people do not state a claim for private nuisance under New York law. *Town of New Windsor*, 2012 WL 677971, at *16.

Here, Plaintiffs bring claims for *private* nuisance, but on behalf of all owners and renters of property within Hoosick Falls. (*See* Compl. ¶ 135.) Indeed, Plaintiffs allege that the relief they request in the form of investigating, treating and remediating the drinking water (*id.* ¶ 172) is already being conducted by State officials. (*See, e.g.*, *id.* ¶¶ 10-12 (alleging that DEC conducted testing of Plaintiffs' private wells and installed treatment systems).) That is, Plaintiffs assert nuisance claims on behalf of a broad community in Hoosick Falls, and further, seek damages related to contamination that is already "subject to abatement [by] the proper

[8] Specifically, *The Seaview at Amagansett v. Trustees of the Freeholders* addressed the timeliness of plaintiffs' private and public nuisance claims, 2015 WL 3884944 (Sup. Ct. Suffolk Cnty. June 2, 2015); *Ivory* discussed the ownership interest requirement necessary to state a private nuisance claim, 116 A.D.3d at 128; and *Citizens of Accord v. Twin Tracks Promotions* addressed whether nuisance claims could be sustained in light of res judicata or collateral estoppel arguments, 236 A.D.2d 665, 665-66 (3d Dep't 1997).

governmental agency." *Shore Realty Corp.*, 759 F.2d at 1050 (quoting *Copart Indus., Inc.* , 41 N.Y.2d at 568). Thus, Plaintiffs' claims do not sound in private nuisance and should be dismissed. *Town of New Windsor*, 2012 WL 677971, at *16; *West Morgan*, 2016 WL 6584932, at *3.[9]

III. PLAINTIFFS DO NOT ALLEGE PHYSICAL INJURY TO THEIR PERSONS

As set forth in Defendants' opening brief, the availability of medical monitoring is governed by the New York Court of Appeals' definitive decision in *Caronia*, which rejected an independent cause of action and held "that medical monitoring is an element of damages that may be recovered only after a physical injury has been proven." *Caronia*, 22 N.Y.3d at 448. *Caronia* emphasized that "[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system." *Id.* at 446 (citation omitted). In doing so, the court rejected the very theories of injury that Plaintiffs allege here. The court explained that "[a] threat of future harm is insufficient to impose liability against a defendant in a tort context." *Id.* at 446 (citation omitted). Even more pointedly, the court held that, as here, alleging "cellular and genetic damage" is not a "claim to have suffered physical injury." (*See* Defs.' Br. at 39-40.) Plaintiffs' assertion of a right to pursue damages for medical monitoring without a legally cognizable physical injury is thus squarely foreclosed by *Caronia*.

Plaintiffs' opposition disagrees at length with Defendants' analysis, but the essence of their response is simple: they think the New York Court of Appeals got New York law wrong in *Caronia*. Relying on a series of statute of limitations decisions "holding that injury occurs at the time of exposure," they contend that mere exposure to PFOA alone constitutes a cognizable injury in tort. (Pls.' Opp. at 34.) Yet Plaintiffs acknowledge that *Caronia* rejected this very

[9] To the extent Plaintiffs claim to have alleged "special damages" (Pls.' Opp. at 29-30), which Defendants dispute, required for *public* nuisance claims, Plaintiffs do not bring such claims here. *See, e.g.*, *Lichtman v. Nadler*, 74 A.D.2d 66, 74 (4th Dep't 1980) ("To have standing to sue [for public nuisance], the private individual must show that he has sustained damage of a special character, distinct and different from the injury suffered by the public generally.").

argument based on the same cases they cite, including *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130 (4th Dep't 1984), and *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287 (1936). (*See id.* at 39.) Specifically, *Caronia* stated that these statute of limitations decisions "merely accepted, for accrual purposes, that the injury accrued at the time of exposure," and did not disturb the "long-held physical harm requirement" for determining an injury in tort. *Caronia*, 22 N.Y.3d at 448. This ruling is binding on this court under the *Erie* doctrine.

Plaintiffs nonetheless urge this Court to disregard *Caronia*'s ruling, which they characterize as *dicta*. This request is contrary to the *Erie* doctrine, to *Caronia*'s express holding, and to decisions of other courts that have applied the physical injury requirement in PFOA litigation. It should be rejected.

