IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIA- PACIFIC CONSUMER PRODUCTS LP,

Petitioner,

v.

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

Respondents.

CASE NO. S13C1723

RESPONSE TO PETITION FOR CERTIORARI REVIEW

John C. Bell, Jr.
Georgia State Bar No. 048600
BELL & BRIGHAM
Post Office Box 1547
Augusta, Georgia 30903-1547
(706) 722-2014

Benjamin M. Perkins
Georgia State Bar No. 140997
Timothy D. Roberts
Georgia State Bar No. 609795
Melissa L. Bailey
Georgia State Bar No. 804341
OLIVER MANER, LLP
PO Box 10186
Savannah, GA 31412
(912) 236-3311

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES. iii

I. INTRODUCTION. 1

II. STATEMENT OF FACTS. 5

III. STANDARD FOR CERTIORARI REVIEW. 8

IV. ARGUMENT AND CITATION OF AUTHORITY. 9

A. The Court should decline to review the sufficiency of the evidence underpinning the rulings of the trial court and Court of Appeals. 9

B. There is no issue of great concern, gravity or importance to the public that necessitates the grant of the Petition. 10

C. Georgia-Pacific did not enumerate the factual findings of the trial court as error in its appeal to the Georgia Court of Appeals. . . 11

D. The Court of Appeals correctly determined that the requirement of commonality is satisfied. 12

E. The Court of Appeals correctly determined that the requirement of typicality is satisfied. 17

F. The Court of Appeals correctly determined that the requirements of Rule 23(b)(3) are satisfied. 19

G. Arguments that do not merit consideration. 26

H. The decisions of the trial court and the Court of Appeals square with the policy concerns related to class actions. 28

IV. CONCLUSION. 30

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES:

A Fast Sign Co., Inc. v. American Home Services, Inc., 291 Ga. 844 (2012). . . . 21

Alexander v. Hulsey Environmental Services, Inc.,
306 Ga.App. 459 (2010). 4, 16

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). 19

American Home Services, Inc. v. A Fast Sign Co., Inc.,
287 Ga.App. 161 (2007). 22

Appleyard v. Wallace, 754 F.2d 955 (11th Cir. 1985). 13

Atlanta Comm. for Olympic Games, Inc. v. Hawthorne, 278 Ga. 116 (2004). 9

Brenntag Mid South, Inc. v. Smart, 308 Ga. App. 899 (2011). 2, 24

Butler v. Sears, Roebuck and Co., ___ F.3d ___ (7th Cir. August 22, 2013)
(certification reaffirmed following remand by 133 S.Ct. 2768);
702 F.3d 359 (7th Cir. 2012). 22

Carnett's, Inc. v. Hammond, 279 Ga. 125 (2005). 21, 22

Comcast v. Behrand, 133 S. Ct. 1426 (2013). 20

Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986)
cert. denied, 479 U.S. 833. 13

Cox v. Cambridge Square Towne House, Inc., 239 Ga. 127 (1977). 16

Doctor's Hospital Surgery Center, LP v. Webb, 307 Ga.App. 44 (2010). 26

Flournoy v. Honeywell Int'l, Inc., 239 F.R.D. 696 (S.D. Ga. 2006). 24

Freeman v. Blue Ridge Paper Products, Inc.,
229 S.W.3d 694 (Tenn.App. 2007). 25

Georgia R. & Banking Co. v. Maddox, 116 Ga. 64 (1902). 4

Griffin Ind. Inc. v. Green, 280 Ga.App. 858 (2006). 23

Grizzle v. Federal Land Bank of Columbia, 145 Ga.App. 385 (1978). 15

Herrin v. Opatut, 248 Ga. 140 (1981). 4

Hoffman v. Atlanta Gas Light Co., 206 Ga.App. 727 (1992). 16

Hooters of Augusta, Inc. v. Nicholson, 245 Ga.App. 363 (2000). 21

In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation,
241 F.R.D. 435 (S.D. N.Y. 2007). 23

In re Scrap Metal Antitrust Lit., 527 F.3d 517 (6th Cir. 2008). 25

In re Urethane Antitrust Lit., 2013 WL 2097346 (D. Kan.). 25

In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation,
___ F.3d ___, 2013 WL 3746205 (6th Cir. 2013). 22

J.M.I.C. Life Ins. Co. v. Toole, 280 Ga.App. 372 (2006). 17

Joiner v. Hercules, case no. 2:94-CV-170, S.D. Georgia. 24

Kirkpatrick v. J.C. Bradford, 827 F.2d 718 (11th Cir. 1987). 21

K-Mart Corp. v. Hackett, 237 Ga.App. 127 (1999). 2, 11

Liberty Lending Servs. v. Canada, 293 Ga.App. 731 (2008). 17, 20

Marshall v. Southern Wood Piedmont, case no. 1:87-CV-121, S.D. Ga. 23

Mathis v. Atlantic Steel Co., case no. 92CV162. 23

Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910 (7th Cir. 2003). 23

Owens v. AlliedSignal, case no. CV95-0035. 24

Powell v. Tosh, 280 F.R.D. 296 (W.D. Ky. 2012). 24

Reed v. State, 291 Ga. 10 (2012). 2

Resource Life Ins. Co. v. Buckner, 304 Ga. App. 719 (2010). 3

Rite Aid of Ga. v. Peacock, 315 Ga.App. 573 (2012). 18

Roberts v. Southern Wood Piedmont Co., 173 Ga.App. 757 (1985). 4, 16

Rollins, Inc. v. Warren, 288 Ga.App. 184 (2007). 26

Roughton v. Thiele Kaolin Co., 209 Ga. 577 (1953). 4

Smith v. Branch, 226 Ga.App. 626 (1997). 16

Solomon v. Barnett, 281 Ga. 130 (2006). 9

State v. McKnight, 265 Ga. 701 (1995). 9

Sterling v. Visicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988). 23

Wal-Mart Stores, Inc.v. Dukes, 131 S.Ct. 2541 (2011). 12, 13, 24

Warden v. Hoar Construction Co., 269 Ga. 715 (1998). 9, 26

STATE STATUTES:

