

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

GLENN GATES and DONNA GATES, h/w :	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	NO. 06-1743
	:	
ROHM AND HAAS COMPANY,	:	
ROHM AND HAAS CHEMICALS, LLC.,	:	
MORTON INTERNATIONAL,	:	
MODINE MANUFACTURING CO.,	:	
HUNTSMAN INTERNATIONAL, and	:	
HUNTSMAN POLYURETHANES	:	
	:	
Defendants	:	

ORDER

AND NOW, this day of , 2007, upon consideration of the Motion for Class Certification, as well as any response, and argument on the Motion, it is hereby ORDERED that the Motion is GRANTED. The Court hereby certifies the Medical Monitoring Class, the Injunctive Relief Class, the Property Loss Class and the Punitive Damages Class, as defined in plaintiffs' Motion. The Court further ORDERS that Aaron J. Freiwald, Esquire of Layser & Freiwald, P.C. shall be appointed Class Counsel.

BY THE COURT:

Pratter, J.

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HUNTSMAN POLYURETHANES :	
Defendants :	

MOTION FOR CLASS CERTIFICATION

Plaintiffs Glenn and Donna Gates, husband and wife, on behalf of themselves and all others similarly situated, move this Court to grant their motion for certification of the proposed class in the above case. In support of their Motion, plaintiffs incorporate by reference, the accompanying Memorandum of Law as well as the attached expert reports and affidavits and other evidence.

Respectfully submitted,

LAYSER & FREIWALD, P.C.

BY: /s/ Aaron J. Freiwald AF 8799
AARON J. FREIWALD, ESQUIRE
GLENN A. ELLIS, ESQUIRE
Attorney for Plaintiff

DATED: October 16, 2006

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HUNTSMAN INTERNATIONAL, and :	
HUNTSMAN POLYURETHANES :	
Defendants :	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION**

I. Introduction

This proposed class action arises from a cluster of rare brain cancers among a small population of individuals in McCullom Lake Village, a lakeside residential community in Northern Illinois. The proposed class includes current and former residents of this community, all of whom have been exposed to toxic chemicals that for many years contaminated their water and air. The chemical contaminants, all volatile organic compounds (“VOCs”), include vinyl chloride, a known human carcinogen. Because of extensive contamination of air and groundwater by defendants over many years and because of a striking, statistically significant incidence of brain cancers in this community, the proposed class members seek equitable relief in the form of a medical monitoring program to make earlier detection of further cases of brain

cancer and a program to safeguard the community's water supply as well as compensatory relief to provide monetary damages for lost property values in the community.

II. Parties

Class representatives Glenn and Donna Gates are longtime residents of McCullom Lake Village, a community of some 400 homes along the northern shore of McCullom Lake in McHenry County, Illinois. McCullom Lake Village ("the Village"), with a population of approximately 1,000 individuals, is located approximately 50 miles northeast of Chicago. McCullom Lake Village is also located about 6,000 feet due south of defendant Rohm and Haas. Defendant Modine Manufacturing Co. ("Modine") sits between Rohm and Haas and the Village. Mr. and Mrs. Gates own property in the Village at 2722 North Orchard Drive, McHenry, Illinois 60050. Neither named plaintiff has brain cancer.

Defendant Rohm and Haas Company ("Rohm and Haas"), is an international specialty chemicals company, with sales of approximately \$8 billion, operations in more than 27 countries and worldwide corporate headquarters located at 100 Independence Mall West, Philadelphia, Pennsylvania 19106. In June 1999, defendant Rohm and Haas acquired the specialty chemicals manufacturing facility at 5005 Barnard Mill Road, Ringwood, Illinois 60072 ("Ringwood facility") as part of a \$5 billion acquisition of Morton International, Inc. ("Morton"). Morton had operated the Ringwood site and manufactured chemical products there since the 1940s.

Following Rohm and Haas' acquisition in 1999, defendant Morton became a wholly owned subsidiary of Rohm and Haas, with its principal place of business at 100 North Riverside Plaza, Chicago, Illinois 60606. Morton continued to operate the Ringwood facility until January

1, 2005, when ownership was legally transferred to Rohm and Haas Chemicals, LLC, a newly created subsidiary of Rohm and Haas.

In 2001, Rohm and Haas sold its Thermoplastic Polyurethane (TPU) business to defendant Huntsman, which included part of the Ringwood facility's operations as well as a facility in Germany. Defendant Huntsman Polyurethanes ("Huntsman") is a wholly owned subsidiary of Huntsman International, with its principal place of business at 5015 Barnard Mill Road, Ringwood, Illinois 60072.

Defendant Modine is an international manufacturer of heating and cooling technology, with sales in excess of \$1.5 billion and operations in more than 14 countries. Modine's corporate headquarters are located at 1500 DeKoven Avenue, Racine, Wisconsin, 53403. Since the early 1960s, Modine has operated a manufacturing plant at 440 Ringwood Road, Ringwood, Illinois 60072, (the "Modine Facility").

Although this class action is brought on behalf of residents of McCullom Lake Village who do not have brain cancer, indirectly this case involves more than one dozen individuals who do have brain cancer or brain tumors. In related actions pending in the Court of Common Pleas, Philadelphia County, Pennsylvania, 12 individuals to date have filed individual claims against these same defendants.¹ In these actions, the individual plaintiffs claim defendants contaminated their air and groundwater causing them to develop brain cancers or brain tumors. The 12 individuals, with their age, type of brain tumor and date of diagnosis, are as follows:

1. Bryan Freund, 45, oligodendroglioma, December 2004;

¹Although all 12 individuals have filed separate actions, the cases have been consolidated for discovery under Branham v. Rohm and Haas et al., Court of Common Pleas, Philadelphia County, May Term 2006, No. 3590.

2. Kurt Weisenberger, 65, oligodendroglioma, January 2005;
3. Brian Diblasi, 46, oligodendroglioma, October 2004;
4. Scott Milliman, 45, oligodendroglioma, July 2002;
5. Franklin D. Branham, 63 (at death), glioblastoma multiforme, April 2004;
6. Sandra Wierschke, 44, glioblastoma multiforme; May 2006;
7. Judith Weisheit, 64, glioblastoma multiforme, April 2006;
8. John C. Stepp, 55, glioblastoma multiforme, September 2006;
9. Cynthia Depaepe, 43, hemangioblastoma, December 2005;
10. Robert Nelson, 48, pituitary brain tumor, October 2005;
11. Nichole Baird, 37, pituitary brain tumor, April 2006;
12. Patrick Kane, 51 (at death), pituitary brain tumor and malignant brain cancer, October 2005.

All 12 individuals are or were longtime residents of McCullom Lake Village or spent significant time there. Eleven of the twelve have been diagnosed within the last two years. More than half have been diagnosed within the last year. Eight of the 12 involve glial cell brain cancers (glioblastoma and oligodendroglioma.) Three of the 12 – Mr. Branham, Mr. Freund and Mr. Weisenberger – lived in homes that are side by side on the same block. (In addition to these 12 cases, plaintiffs' counsel is investigating at least five additional brain cancer cases.)

Defendants in this case caused extensive groundwater contamination underneath and around their manufacturing facilities. The contamination of the groundwater occurred over a period of more than 40 years. In addition, defendants caused contamination of the air. The air and groundwater have been contaminated with toxic chemicals, including vinyl chloride, a

volatile chemical that defendant Rohm and Haas has admitted is associated with human brain cancer. As set forth below, there is evidence to show that the contaminated air and groundwater migrated to McCullom Lake Village, exposing residents there to toxic, cancer-causing chemicals. The striking incidence of brain cancers among residents of McCullom Lake Village supports plaintiffs' claim that the proposed class members have been exposed to dangerous chemical toxins and should be afforded the relief sought here.

This case raises the kinds of claims for which Rule 23 of the Federal Rules of Civil Procedure was designed. There are numerous class members. The central questions in this dispute – whether there was exposure, whether the exposure places residents at risk – are common to all class members. These common questions predominate over any individual questions. The mechanism for class actions set out in Rule 23 is appropriate for this case and far superior, efficient, economical and just as compared to thousands of individuals filing identical claims.

III. Relevant Facts

Although merits discovery in this action has been deferred until after disposition of this Motion, plaintiffs have developed extensive facts about the circumstances giving rise to the claims in this case. These facts, taken from third party discovery, discovery conducted to date in the related individual cases, and deposition and document discovery conducted in this case, support plaintiffs' claim that this case should be certified as a class action. In addition, plaintiffs offer the Affidavit-Reports of four qualified experts, a hydrogeologist, an environmental meteorologist, an epidemiologist, and a toxicologist, whose opinions support this Motion.

A. Morton/Rohm and Haas' Environmental Contamination

Since the 1940s, the Ringwood Facility was a site for the manufacture of specialty chemicals, including highly toxic soil fumigants and chemicals used in various plastics products. The plant buildings occupy an area bounded by the unincorporated Village of Ringwood (population of approximately 400) to the north; Ringwood Road to the west; and Union Pacific (formerly Chicago and Northwestern) rail tracks to the east. Since the early 1960s, defendant Modine has occupied land adjacent to and directly south of the Morton/Rohm and Haas Ringwood facility. On the eastern side of the rail tracks, defendant Morton/Rohm and Haas also owns approximately 80 acres of undeveloped farmland. South of Modine is a parcel of undeveloped farmland that stretches to McCullom Lake Road, the road that defines the northern border of McCullom Lake Village.² See Exhibit E, a map of the area.