A. This Court Must Reject Plaintiffs' Invitation to Disregard *Caronia*

Plaintiffs remarkably insist it is "beyond dispute" that *Caronia*'s rejection of their arguments was a "gratuitous, nonbinding *dictum*" that need not be followed here. (*See* Pls.' Opp. at 40-41.) Referring to the opinion of the court in *Caronia* as merely "Judge Pigott's" opinion, Plaintiffs urge that the portions of the opinion with which they disagree do "not reflect *Caronia*'s holding and cannot be said to overrule binding Court of Appeals precedent." (*Id.* at 40.) They dismiss *Caronia*'s analysis as a "nonsensical interpretation of New York law and logic" and chastise New York's highest court for having purportedly "failed to recognize [the] fundamental contradiction" in its own reasoning. (*Id.* at 41.)

At the outset, and apart from the many errors in Plaintiffs' analysis of New York law, this Court is bound under *Erie* to follow *Caronia*. "The *Erie* doctrine permits federal courts to rule upon state law as it presently exists and not to surmise or suggest its expansion." *Ball v. Joy Tech., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (quotation omitted). In construing New York law, this Court must "afford the greatest weight to decisions of the New York Court of Appeals," and in the case of any uncertainty or ambiguity, it must "carefully … predict how the highest court of the forum state" would decide the issue. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997). In such circumstances, the Court must exercise caution, for "[f]ederal court is not the

place to press innovative theories of state law," *Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 925 (7th Cir. 1990) (quotation omitted), and where Plaintiffs choose the federal forum, they "cannot justifiably complain if the federal court manifests great caution in blazing new state-law trails." *Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254, 259 (1st Cir. 1992) (citations omitted).

This standard is fatal to Plaintiffs' arguments. Under *Caronia* there is no need for this Court to wager an *Erie* guess: *Caronia* is directly on point and was decided less than three years ago, following certification from the Second Circuit to clarify New York law. *See Caronia v. Philip Morris USA, Inc.*, 748 F.3d 454, 455 (2d Cir. 2014). The decision's extensive discussion of the law and policy of medical monitoring leaves no uncertainty or ambiguity concerning how the New York Court of Appeals would rule in this matter. The Court of Appeals accepted review in *Caronia* to decide "determinative questions of New York law … for which no controlling precedent of the Court of Appeals exists." 22 NYCRR § 500.27(a). The opinion that commanded a majority of the New York Court of Appeals rejected both the theories of injury advanced by Plaintiffs here and also their counterargument based on statute of limitations cases. There is no basis for Plaintiffs to ask this Court to ignore *Caronia*'s thorough explication and reconciliation of the New York law of medical monitoring as mere *dicta*, much less to suppose that the outcome on that issue would be any different a second time around. There is simply no room to disregard *Caronia*, no matter how much Plaintiffs may disagree with its reasoning. Plaintiffs' request for medical monitoring damages should be dismissed with prejudice.

B. Plaintiffs' Arguments Were Squarely Rejected by *Caronia*'s Holding

The certified question in *Caronia* was whether "an independent equitable cause of action for medical monitoring" existed for individuals *who had exposure, but no physical injury*. 22 N.Y.3d at 446.[10] Thus, in order for the court to answer the certified question in the negative, as it

[10] Specifically, the Second Circuit asked the New York Court of Appeals to determine whether medical monitoring was available in New York where exposure to a substance was uncontested and extensive, but no illness had been diagnosed: "Under New York Law, may a

did, it was *essential* to find that exposure does not constitute injury—*i.e.*, that ingesting an allegedly toxic substance was not the same as sustaining physical harm. The court did exactly that, answering the certified question in the negative and explaining that "[t]he requirement that a plaintiff sustain *physical harm* before being able to recover in tort is a fundamental principle of our state's tort system." 22 N.Y.3d at 446 (citation omitted, emphasis added). The text that Plaintiffs challenge thus cannot be relegated to *dicta*.

Notably, the *Caronia* plaintiffs advanced the very same argument that Plaintiffs resurrect here, based on the very same cases. They asserted that because decisions concerning the statute of limitations had equated exposure with injury, that principle also applied to determining the existence of an injury supporting a cause of action in tort. *See id.* at 447-48 (citing *Askey*, 102 A.D.2d 130; *Schmidt*, 270 N.Y. 287). *Caronia* rejected that argument, holding that "[n]either *Schmidt* nor *Askey* questioned this State's long-held physical harm requirement," but were rather limited to addressing the statute of limitations. *Id.* at 448.[11] Plaintiffs' claim that this issue "was never presented to the Court of Appeals or briefed, argued or challenged by either party" is thus flatly contrary to the *Caronia* opinion on its face. (Pls.' Opp. at 40.)