O.C.G.A. § 41-1-7. . . . . 3, 4, 16

O.C.G.A. § 9-11-23. . . . . 3, 11, 17

O.C.G.A. § 9-11-23(a)(3). 9, 17

O.C.G.A. § 9-11-23(b)(3). 9, 19, 21,25, 26

STATE RULES:

Rule 40, Rules of the Supreme Court of Georgia. 1, 9, 10

OTHER AUTHORITIES:

§10:3, *et seq.*, Newberg on Class Actions, Fourth Ed.. 25

Annot. 8 ALR 6th 465. 4

I. INTRODUCTION

Georgia-Pacific's Petition for Certiorari is but a plea for this Court to reweigh the evidence presented to the Superior Court of Effingham County and to make new and different findings of fact that are contrary to the findings of fact entered by the Superior Court. The Petition disregards the command that certiorari is not for review of evidentiary sufficiency.

Throughout its Petition, Georgia-Pacific references "facts" which the lower court allegedly misconstrued or overlooked. However, the trial court's order and the Court of Appeals' opinion indicate that each court undertook the analysis required by the statute and controlling case law in reaching their decisions.

Georgia-Pacific's argument that proceeding as a class action will require a series of "individual mini-trials" is unfounded. The class members assert the same claims for the same injures that were caused by the same chemicals, emitted from the same source. The answers to common questions, including the nature of the chemicals, the source of the chemicals and liability in nuisance and trespass, will be applicable to each class member. Thus, while this action, like any class action, will have some individual inquiries, these issues do not *predominate* over the *answers* to common questions.

The Petition cites repeatedly, though quite selectively, to the evidentiary

record, but only cites sporadically to the Opinion of the Court of Appeals and does not quote a single complete sentence from the Opinion of the Majority. (See generally, Petition for Certiorari) The Petition does not note that Petitioner chose not to enumerate as error any of the Superior Court's findings of fact:

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

Opinion of Court of Appeals, p. 7.

The findings of fact of the trial court should be affirmed unless clearly erroneous, a standard that is the same as "any evidence." *Reed v. State,* 291 Ga. 10, 13 (2012) (a trial court's findings of fact are to be reviewed under an "any evidence" test); *Brenntag Mid South, Inc. v. Smart*, 308 Ga. App. 899, 902 (2011) (findings of fact must be affirmed if supported by any evidence). "Georgia law requires that each error be separately enumerated. Parties are not permitted to enlarge their enumerations of errors by including additional issues in their brief." *K-Mart Corp. v. Hackett*, 237 Ga.App. 127, 130 (1999) (internal citations omitted). Arguments as to matters not separately enumerated as error are deemed abandoned. *Id.*

> Implicit in this deferential standard of review is a recognition of the fact-intensive basis of the certification inquiry and of the trial court's inherent power to manage and control pending litigation.

Resource Life Ins. Co. v. Buckner, 304 Ga. App. 719, 729 (2010).

The trial court's unchallenged findings of fact clearly support the conclusion that common issues of law and fact predominate. Despite Georgia-Pacific's apocalyptic tale of the Court of Appeals' "neutering" of the standards governing class certification which will result in a sudden, uncontrollable onslaught of class action litigation, the lower courts' decisions comport with longstanding Georgia jurisprudence. Although Georgia-Pacific asserts that it employs "[r]esponsible facility operators," the undisputed fact remains that its toxic emissions have directly harmed the property of residents of the class area. The "hydraulic pressure to settle" placed upon Georgia-Pacific is not a result of errors of the lower courts, but rather a result of its own decision to continuously emit toxic, corrosive chemicals into the air. It is Georgia-Pacific that asks this Court to reject the established construction of O.C.G.A. § 9-11-23 so as to give this statute a new and narrow meaning calculated to close the courthouse to property owners suffering from a common toxic invasion.

Petitioner's arguments concerning the element of *typicality* is likewise flawed as it is founded upon an erroneous legal argument. Petitioner repeatedly cites O.C.G.A. § 41-1-7 for the proposition that this statute provides a "coming to the

nuisance defense" as to the named Plaintiffs, and thereby renders their claims atypical. (Petition, pp.19-20) However, Petitioner elects not to quote the statute either in whole or in part, nor cite the cases that construe this statute that is Georgia's version of what are commonly known as, "Right to Farm Acts." *See* Annot. 8 ALR 6th 465.

Georgia-Pacific's Effingham County plant is a "tissue mill" that manufacturers paper products from recycled paper. (R.1317, pp. 36-37) It does not process logs into pulp. (*Id.*, p. 36) The toxic fumes at issue in this case emanate from its massive sludge fields that are filled with waste from its manufacturing process. (*Id.*, p. 24) It is not a farm.

