New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

JAY BURDICK, CONNIE PLOUFFE, EDWARD PLOUFFE, FRANK SEYMOUR, SUZANNE SEYMOUR, EMILY MARPE, as parent and natural guardian of E.B., an infant, and G.Y., an infant, JACQUELINE MONETTE, WILLIAM SHARPE, EDWARD PERROTTI-SOUSIS, MARK DENUE, and MEGAN DUNN, individually and on behalf of all similarly situated,

Plaintiffs-Respondents,

against

TONOGA, INC. (d/b/a TACONIC),

Defendant-Appellant.

MOTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

JAY BURDICK, CONNIE PLOUFFE, EDWARD PLOUFFE, FRANK SEYMOUR, SUZANNE SEYMOUR, EMILY MARPE, as parent and natural guardian of E.B., an infant, and G.Y., an infant, JACQUELINE MONETTE, WILLIAM SHARPE, EDWARD PERROTTI-SOUSIS, MARK DENUE, and MEGAN DUNN, individually and on behalf of all similarly situated,	:	
	:	Case No. 527117
Plaintiffs-Respondents,	:	
- against -	:	**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***
TONOGA, INC. (d/b/a TACONIC),	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that, upon the annexed affirmation of Andrew J. Pincus, dated January 17, 2019, the Chamber of Commerce of the United States of America will move this Court, at a term of the Appellate Division of the Supreme Court, Third Department, at the Courthouse located at State Street, Albany, New York on Monday, February 4, 2019, or as soon thereafter as counsel may be heard, for an order granting leave to file a brief as *amicus curiae* in support of Defendant-Appellant Tonoga, Inc. (d/b/a Taconic). The motion will be submitted on the papers, and Respondents' personal appearance in opposition is neither required nor permitted.

Dated: January 17, 2019

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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Plaintiffs-Respondents,	:	**AFFIRMATION OF ANDREW J. PINCUS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***
- against -	:	
TONOGA, INC. (d/b/a TACONIC),	:	
Defendant-Appellant.	:	

ANDREW J. PINCUS, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Mayer Brown LLP, counsel for the Chamber of Commerce of the United States of America ("the Chamber"). I am familiar with the legal issues involved in the above-captioned action. I submit this affirmation in support of the motion of the Chamber for leave to file the accompanying brief as *amicus curiae* in support of Tonoga, Inc. (d/b/a Taconic).

2. The Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every

industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in the courts on issues of concern to the business community.

3. This case presents extremely important questions concerning the standards for class certification under Article 9 of the New York Civil Practice Law and Rules. Courts in New York, and courts applying similar standards across the country, have consistently refused to certify property damage and medical monitoring classes in cases where plaintiffs allege that chemicals released by a defendant affected many properties and persons at various times and in different ways. The trial court's decision in this case breaks sharply with this authority and, if affirmed, is likely to lead to certification of more improper and unmanageable classes.

4. The Chamber's brief argues that the trial court's class certification decision rests on two separate but related errors. *First*, the trial court refused to adequately scrutinize issues bearing on the propriety of class certification because it felt that those issues overlapped with the merits of the plaintiffs' claims. In so doing, the court failed to determine whether the plaintiffs' class certification request actually satisfied Article 9's requirements. *Second*, the trial court ignored or mischaracterized a number of individualized liability issues. Both of these errors led

the trial court to reach a conclusion that is sharply at odds with leading decisions in this area.

5. Many of the Chamber's members have experienced firsthand the reasons why environmental contamination claims cannot be resolved fairly and efficiently on a classwide basis. Participation of the Chamber as *amicus curiae* in this appeal would assist the Court by discussing the broad range of experience with these issues, as set forth in the case law, and how Article 9's requirements should be applied.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Chamber leave to submit its brief as *amicus curiae* in support of Defendant-Appellant Tonoga, Inc. (d/b/a Taconic); (ii) accepting the brief that has been filed and served along with this motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: January 17, 2019

MAYER BROWN LLP

Of Counsel:

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INTRODUCTION

This appeal raises exceptionally important questions regarding the standards governing class action procedure in New York. It arises from alleged contamination of soil and water in the area around Petersburgh, New York with a chemical called perfluorooctanoic acid ("PFOA"). The plaintiffs contend that for over a half-century the manufacturing and waste-disposal practices of defendant Tonoga, Inc. (d/b/a Taconic) allegedly caused PFOA to reach the environment in the Petersburgh area through alleged air and water discharges. As a result of these activities, the plaintiffs argue, PFOA has contaminated the area soil, various sources of drinking water, and groundwater. The plaintiffs contend that the presence of PFOA has caused their property values to decrease and put them at increased risk of developing a wide range of conditions, ranging from certain cancers to high cholesterol, all supposedly requiring medical monitoring.