Plaintiffs dismiss *Caronia*'s rejection of the theory that exposure equals injury as "nonsensical," but Plaintiffs simply misread New York law. Plaintiffs base their argument on a line of statute of limitations cases holding that "'as a matter of law, the tortious injury is deemed to have occurred upon the introduction of the toxic substance into the body.'" (*See* Pls.' Opp. at 35 (quoting *Consorti v. Owens Corning Fiberglas Corp.*, 86 N.Y.2d 449, 452 (1995)).) The decisions that Plaintiffs cite themselves recognize that this rule applied only to the statute of

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current or former longtime heavy smoker who has not been diagnosed with a smoking-related disease, and who is not under investigation by a physician for such a suspected disease, pursue an independent equitable cause of action for medical monitoring for such a disease?" 22 N.Y.3d 446 (quoting 715 F.3d 417, 450 (2013)).

[11] As another court has observed, *Askey* "highlight[s] the pitfalls of rigidly equating exposure with injury, and reinforce[s] the notion that the two are factually and legally distinct." *Penny v. United Fruit Co.*, 869 F. Supp. 122, 127 (E.D.N.Y. 1994).

limitations under CPLR 214. The policy supporting this "exposure rule" was "that an injured individual's occasional hardship is outweighed by the advantage of outlawing stale claims." *Rothstein v. Tennessee Gas Pipeline Co.*, 87 N.Y.2d 90, 93 (1995) (citation omitted). Moreover, the exposure rule was ultimately replaced in 1986 with the enactment of CPLR 214-c, which provided "a balanced and more equitable discovery accrual mechanism." *Id.* As a more recent decision explains, the historical exposure rule "was being applied to determine the accrual date of toxic tort claims for statute of limitations purposes and discernibly for no other purpose" but has since "been abrogated" by the enactment of CPLR 214-c. *In re N.Y. City Asbestos Litig.*, 32 Misc. 3d 161, 171-72 (Sup. Ct. N.Y. Cnty. 2011).

Plaintiffs insist that CPLR 214-c did not alter the exposure rule (Pls.' Opp. at 37-38), but the plain language of the statute is directly to the contrary. The statute governs claims "for personal injury or injury to property caused by the *latent effects of exposure*," thus acknowledging situations where injury comes after exposure. CPLR 214-c(2) (emphasis added).[12]

Moreover, Plaintiffs' invitation to use the abrogated exposure rule as the foundation for their claims not only violates *Caronia*'s direct holding, but also the "policy reasons" that "militate against a judicially-created independent cause of action for medical monitoring." 22 N.Y.3d at 452. As *Caronia* explained, "[t]he physical harm requirement serves a number of important purposes: it defines the class of persons who actually possess a cause of action,

[12] Indeed, in discussing some of the very cases Plaintiffs cite, in *In re N.Y. Cnty. DES Litig.* the New York Court of Appeals addressed the enactment of CPLR 214-c, prior to which,"[t]he dichotomy in the case law that the Legislature intended to address was that between impact or exposure on the one hand and resulting infirmity on the other." 89 N.Y.2d 506, 514 (1997). Because of that "narrow focus," the Court of Appeals held that "the only reasonable inference is that when the Legislature used the phrase 'discovery of the injury,' it meant discovery of the *physical condition* and not, as plaintiff argues, the more complex concept of discovery of both the condition and the nonorganic etiology of that condition." *Id.* (emphasis added). Thus, to the extent that the statute of limitations is relevant to whether Plaintiffs can state a tort claim, *DES Litigation* in fact supports the argument that injury is synonymous with a *physical condition*, and not, as Plaintiffs contend, with exposure.

provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims." *Id.* at 446. "[D]ispensing with the physical injury requirement," *Caronia* stated, "could permit 'tens of millions' of potential plaintiffs to recover monitoring costs, effectively flooding the courts while concomitantly depleting the purported tortfeasor's resources for those who have actually sustained damage." *Id.* at 451 (citing *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 442-44 (1997)). And because "it is speculative, at best, whether asymptomatic plaintiffs will ever contract a disease," allowing recovery for those who have exposure but no physical harm "would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure." *Id.* Allowing the exposure rule to serve as a benchmark for tort injury would lead to the very same concerns. Plaintiffs' invitation to disregard both the holding of and the policy supporting *Caronia* should be rejected.