An entity that maintains a nuisance in the form of noxious fumes from a waste disposal area is not protected from accountability by O.C.G.A. § 41-1-7. *Alexander v. Hulsey Env. Serv, Inc.*, 306 Ga.App. 459, 462 (2010) (waste disposal site); *cert. denied*; *Roberts v. Southern Wood Piedmont Co.*, 173 Ga.App. 757 (1985) (processing of logs into telephone poles is not an "agricultural operation" protected by the statute); *See Herrin v. Opatut*, 248 Ga. 140, 143 (1981) (construing the statute narrowly). Georgia's common law has long rejected the "coming to the nuisance" defense. *Roughton v. Thiele Kaolin Co.*, 209 Ga. 577, 581 (1953); *Georgia R. & Banking Co. v. Maddox*, 116 Ga. 64, 79 (1902) ("[T]he old rule, maintained by some

authorities, that coming to a nuisance will prevent a person so coming from making any complaint, has long since been exploded.").

Georgia-Pacific's argument on *typicality* is thus founded upon a legal proposition that is contrary to controlling precedent.

The grounds asserted do not merit certiorari review.

II. STATEMENT OF FACTS

Georgia-Pacific operates the Georgia Pacific Savannah River Mill plant in Effingham County ("the Mill"). The Mill includes a power plant, waste water treatment facility, landfill, and sludge fields. (R.156-95) Georgia-Pacific operates its facilities, including its landfill and sludge fields and other waste disposal facilities, in such a manner as to release toxic chemicals and fumes that spread to the properties owned by the named Plaintiffs and members of the class. The principle chemical that off-gases from the sludge fields is hydrogen sulfide gas, a gas that smells like rotten eggs and forms hydrosulfuric acid when combined with water. It is most noticeable on damp days with low clouds and no wind. (R.1317, pp. 24-25)

The Class Representatives live in the homes that they own in the Class Area. (R.196-211).

The hydrogen sulfide released by Georgia-Pacific constitutes an ongoing and continuing trespass and nuisance that damages their property, as well as the rest of

the properties located within the Class Area. This suit seeks recovery for that resulting damage. The personal discomfort, coughing and burning eyes reported by people living within the class area are facts relevant to damage to property value. Who would want to buy a home and live where the air is so toxic that it makes you cough and burns your eyes?

Georgia-Pacific is a Major Source of pollutants under Title V, and it has Major Source Status for its emission of pollutants including Hydrogen Sulfide, PM, PM10,SO2, VOC, NOx, CO, TRS, individual HAP, and total HAPs. (R.212-46) The hydrosulfuric acid produced by the combination of Georgia-Pacific's hydrogen sulfide fumes combines with moisture, such as dew, and corrodes and destroys air conditioners throughout the class area. Georgia-Pacific documents report that on thirty separate occasions residents of the area contacted Georgia-Pacific regarding air conditioner failures. Georgia-Pacific accepted responsibility and paid to have those units replaced or repaired. (R.270-361) The first complaint identified in discovery was made in May 2007. Since the hearing on Plaintiffs' Motion for Class Certification on April 16, 2012, air conditioner units at five separate homes in the proposed class area failed, as recently as July 2013. Georgia-Pacific has acknowledged its responsibility for these failures. (R.1423-48) The purported "solutions" implemented by Georgia-Pacific have failed.

Air conditioner failures are not the only problems. Georgia-Pacific produced numerous documents which memorialize complaints regarding the Mill's emissions from residents of areas within and beyond the Class Area, many of whom live over a mile from the Mill's 150 acres of sludge fields. (R.841-44) There were 107 hydrogen sulfide-related complaints from 2006 through February 2012. (R.849-1046; 1048; 1049-52) Seventy-nine complaints were made by persons who are not residents of Mallard Pointe (the neighborhood in which the class representatives live). The documents reveal the following:

- Georgia-Pacific received multiple complaints from residents who were unable to breathe, were vomiting, or were suffering from headaches caused by the Mill's pollution. (*See e.g.*, R.857-60; 957-58; 1047)
- Georgia-Pacific received complaints from residents who were coughing and choking due to the pollution. (R.865-66; 879-80; 883-84)
- Residents in the area reported that they could not tolerate being outside due to the pollution. (R.869-70; 851-54; 860-61; 997-98, 1033-34)
- Homeowners reported that they were unable to sell their properties due to the odor and pollution and that Georgia-Pacific's pollution was diminishing their property values. (R.851-54; 877-78; 897-98; 1048)
- Odor pollution was permeating into their homes. (R.895-96; 949-50; 957-58;

1007-08; 877-78; 935-36; 979-80; 1027-28; 1041-42; 1047)

- Pollution was corroding various household fixtures, air conditioners, and other items. (R.912-13; 921-22; 935-36; 995-96; 1009-10; 851-52; 857-59; 1047; 1048; 1049-52)
- Pollution was causing a loss of sense of smell or was burning their eyes, noses and throats. (R.955-56; 997-98; 893-94; 1019-20; 1027-28; 1047)
- A young girl waiting on a school bus was covering her nose with her shirt "because it stunk so bad." (R.1033-34)
- Georgia-Pacific was informed that three residents in the area suffered from skin diseases they attributed to the Mill's pollution. (R.851-54)
- Residents in the area were embarrassed to have guests in their homes because of the odor and pollution. (R.923-25; 1047)

The evidence establishes that Georgia-Pacific's pollution is widespread and injurious to persons and property located well over a mile from Mallard Pointe, an area that more than encompasses the Class Area. Georgia-Pacific's attempt to minimize the magnitude of the problems is impeached by its own records.