For decades, Morton and Rohm and Haas dumped thousands of pounds of toxic chemicals into the ground, in pits and settling ponds. These toxic substances included 1,1-dichloroethylene (“1,1-DCE”), a volatile organic compound (VOC) that degrades in the subsurface soils and groundwater to produce vinyl chloride, a highly toxic and cancer causing chemical. From 1961 until 1977, Morton pumped chemical process waste liquids and other toxic chemical waste into an on-site settling basin, sometimes referred to as the landfill or the lagoon or the Highlands. The on-site landfill was later determined to be a primary cause of groundwater contamination at the site. In addition to routine toxic waste dumping at the Ringwood Facility, every year dozens and often hundreds of chemical spills, accidents, leaks and other releases

²Individual plaintiffs Bryan Freund, Kurt Weisenberger and Franklin D. Branham all lived in adjacent homes on McCullom Lake Road.

occurred at the plant, further contributing toxic chemicals to the environment, including the air and groundwater.

In 1983, Morton reported to the Illinois Environmental Protection Agency (IEPA) that testing of one of the plant wells revealed evidence of groundwater contamination. The following year, the company took initial steps to assess the nature and extent of the groundwater contamination. An outside environmental consultant, IT Corporation, was retained in 1985 to perform site assessments. Morton, and later Rohm and Haas, has repeatedly held itself out as having diligently investigated and cleaned up the environmental contamination at their site, once the problem was identified. According to documents discovered in this case, however, Morton was aware of groundwater contamination at least a full decade before the IEPA was notified and before any groundwater investigation was undertaken.

In a confidential internal memorandum dated December 6, 1973, former plant manager Sidney Martin reported to a senior Morton executive on plans for a new wastewater treatment facility for the plant. See Martin Memo, December 6, 1973, Exhibit F. Martin notes that the decision to construct a process wastewater treatment facility at the plant was based on the finding that “our present method of process waste impoundment in the existing sludge pit was no longer acceptable.” Under the treatment system then in place, some process wastewater was directed to a lime treatment reactor for adjustment of pH before flowing into a large impoundment sludge pit. Wastewater would then move to a series of three above-ground ponds before discharging to a creek that runs along the rail tracks and then southeast to the Fox River.

Plant manager Martin in the 1973 memo describes how sampling wells were dug “downstream” from the sludge pit to determine if there was any leakage. Tests confirmed that indeed the sludge pit was leaking into the groundwater. As plant manager Martin explained,

Obviously, the water at the upper level of the water table is not normally considered as a drinking water source. However, it is also obvious that the possibility of infiltration into a lower water strata which is a supply source is a possibility. In any case, contamination was again demonstrated by this [well testing] data and the only conceivable source of the contamination is seepage from the sludge pit.

Martin also notes that seepage into the groundwater from the sludge pit is evident from the fact that pump rates into the pit should have led to its overflowing “several years ago.”

In the 1973 memo, plant manager Martin then explained how the fact of groundwater contamination at the Ringwood Facility is to be concealed from state authorities:

Assuming that the gross contamination which occurs from seepage from the sludge pit can result in contamination of a drinking water supply, we are in violation of several water quality standards at this time, and will continue to be in violation until use of the sludge pit is discontinued. It is noted that there is no evidence of contamination of well water at this time. This most likely is due to the fact that even though seepage represents a fairly concentrated contamination source, the volume is relatively small and natural degradation and dilution alleviates the problem. On the other hand, it may be simply due to the fact that no one has drilled a well at the necessary location. . . . It is felt, and this feeling is shared by our consultant, Dr. Eckenfelder, that if the seepage problem were brought to the attention of the state and federal regulatory agencies, we could expect action to be taken rather abruptly. At this time, to the best of our knowledge, the problem has not been brought to their attention. (Emphasis added)

Apparently, plant manager Martin believed the risk of state or federal enforcement action in connection with the groundwater contamination that had been identified could be very detrimental. As Martin concluded in his December 1973 memo, “In consideration of all the factors discussed above, it is felt that correction of the situation as soon as possible is a necessity

if we are to insure that the uninterrupted operation of the Ringwood plant is not placed in jeopardy.” No documents have been identified indicating that state or federal authorities were notified of the sludge pit seepage and groundwater contamination problem. Nor did Morton undertake a groundwater remediation program at this time.

In the mid-1970s, Morton officials once again confronted questions about groundwater contamination at the site in connection with the decision to close the landfill-lagoon. By this time, millions of gallons of liquid waste had been poured into the unlined settling basin for more than 15 years. At his deposition, Mr. Martin explained that one of the reasons for closing the landfill was that Morton had concerns about the landfill possibly causing groundwater contamination.

Well, I think it just became more and more obvious to us that this [landfill-lagoon system] was not going to be acceptable practice in the future. We had to change our processes, our practices. And that had something – you know, part of that was driven by the environmental regulations that were being proposed. Part of it was driven by the fact that, you know, we were concerned about – starting to be concerned about, you know, ground water contamination possibly.

See Deposition of Sidney G. Martin, September 29, 2006, p. 57, attached as Exhibit G. Despite these concerns, Martin testified at his deposition, Morton did not undertake any effort to verify whether there was any contamination from the landfill-lagoon. Morton did not hire a consultant, did not undertake a study, did not place a single well. See Exhibit G, pp. 62-63.

At other points in the 1970s, Morton had good and sufficient reason to investigate groundwater contamination from its site activities but failed to do so. In 1975, a tanker car making a delivery to the plant spilled 200 gallons of dichloropropane/dichloropropene, a highly toxic chemical mix. In 1978, a Morton employee accidentally left a tanker valve open for some

15 hours, allowing a significant spill of 1,1-DCE, a toxic chemical that, once in the soil or groundwater, degrades into vinyl chloride, a known human brain carcinogen. See Handwritten incident report, February 2, 1978, attached as Exhibit H. Morton did not undertake an environmental assessment following either of these significant chemical spills. When groundwater studies were finally undertaken 10 years later, tests showed concentrations of several toxic chemicals, including dichloropropane, 1,1-DCE and vinyl chloride.

By 1984, when chemical contamination had turned up in one of its plant wells, Morton could no longer ignore the groundwater contamination underneath its Ringwood Facility. Three environmental consultant companies provided proposals for assessing the site facility and its groundwater problem. In a memorandum dated November 1, 1984, former plant manager Martin analyzed the three proposals, all of which recommended placement of groundwater monitoring wells in various locations around the Morton plant property to determine how far the contamination had spread. One of the consultants, Dames & Moore, proposed placing two wells on Modine's property, that is, due south of the closed landfill, at the time a suspected source of the groundwater contamination. In the November 1, 1984 memo, Martin stated,

The Dames & Moore quote is considerably higher than the IT quote, primarily because they propose drilling about twice the lineal feet of monitoring wells. . . They do propose two wells that are not on our property. This I think should be avoided at this time, if it can be done without jeopardizing the validity of their investigation. (Emphasis added.)

See Martin memo, November 1, 1984, attached as Exhibit I.

Plant manager Martin knew that there were multiple aquifers underneath the plant site, including shallow and deep aquifers. In his November 1, 1984 memo, Martin also noted that Dames & Moore proposed drilling several deeper monitoring wells "to determine if the two out-

wash aquifers are linked.” As Mr. Martin explained in his 1984 memo, “It would seem that this is pertinent to an evaluation of potential off-site considerations since the deeper of the two out-wash aquifers may serve as a source of drinking water in the surrounding area.” See Exhibit I (Emphasis added).

Morton did not hire Dames & Moore, the firm that proposed the off-site monitoring wells and the deeper aquifer wells. Instead, Morton hired company that proposed the less expensive investigation plan, IT Corporation, and then Morton limited their investigation to a study of the shallow groundwater only, i.e., the aquifer that was not thought to be linked to area drinking water supplies. As IT Corporation noted in its first of two reports for Morton, the groundwater investigation was “limited to depths of 70 feet or less,” i.e., the shallow aquifer. See “Plume Identification Project,” IT Corp., June 1985, p. 3-1, attached as Exhibit J.

Morton’s hired consultants assumed that groundwater flow followed the surface topography, which sloped to the east and southeast away from the closed landfill. Sure enough, monitoring wells placed east and southeast of the landfill detected migration of chemical contaminants in that direction. However, no investigation was performed to assess any migration of chemical contaminants to the south, in the direction of Modine and McCullom Lake Village. Morton and its consultants conducted no investigation of the deeper aquifer, a known source of drinking water for the surrounding communities.

The IT Corporation issued two reports in 1985 that confirmed the presence of significant quantities, that is, “high concentrations” of VOCs in the groundwater, including 1,1-DCE, vinyl chloride, benzene and others. See Exhibit J, p. 1-1. The IT reports determined that VOCs in the groundwater were attributable to (1) the closed lagoon/landfill (on the western part of the

property) and discharge of waste water containing VOCs into the above ground retention ponds at the facility and (2) the release of 1,1-DCE in 1978 from the railroad tank car spill.