The trial court certified four different classes in this case. Three consist of Petersburgh-area property owners or lessors asserting property-damage or nuisance claims based on the alleged presence of PFOA in their soil and water. The fourth consists of individuals who drank Petersburgh-area water during an undefined time period and who have tested above the national "background level" for blood concentrations of PFOA.

In certifying those classes, however, the trial court ignored or downplayed numerous individualized questions related to causation, liability, and damages and refused to a take a hard look at the impediments to class treatment in this case. The trial court's certification decision sharply departed from recent decisions by New York and federal courts, which have consistently denied requests for class certification in cases alleging environmental contamination. The court's erroneous conclusion will affect not only this case but many others in which plaintiffs improperly seek to aggregate highly individualized claims based on a defendant's supposedly common course of conduct.

INTEREST OF THE *AMICUS CURIAE*

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's important functions is representing its members' interests before the federal and state courts. To that end, the Chamber regularly files *amicus* briefs in New York courts in cases involving class actions, mass torts, and other issues of vital interest to the business community.[1]

[1] *See, e.g.*, Am. Curiae Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APRL-2017-00114 (N.Y.) (punitive damages);

The Chamber and its members have a keen interest in ensuring that, consistent with Article 9 of the New York Civil Practice Law & Rules and the requirements of due process, courts rigorously analyze whether a plaintiff has satisfied the prerequisites for class certification. The trial court failed to undertake an appropriately searching analysis here. Accordingly, the Chamber respectfully urges this Court to reverse the trial court's certification order and clarify that a trial court cannot avoid its obligation to rigorously scrutinize a plaintiff's claimed compliance with Article 9 before certifying a class.

ARGUMENT

The trial court's decision in this case rests on two separate but related legal errors. *First*, the trial court's certification order impermissibly refused to address numerous key issues by declaring—erroneously—that "factual disputes" are inappropriate for resolution at the class certification stage. *Second*, the trial court repeatedly invoked Taconic's allegedly common course of conduct with respect to PFOA to brush aside the massive variation in individual PFOA exposures and blood levels, medical conditions and health risks, and property features, uses, and values for the members of the class. Each of these errors independently compels reversal of

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Am. Curiae Brief of Business Council of New York State, Inc. et al., *Caronia v. Philip Morris UAS, Inc.*, No. CTQ-2013-00004 (N.Y.) (medical monitoring); Am. Curiae Br. of Chamber of Commerce of the United States of Am. et. al., *Sperry v. Crompton Corp.*, No. 2004-6518 (N.Y.) (indirect purchaser class actions).

the trial court's decision, which cannot be reconciled with the consistent precedent rejecting class certification in cases alleging environmental contamination.

I. The Trial Court Erred By Failing To Address Issues Critical To The Class Certification Determination.

The trial court's core legal error was its repeated refusal to resolve disputes that it deemed too "factual" for the class certification stage. By declining to address questions that were directly relevant to class certification, the court violated settled precedent and impermissibly placed a thumb on the scale in favor of certification.

Several examples illustrate the trial court's improper approach. Take first the court's response to the dispute over the plaintiffs' contention that property-damage claims could be resolved on a classwide basis by using statistical methodologies to isolate the effect of alleged PFOA contamination on the values of class properties. The court simply declined to address whether the plaintiffs' experts' "average percent diminution" model actually could resolve classwide questions about property damage or "adequately account for the unique features of each property," R.11.[2] It likewise refused to weigh in on whether the named plaintiffs' properties were representative or typical of the class because it deemed such questions "an empirical matter" that should not be considered at class certification. *Id.*

[2] This brief cites to the Record on Appeal as "R.___", using the pincites at the top of each record page.

Second, the court refused to consider many of Taconic's arguments against certification of the medical monitoring class. Again deeming the arguments "merit based and factually disputed," the court refused to address fundamental questions such as "the efficacy of administering a medical surveillance program for an entire exposed population" and "whether medical monitoring procedures may be harmful to some class members." R.14. These arguments showed that "it is not scientifically possible to assess increased disease risk on a group or class basis." R.15. Remarkably, however, the court concluded that "[w]hether Plaintiffs are able to prove their theory" regarding classwide risk "is . . . *irrelevant*" to class certification. R.17 (emphasis added).