III. STANDARD FOR CERTIORARI REVIEW

> A petition for the writ will be granted only in cases of great concern, gravity, or importance to the public.
> Certiorari generally will not be granted to review the sufficiency of

evidence.

Rule 40, Ga. Supreme Ct. R.

This petition addresses interpretation of a statute, O.C.G.A. §§ 9-11-23(a)(3) and 23(b)(3).

> Since the legislature is charged with knowledge of the courts' interpretation of statutes, the failure to amend the statute raises a presumption that the legislature intended to make no change in the law.

Warden v. Hoar Construction Co., 269 Ga. 715, 717 (1998).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. The Court should decline to review the sufficiency of the evidence underpinning the rulings of the trial court and Court of Appeals.

A petition for writ of certiorari should not be granted to review the sufficiency of evidence or to review factual findings made by the Court of Appeals or a trial court. *See Solomon v. Barnett*, 281 Ga. 130, 131 (2006) (Supreme Court accepted the Court of Appeals' factual findings because it did not generally grant certiorari to review the sufficiency of evidence); *State v. McKnight*, 265 Ga. 701 (1995) (Supreme Court "decline[d]...to review the sufficiency of the evidence supporting..." a fact-intensive trial court ruling); *Atlanta Comm. for Olympic Games, Inc. v. Hawthorne*, 278 Ga. 116, 118 at n. 4 (2004) ("We did not grant [the] petition for certiorari to review the Court of Appeals' factual finding").

In arguing for a grant of certiorari, Georgia-Pacific draws selected words from depositions, documents, and other record evidence. The cited evidence was reviewed by the trial court and the Court of Appeals. In an apparent effort to side-step Rule 40, Georgia-Pacific couches its grievances as failures to undergo sufficiently rigorous analysis. However, careful reading of Georgia-Pacific's Petition reveals that it simply seeks to have this Court review the sufficiency of the evidence. (*See e.g.* Petition, p. 21, stating Plaintiffs failed "to point to **facts** demonstrating typicality"). Georgia-Pacific's first enumeration of error is that the "Court of Appeals majority improperly *concluded*" the commonality requirement was met based on its evaluation of the facts. (Petition, p. 11) (emphasis supplied). Georgia-Pacific's second enumeration of error is that the "majority incorrectly *found*" the typicality requirement was satisfied based on its evaluation of the facts (*Id.*, pp. 11-12) (emphasis supplied). In its third enumeration of error, Georgia-Pacific takes issue with the Court of Appeals' "*finding*" with respect to damages. (*Id.*, p. 12)

Thus, the enumerated errors relate to the sufficiency of the evidence to support findings below. The Petition for certiorari should be denied.

B. There is no issue of great concern, gravity or importance to the public that necessitates the grant of the Petition.

The issues complained of by Georgia-Pacific do not rise to the standard of

matters of great concern, gravity or importance. The order of the trial court and the opinion of the Court of Appeals demonstrate a straightforward application of Georgia class action jurisprudence. Georgia-Pacific's chief complaint is that those courts did not adopt a more narrow approach than has ever been employed by Georgia courts. Thus, there is no matter of great concern, gravity or importance to address.

C. Georgia-Pacific did not enumerate the factual findings of the trial court as error in its appeal to the Georgia Court of Appeals.

"Georgia law requires that each error be separately enumerated. Parties are not permitted to enlarge their enumerations of errors by including additional issues in their brief." *K-Mart Corp. v. Hackett,* 237 Ga.App. 137, 130 (1999).

Georgia-Pacific's single enumeration in the Court of Appeals stated:

> The Superior Court erred by certifying the *Ratner* class without requiring Appellees to 'affirmatively demonstrate' with 'significant proof' their compliance with each of the seven requirements of O.C.G.A. § 9-11-23…and by failing to conduct a 'rigorous analysis' of each of the seven requirements as required by *Dukes* and *Rite Aid*."

(Georgia-Pacific Appellant Brief in Court of Appeals, p. 18)

The Court of Appeals addressed this in its opinion, stating, "[Georgia-Pacific] did not enumerate as error any specific factual finding made by the superior court." (Opinion, p.7) For that reason, the Court of Appeals adopted the trial court's findings of fact. (*Id.*) Georgia-Pacific's decision not to enumerate as error any findings of fact

of the trial court is not a reason to grant certiorari.

D. The Court of Appeals correctly determined that the requirement of commonality is satisfied.

Georgia-Pacific argues that the holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) demands reversal of the Court of Appeals' holding that the trial court did not abuse its discretion by finding that the commonality and typicality requirements were satisfied.

In *Dukes*, the United States Supreme Court stated the "common contention" must be "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. In *Dukes*, the class claims hinged on "literally millions" of independent employment decisions by store managers at thousands of Wal-Mart stores and offices located throughout the country. *Id.* at 2552. The Court held that the claims lacked commonality because they lacked "some glue holding the alleged *reasons* for those decisions together." *Id.*

Unlike *Dukes*, this case involves claims by landowners pertaining to damage done to their property by a single facility. The type of damage alleged for each class member is the same—pollution from Georgia-Pacific's Mill. Georgia-Pacific's activities have been publicized by the Mill's own manager, Russ McCollister, who,

in an April 2007 newsletter, stated, "We are increasing production, which creates more traffic, more noise from the traffic, and more activity in our landfill. This activity releases odorous gases that are the product of most landfills, which creates issues for our neighbors." (R. 765) As outlined *supra* pp. 7-8, the types of complaints Georgia-Pacific has received have been duplicative, and have stemmed from the hydrogen sulfide gas emanating from the sludge fields. In keeping with *Dukes*, the glue that holds all of the complaints together is the same--emission of the same chemical by the same company from the same waste disposal area.