To address the groundwater contamination at its site, Morton entered into a voluntary groundwater clean-up program under loose supervision by the IEPA. By entering the “voluntary” program, Morton avoided enforcement action by the state and retained greater flexibility and control over the remediation (i.e., clean up) effort. Morton did not, however, tell IEPA that groundwater contamination had been known or suspected as far back as 1973.

For the next six years, Morton continued to conduct on-site assessments in preparation for implementation of a groundwater clean up program. During this entire time, Morton did not inform its southern neighbor, Modine, about the groundwater contamination problem, even though the primary source of the contamination, the eight-acre closed landfill was situated just a few feet north of the fence line between the two companies and even though the contaminants found in the groundwater were highly toxic, cancer-causing chemicals.

James Rulseh, the plant manager at Modine’s Ringwood facility from 1983 to 1990, testified that, in the time that he was plant manager, Morton never informed Modine that groundwater contamination had been found just a few feet north of Modine’s property. See deposition of James Rulseh, October 6, 2006, p. 30-32, attached as Exhibit K.

Nor did Morton inform residents of McCullom Lake Village, whose homes and drinking wells were situated a few thousand feet south of Modine, that toxic chemicals in the groundwater threatened residential wells there and elsewhere in the area. Morton did not offer to test any domestic wells south of the site or at McCullom Lake Village. In fact, Morton continued to exercise deliberate neglect in terms of fully assessing the extent of its groundwater

contamination. Morton did not place wells to the south; did not test domestic wells to the south; did not evaluate the deeper aquifers known to carry drinking water to the south; did not investigate the potential for human exposure to the south. Instead, Morton settled for the convenient but incomplete truth that the underground contamination plume moved only in the shallow aquifer and only to the southeast, that is, onto its own eastern property, where there were no homes, no drinking water wells, and no immediate dangers.

In late 1985, Morton solicited proposals from two companies to perform further site assessments. IT Corporation, the consultant that had performed the initial groundwater investigations, submitted a proposal that included sophisticated groundwater modeling, to more accurately determine groundwater flow, and an exposure assessment, to determine the risk of human exposure to chemical contaminants. Another consultant, Geraghty & Miller, submitted a less ambitious proposal, one that did not aim to better define the groundwater systems underneath the plant and did not include a plan for any human exposure assessment. As former plant manager, Martin stated in his November 1, 1984 memo, when IT Corporation had visited the Ringwood Facility site, “it seemed that they [IT Corporation personnel] spent an inordinate amount of time asking questions about our tank farm area, the underground storage of adhesive waste solvent, and the outside storage of various [chemical] constituents.” See Exhibit I.

Morton chose the less expensive, less ambitious Geraghty & Miller proposal and fired IT Corporation.

In 1990, as Morton moved slowly to install a groundwater treatment system, the United States Environmental Protection Agency (US EPA) conducted a site survey, issuing a Screening Site Inspection Report on July 13, 1990. The US EPA’s report confirmed that Morton’s

groundwater contamination posed a potential threat to the drinking water supplies of area residents. The report stated,

Wells used for drinking water in the area are screened at depths ranging from approximately 20 feet to approximately 300 feet. Local wells draw from the aquifer of concern within a 3-mile radius of the site and serve approximately 29,776 persons, which is the target population affected by groundwater contamination.

See US EPA Screening Site Inspection Report, p. 5-2,3, attached as Exhibit L. Despite the US EPA's findings, Morton did nothing to assess whether groundwater contamination extended to the south, that is, in the direction of residents in McCullom Lake Village.

In 1991, Morton installed a groundwater treatment system that included a so-called air stripper. Using a large-scale extraction well, the system pumped groundwater into the stripper, which then exposed the water to the air, "stripping" out the volatile organic chemicals from the water and into the air. The air stripper system was poorly designed and located far from the primary source of contamination, the landfill. Defendant has now admitted that the air stripper system never operated at greater than 25 percent capacity.

By 1997, it was clear that Morton's decision to hire the less expensive, less comprehensive consultant, Geraghty & Miller, had been short-sighted. In 1997, Morton switched environmental consultants again and hired Geomatrix Consultants ("Geomatrix") to come in and review the company's groundwater remediation plans. Geomatrix noted that the Geraghty & Miller plan remediation plan had projected that groundwater remediation would be sufficiently completed within three to four years of operating the air stripper system. Geomatrix's review of the available technical data showed that Morton and Geraghty & Miller were way off in their projections and in their fundamental understanding of the situation. See "Work Plan for

Groundwater Assessment,” Geomatrix Consultants, November 3, 1999, p. 1-2, attached as Exhibit M.

Geomatrix arrived at three important new findings:

1. The existing pump and treat system was not containing the groundwater contamination;
2. Sixteen years after Morton first acknowledged the existence of groundwater contamination underneath its site, the downgradient extent of the contamination plume was not known; and
3. Morton’s and Modine’s groundwater contamination plumes had co-mingled downgradient from their respective sources, a factor that had not been taken into any account previously.

See Exhibit M, p. 2.

The stripper system had failed in another important way: In the process of removing toxic chemicals from the groundwater, the air stripper dispersed these chemicals, including vinyl chloride into the air. Once airborne, these toxic chemicals migrated into the surrounding communities including McCullom Lake Village. Even though Morton was fully aware that the air stripper was releasing significant quantities of vinyl chloride into the air, Morton did not warn area residents. Conveniently, nor did Morton measure or track or report to IEPA on air emissions from the stripper, including emissions of vinyl chloride.

Since Rohm and Haas acquired the facility in 1999, groundwater contamination problems have continued. In November of 1999, for instance, the Ringwood facility was cited by the IEPA following an accidental release of approximately 991 pounds of 1,1-DCE. In 2001, there were

232 spill incidents amounting to hundreds of gallons of released chemicals. See 2001 Spill Report, attached as Exhibit N. Stanislaus Zagula, the Ringwood plant's Environmental Manager, has testified that this number of spill incidents in 2001 is typical. See Deposition of Stanislaus Zagula, October 4, 2006, pp. 173-174, attached as Exhibit O. In February 2005, the Ringwood Facility experienced another significant release of 1,1-DCE because of a reactor accident. The U.S. Occupational Health and Safety Administration (OSHA) cited Rohm and Haas in connection with this chemical spill.

By mid-2004, seven years after Geomatrix advised Morton/Rohm and Haas that its groundwater treatment/air stripper system was not working, defendant still had not implemented a modified, upgraded or alternative treatment system. In May 2004, more than 20 years after Morton/Rohm and Haas first acknowledged to state authorities the presence of groundwater contamination, the Illinois EPA issued a Notice of Violation, finding that the Ringwood Facility was in violation of state environmental laws because of continuing high levels of VOCs in the groundwater. See IEPA Notice of Violation, May 3, 2004, attached as Exhibit P.

Herbert Cox, who was the Ringwood Facility plant manager when the IEPA issued its citation, explained that IEPA was clamping down on companies who were not moving diligently enough in the "voluntary" site remediation program. As Mr. Cox explained, "They [IEPA] indicated to me that various companies had – that were in the voluntary program had not moved forward with the implementation of their plans and so that the decision of the Illinois EPA was to put a higher degree of leverage on those companies that were in the voluntary program." See deposition of Herbert Cox, September 26, 2006, p. 110-117, attached as Exhibit Q.

Rohm and Haas insists that the groundwater contamination underneath its facility is not a threat to area residents, including residents of McCullom Lake Village. But Rohm and Haas' own consultants, according to documents discovered in this case, suggest that the company's confidence in this view is unfounded.

In 2003, URS, yet another environmental consultant retained by Morton/Rohm and Haas, conducted groundwater modeling, the purpose of which was to test different well placements for a new groundwater treatment system being designed to contain, i.e. stop the flow of chemical contaminants originating from the former landfill-lagoon. In a report setting out its preliminary modeling results, URS noted that groundwater extraction wells were tested at both the upper and lower levels of the shallow aquifer, sometimes referred to as Aquifer 1. The reason for testing wells in the deeper portions of this aquifer, URS explained, "is because particles originating in the deepest part of the aquifer are most likely to escape downward, through the confining unit into deeper aquifers, thus avoiding capture." See URS, "Preliminary Modeling of Hydraulic Plume Control at the Source," May 5, 2003, p. 5, attached as Exhibit R.

The deeper aquifer beneath the so-called confining layer is Aquifer 5, the groundwater source described by the US EPA and others as the "aquifer of concern," because it is a source of area drinking water. Yet Morton/Rohm and Haas has never asked any of its consultants to test any wells in the deeper aquifer, a groundwater source for drinking wells in McCullom Lake Village and other residential wells south of the Ringwood Facility. In fact, the evidence so far shows that defendant has stopped its consultants from doing so.