Third, the trial court uncritically accepted the plaintiffs' assertion that the causation element of their medical monitoring claims was automatically satisfied because each class member could establish PFOA blood serum levels that were "above background levels." *See* R.16-17. As Taconic's experts showed, whether PFOA levels "in excess of background" correspond to a meaningful increase in risk—and to what extent—is an inherently individualized question that cannot be answered on a classwide basis. *See, e.g.*, R.791-92 (Aff. of Joseph V. Rodricks). The court simply assumed away this critical dispute.

The trial court's approach to these issues was contrary to well-established law. By describing challenges to the viability of the plaintiffs' classwide theories for

property damage and medical monitoring as mere "proof issues" or "disputed issues of fact," the court effectively relieved the plaintiffs of their burden to demonstrate that they satisfied Article 9's class certification requirements. The failure to rigorously scrutinize the theories put forth by the plaintiffs' experts all but guaranteed certification of the requested classes even though class proceedings in these circumstances would be unworkable and unfair.

The trial court's decision not to address these issues appeared to stem from its belief that for class certification purposes "the question is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of CPLR 901 and 902 have been met." R.8.

But a court should not "refus[e] to entertain arguments . . . that b[ear] on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013); *cf. Gottlieb v. March Shipping Passenger Servs.*, 67 A.D.2d 879, 880 (1st Dep't 1979) ("any renewal of this motion [to certify a class] should give further factual information, obtained by deposition or otherwise, as to the merits" of the claims). After all, a motion for class certification "generally involves some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). A court may not wholly *disregard* individualized issues simply because they raise "factual" or "empirical" issues.

As one court explained in an environmental contamination case, a judge considering class certification is obligated to "investigat[e] the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments," for these issues "must be engaged" by the trial judge "before he can make a responsible determination of whether to certify a class." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086-87 (7th Cir. 2014); *see also, e.g.*, *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue"). If, as here, factual disputes call into doubt the viability of class litigation, those issues are not at all "irrelevant" to the certification decision. R.17.

The trial court recognized that it should look to the recent federal precedents (R.8) and should "consider" merits-based arguments that bear on class certification (R.11). But it paid only lip-service to those principles—failing to make critical determinations as to whether the elements of the plaintiffs' claims can be established classwide. Instead, the court again and again identified a critical legal or factual dispute and declined to decide it because the court deemed it a "merits," "factual," "proof," or "empirical" issue. That is reversible error.

II. A "Common Course Of Conduct" By Itself Cannot Justify Class Certification—A Court Still Must Determine Whether Common Issues Predominate.

The trial court committed another crucial error when it repeatedly relied on what it called Taconic's "common course of conduct" to support class certification, holding that a plaintiff's claims warrant class treatment if they "arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." R.10. Rejecting the older decisions cited by the trial court, courts have consistently held that "a common course of conduct is *not enough* to show predominance" where, as here, that "common course of conduct is not sufficient to establish liability of the defendant to any particular plaintiff." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002) (emphasis added); *see also, e.g.*, *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 323 (S.D.N.Y. 2003) ("A common course of conduct by the defendant is insufficient to establish predominance.").

Even assuming that Taconic's conduct across fifty-plus years could be considered "common" with respect to the diverse members of the four certified classes, such conduct would not establish commonality with respect to numerous critical elements of plaintiffs' claims such as exposure, contamination, causation, and injury. Only individualized, fact-intensive, and time-consuming analysis of each

class member's claim could bridge that gap, rendering the claims here manifestly inappropriate for class treatment.

A. The Trial Court Ignored Individualized Issues Pertaining To The Property Damage Classes.

With respect to the property-damage/nuisance classes, the trial court held that common issues predominate because "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." R.12. That was error. Among other things, a supposedly common course of conduct by a defendant cannot establish (1) whether a particular class member's property and/or drinking water was contaminated with PFOA, (2) whether Taconic's remediation efforts eliminated any material PFOA contamination, (3) how any PFOA contamination happened, (4) whether the class member's property diminished in value as a result of any PFOA contamination, and (5) how much diminution is attributable to any PFOA contamination. *See* R.681 (Aff. of William H. Desvousgas); R.899-900 & R.904 (Aff. of Paul Wm. Hare). Each of those crucial determinations requires individualized inquiry that takes into account the specific characteristics of each class member and each class property.