The central issues in this case are common to all class members. The answers to these issues will "drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2555. The finder of fact will adjudicate whether Georgia-Pacific's sludge produces the toxic chemicals, including hydrogen sulfide, that have spread into the class area, whether this constitutes a nuisance or trespass, and, if so, what damage results. Common proof will be presented to prove common harm. Georgia-Pacific harps on potential factual details that may vary among class members. Factual differences do not bar a class action when answers to common questions of law can resolve the central issues. *Id.* at 2551; *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) *cert. denied,* 479 U.S. 833; *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) ("The similarity of the legal theories shared by the plaintiffs and the class

at large is so strong as to override whatever factual differences might exist...").

Georgia-Pacific argues that the common issues which are "capable" of class-wide resolution are insufficient. Georgia-Pacific overlooks the obvious fact that the determination of the common issue of whether Georgia-Pacific's emissions result in noxious odors, toxicity and corrosion, and harm to class property is a threshold matter to be resolved before individual damages may be assessed. By certifying the class, the Superior Court correctly held that a determination as to whether Georgia-Pacific's emissions were noxious, toxic, and/or corrosive would determine whether or not there was "common injury" to the class. The amount of damage may vary among the class members, but no class member has a claim absent that threshold determination of class-wide liability which will be *resolved* on a class-wide basis.

Georgia-Pacific's argument for certiorari focuses on distinctions that may be relevant as to damages, but not as to the overarching issue of liability. The weakness of its argument is illuminated by its assertion that resolution of the question of *liability on a class-wide basis* does not support a finding of *commonality*. (Petition, p.18) Georgia-Pacific omits acknowledgment that it has repeatedly accepted responsibility and funded repairs for damage to homes in the class area caused by its pollution. By its actions, it has admitted class-wide causation, liability and damage. (R.270-361; 1423-48) And, as previously noted, *Plaintiffs do not seek recovery for*

personal injuries. At the deposition of Ms. Kathy McDonald, Tim Roberts, counsel for Plaintiffs, stated on the record "plaintiffs aren't seeking compensation for personal injuries..." (R.1223, pp. 5:23-55:5). In response, counsel for Georgia-Pacific replied "[o]kay, if that's not the case, that's fine. So with that, I think I'm done." (*Id.* at p. 55:6-8; see also R.1221, p. 4:8-17). Oral stipulations between counsel disclaiming contentions are binding. *Grizzle v. Federal Land Bank of Columbia*, 145 Ga.App. 385, 389 (1978). Contrary to Georgia-Pacific's insinuation that Respondents have only sought to disclaim a claim for personal injury on appeal to avoid reversal, Respondents disclaimed seeking recovery for personal injuries as far back as March 2, 2012, and Georgia-Pacific's counsel agreed to said disclamation. Accordingly, Georgia-Pacific's arguments on this issue are irrelevant.

Despite the clear evidence of Georgia-Pacific's liability, it attempts to create red herring issues. Georgia-Pacific contends that the "nature of hydrogen sulfide" means nothing to an ultimate determination on the merits because "Georgia-Pacific's waste disposal practices have changed over time." (Petition, p.17) This assertion overlooks the fact that the problem still exists, and Georgia-Pacific has yet to implement any new solution which has obviated the emissions. Thus, regardless of Georgia-Pacific's internal practices, the external result has remained constant.

Georgia-Pacific attempts to dispute the finding of *predominance of common issues* by arguing that its affirmative defenses, such as the coming to the nuisance defense, will require individualized determinations. As noted above, Georgia-Pacific has no *coming to the nuisance* defense. *supra*, pp. 3-5. O.C.G.A. § 41-1-7 provides certain protections for farming operations, but it is of no relevance to this case or to the waste disposal operations at Georgia-Pacific's plant. *Alexander,* 306 Ga.App. at 462 (the act does not apply to waste disposal facilities); *Roberts,* 173 Ga.App. at 757 (plant that made telephone poles from logs was not an "agricultural or farming operation" covered by the Act).

Georgia-Pacific's statute of limitations defense fails as a matter of law. This is a classic continuing environmental tort. It is undisputed that this nuisance continues today. This eliminates a statute of limitations defense as to the entire class. *Cox v. Cambridge Square Towne House, Inc.*, 239 Ga. 127, 128 (1977); *Smith v. Branch*, 226 Ga.App. 626, 628 (1997) (action is not barred if contamination was continuing to spread within the past four years); *Hoffman v. Atlanta Gas Light Co.*, 206 Ga.App. 727, 730 (1992) (suit filed in 1990 claiming damages resulting from chemical spills occurring between 1954 and 1956 was not time barred because the nuisance caused by the contamination continued).

The trial court detailed common questions of law and fact which, when answered, will result in common factual answers necessary to resolve the claimants' claims. The Court of Appeals reviewed these findings and found no error, correctly applying the provisions of O.C.G.A. § 9-11-23 as enunciated in established Georgia precedent. Petitioner has failed to present grounds for certiorari.

E. The Court of Appeals correctly determined that the requirement of typicality is satisfied.

O.C.G.A. § 9-11-23(a)(3) requires that the claims asserted by the Ratners and the McDonalds be typical of the claims asserted on behalf of the members of the class. *Typicality* is satisfied "upon a showing that Appellant committed 'the same unlawful acts in the same method against an entire class.'" *Liberty Lending Services v. Canada*, 293 Ga.App. 731, 738 (2008); *see also J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga.App. 372, 378 (2006) (the named plaintiff's claim was typical of the claims of the proposed class where the claims were "one and the same").