After years and years of study, thousands of pages of reports, hundreds of well tests, soil samples and laboratory analyses, the geologists and scientists at URS, now Rohm and Haas'

primary environmental consultant, have opined that they do not really know where the contamination plume is. Just last year, in an email from Steven Moeller, a senior geologist at URS, to Carl Coker, the Philadelphia-based corporate remediation site manager for Rohm and Haas, Mr. Moeller characterized the groundwater plume as “really speculative.” See Moeller email, May 20, 2005, attached as Exhibit S.

On the same day, Moeller sent another email to Mr. Coker, explaining that one of the reasons for the ongoing uncertainty about the extent of the contamination plume was the fact that “interpretations are initially constrained by the limited number of data points (i.e., the limited areal distribution of the existing monitoring network and the limited number of sampling points per event).” See Moeller email, May 20, 2005, Exhibit T. In the same email, however, Mr. Moeller reassured Rohm and Haas’ Coker that, even though there were great uncertainties about the extent of the groundwater plume, “We chose to interpret these extents as somewhat small (just beyond those wells with exceedances) to favor Rohm and Haas.” See Exhibit T.

A few months later, on September 21, 2005, Marek Ostrowski, another URS scientist, shared his thoughts about the groundwater investigation in an internal email among URS colleagues. Mr. Ostrowski noted, “The old problem there – all wells are stretched in a line, as opposed to covering an area. This makes the plume picture very arbitrary. . . .So, we don’t even know whether the upper zone is clean or contaminated.” See Ostrowski email, September 21, 2005, attached as Exhibit U.

Numerous depositions have yet to be taken and many document requests and other written discovery is pending. Further discovery is expected to develop the factual pattern set forth here.

B. Modine's Environmental Contamination

Modine manufactures heat exchangers and air conditioning condensers for automobiles and trucks at its Ringwood facility. Although Modine is not a chemicals maker, like Morton, Modine has generated significant amounts of toxic and hazardous waste over the years. Some of this waste has been buried on company property.

Former plant manager James Rulseh testified that he himself discovered an on-site waste disposal pit shortly after he came to work at the Ringwood plant in the late-1970s. This chemical waste pit was nothing more than a hole in the ground, into which Modine employees emptied 55-gallon drums of spent industrial solvents, including naphtha and toluene. Mr. Rulseh explained that the disposal area he found was "an area, dirt mounded up on all sides, yeah, like a pit of some kind, dirt build up on the side. The resulted indentation was uses to dispose of this paint and paint solvents. See Exhibit K, pp. 54-57.

Over the years, Modine used toluene, 1,1,1-trichloroethane and trichlorethene ("TCE") as degreasing agents in its manufacturing operations. Like the 1,1,-DCE used at the Morton facility, TCE chemically degrades when spilled into the ground or groundwater, transforming into vinyl chloride, a known human brain carcinogen. TCE, itself a suspected human carcinogen, was used at the Modine facility from 1975 to 1981, according to Mr. Rulseh. During the years that TCE was used at the Modine facility, spent TCE, toluene and related toxic substances were dumped or spilled into the ground at the facility.

Despite its longtime dumping practices at its Ringwood plant, Modine took no action to test or monitor for groundwater contamination until 1990. At that time, Modine removed three underground storage tanks that were no longer in use. One of the tanks, an 8,000-gallon tank

containing naphtha and toluene, two toxic industrial solvents, was found to have leaked into the ground.

In the course of the subsurface and groundwater investigation that followed, Modine discovered that the groundwater underneath its facility contained extensive contamination, with high concentrations of several VOCs, including TCE, benzene, and vinyl chloride. Contradicting the reports of consultants for Morton/Rohm and Haas, Modine's outside environmental consultant, STS Corporation, has found that the flow of chemical contaminants in the shallow groundwater is to the southeast from the plant, but the flow of the groundwater in the deeper aquifer is to the south. See, Report of STS Corporation, May 16, 2005, attached as Exhibit V.

Notwithstanding evidence of groundwater contamination flowing to the south, i.e., directly toward McCullom Lake Village, Modine has at no time placed any monitoring wells to the south of its property. Modine has not offered to test any residential wells in McCullom Lake Village. Modine has not issued any warnings to area residents regarding the migration of its groundwater contamination and the potential threat to human health.

Numerous depositions have yet to be taken and many document requests and other written discovery is pending. Further discovery is expected to develop the factual pattern set forth here.

C. Huntsman's Environmental Contamination

Hunstman acquired the TPU manufacturing unit from Rohm and Haas in 2001. Although Huntsman has not yet complied with discovery requests, there exists evidence from other sources that Huntsman has participated in spills and leaks of chemicals during its years at the Ringwood Facility. Some of these may have contributed to more recent contamination of area groundwater.

Several of the chemical spills documented by Rohm and Haas in 2001 are attributed to Huntsman. See 2001 Spill Report, attached as Exhibit N. For example, in August of 2001, Huntsman released 5,000 pounds of PS 380 pre-blend in an incident attributed to “operator error.” Other chemical spills, according to Rohm and Haas records, occurred in subsequent years.

More discovery is needed to determine Huntsman’s contribution to air and groundwater contamination. More discovery is also needed to determine Huntsman’s knowledge of air and groundwater contamination in the area, which information is relevant to plaintiffs’ claims for fraud, misrepresentation and civil conspiracy.

D. Contamination from Defendants’ Facilities Caused Residents of McCullom Lake Village to be Exposed to Toxic Chemicals

Accompanying this brief, plaintiffs provide affidavits and curricula vitae from four experts:

1. Grèg Hill, hydrogeologist, Exhibit A;
2. Paolo Zannetti, environmental meteorologist, Exhibit B;
3. Gary Ginsberg, toxicologist, Exhibit C; and
4. Richard Neugebauer, epidemiologist, Exhibit D.

Taken together, plaintiffs’ experts opine that they can establish a connection between the environmental contamination described above and a risk of brain cancer among the proposed class members, the residents of McCullom Lake Village.

1. Contamination from Defendants' Plants Likely Migrated to Domestic Wells in McCullom Lake Village

Greg Hill, a hydrogeologist, has academic training in engineering, geology and hydrogeology. He has worked for the US EPA, Mobil Oil and various consulting firms specializing in groundwater investigations and groundwater remediation efforts. He is qualified to offer opinions about the groundwater investigations that have already taken place at defendants' sites as well as about the likely groundwater pathways that carried toxic contaminants from defendants' properties to McCullom Lake Village.

Based on review of numerous reports prepared by the environmental consultants for Morton/Rohm and Haas and for Modine, Mr. Hill has reached opinions about both issues:

Based upon the information reviewed, I have formulated a professional opinion that the work performed to date has been incomplete and therefore inadequate to fully characterize past releases of hazardous chemicals that have impacted groundwater quality. Additionally, it is my opinion that there exist several groundwater pathways which have been ignored by Rohm and Haas and Modine, by which significant quantities of hazardous chemicals likely were transported to domestic wells in McCullom Lake Village.

See Exhibit A.

Mr. Hill's 12-page, single-paced report lays the groundwork for the more detailed assessment he will perform once we have all data in hand for analysis. Mr. Hill's extensive preliminary review makes clear that he is qualified and capable of performing a thorough groundwater assessment and modeling that will show that defendants have not correctly or completely defined the groundwater contamination plume and that significant quantities of toxic chemicals have traveled via groundwater to the drinking wells of McCullom Lake Village.

2. Contamination from Defendants' Plants Migrated by Air To McCullom Lake Village

Paulo Zannetti, a Qualified Environmental Professional and expert on environmental contamination, has examined meteorological data from the McHenry, Illinois area as well as documents from defendants that provide information about wind and air patterns at and around the site facilities. According to Mr. Zannetti, he can perform air modeling, using methodologies widely used in the profession and accepted by professionals and government agencies. These air models can take data on the chemicals of concern, chemical concentrations in the groundwater, technical data on the air stripper used to remediate the groundwater, and arrive at conclusions about the quantities of volatile organic material, including vinyl chloride that traveled south to McCullom Lake Village.

Air pollution modeling is an appropriate technique for measuring the amount of chemical contaminants to which members of the class were exposed. This modeling is an effective means of assessing exposure to the class as a whole

3. Chemicals of Concern from Defendants' Plants, Especially Vinyl Chloride Are Causally Significant in Establishing a Risk of Brain Cancer

Toxicologist Gary Ginsberg will offer opinions on the toxicology of vinyl chloride, one of the leading chemicals of concern in the contaminated groundwater at both the Morton/Rohm and Haas facility and the Modine facility, as well as other chemicals of concern involved in the exposures at issue. Dr. Ginsberg, who has worked for the Connecticut Department of Public Health, the University of Connecticut School of Community Medicine, the Yale University School of Medicine, the US EPA, and the National Science Foundation, will perform a toxicity assessment of the McCullom Lake village community.

According to Dr. Ginsberg, his toxicity assessment “will lead to a characterization of VC risks in this community.” See Exhibit C. The methodology he will employ includes taking data from defendants about the amount of chemicals that entered the environment, applying the hydrogeologic and atmospheric dispersion models of plaintiffs’ other experts, and then determining “the plausibility of exposure and risk, the likelihood that the observed brain cancer cases could be related to VC exposure, an evaluation of the uncertainties, and an estimate of the average brain cancer risk level in the community.”