C. Other Courts Reject Mere PFOA Accumulation as a Physical Injury

Although New York law controls this case, it bears noting that New York is not an outlier in requiring a present physical injury as a foundation for tort liability. (*See* Defs.' Br. at 40.)[13] Other courts that follow the physical injury requirement have accordingly rejected attempts to plead tort claims based solely on the accumulation of PFOA in an individual's blood. "The presence of PFOA ... in the plaintiffs' blood does not, standing alone, establish harm or injury for purposes of proving a negligence claim." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 95 (4th Cir. 2011). Rather, under the physical harm rule, the "plaintiff also must produce

[13] Plaintiffs' brief concludes with a string cite that includes cases that authorized medical monitoring without a physical injury (Pls.' Opp. at 44-45), but *Caronia* itself recognized that "[t]he highest courts in our sister states are divided on whether an independent cause of action for medical monitoring should lie absent any allegation of present physical injury or damage to property." *Caronia*, 22 N.Y.3d at 449-50. Because *Caronia* ultimately rejected a cause of action for medical monitoring based on New York's physical injury requirement, caselaw from other jurisdictions rejecting the physical injury requirement is of no persuasive value in construing New York law.

evidence of a *detrimental effect to the plaintiffs' health* that actually has occurred or is reasonably certain to occur due to a present harm." *Id.* (emphasis added) (citation omitted).

More recently, the *West Morgan* court rejected similar tort claims based on alleged PFOA accumulation and the fear of future illness. There, the plaintiffs alleged they had "elevated levels of PFOA, PFOS, and related chemicals in their blood serum, and that those elevated levels cause long-term physiologic alterations and damage to the blood, liver, kidneys, immune system, and other organs." 2016 WL 6584932, at *3. Yet they did "not claim that *they currently* have a disease as a result of their exposure," which was contrary to the longstanding requirement of Alabama law that the Plaintiff have "'a manifest, present injury before a plaintiff may recover in tort.'" *Id.* at *3 (emphasis added) (quoting *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001)). Thus, because the plaintiffs did "not allege that they have developed any disease or symptoms" from PFOA, they failed to allege a personal injury. *Id.* The same result is warranted here under New York law as under West Virginia and Alabama law in *Rhodes* and *West Morgan*. Plaintiffs' claims seeking medical monitoring should therefore be dismissed with prejudice.

CONCLUSION

For the foregoing reasons and for those set forth in Defendants' opening brief, the Court should (1) dismiss the Complaint's damages claims with prejudice; and (2) defer consideration of Plaintiffs' injunctive claims pursuant to the so-ordered stipulation of interim stay.

Defendants respectfully request the opportunity to present oral argument in support of their motion, at a time convenient for this Court.

Dated: November 16, 2016

Respectfully submitted,

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December 23, 2016

VIA ECF

Hon. Lawrence E. Kahn
United States District Judge
United States District Court
Northern District of New York
James T. Foley Courthouse
445 Broadway
Albany, New York 12207

Re: Baker et al. v. Saint-Gobain Performance Plastics Corporation and Honeywell International, Inc., Case No.: 1:16-CV-00917-LEK-DJS

Your Honor:

We represent Defendant Saint-Gobain Performance Plastics Corporation in the above-referenced matter. Having just received and reviewed the transcript of the December 7, 2016, hearing before the Court on Defendants' motion to dismiss, we write on behalf of both Defendants to clarify certain statements made to the Court. Because we believe the factual record in *Caronia* was inadvertently mischaracterized by certain statements of Plaintiffs' counsel, we are providing this letter for the benefit of the Court and to avoid any unintended confusion.

During oral argument, referring to the record before the New York Court of Appeals in *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 452 (2013), Plaintiffs' counsel argued that the plaintiffs in *Caronia*:

> certainly made the argument that – that cigarette smoke is toxic ***but they never made the argument that the plaintiffs had suffered a present injury*** …. Therefore, the plaintiffs in *Caronia* did not, as defendants argue, present the argument we're presenting. ***They never alleged that these smokers had toxic invasion of the body and that being an injury***.

12/07/16 Hr'g Tr. (Ex. A) at 18:4-19 (emphasis added).

Yet review of the record in *Caronia* reveals that the plaintiffs there did, in fact, allege the same sort of injury at the cellular and genetic levels that Plaintiffs allege in this action. The operative complaint in *Caronia* alleged that:

> Plaintiffs and each and every class member suffered ***sub-clinical and/or sub-cellular injury and damage to the structures of his or her lungs***.