The plaintiffs provided no reason to assume that every class property contains PFOA from Taconic at levels warranting relief. For example, while the plaintiffs' expert speculated that he could develop a classwide model to identify property value losses, he did not actually do so—let alone establish that such a model would work

reliably despite the many property-specific factors that would have to be considered. *See* R.352-55 (Aff. of Jeffrey E. Zabel); R.685-700 (Aff. of William H. Desvousgas). And Taconic's expert showed that many area properties actually *appreciated* in value after public disclosure of the alleged PFOA contamination. R.700- 06 (Aff. of William H. Desvousgas)

That record precludes class certification notwithstanding any supposedly "common course of conduct." *See, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2018) (denying certification of property-damage class based on need for "property-by-property" analysis); *Parko*, 739 F.3d at 1086-87 (similar); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("if [plaintiffs and their experts] propose to use such a method to prove injury, they must show that it could work to prove classwide injury with common evidence"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-88 (3d Cir. 2001) (class certification cannot be founded on promises that an expert will "devise a formula").

The trial court also improperly glossed over the necessary individual inquiries by incorrectly asserting that they are merely "questions regarding damages." R.12; *see also* R.13 (discounting fact that "damages may vary between the plaintiffs here"). The individual questions in this case bear directly on liability issues regarding contamination, causation, and fact of injury. Taconic's papers opposing class certification showed that it is prepared to contest, on a property-by-property

basis, whether material amounts of PFOA are present, who is responsible for any PFOA contamination, and whether any PFOA contamination reduced the value of the property. Def.'s Mem. in Opp. to Mot. for Class Cert. 53-54.[3] Each of those questions is a matter of liability, not damages. *See, e.g.*, *Ebert*, 823 F.3d at 479 ("[a]djudicating claims of liability" requires inquiry into such questions).

Indeed, courts routinely hold that such individual questions of contamination, causation, and injury preclude certification of property-damage classes in environmental contamination cases. *See, e.g.*, *Aprea v. Hazeltine Corp.*, 247 A.D.2d 564, 565 (2d Dep't 1998) ("issues exist as to whether and to what extent the emission caused any damage to any individual's property or their use and enjoyment thereof, and whether and to what extent the proximity of the [facility] affected the market value of individual properties"); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 307 (S.D. Ala. 2006) ("causation will unquestionably be an individual-specific enterprise" in contamination cases because "[t]he mere presence" of a contaminant "at a location says nothing about causation"); *Cotromano v. United Techs. Corp.*, No. 13-cv-80928, 2018 WL 2047468, at *20 (S.D. Fla. May 2, 2018) (denying class

[3] To be sure, the trial court stated that "defendant does not contest that it was the source of the contamination." R.13. But Taconic clearly argued in its briefing that "[i]ndividualized determinations must be made as to the source of the PFOA" and noted that the class area "is close to or overlaps with three other facilities known to have used PFOA containing products." Def.'s Mem. in Opp. to Mot. for Class Cert. 5; *see also id.* at 53.

certification and noting that "intangible 'environmental stigma' damage . . . can vary significantly parcel to parcel, block to block").

By disregarding the substantial individual questions raised by the plaintiffs' property-damage/nuisance claims, the trial court failed to give the plaintiffs' class certification request the searching scrutiny that CPLR Article 9 requires.

B. The Trial Court Ignored Individualized Issues Pertaining To The Medical Monitoring Class.

The same errors infected the certification of the medical monitoring class. The trial court acknowledged that the "factual differences among the named plaintiffs and the proposed class members" threaten to generate many individualized issues "involving causation and damages" in class litigation over the plaintiffs' request for medical monitoring. R.14-15 & 17. But the trial court went off course by again asserting that such differences do not matter because "all plaintiffs' medical monitoring claims arise from the same course of conduct by the defendant and are based on the same legal theory." R.17.

A "common course of conduct" does not support certification of a medical-monitoring class when individual questions of exposure, causation, and need are present, as they are here. *E.g.*, *In re St. Jude Med. Inc.*, 522 F.3d 836, 840 (8th Cir. 2008) (class certification not appropriate on plaintiffs' request for "the highly individualized remedy of medical monitoring"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995) (rejecting medical monitoring class of "individuals who

might have been exposed to hazardous substances released into the environment in varying ways and degrees at different times").