Dr. Ginsberg’s approach is suitable for a class action because he can perform his toxicity assessment on a classwide basis. Dr. Ginsberg explains that his “analysis will pertain to the community as a whole, not just to selected homes that have special concerns due to their location in relation to the VC transport path (e.g., homes nearest the groundwater plume) or in relation to the cancer cases.” See Exhibit C.

4. The Significant Number of Brain Tumor Cases Among Residents of McCullom Lake Village Strongly Suggests a Brain Cancer Cluster

Although the individual plaintiffs in the related state court actions are not parties to this action, the fact that there is a significant incidence of brain cancer and brain tumors among current and former residents of McCullom Lake Village is central to this class action. Richard Neugebauer, plaintiffs’ expert epidemiologist, has already concluded, based on preliminary review of the data, has already concluded that the incidences of brain cancer in the Village are “sufficient to raise substantial public health concerns and to warrant a full epidemiologic investigation of a possible cancer cluster in this area.” See Exhibit D. Neugebauer, an epidemiologist on the Faculty of Medicine of Columbia University in new York, has already

found that the rate of oligodendrogliomas, one of two types of primary malignant brain cancers in the Village, is eight times the expected incidence.

Although the investigation is in its early stages, according to Neugebauer, the evidence thus far indicates “that 1. McCullom Lake Village lies close to a major source of environmental contamination and that 2. The rates of two brain cancer subtypes, glioblastoma and oligodendroglioma, appear considerably elevated in this small geographic area.” See Exhibit D.

IV. Argument

Plaintiffs seek certification of the following classes:

1. The Medical Monitoring Class

All current and former residents of McCullom Lake Village exposed to TCE, 1,1-DCE and/or vinyl chloride originating from defendants’ properties.

2. The Injunctive Relief Class

All current property owners of McCullom Lake Village who seek injunctive relief in the form of measures to safeguard their wells and water supply

3. The Property Loss Class

All current and former property owners of McCullom Lake Village who incurred or will incur property remediation costs and expenses or loss of property value due to exposure to TCE, 1,1-DCE and/or vinyl chloride from defendants’ properties.

4. Punitive Damages Class

All members of the foregoing three classes.

Rule 23 of the Federal Rules of Civil Procedure governs class certification. Subsection (a) of the Rule lists the four prerequisites for a class action. These four prerequisites – numerosity, commonality, typicality, and adequacy – are all satisfied in this case and are discussed in detail below. See section IV.A., *infra*. Subsection (b) of the Rule describes three independent grounds supporting class certification – avoidance of inconsistent or prejudicial decisions; pursuit of classwide injunctive relief, and pursuit of damages where common issues predominate over individual issues. See Fed.R.Civ.Pro. 23(b)(1), (2) and (3), respectively. The grounds supporting class certification are not mutually exclusive, and plaintiffs may seek and be awarded class certification by satisfying the requirements for any one or more subparts of subsection 23(b). See e.g., Seawell v. Universal Fidelity Corp., 235 F.R.D. 64,68 (E.D. Pa. 2006)(certifying injunctive claims under 23(b)(2) and damages claims under 23(b)(3)).

In this case, plaintiffs move for class certification both under subpart 23(b)(2), permitting class actions for injunctive relief, and under 23(b)(3), permitting class actions for damages. Plaintiffs seek an injunction on behalf of the Medical Monitoring Class and the Injunctive Relief Class in the form of an order directing Defendants to do the following:

- abate the hazards they have created by cleaning, monitoring and preventing future contamination;
- bypass the private wells through which Class members have exposed to toxic chemicals by connecting members' homes to the municipal water system, and

- alleviate the significant risk of disease they have caused by funding a court-administered medical monitoring program.

Plaintiffs also seek damages on behalf of the Property Loss Class, including compensatory damages, including property remediation costs and expenses and the loss of property value. Lastly, plaintiffs seek punitive damages on behalf of the Punitive Damages Class. For the reasons that follow, the Court should grant plaintiffs' motion for class certification with respect to both their claims for injunctive relief and for damages.

In conjunction with their motion for class certification, Plaintiffs also move for appointment of Aaron J. Freiwald, Esquire of Laysner & Freiwald, P.C. as class counsel. See Fed.R.Civ.Pro. 23(g); see also section IV.A.4, *infra*.

A. Plaintiffs Have Satisfied the Prerequisites to Class Certification Under Subsection 23(a)

Plaintiffs, as the moving parties, have the burden of proof, and the decision whether Plaintiffs have met their burden rests within the sound discretion of the Court. See Califano v. Yamaski, 442 U.S. 682, 703 (1979). The decision turns on whether plaintiffs have satisfied the requirements of Rule 23, not whether plaintiffs have stated a cause of action or will prevail on the merits. See Eisen v. Carlisle and Jacqueline, 417 U.S. 156, 178 (1974). For example, the Court should consider whether an expert opinion provides a common method of proof, but not choose among competing experts or evaluate whether the expert opinion ultimately will be accepted by the trier of fact. See In re Visa Check/Master Money Antitrust Litig., 280 F.3d 124, 132, 134-135 (2d Cir. 2001) ("The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact

warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.”)

1. Joinder of All of the Individual Class Members Would Be Impracticable

The first of the four prerequisites to class certification is a finding that the class members are so numerous that joinder of all members would be impracticable. See Fed.R.Civ.Pro. 23(a)(1). The precise number of class members need not be determined in order to determine that the class is too numerous to practicably join every individual. See Josephat v. St. Croix Alumina, LLC, No. Civ. 1999-0036, 2000 WL 1679502 at *3 (D. Virgin Islands Aug. 7, 2000). Instead, plaintiffs must provide “some evidence” or “a reasonable estimate” of the number of class members. Id. Here, plaintiffs allege that there are approximately 400 homes in McCullom Lake Village and there likely are approximately 1,000 current residents, according to 2000 census data. In Josephat, the court certified a medical monitoring and property damage class of a similar size – several hundred homes and several thousand residents. Id. at *3-4. Much smaller classes have been certified, and any class numbering in excess of 100 typically satisfies the requirement that joinder be impracticable. See Rendler v. Gambone Bros. Development Co., 182 F.R.D. 152, 157 (E.D. Pa. 1998). Even very small classes may be certified where, as here, the primary relief sought is injunctive. See Weiss v. York Hospital, 745 F.2d 786, 808 (3d Cir. 1984). In any event, the approximate size of the proposed Class in this case puts the number of Class members many multiples beyond the threshold for numerosity.

In Josephat, acknowledging the impracticability of joinder of a class in the thousands, the court stated that “it is much more convenient and expedient for the Court to resolve the issue in

this case in one adjudication as opposed to possibly hundreds or thousands of discrete and redundant actions.” Josephat at *4. The same rationale applies here where the joinder of thousands of current and former residents of McCullom Lake Village would create an overwhelming procedural burden while doing nothing to advance a determination of the common issues in the case. Also, the financial burden associated with joinder for many class members would be an effective bar to relief. See Josephat, where the court noted that another reason joinder should be considered impracticable is that “because of their limited financial resources, class members in the instant case might be unlikely to institute individual actions.”

For the foregoing reasons, plaintiffs ask this Court for a finding that the Class is so numerous that joinder would be impracticable.

2. There Are Questions of Law and Fact Common To the Class

The second of the four prerequisites to class certification is that there must be common questions of law or fact. Although courts often consider the existence of common questions in conjunction with consideration of whether common questions predominate over individual issues, the commonality requirement under 23(a)(2) focuses only on whether common issues exist. As the Court of Appeals has made clear, determining commonality should not be a difficult task:

[T]he commonality standard of Rule 23(a)(2) is not a high bar: it does not require identical claims or facts among class member, as "the commonality requirement will be satisfied if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class."

In re Chiang, 385 F.3d 256, 265 (3d Cir. 2004) (quoting Johnston v. HBO Film Mgmt., 265 F.3d 178, 184 (3d Cir. 2001)). In this case, each of plaintiffs’ claims raises numerous common

questions of law and fact. See, e.g., Yslava v. Hughes Aircraft Co., 845 F. Supp. 705, 713 (D. Ariz. 1993) (“The core issues of liability and exposure [in the medical monitoring claim before the court] are common to all class members. Commonality among the members exists notwithstanding certain factual variations.”); see also Leach v. E.I. DuPont DeNemours and Co., No. 01-C-608, 2002 WL 1270121 at *11 (W.Va.Cir.Ct. 2002) (“In cases like this involving claims arising from a chemical release, commonality is readily found, particularly where medical monitoring claims are involved.”) (citing cases).

(a) Plaintiffs’ Medical Monitoring Claim Presents Numerous Common Questions Of Law And Fact

The elements of a claim for medical monitoring are

- exposure greater than normal background levels;
- to a proven hazardous substance;
- caused by defendants’ negligence;
- as a proximate result of the exposure plaintiff has a significantly increased risk of contracting a serious latent disease;
- a monitoring procedure exists that makes the early detection of the disease possible;
- the proscribed monitoring regime is different from that normally recommended in the absence of the exposure; and
- the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

See Redland Soccer Club, Inc. v. Dept. of the Army, 548 Pa. 178, 195-96, 696 A.2d 137, 145-46 (1996); accord Muniz v. Rexnord Corp., No. 04 C 2405, 2006 WL 1519571 at *7 (N.D. Ill. May 26, 2006) (citing Lewis v. Lead Indus. Assoc., Inc., 793 N.E.2d 869 (Ill. App. 2003)). Each of

the elements of plaintiffs' medical monitoring claim presents multiple questions of law and/or fact common to the Class, including the following:

(1) Were class members exposed to TCE, 1,1-DCE and/or VC in amounts higher than normal background levels?