Caronia Fourth Am. Compl. (Ex. B) at ¶ 73 (emphasis added).[1]

These allegations were supported by the report from the *Caronia* plaintiffs' expert, Dr. Miller, which was attached to the plaintiffs' Rule 56.1 statement. (Ex. C at ¶ 68.) Dr. Miller asserted that "[e]ach puff of a cigarette produces harm to the cells and tissues of the airways and lung, which enhances carcinogenic genetic mutations and loss of protective repair processes and impairs the body's ability to expel carcinogens." (Ex. D at p. 2.) Amplifying the nature of the harm to the cells, tissues, and genes, Dr. Miller's expert report in *Caronia* further stated:

> 9. Each puff of a cigarette produces harm to the cells and tissues of the airways and lung. The particles and gases inhaled cause an inflammatory reaction in the larger (bronchi) and smaller (bronchioles) airways leading to accumulation of inflammatory cells and secretions, impairment of mucociliary clearance, and hyper-reactivity of the smooth muscle causing bronchoconstriction. In the lung, the balance of cellular protein synthesis and degradation is shifted so that elastin is destroyed, resulting in the over distention and destruction of functional airspaces which is emphysema.
>
> 10. In addition to these inflammatory and destructive effects, the many carcinogens in cigarette smoke damage the genes of the airway cells and impair the repair mechanisms which protect against the genetic damage. The result is enhancement of carcinogenic genetic mutations and loss of protective repair processes. That bronchoalveolar clearance mechanisms to expel particles have been impaired potentiates the carcinogenic actions.

(Ex. D at pp. 5-6.)

Thus, the issue before the district court in *Caronia* was framed as one involving "asymptomatic plaintiffs" who do not have a "'present injury in the form of a manifest medical condition.'" 2011 WL 338425, at *4. By the time the Second Circuit issued its opinion the distillation of the plaintiffs' allegation of harm was one of "not yet exhibited physical injury," *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 418, 421-22, 425-27, 435 (2d Cir. 2013), and by the

[1] In *Caronia*, the "fourth amended complaint" was the operative pleading when the Eastern District issued its decision "to dismiss the medical monitoring claim." *Caronia v. Philip Morris USA, Inc.*, 2011 WL 338425, at *1 (E.D.N.Y. Jan. 13, 2011).

time the New York Court of Appeals addressed the issue, "no physical injury" became a shorthand reference to describe the *Caronia* plaintiffs' claim of subclinical cellular and genetic harm.

Review of the *Caronia* plaintiffs' briefing to the New York Court of Appeals further reveals that allegations of harm to their cells and tissues was a material component of their claims.

- "That is not to say that Plaintiffs and the proposed class have not suffered bodily harm from prolonged Marlboro use. ***Each cigarette smoked, and the ongoing effect of continued cigarette use, causes harm to the cells and tissues of the respiratory system.*** … Nor did Plaintiffs allege (nor do the proofs indicate) that they were proper candidates for monitoring ***when they first suffered harm to the cells and tissues of the respiratory system, namely, the moment they smoked their first cigarette***." Pls.-Appellants' Br. (Ex. E) at 18-19 (emphasis added) (internal citations omitted) (also available at 2013 WL 8023761).

- "In this case, Plaintiffs were not merely exposed to cigarette smoke. The uncontroverted evidence is that ***they also suffered bodily harm to the tissues and cells of their lungs***." Pls.-Appellants' Reply Br. (Ex. F) at 26 (emphasis added) (also available at 2013 WL 8023763).

Similar references to damages to their cells, tissues, and genes are found throughout the *Caronia* plaintiffs' briefing. *See* Pls.-Appellants' Br. (Ex. E) at 35, 38 n.33, 56; Pls.-Appellants' Reply Br. (Ex. F) at 63. Finally, at oral argument before the New York Court of Appeals, the *Caronia* plaintiffs again made clear that they alleged cellular injuries.

> Judge Rivera: Let's hear your argument on injury. I believe it's the twenty-pack injury.
>
> Ms. Phillips: That's exactly right … ***[T]here is no question that a person who has smoked twenty pack-years and is fifty years of age … has not just cellular changes but cellular injuries***.

Caronia Oral Argument Tr. (Ex. G) at 41:18-42:2 (emphasis added).

In sum, notwithstanding Plaintiffs' statements to the contrary at the hearing before this Court, cellular and genetic injuries were affirmatively alleged by the plaintiffs and were before the courts in *Caronia*. Paralleling the allegations in *Caronia*, Plaintiffs in the biomonitoring class in this action allegedly "suffer injury and damage at the cellular and genetic level by accumulation of PFOA in their body." 12/07/16 Hr'g Tr. (Ex. A) at 14:6-8. Thus, as stated in the Defendants' brief and at oral argument, *Caronia* is controlling and dispositive, thereby compelling dismissal of Plaintiffs' claim for medical monitoring.