In these circumstances, proof of the supposedly "common course of conduct" would not come close to establishing the defendant's liability. That is why decision after decision has refused to certify medical-monitoring classes. *See, e.g.*, *St. Jude Med.*, 522 F.3d at 840; *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004); *Boughton*, 65 F.3d at 826-27.

The trial court tried to diminish the individual issues that would pervade any class litigation over medical-monitoring relief by impermissibly conflating the presence of "above background" PFOA blood levels with proof of the other issues necessary to establish liability. R.16. An "above background" PFOA blood level is no substitute for proof of an actionable exposure, much less proof of a causal link to the defendant's actions or a need for the proposed medical monitoring. *See Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 448-49 (2013).

For many putative class members—depending on their age, gender, weight, medical history, genetics, lifestyle, and amount and duration of PFOA exposure—an "above-background" PFOA blood level may not create any material additional risk of developing a disease linked to PFOA exposure. Indeed, the studies reporting links between PFOA and certain diseases involved exposures far above the background level and do not even purport to establish such links for all individuals

regardless of circumstances. *See* R.762 (Aff. of Jessica Herzstein); R.793-95 & 801-20 (Aff. of Joseph V. Rodricks). Only individual inquiries could establish whether a particular class member has had significant enough exposure to PFOA to warrant medical monitoring. *See, e.g.*, *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 267-68 (3d Cir. 2011).

The same is true for whether PFOA released by Taconic caused a class member's increased risk of disease. *See, e.g.*, *Rhodes v. E.I. du Pont de Nemours & Co.*, 253 F.R.D. 365, 376-79 (S.D. W. Va. 2008). Depending on where they have lived and worked and what products they have used, class members may have been exposed to other far more significant PFOA sources. *See* R.825 (Aff. of Joseph V. Rodricks); Def.'s Mem. in Opp. to Mot. for Class Cert. 15, 42-44.[4] And any particular class member's risk of any particular disease could easily be attributable to something other than PFOA exposure, like family history or lifestyle choices. *See* R.761 (Aff. of Jessica Herzstein).

[4] As with the property-damage/nuisance classes, the trial court mistakenly assumed that the medical monitoring request was "based upon the common and overriding fact of an above background level of PFOA exposure caused by a single source." R.17. In fact, Taconic squarely contested the plaintiffs' "single source" theory. *See* Def.'s Mem. in Opp. to Mot. for Class Cert. 44 ("Many potential class members may have 'elevated' PFOA blood levels from occupational exposures, from some other source at some other point in their residential history, or from contamination from any of the other PFOA using facilities in the area.").

The reasonable necessity of medical monitoring is another crucial individual issue. *See, e.g.*, *Rowe v. E.I. du Pont de Nemours & Co.*, No. 06-cv-1810, 2008 WL 5412912, at *20 (D.N.J. Dec. 23, 2008). The benefits and safety of any proposed medical monitoring procedure turn on myriad individual characteristics, including age, health, and medical history. *See* R.753-55 (Aff. of Jessica Herzstein). And even safe and beneficial procedures will not be necessary for those who are already receiving those procedures (like testing for high cholesterol) as part of their ordinary medical care. R.768 (same).

The trial court offered no way to address these individualized considerations on a classwide basis. Instead, it simply stated that "whether defendant was negligent in releasing PFOA from its facility" was a common issue sufficient to support certification. R.17. But the existence of one common issue is plainly insufficient to establish the predominance of common issues required for class certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997) (affirming denial of class certification where it was unclear whether members would "contract asbestos-related disease and, if so, what disease each will suffer" and where "monitoring and treatment will depend on singular circumstances and individual medical histories").

III. The Trial Court's Decision Is At Odds With Courts' Consistent Refusal To Certify Classes In Cases Alleging Environmental Contamination.

The interrelated errors described above—the failure to resolve disputed factual issues bearing on class certification, the reliance on Taconic's allegedly

common course of conduct, and the assumption that the mere presence of PFOA would establish classwide liability—caused the trial court to reach a conclusion that is squarely at odds with consistent judicial determinations rejecting class certification in environmental contamination cases.