This is a common question because the fact of exposure will be proven by expert testimony and review of the defendants' records, not by reference to any individual plaintiffs' conduct or circumstances. The issue essentially is whether the groundwater and/or the airflow leading to McCullom Lake Village was contaminated with TCE, 1,1-DCE and/or VC. There is no naturally-occurring background level for any of these chemicals. They are man-made chemicals not found in nature and, therefore, *any* exposure to one or more of these chemicals represents exposure greater than normal background levels. Accordingly, proving the fact of exposure greater than normal background levels involves proving some minimum level of one or more of these chemicals in the water and/or the air to which residents of the Village were exposed. Differences in exposure levels among class members within the Village, if any, are not relevant.

In this case, plaintiffs' experts already have identified potential pathways in the underground water flow and in the airflow through which hazardous chemicals located on defendants' properties contaminated plaintiffs' water and air supplies. See expert reports of Greg Hill, hydrogeologist (Exhibit A) and Paolo Zannetti, environmental meteorologist (Exhibit B). These experts also have opined that scientifically reliable methods exist for modeling the flow of TCE, 1,1-DCE and VC that reached McCullom Lake Village through these pathways at varying times in the past.

Thus, the question of whether class members were exposed to TCE, 1,1-DCE and VC in amounts higher than normal background levels will be answered positively or negatively with expert testimony based on defendants records and testimony, i.e., common evidence. The question of exposure depends on proof of pathways to the community as a whole, not to any one home within the community. Proving exposure here will be proved by evidence of community exposure and will not be dependent on proving exposure to each individual. The exposure question is, therefore, a common question. Cf. In re School Asbestos Litig., 789 F.2d 996, 1009-10 (3d Cir. 1986).

In School Asbestos, the Court of Appeals considered plaintiffs' argument that *any* exposure to asbestos was unsafe, and held as follows:

Plaintiffs contend that the presence of any airborne asbestos fibers in a school presents an unacceptable hazard. Whether that is true or whether only a higher concentration creates a danger is an issue common to all members of the plaintiff class. Ascertaining the danger point is critical to the determination of whether class members have sustained a legal injury and also is pertinent in establishing the existence of a defective product.

Id. In this case, as in School Asbestos, the determination of the "danger point" is a common question regardless of any variation in exposure that may exist among Class members

(2) Are TCE, 1,1-DCE or VC hazardous substances?

Whether one or more of the chemical compounds at issue is a proven hazardous substance also is a question that will be decided independent of any particular Class members' conduct or circumstances. In this case, plaintiffs' toxicology expert has opined that each of the three chemical compounds is a proven hazardous substance and/or degrades into a proven hazardous substance. See expert report of Gary Ginsberg, toxicologist, attached at Exhibit C.

Dr. Ginsberg bases his opinion on the available scientific literature – common evidence for all class members.

It should also be noted that defendant Rohm and Haas has already conceded that vinyl chloride is associated with human brain cancer. In Estate of Barry Lange v. Rohm and Haas, Court of Common Pleas, Philadelphia County, April Term 2005, No. 2861, Dr. Arvind C. Carpenter, a senior executive and corporate epidemiologist for Rohm and Haas testified about an epidemiological study he conducted to investigate brain cancers among employees of the company's research facility in Spring House, Pennsylvania. Dr. Carpenter testified:

Q: And then Vinyl Chloride, based on your review as part of this epidemiological study, showed an association to liver cancer in humans and brain cancer in humans; correct?

A: Yes.

See Deposition of Arvind C. Carpenter, September 1, 2006, pp. 550-555, attached as Exhibit W

(3) Did defendants breach a duty owed to plaintiffs and did that breach cause chemical exposure?

Whether defendants were negligent turns on an examination of their conduct, which by definition raises common questions answered by common evidence. See, e.g., Snow v. Atofina, No. 01-72648, 2004 WL 3768120 at *6 (E.D. Mich. March 18, 2004).³

³The analysis of this element of plaintiffs' medical monitoring claim differs from the negligence claim with respect to causation and damages. See Section IV.A.2(e)(discussing negligence claim). The elements of a claim for negligence, of course, are duty, breach, causation and damages. The duty and breach are the same in both the medical monitoring and negligence claims, but the causation and damages elements differ. The question for medical monitoring is whether the breach of duty caused exposure that creates an increased risk of a latent disease such that an equitable remedy, i.e. medical monitoring, is justified. In the negligence claim, the issue is whether the breach of duty caused property damage.

Assuming plaintiffs prove that defendants breached a duty owed to the Class, whether that breach caused TCE, 1,1-DCE or VC to contaminate the McCullom Lake Village water and air supplies also turns on common evidence relating to defendants' use and disposal of these chemicals and not on the actions of individual Class members. In fact, there is no other identifiable source for these chemicals in the area other than defendants' properties, so proof of exposure to these chemicals is *de facto* proof that the exposure originated on defendants' properties – i.e, that defendants' breach caused the exposure.

(4) Do the class members have a significantly increased risk of contracting a serious latent disease as a result of the exposure?

There is no question that brain cancer is a serious latent disease, the severity of which does not differ among class members – it is fatal in all cases.

Like the question of whether TCE, 1,1-DCE and VC are proven hazardous chemicals, the question of whether and to what degree exposure to those chemicals increases the risk of brain cancer is a common question that will be answered by expert testimony. Expert testimony on the carcinogenicity of the chemicals of concern in this case will be based not on review of individual circumstances but on published literature regarding the effects of exposure. Thus, the question of the causal link between exposure and increased risk is a common question. Similarly, the question of the precise level of exposure that corresponds to a “significant” increased risk also is a common question. Neither of those questions turns on examination of individual circumstances.

Moreover, as long as the common evidence shows a minimum level of classwide exposure, i.e. a level high enough to “significantly” increase the risk of contracting brain cancer,

variations in the significance of the risk among class members do not affect the commonality of the showing of increased risk.

Again, it should be noted that vinyl chloride has been found in the contaminated groundwater beneath the Ringwood facilities of both Rohm and Haas and Modine. Dr. Carpenter, the in-house corporate epidemiologist for Rohm and Haas, only last month testified under oath that he has conducted an extensive scientific inquiry that found that vinyl chloride is associated with human brain cancer. See deposition of Dr. Carpenter, Exhibit W.

- (5) Does a monitoring procedure exist that makes the early detection of brain cancer possible?**
- (6) Is the proscribed monitoring regime different from that normally recommended in the absence of the exposure?**
- (7) Is the prescribed monitoring regime reasonably necessary according to contemporary scientific principles?**

These three elements of a medical monitoring claim all raise common questions because they turn on evidence of medical science independent of Class members' medical histories. The first two questions are simply medical fact questions unrelated to the specific parties to the lawsuit. For example, either MRIs, or other monitoring procedures to detect brain cancer, exist or they do not. Similarly, either MRIs or other monitoring regimes differ from the procedures given in the absence of exposure, or they do not. Because the questions that must be answered are the same for all Class members, and because the evidence needed to answer those questions is scientific literature and medical expertise alone – common evidence – and because answers will apply with equal force to all Class members' claims, the questions are common questions of fact.

The last question similarly turns on expert medical testimony based on evidence common to the Class. Plaintiffs intend to present expert medical testimony in the merits phase of this litigation regarding the medically reasonable need for MRI screening based on the exposure levels identified by the Plaintiffs' hydro-geologist and meteorologist, and based on the expert opinions of the Plaintiffs' toxicologist about the significance of the risk posed by such exposure levels.

In this case, unlike many others, there is already significant evidence of disease, specifically brain cancer. This is not a case where environmental contamination or toxic exposure problem has been identified and a class action has been filed seeking a monitoring regime to look for any disease that may occur in the future. The basis of this Class action is that a statistically significant number of brain cancers has already occurred and has occurred very recently.

McHenry County staff epidemiologist Sherrie Gallas has testified in this case that there is a higher than expected incidence of brain cancers in the population that includes McCullom Lake Village. Although Ms. Gallas did not actually have cancer incidence data for McCullom Lake Village, she did look at recent cancer data for the 60050 zip code, a population of 47,000 (i.e., 47 times the population of the Village). She estimated, based on known cancer rates nationally, that out of 14 brain cancers reported for the 60050 zip code for the five-year period 1999-2003, one could expect one case of oligodendroglioma, one of the rare brain cancer types known to have occurred recently in the Village. Just taking the cases of Mr. Freund and Mr. Weisenberger, that represents two cases of oligodendroglioma within the same year (and, by the way, two cases of the same rare brain cancer afflicting next-door neighbors.) As Ms. Gallas testified,

Q: Okay. If you'd expect to see one oligodendroglioma for the 60050 zip code, how many based on these numbers, would you expect to see in the McCullom Lake Village population of 1,000?