Here, Mr. and Mrs. Ratner, and Mr. and Mrs. McDonald assert in their affidavits that Georgia-Pacific's wrongful discharges injured them and all members in the class in the same way. (R.196-99; 200-03; 204-07; 208-11) The claims asserted on behalf of the class representatives and on behalf of the class are based on the same legal theories. The Ratners and McDonalds have thus *suffered the same*

injury as the remaining class; namely, their property has been subjected to contamination by the same pollutant emitted by the same source—Georgia-Pacific. The named Plaintiffs thus satisfy the "same injury" requirement enunciated in *Rite Aid of Ga. v. Peacock*, 315 Ga.App. 573 (2012).

Georgia-Pacific argues that damages may vary among the class members. Georgia-Pacific contends there is no "common proof" because the class members have owned their homes for varying lengths of time and because of the location of the homes. (Petition, p.21) This goes to the amount of damages to which a class member is entitled, and not to the issue of whether Georgia-Pacific's actions have resulted in injury to the class members. The fact that class members were exposed to Georgia-Pacific's actions for varying periods of time does not trump the fact that each was harmed by those actions. Essentially, Georgia-Pacific argues that the class members' circumstances must be *identical* to those of each and every class member. This position is unfounded. The requirement is that the class representatives' claims be *typical*, not identical. As both the trial court and Court of Appeals determined, the claims of the class representatives are sufficiently similar to the remaining class members because they all stem from Georgia-Pacific's wrongful discharges that has

resulted in damage to the property of class representatives and class members.[1] Accordingly, the claims of the Ratners and the McDonalds are typical of the claims of the class. This issue presents no grounds for certiorari.

F. The Court of Appeals correctly determined that the requirements of Rule 23(b)(3) are satisfied.

O.C.G.A. § 9-11-23(b)(3) provides for certification of the class if the common issues "predominate" over individual issues and if a class action mechanism is superior for the adjudication of the issues.

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Common issues of fact and law predominate when the issues on which liability turns are common:

---

[1] Georgia-Pacific additionally argues that "geographical differences" with respect to the Ratners and McDonalds' properties disqualify them as class representatives. This concern does not pertain to *typicality* as the named Plaintiffs live in the class area.

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

Liberty Lending Svcs. 293 Ga.App. at 739-740 (2008).

Georgia-Pacific contends that Georgia jurisprudence was revolutionized by the United States Supreme Court's decision in *Comcast v. Behrand*, 133 S. Ct. 1426 (2013). However, the *Comcast* decision is inapposite. *Comcast* is a very complex antitrust class action that does not purport to enumerate new rules for adjudication of class actions in federal courts. It is but an application of established federal law to unique and complex facts.

The law for certification of class actions in Georgia is well-established by decisions of Georgia's appellate courts. The trial court methodically applied controlling law, making findings of fact that fully support its decision. Georgia-Pacific did not enumerate these findings of fact as error. This failure is understandable because the record supports the findings of fact.

In this case, the legal and factual issues as to the liability and damages caused by Georgia-Pacific to the property of the Ratners and the McDonalds are the same as

the issues of liability and damage to the class, and are therefore common issues. These common issues were delineated by the trial court. (*See* R.1602-12) These findings were adopted by the Court of Appeals.

The fact that the amount of damages may vary among class members does not defeat a finding that common issues predominate. Where a common course of conduct by one defendant causes the same harm to each class member, individual issues as to damages and causation will not defeat certification. *Kirkpatrick v. J.C. Bradford*, 827 F.2d 718 (11th Cir. 1987).

The broad breath of discretion committed to the trial judge on this 23(b)(3) issue is illustrated by cases involving class actions asserting claims for unsolicited faxes. In *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga.App. 363 (2000), *cert. denied*, the Court affirmed certification of a class of recipients of unsolicited faxes, holding that the trial judge did not abuse its discretion in finding that common issues predominated. *Id.* at 368. In *Carnett's, Inc. v. Hammond*, 279 Ga. 125 (2005), this Court held that it was not an abuse of discretion for the trial court to conclude that common issues did not predominate in a factually similar unsolicited fax case. *Id* at 127. And, in *A Fast Sign Co., Inc. v. American Home Services, Inc.*, 291 Ga. 844 (2012), this Court affirmed the judgment in favor of the class in another unsolicited fax class action. The Court of Appeals had previously affirmed certification of the

class, rejecting the defendant's "hypothetical" attack on commonality and finding no abuse of discretion by the trial court. *American Home Services, Inc. v. A Fast Sign Co., Inc.*, 287 Ga.App. 161, 163 (2007). The *Carnett's* case upon which Petitioner relies heavily thus supports appellate respect for the trial court's exercise of discretion on the issue of whether common issues predominate. "[T]he trial court was within its discretion to deny class certification. . ." *Carnett's*, 279 Ga. at 129.

Courts often certify and appellate courts affirm certification of class actions with far more members and far more individual issues than are present in this case. A good recent example are the front-loading washing machine class actions that assert that the door gaskets trap water, breed mold and damage laundry, with the manufacturers

asserting that the problem can be avoided if the owners routinely wipe the gasket to keep it clean and dry between uses. *E.g., Butler v. Sears, Roebuck and Co.*, ___ F.3d ___ (7th Cir. August 22, 2013) (certification reaffirmed following remand by 133 S.Ct. 2768); 702 F.3d 359 (7th Cir. 2012); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation,* ___ F.3d ___, 2013 WL 3746205 (6th Cir. 2013) (certification reaffirmed following remand).