In *Rhodes v. E.I. du Pont de Nemours & Co.*, for instance, the district court refused to certify a medical monitoring class based on purported PFOA contamination in the residential water supply in Wood County, West Virginia. The court found that numerous elements of the plaintiffs' claims—including the requirements of significant exposure to PFOA, increased risk proximately caused by the activities of the defendant, and reasonable necessity of diagnostic testing—all "require individualized inquiries that are not conducive to common treatment." 253 F.R.D. at 374-80. It concluded that a claimed "general causal relationship" between PFOA and human disease "may justify the establishment of a public health medical monitoring program, but it is insufficient to establish tort liability." *Id*. at 379.[5]

Another decision in a PFOA case, *Rowe*, rejected a medical monitoring class based on alleged PFOA exposure from the defendant's manufacturing processes.

[5] Highlighting the trial court's core error here, the *Rhodes* court recognized that it should refrain from "assess[ing] the merits of the plaintiffs[']claims" at class certification, but appropriately declined take the further step of refusing to address factual arguments that demonstrated that the requirements for certification were not met. 253 F.R.D. at 374.

The court found that common issues did not predominate because the same three common issues identified in *Rhodes*—significant exposure, increased risk, and need for medical monitoring—demanded individualized inquiries. *Rowe*, 2008 WL 5412912 at *20-22; *see also id*. at *10-20.[6]

Again, the court refrained from directly assessing the merits, but still engaged in a rigorous analysis of the propriety of class certification by assessing—and rejecting—the plaintiffs' claims that class members' claims could be resolved by common proof. The court observed, for instance, that "class members' actual exposure" to PFOA "will vary depending on their size and water consumption habits, not to mention their duration of use of the [local] water supply," and that "each class member's risk of disease will differ depending on his/her background risk of disease and susceptibility to PFOA." *Id*. at *17, *21.

The trial court here found *Rowe* "well reasoned" and observed that Taconic set forth "the same arguments" against certification. R.15. However, the court purported to distinguish *Rowe* on two questionable bases. It deemed above-background PFOA blood levels to be classwide evidence of liability, which is

[6] It is significant that the *Rowe* court denied certification even though it noted, like the trial court here, that Rule 23 should be given a "liberal construction," and that "the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Rowe*, 2008 WL 5412912, at *3; *accord* R.14 (agreeing that "any error, if there is to be one, should be committed in favor of allowing a class action").

thoroughly mistaken for the reasons noted above. R.17; *see supra* pp. 13-14. And it tried to draw a contrast between New York and New Jersey law based on New Jersey's requirement that "exposure caused a distinctive increased risk of future injury" that is "significant," but it acknowledged that New York imposes a similar "proof requirement" that "the prospective consequences may with reasonable probability be expected to flow from the past harm." *Id*.

Rowe and *Rhodes* do not stand alone. They are consistent with a host of cases rejecting the contention that a supposedly common course of conduct can overcome the myriad individualized issues applicable to medical monitoring claims.

One federal appellate court observed that "[c]ourts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues such as whether defendants released the offending chemical into the environment." *Gates*, 655 F.3d at 270. *See also, e.g.*, *Ball*, 385 F.3d at 727-28 ("seeking medical monitoring … raised individual issues" that precluded class certification); *Boughton*, 65 F.3d at 828 (individual exposure and injury issues made it proper to deny certification of class seeking medical monitoring); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 601-05 (M.D. Pa. 1997) (no medical monitoring class where exposure and causation varied).

Courts also consistently reject property-damage classes based on alleged environmental contamination, especially where (like here) the alleged contamination spanned decades, occurred in different ways, involved alternative sources, and affected different individuals in different ways. In *Gates*, for example, the plaintiffs sought certification of a class of property owners who allegedly suffered a diminution in property values under negligence, nuisance, and other tort theories. 655 F.3d at 271. As here, the plaintiffs' theory rested on alleged contamination caused by multiple pathways over many years. *See id*. at 259 The Third Circuit concluded that "[g]iven the potential difference in contamination on the properties, common issues do not predominate." *Id*. at 272.

Similarly, in *Ebert*, the Eighth Circuit rejected certification of property-damage claims based on alleged "vapor contamination" stemming from the disposal of hazardous waste over a fifteen year period. As the court noted, even assuming that the defendant's role in the contamination could be resolved on a classwide basis, the trial court still would have to engage in "a property-by-property assessment of additional upgradient (or other) sources of contamination, whether unique conditions and features of the property create the potential for vapor intrusion, whether (and to what extent) the groundwater beneath a property is contaminated, whether mitigation has occurred at the property, or whether each individual plaintiff acquired

the property prior to or after the alleged diminution in value." *Ebert*, 823 F.3d at 479-80.