MR. BARTEL: Objection as to form.

A: A lot less than one. It would be less than one.

See Deposition of Sherrie Gallas, September 13, 2006, pp. 133-140, attached as Exhibit X. Dr.

Chen, the chief epidemiologist for the Illinois Department of Public Health, reviewed state cancer registry data and found a statistically significant increased incidence of oligodendroglioma in McHenry County as compared with the statewide numbers. See Deposition of Sherrie Gallas, pp. 308-313, Exhibit X.

In addition, plaintiffs' expert epidemiologist Richard Neugebauer, has provided an expert affidavit in which he opines that the rates of brain cancer in McCullom Lake Village are "considerably elevated." See Exhibit D.

The question of whether a brain cancer cluster exists in McCullom Lake Village is not theoretical. Just last month, yet another longtime resident of McCullom Lake Village was diagnosed with malignant brain cancer, bringing the total number of known brain cancers just in the last two years to 11. Three individuals have been diagnosed within the last several months.

Moreover, epidemiological proof of an increased risk to all Class members is not affected by the individual conduct and circumstances of Class members. Unlike certain cases – like the tobacco cases – where the necessity for medical monitoring could be proven only upon an examination of an individual Class members' medical history and habits, here the necessity for medical monitoring may be proven by objective criteria applied to the Class as a whole, independent of individual Class members' medical history and habits. Cf. In re Paoli R.R. Yard

PCB Litig., 35 F.3d 717, 790-91 (3d Cir. 1994)(“We agree with the plaintiffs that [their expert] could reliably testify as to a patient’s future risk without examining the patient.”).

**(b) Plaintiffs’ Nuisance Claims Present
Common Questions of Law and Fact**

Plaintiffs have brought claims for public and private nuisance against defendants. Public nuisance claims have two elements: (1) an *unreasonable* interference (2) with a *public* right. See Rest. 2d of Torts § 821B; Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985). Private nuisance claims add intent to the first element, and involve private, not public, rights. Private nuisance claims thus have the following two elements: (1) an *intentional* and *unreasonable* interference (2) with a *private property right*. See Rest. 2d of Torts § 822; McQuilken v. A & R Development Corp., 576 F. Supp. 1023, 1029-1030 (E.D. Pa. 1983).⁴

Determining whether plaintiffs have satisfied these elements depends on the following common questions:

with respect to the claim for public nuisance:

- (1) Is freedom from air and water pollution a public right?
- (2) If so, did defendants interfere with that public right – *i.e.*, did defendants handle TCE, 1,1-DCE and VC in a manner that contaminated the air and water supply of McCullom Lake Village?
- (3) Was defendants’ interference unreasonable?

⁴ Negligent or abnormally dangerous conduct may substitute for intentional conduct to satisfy the first element of a private nuisance claim. See Rest. 2d of Torts § 822; McQuilken, 576 F. Supp. at 1029-30. Like the question of defendants’ intent, questions of defendants’ negligence or strict liability are common questions. See sections IV.A.2(d) and (e), *infra*, discussing the common questions on plaintiffs’ strict liability and negligence claims.

with respect to the claim for private nuisance:

- (1) Is freedom from pollution of private wells a private property right?
- (2) If so, did defendants interfere with a private property right – i.e., did defendants handle TCE, 1,1-DCE and VC in a manner that contaminated private wells throughout McCullom Lake Village?
- (3) Was defendants' interference intentional?
- (4) Was defendants' interference unreasonable?

The first question under either claim is a pure question of law. As such, there is no need for examination of any evidence, common or otherwise. By definition, this question is applicable not only to all Class members, but to all persons in all cases.

The remaining questions deal solely with evidence of defendants' conduct and state of mind. These questions will be answered without reference to any Class members' individual conduct or circumstances, and the answers will apply with equal force to all Class members' claims. See McQuilken, 576 F. Supp. at 1030 (certifying a private nuisance claim after reviewing the elements of the claim, finding that "the issue whether defendants' conduct was intentional and unreasonable" was appropriate for determination on a classwide basis).

Additional common questions include (a) whether the nuisance, if any, is a continuing nuisance; and, (b) if not, whether the nuisance is likely to resume in the future?

The answers to the common questions noted above are sufficient to determine defendants' liability. Nothing more is needed to support plaintiffs' request for injunctive relief to remedy the continuing nuisance, and only the calculation of individual damages remains to be proven to support plaintiffs' request for damages.

**(c) Plaintiffs' Trespass Claim Presents
Common Questions of Law and Fact**

Plaintiffs bring a claim for trespass against defendants. A trespass claim requires proof of (1) intentionally or negligently (2) causing something to enter another's land. See Rest. 2d of Torts § 158 (intentional trespass); 165 (negligent trespass). To prevail on a claim for negligent trespass, the entry also must cause damage. See Rest. 2d of Torts § 165. Determining whether plaintiffs have satisfied these elements presents the following common questions:

- (a) Did defendants cause TCE, 1,1-DCE and VC to enter private wells in McCullom Lake Village?
- (b) Was defendants' conduct intentional or negligent?
- (c) Has the entry of TCE, 1,1-DCE and VC into private wells in McCullom Lake Village damaged the wells or the land?

These questions will be answered without reference to individual Class members' conduct or circumstances. For example, expert testimony will answer the questions relating to the spread and effect of TCE, 1,1-DCE and VC. Plaintiffs' hydrogeologist and environmental meteorologist will describe the plume of contamination emanating from the plant sites. See Exhibits A and B. Plaintiffs' toxicologist will describe the harm caused by the contamination. See Exhibit C. The testimony of these experts will be based on objective data including the amount of chemicals processed by defendants, the manner of disposal, the hydrogeology of the area, the properties of the chemicals at issue, and scientific literature. The answers to the questions will apply with equal force to all Class members' claims. Accordingly, these are common questions supporting class certification.

**(d) Plaintiffs' Strict Liability Claim
Presents Common Questions of Law and Fact**

The elements of a claim for strict liability are (1) an abnormally dangerous activity that (2) causes harm. See Rest. 2d of Torts § 519; Hennigan v. Atlantic Refining Co., 282 F. Supp. 667, 681-82 (E.D. Pa. 1967). Whether an activity constitutes an abnormally dangerous activity is a common question like all questions that focus on defendants' conduct. See In re Asbestos School Litig., 107 F.R.D. 215, 220 (E.D. Pa. 1985)(recognizing the focus on defendants' conduct regardless of how conduct is characterized in terms of a specific tort). Whether that activity caused harm to property – i.e., exposure – also is a question common to all Class members. See section VI.A.2(a), *supra* (discussing commonality of exposure analysis in context of medical monitoring claim).

**(e) Plaintiffs' Negligence Claim Presents
Common Questions of Law and Fact**

The elements of a negligence claim are duty, breach, causation and damages. See Baretta, 227 F.3d 415, 422, n.9 (3d Cir. 2002). Each of these elements presents common questions.

- (1) Did defendants' owe members of the Class a duty of care with respect to handling hazardous chemicals?
- (2) Did defendants fail to exercise the requisite duty of care?
- (3) Did the Class members suffer property damage?
- (4) Was the property damage, if any, the result of defendants' breach of its duty to Class members?

The focus of the inquiry in plaintiffs' negligence claim once again is the defendants' conduct – evidence of which is common to the entire Class. As discussed above, even with respect to damages, the proof that defendants' conduct caused damages may be determined by

expert testimony without involving individual issues. Calculating the extent of damages does not raise predominating individual issues. See Zeno v. Ford Motor Co., – F.R.D. – , 2006 WL 2794558 at *24 (W.D. Pa. 2006)(“Courts have recognized, particularly with respect to damages, that the necessity to engage in some individual inquiry at the damages stage does not necessarily defeat certifying a class for the purposes of determining liability over issues that are properly considered as part of a class action.”)

Moreover, plaintiffs’ negligence per se claims present the common question of whether defendants’ conduct violated the terms of the statute. See, e.g., Josephat, 2000 WL 1679502 at *4-5 (finding negligence per se for violation of statute to be a common issue).

**(f) Plaintiffs’ CERCLA Claim Presents
Common Questions of Law and Fact**

Liability under CERCLA is determined by an inquiry into defendants’ conduct independent of, and unconnected with, the conduct and conditions of individual Class members. Accordingly, liability under CERCLA has been held to be a common issue. See Yslava, 845 F. Supp. at 712; See also O’Connor, 180 F.R.D. at 371 (CERCLA, negligence and strict liability claims present common questions).

**(g) Plaintiffs’ Fraud and Conspiracy Claims Present
Common Questions of Law and Fact**

The elements of fraud are a knowing misrepresentation reasonably relied on to the plaintiffs’ detriment. See Strategic Staffing Group v. Friedell, 2006 WL 2668546 (E.D. Pa. 2006). The elements of a conspiracy claim are an agreement to do an unlawful thing, or an agreement to do a lawful thing by unlawful means. See Morganroth & Morganroth v. Norris, McLaughlin & Marcus, 331 F.3d 406, 414 (3d. Cir. 2003). As with plaintiffs’ other damages

claims, the focus in these claims is on the defendants' conduct. Like those other claims, proof of whether defendants engaged in fraud and conspiracy raises issues common to all members of the Class. In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528 (3d Cir. 2004).