Georgia Pacific seems to argue that it is beyond the pale of class action jurisprudence for a court to conclude that common issues predominate in a class

action seeking to recover in nuisance and trespass for damage to real property that is caused by the unwanted discharges of a neighboring industrial facility. Such is not the case. *See, e.g., Sterling v. Visicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (affirming certification of a class alleging groundwater contamination); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Lit.*, 241 F.R.D. 435, 447 (S.D.N.Y. 2007) (certifying class for environmental damage to property); *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 912 (7th Cir. 2003) (certifying a class for contamination of class property).

A number of Georgia courts have found that common issues predominated in class actions asserting environmental wrongs. In *Griffin Ind. Inc. v. Green*, 280 Ga.App. 858 (2006), this Court affirmed the trial court's grant of class certification for a class composed of persons who owned property within two miles of the defendant's rendering plant that produced foul odors. The action sought injunctive relief, compensation for diminution in property value and punitive damages. *Id.* In *Marshall v. Southern Wood Piedmont*, case no. 1:87-CV-121, S.D. Ga., Judge Bowen certified a class of property owners, who owned property within a geographically-defined area, asserting damage to property caused by groundwater contamination resulting from disposal of multiple wood-treating chemicals over many decades. The case settled for $8,610,000.00. In *Mathis v. Atlantic Steel Co.*, case no. 92CV162,

Judge Forehand of the Tift County Superior Court certified a class of persons owning property within a geographically defined area asserting damage caused by ongoing air releases of the defendants' flue ash. The case settled for $3,000,000.00. In *Joiner v. Hercules*, case no. 2:94-CV-170, S.D. Georgia, Judge Alaimo certified a class of property owners owning property within a geographically defined area asserting property damage from toxaphene contamination caused by releases by the defendant that had begun decades before. The case settled for $3,900,000.00. In *Owens v. AlliedSignal*, case no. CV95-0035, Judge Douglas of the State Court of Glynn County certified a class of property owners asserting claims for property damage caused by the defendant's releases of mercury and PCB's into the Turtle River estuary beginning in the 1950s. The case was ultimately litigated in the Southern District of Georgia, and, after over a decade of litigation, the case settled for $25,000,000.00, in a settlement class certified by Judge Alaimo. *Flournoy v. Honeywell Int'l, Inc.*, 239 F.R.D. 696 (S.D. Ga. 2006) (cited with approval, *Brenntag Mid South, Inc. v. Smart*, 308 Ga.App. 899, 904 (2011). And, in a federal case decided after the *Dukes* decision, the court certified a class of persons living within a geographically defined area asserting claims for damage caused by odors coming from the defendant's pig farm. *Powell v. Tosh*, 280 F.R.D. 296 (W.D. Ky. 2012).

These cases establish that environmental tort claims are suitable for class treatment. Issues relevant to damages do not bar a conclusion that common issues of law and fact predominate. Here, as found by the trial court, the common course of unlawful conduct of Georgia-Pacific and the resulting damage meets the requirements for establishing predominance under established precedents construing O.C.G.A. § 9-11-23(b)(3).

The above Georgia environmental class actions were each settled for a lump sum, what courts sometimes refer to as an aggregate recovery, with a special master appointed to apportion the recovery among class members. The damage claims in a class action can likewise be adjudicated by a jury on an aggregate basis. *E.g., In re Scrap Metal Antitrust Lit.*, 527 F.3d 517 (6th Cir. 2008) (lump sum verdict for class affirmed.); *In re Urethane Antitrust Lit.*, 2013 WL 2097346 (D. Kan.) (Post-trial motions to set aside aggregate verdict for class denied); *Freeman v. Blue Ridge Paper Products, Inc.*, 229 S.W.3d 694 (Tenn.App. 2007) (jury verdict awarding class-wide aggregate damages in pollution case sounding in nuisance affirmed); §10:3, *et seq.*, Newberg on Class Actions, Fourth Ed. A jury thus can render common, class-wide answers on liability and damages.

In this case, only Georgia-Pacific's conduct is at issue. The same wrongful actions of Georgia-Pacific are alleged to have caused harm to each class member.

(R.427-37) The same types of damages are sought for every class member. (*Id.*) The Amended Complaint sets forth the common course of conduct alleged by Respondents. (*Id.*) Georgia-Pacific has admitted that it is the culprit by continually reimbursing area residents within and far beyond the class area for costs associated with repairing corroded air conditioning units. (R.270-361; 1423-48) The cautionary language of *Rollins, Inc. v. Warren* disclaiming certification where individualized determinations will be necessary as to "most or all of the elements of [the class members'] individual claims" is not applicable.[2] 288 Ga.App. 184, 187 (2007)

Georgia-Pacific's arguments on the requirements of O.C.G.A. § 9-11-23(b)(3) present no grounds for certiorari review.