Hon. Lawrence E. Kahn
December 23, 2016

Respectfully submitted,

/s/ Sheila L. Birnbaum
Sheila L. Birnbaum

cc: All Counsel of Record (via ECF)

EXHIBIT I

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December 29, 2016

VIA ECF
Hon. Lawrence E. Kahn
United States District Judge
United States District Court
Northern District of New York
James T. Foley Courthouse
445 Broadway
Albany, New York 12207

RE: ***Baker et al. v. Saint-Gobain Performance Plastics Corp.,*** **1:16-CV-00917-LEK-DJS**

Dear Judge Kahn:

On Friday, December 23, 2016, Defendants filed a supplemental letter brief in support of their motion to dismiss, following the oral argument before this Court on December 7, 2016. They claim that their post-argument letter follows their reading of the transcript of the oral argument, which they contend requires that they "clarify certain statements made to the Court." *See* Letter from Sheila Birnbaum to Hon. Lawrence E. Kahn (Dec. 23, 2016) (Doc. # 30) ("Surreply Letter"). That is not an appropriate purpose of a post-argument filing, and this Court's rules specifically prohibit such a filing. Defendants' Surreply Letter, with over 300 pages of attachments, does not "clarify" statements but rather is nothing more than an attempt to submit additional legal argument beyond that allowed by the Court. The Court should strike Defendants' improper Surreply Letter.

First, Local Rule 7.1(b)(1), which pertains to "Dispositive Motions," states, "[a] surreply is not permitted." Defendants' post-argument letter is obviously a unilateral surreply submitted without permission and, accordingly, inconsistent with Local Rule 7.1. As the court observed in *Lewis v. Wallace*, No. 11-cv-0867, 2013 WL 1566557 (N.D.N.Y. Feb. 13, 2013), "'This rule is not a mere technicality, but a well-reasoned procedure premised, in part, on the fact that it is the movant who is shouldered with the ultimate burden on the motion and who therefore should be (for reasons of judicial efficiency and simple fairness) afforded the last word on the motion.'" *Id.* at *4 (authority omitted). The District Court then continued: "for reasons of judicial efficiency and fairness, and because plaintiff failed to first seek permission from the court to submit his surreply, the court will not consider this submission, and orders it stricken from the record." *Id.* The Court should take the same actions here. Defendants' filing is particularly inappropriate as they filed over 300 pages of new material without permission and as Plaintiffs'

counsel made no new arguments, nor did they cite new cases, at the oral argument. Defendants had every opportunity to make the arguments they now make in their Surreply Letter either in their reply brief (Doc. #23) or at oral argument, and their failure to do so precludes their now improper attempt to include these arguments in an untimely surreply.

Second, Defendants did not seek permission from the Court, nor did they inform Plaintiffs' counsel of their intention, to file a surreply. The parties previously negotiated a briefing schedule to govern Defendants' Rule 12(b)(6) motion, and that schedule did not include the filing of a surreply. Without grounds and permission for such a filing, it is improper and should be stricken.

Third, good reasons support the Court rejection of Defendants' filing. According to Rule 7.1(b)(3), "[t]he Court shall not consider any papers required under this Rule that are . . . not in compliance with this Rule unless good cause is shown." Defendants have not shown good cause for filing a surreply, nor did they even try. In their reply brief and at oral argument, Defendants had every chance to advance the arguments they make in their Surreply Letter. They did not do so. Instead, they now flout the local rules by filing their Surreply Letter without even seeking leave to file it. What is more, their Surreply Letter misstates the record and holding in *Caronia*, attempting to preempt Plaintiffs' opportunity to respond. The fact that Defendants' counsel was not prepared to address these arguments either in their reply brief or during oral argument, when it was appropriate to do so and when Plaintiffs' counsel would have had an opportunity to respond, precludes Defendants from relitigating these issues now.

Because of the substantive and procedural improprieties set forth in Defendants' post-argument letter brief, Plaintiffs respectfully request that the Court strike Defendants' Surreply Letter. In the alternative, should the Court not strike Defendants' Surreply Letter, Plaintiffs respectfully request that the Court permit Plaintiffs to file a substantive response to the letter, a copy of which is attached as Exhibit A.

Respectfully submitted,

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