In sum, each of Plaintiffs' claims presents common issues and, for the foregoing reasons, plaintiffs ask this Court for a finding that there are questions of law and fact common to the Class.

3. The Named Plaintiffs' Claims Are Typical of the Claims of Class Members

Like commonality, the threshold for typicality is low. See Baby Neal ex. rel. Kanter v. Casey, 43 F.3d 48, 58 (3d. Cir. 1994). Numerous courts have held that representative plaintiffs seeking medical monitoring and other claims arising out of exposure to toxic substances have claims typical of the class of persons seeking relief for the exposure. See, e.g., Olden v. LaFarge Corp., 203 F.R.D. 254, 270 (E.D. Mich. 2001); Day v. NLO, Inc., 144 F.R.D. 330, 334 (S.D. Ohio 1992); Leach, 2002 WL 1270121 at *11-12 (applying federal precedent to identical state law class action standards). Here the representative plaintiffs assert the same legal theories for themselves as for the entire Class and do so on the basis of the same common nucleus of facts.

For the foregoing reasons, plaintiffs ask this Court for a finding that the claims of the representative plaintiffs are typical of those of all Class members.

4. Plaintiffs Will Adequately Represent The Class

Rule 23(a) also requires that the representative class members "fairly and adequately protect the interests of the class." See Fed. R. Civ. P. 23(a)(4). "The Third Circuit has held that 'adequate representation depends on two factors: (i) the plaintiff's attorney must be qualified,

experienced, and generally able to conduct the proposed litigation; and (ii) the plaintiff must not have interests antagonistic to those of the class.” Hoxworth v. Blinder Robison & Co., 980 F.2d 912, 923-24 (3d Cir. 1992). This requirement ensures “that the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit.” Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977).

In this case, neither Mr. and Mrs. Gates nor their attorneys have any interests antagonistic to those of the Class. The Gates have no antagonistic or conflicting interests with members of the Class, and no indication of any conflict of interest is in the record. Counsel are aware of no personal or employment relationships between any of the plaintiffs and any of the defendants. To the contrary, plaintiff and each member of the proposed Class have strong, common interests in establishing defendants' liability. Accordingly, plaintiffs' claims are sufficiently aligned with the interests of the absent members of the Class to ensure that the universal claims of the Class will be prosecuted with diligence and care by plaintiffs as representative of the Class. The representative plaintiffs are willing and prepared to serve the Court and the proposed Class in a representative capacity with all of the obligations and duties material thereto.

Courts do not require the representative plaintiffs to be the best of all possible plaintiffs or to be especially knowledgeable, or to possess a detailed understanding of the legal or factual basis on which a class action can be maintained. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 366 (1966). Absent any conflict between the interests of the Class representatives and other Class members, and absent any indication that the representatives will not aggressively conduct the litigation, fair and adequate protection of the Class may be assumed. Guarantee Ins. Agency Co. v. Mid-Cont'l Realty Corp., 57 F.R.D. 555, 565 (N.D. Ill. 1972). There has been no showing that

these plaintiffs have any interests different from those of the entire Class, or that the claims will not be actively pursued.

In recognition of the fact that Class representatives will not always grasp the intricacies of a complex action, the adequacy prong is properly focused on the capabilities of plaintiffs' counsel to vigorously prosecute the Class claims. In the Third Circuit, the competency of class counsel is presumed and the burdens of proving inadequacy of counsel is on defendants. Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir. 1982).

In this action, plaintiffs are represented by counsel with extensive experience. The efforts of counsel for plaintiffs thus far in this case show that counsel is committed to the vigorous prosecution of this action and possesses the skills necessary for such efforts.

B. Plaintiffs Have Satisfied The Prerequisites To Class Certification Under Subsection 23(b)

1. The Class Has the Requisite Coherence to Satisfy the Requirements Of Subpart 23(b)(2)

Subpart 23(b)(2) of Rule 23 provides that a class action may be maintained where the party opposing the class has acted or refused to act on grounds generally applicable to the class. In this case, the remedies for defendants' violation of public and private nuisance laws include plaintiffs' request for injunctive relief in the form of additional monitoring and remedial measures, and the provision of an alternate water supply (one that is not threatened by the continuing contamination emanating from defendants' property). "The claims seeking equitable, declaratory, or injunctive relief to force a defendant to abate or cease emissions of chemicals being released from a defendants' operations are the types of claims that are squarely within the boundaries of Rule 23(b)(2)." Leach, 2002 WL 1270121 at *14.

In determining whether to certify a class under subpart 23(b)(3), courts consider whether individual issues will affect the “coherence” of the class action. See Barnes v. American Tobacco Co., 161 F.3d 127, 143 (3d. Cir 1998). In this case, the remedy of injunctive relief adds no individual issues to the mix that would affect the coherence of the class action. McCullom Lake Village is a small, geographically well defined area, the residents of which have all been exposed to some degree of chemical contaminants such that individual issues of usage, susceptibility to disease, and other individual issues have no bearing on the Court’s approval of a single, common remedial plan for all class members. For example, a Court order directing defendants to provide municipal water to replace private wells will involve only a consideration of the expert testimony regarding the extent of the contamination and the likelihood of continuing or future contamination. Individual past exposures are irrelevant – injunctive relief addresses ongoing and future harm.⁵

Individual past exposures are relevant to medical monitoring, but variation in individual exposures does not affect the coherence of the class where, as here, the Court is able to determine through common evidence a baseline exposure across the entire Class population that triggers the need for medical monitoring independent of any other individual circumstances. This is a simple case – a numerous, but relatively small class, one site of contamination, one set of closely related chemical compounds, one topographical and hydrogeological area, one latent disease at issue,

⁵ On the question of whether such relief is feasible, plaintiffs note that the court in Leach, 2002 WL 1270121 at *9, discussed a consent order in which the defendant in that case, DuPont, agreed to provide alternate water to a class of all users of any private drinking water well or public water system anywhere in Ohio or West Virginia where C-8, the chemical at issue, was found at a certain level. In this case, plaintiffs simply ask for an order directing the defendants to supply a connection to an existing clean water supply for a single village that is only six or seven blocks long and several blocks wide.

and clear epidemiological evidence of risk independent of class members' medical histories. This case is far more coherent and far less complicated than other medical monitoring cases in which class certification was granted. Cf. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988); Day v. NLO, Inc., 144 F.R.D. 330 (S.D. Ohio 1992); Yslava v. Hughes Aircraft, 845 F. Supp. 705 (D. Ariz. 1993).

2. Common Issues Predominate Over Individual Issues and the Class Action Is a Superior Method of Adjudication, Satisfying the Requirements of Subpart 23(b)(3)

Class certification is appropriate under subsection (b)(3) of Rule 23 when, as here, the following conditions exist: questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. See Fed.R.Civ.Pro. 23(b)(3).

(a) Common questions predominate over individual issues

Any individual issues involved in calculating individual property damage claims will not predominate over the numerous common issues identified and discussed above. While the amount of damage caused by entry of hazardous materials may differ from well to well depending on the amount of exposure, the question of whether exposure constitutes damage (or the question of the level at which exposure constitutes damage) is a common question. There will be one answer, and it will be applied with equal force to the claims of all Class members, who will then use that answer to calculate their individual damages, if any. See Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910 (7th Cir. 2003)(finding that individual questions as to

whether TCE contamination reached class members' properties and harm was suffered did not predominate over classwide issues such as whether defendant leaked TCE in the first place).

This is not a personal injury or mass tort case. With respect to the damages class certification, the questions relating to personal health issues and personal conduct – the length of time residing in the Village, water usage, susceptibility to disease, etc. – simply are not relevant to plaintiffs' property damage claims. Indeed, courts often draw the distinction between personal injury claims and property damage claims in certifying property damage claims. See Josephat, 2000 WL 1679502 at *11, (citing School Asbestos, 789 F.2d. at 1009).

(b) A class action is superior to other methods of adjudicating the Class members' claims

One of the central purposes of a class action is to provide relief to a group of individuals who have been harmed but who lack the resources to seek individual recovery by allowing them to aggregate individual claims and make it financially feasible for them to obtain representation and prosecute the case. See O'Connor, 194 F.R.D. at 318. At this time, the only individuals who have the motivation to bring suit on their own behalf alone are those unfortunate few who already have contracted brain cancers and are suing for significant personal injury damages. The Class, however, expressly excludes them and others with personal injuries caused by defendants. While having a legitimate concern about the effects of their past exposure and the potential continuing and future exposure, those who are left in the Class cannot afford to litigate on their own behalf only. Denial of class certification will effectively keep the Class members out of Court. A *de facto* financial bar to litigation is not an alternative to a class action, let alone a superior alternative.

Accordingly, Plaintiffs ask the Court to find that the requirements of subpart 23(b)(3) have been met.

V. Conclusion

For all of the reasons set forth above, plaintiffs respectfully request that the Court certify this Class.

Respectfully submitted,

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