Other courts have rejected property-damage classes for similar reasons. *See, e.g.*, *Boughton*, 65 F.3d at 827 (denying certification where class members were "exposed to hazardous substances released into the environment in varying ways and degrees at different times"); *Benefield v. Int'l Paper Co.*, 270 F.R.D. 640, 651 (M.D. Ala. 2010) (no certification where "individualized determinations will have to be made of whether each class member has suffered injury and whether that injury was proximately caused by the Defendant's actions"); *Satsky v. Paramount Commc'ns, Inc.*, 1996 WL 1062376, at *15 (D. Colo. Mar. 13, 1996) ("The amount of contamination on a class member's property and … whether the contamination was at a hazardous level is not a question common to the class because even if it is answered as to one class member, it is not answered as to all.").

These on-point federal authorities should carry weight in this case, given the long history of New York courts looking to federal precedents on class certification and the overlapping requirements of Fed. R. Civ. P. 23 and CPLR Article 9. *See* R.8. In addition, decisions from New York courts are almost entirely in accord that environmental or mass tort claims, especially those involving alleged contamination persisting over many decades and involving multiple contamination pathways, are inappropriate for class treatment. *E.g.*, *Osarczuk v. Assoc. Univs., Inc.*, 82 A.D.3d

853, 855-56 (2d Dep't 2011); *Aprea*, 247 A.D.2d at 565 (2d Dep't 1998); *Sternberg v. New York Water Serv. Corp.*, 155 A.D.2d 658, 659-60 (2d Dep't 1989); *Evans v. City of Johnstown*, 97 A.D.2d 1, 3 (3d Dep't 1983); *Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830, 830-31 (4th Dep't 1979).

The trial court purported to distinguish *Osarczuk* on the ground that this case involved "one chemical" supposedly "emanating from one source." R.12. As discussed above, that premise is incorrect. Taconic did not concede, and in fact vigorously disputed, that all of the alleged contamination on class members' properties was attributable to its facility.

In any event, the fact that *Osarczuk* involved multiple chemicals from a single defendant is a distinction without a difference. Regardless of how many purportedly injurious chemicals Taconic supposedly emitted, claims based on alleged contamination of hazardous material "over several decades, from various sources and in various ways" raise "complicated" and "individualized" questions—not only as to "the extent of damage, if any, to the numerous individual properties and their diminished market value," but also "as to causation." *Osarczuk*, 82 A.D.3d at 855-56. These complicated and individualized questions preclude class certification here, just as in *Osarczuk*.

The trial court also failed to meaningfully distinguish *Evans*, in which the Third Department affirmed denial of certification of contamination claims related to

the Johnstown and Gloversville municipal sewerage plant. The *Evans* court plainly stated that, despite common issues regarding the operation of the sewerage plant and the environmental effect of "alleged pollution or effluent from the plant," it was "clear" that "the main issues of whether a specific injury to property or person was caused by the sewerage plant and of the extent of any damages require individualized investigation, proof and determination." *Evans*, 97 A.D.2d at 3 (citing *Wojciechowski*, 67 A.D.2d at 830).

The trial court here concluded that *Evans* was not controlling because the plaintiffs supposedly had "alleged a specific injury to their property" and Taconic "does not contest that it was the source of the contamination." R.13. But as explained above, causation, as well as contamination and injury, are in fact fiercely contested, and determining these issues will require the sort of "individualized investigation, proof and determination" that *Evans* held is incompatible with class certification.

In sum, both state and federal authority point overwhelmingly to the conclusion that classes like the ones proposed in this case may not be certified. By disregarding this authority, the trial court committed reversible error.

CONCLUSION

Class certification is a critical stage in a lawsuit, and it therefore is critically important that trial courts strictly scrutinize the evidence presented in determining whether to certify a class in conformance with CPLR Article 9. Here, the trial court

improperly ignored core factual and legal issues. This Court should reverse the trial court's certification order and remand this case for further proceedings as an individual action.

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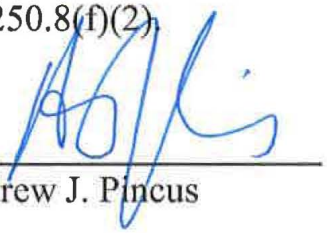
By: 
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