G. Arguments that do not merit consideration.

The snippets drawn from a deposition of Mr. Henry B. Garrett are not grounds for certiorari. Mr. Garrett is a licensed real estate appraiser with extensive experience in appraising the effect of contamination on property value. He is neither a lawyer nor a toxicologist. (*See* R. 457-62) He met with class counsel and traveled through the area that is now the "class area" as well as around the surrounding area. (R.1316,

---

[2] Additionally, Georgia-Pacific's citation of *Doctor's Hospital Surgery Center, LP v. Webb* is misplaced because, again, Plaintiffs do not seek to recover for personal injuries. 307 Ga.App. 44, 47 (2010) (certification failed due to "highly personalized injuries including anxiety, emotional distress, and loss of consortium").

pp. 6-7) He was provided information about hydrogen sulfide, its smell, the air conditioner failures and was told that the source of the gas is Georgia-Pacific's sludge fields. (*Id.* pp.7-13) He inspected maps and records from the Effingham County Tax Assessor. (*Id.* pp.12-14) He testified that he did not establish the class boundaries. (*Id.* p.7) At the time of the deposition, he had not conducted formal appraisals of properties nor had he been asked to do so. (*Id.* p.16)

Counsel for Georgia-Pacific asked Mr. Garrett questions about what steps he would take if asked to conduct appraisals of each parcel within the class area. (*Id.* pp. 32-36) He was then asked if he knew of "appraisal literature" that described how to identify "the affected area" in a pollution case, to which Mr. Garrett gave a reasonable answer that encompasses nearly one-half of a page of the deposition and that includes the words "seat of the pants" that Petitioner cites without including either the full question nor the complete answer. (*Id.* p.42; Petition, p.10) The Petition quotes part of Mr. Garrett's answer as though he was answering a very different question. It is clear from the deposition context that Mr. Garrett is talking about an exercise of judgment drawn from experience, words that a lawyer might prefer to use rather than, "seat of the pants." Nothing in Mr. Garrett's deposition contradicts the uncontradicted evidence that Georgia-Pacific's toxic hydrogen sulfide spreads

throughout the class area as defined by the court, stinks, and has destroyed numerous air conditioners throughout the class area and beyond.

H. The decisions of the trial court and the Court of Appeals square with the policy concerns related to class actions.

Georgia-Pacific harps on the "enormous settlement pressure" it will endure if certiorari is denied. As noted before, any pressure that Georgia-Pacific might feel is a result of its own reckless conduct. Georgia-Pacific incredibly argues that the Court of Appeals' decision will have "grave practical consequences" on facilities that are "operating responsibly." (Petition, p. 30). This argument is completely disingenuous considering Georgia-Pacific, by its own admission, has been willfully polluting to such a degree as to cause air conditioning units to corrode and fail. Such practices can hardly be categorized as "operating responsibly."

Georgia-Pacific's argument that class actions similar to this case threaten its financial solvency can most politely be described as hog wash. When did such an argument become a defense to wrongdoing or the foundation of a right to despoil the property of another?

Similarly, Georgia-Pacific's contention that few residents are interested in suing Georgia-Pacific is belied by its own records of complaints. Ms. Raduazzo, of 142 Ridgewood Circle, told Georgia-Pacific on November 17, 2009, that she "ought

to get a lawyer and sue you." (R.1135) Similarly, Ms. Julie Oliver, a resident of the class area, informed Georgia-Pacific of her intention to contact her "environmental attorney." (R.1049) Angela Noles, a resident of Long Pond Road, told Georgia-Pacific's employee (Mr. Howell) that the sulfur from the Mill was damaging her property and asked if Georgia-Pacific had "ever been sued over this...well maybe it is about time." (R.1047) These references indicate that interest is not tepid. Of course, those who wish to do so can opt out of the class once notice is sent to class members. Respondents doubt that many will choose to be excluded from the class.

Georgia-Pacific's argument reflects a view that the class members' property rights should bow down to the "presence of the facility." Georgia-Pacific seems to argue that there is no cause of action for property damage from corrosive emissions absent the industrial facility having been previously found in violation of an environmental law or regulation. (Petition, p. 30) ("Any industrial facility, even one operating responsibly and within the law...would be subject to the *in terrorem* threat of class certification whenever any neighbor...objects to the presence of the facility"). Thus, by virtue of its industrial nature, Georgia-Pacific contends that its property rights in the Mill supersede the property rights of its neighbors whose property is damaged by its corrosive emissions. As evidenced by the dearth of citations to

support this contention, this principle has no basis in Georgia jurisprudence. The issue is certainly not ripe for certiorari review.

IV. CONCLUSION

There is no issue of great concern, gravity or importance to the public to warrant review. The Petition for Certiorari should be denied.

Respectfully submitted this 26th day of August, 2013.

s/ John C. Bell, Jr.

John C. Bell, Jr.
Georgia State Bar No. 048600
BELL & BRIGHAM
Post Office Box 1547
Augusta, Georgia 30903-1547
(706) 722-2014

Timothy D. Roberts
Georgia State Bar No. 609795
Benjamin M. Perkins
Georgia State Bar No. 140997
Melissa L. Bailey
Georgia State Bar No. 804341
OLIVER MANER, LLP
P. O. Box 10186
Savannah, GA 31412

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing **RESPONSE TO PETITION FOR CERTIORARI**, upon opposing counsel via electronic mail as follows:

David E. Hudson, Esquire — DHudson@hullbarrett.com
William J. Keogh, Esquire — Wkeogh@hullbarrett.com
Hull Barrett, P.C.
PO Box 1564
Augusta, GA 30903-1564

R. Clay Ratterree, Esquire — clayr@epra-law.com
Tracy O'Connell, Esquire — toconnell@epra-law.com
Ellis, Painter, & Adams LLP
Post Office Box 9946
Savannah, GA 31412

This 26th day of August, 2013.

s/ John C. Bell, Jr.
John C. Bell, Jr.
Counsel for Respondents