UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Elnora Carthan, *et al.*, Plaintiffs, -v- Rick Snyder, *et al.*, Defendants.	Case No.: 5:16-cv-10444-JEL-MKM Hon. Judith E. Levy Magistrate Judge Mona K. Majzoub

REPLY IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Class certification is the only available means of obtaining justice—*now or ever*—for tens of thousands of residents and businesses harmed by the Flint Water Crisis. While some of relief has been obtained from the Government Defendants in the form of the proposed Settlement,[1] Veolia and LAN (collectively, the "Engineering Defendants"[2]) have yet to answer for their role in causing contaminated water to injure Flint residents. The proposed class action seeks to do just that.

As described in Class Plaintiffs'[3] opening brief[4] and other filings, Veolia and LAN's conduct fell far short of what was required of a professional engineer and they should be required remedy the damage their conduct has caused. Notably, nothing about Plaintiffs' allegations of professional negligence is unique to any single class member. Rather, these claims stem from a single event, the Flint Water

[1] Notice Regarding Pls.' Mot. for Settlement Approval, Ex. A, Amended Settlement Agreement, Jan. 15, 2021, ECF No. 1394-2.

[2] Veolia North America, LLC, Veolia North America, Inc., and Veolia North America Operating Services, LLC (collectively, "Veolia") and Lockwood, Andrews & Newnam, Inc., Lockwood, Andrews & Newnam, P.C., and Leo A. Daly Company (collectively, "LAN").

[3] "Class Plaintiffs" and "Plaintiffs" are used interchangeably herein.

[4] Mem. in Supp. of Class Pls.' Mot. for Class Certification ("Class Cert. Br."), July 16, 2020, ECF No. 1207.

Crisis, and involve factual and legal questions that can, almost exclusively, be decided using evidence that is common to the Class.

In deciding whether to certify a case like this, the fundamental questions are whether the proposed class seeks to remedy a common legal grievance, and whether class treatment of these issues would be fair and efficient. These questions are answered in the affirmative when, as here:

- **Section I:** Core liability questions—including those related to the factual underpinnings of the case, duty, breach, and several key elements of causation—depend exclusively on legal and factual determinations that are common to the class. Therefore, these threshold liability issues should be certified for the entire Class under Federal Rule of Civil Procedure 23(c)(4).

- **Section II:** For the Residential Property, Business, and Minors Subclasses, common questions—including the threshold liability issues described in Section I as well as additional elements of causation, injury, and damages—predominate over individual issues, supporting certification of damages subclasses under Federal Rule of Civil Procedure 23(b)(3).

- **Section III:** With respect to the Residential Property, Business, and Minors Subclasses, a class action is the superior means of adjudicating claims against the Engineering Defendants. With respect to the broader Class, certification of threshold liability is the superior means of adjudicating claims against the Engineering Defendants. As such, the superiority requirements of Rule 23(b)(3) and 23(c)(4) are satisfied.

- **Section IV:** Given the prevalence of common issues in this case, as shown in Sections I and II, the question of commonality is resolved in favor of certification. Similarly, following more than five years of hard-fought litigation, the adequacy of representation—from the proposed Class and Subclass representatives and Interim Co-Lead Class Counsel ("Class Counsel")—has been demonstrated. Each of the named Plaintiffs has claims typical of the Class or Subclass they seek to

represent. For these and other reasons discussed more fully below, the Rule 23(a) factors have been satisfied.

- **Section V:** The procedures proposed to protect minors' rights are more than sufficient. Though some individuals—including minors—have chosen to file their own suits, many have not. Establishing causation and damages stemming from contaminated water years, even decades, after the fact could be incredibly challenging and the costs of litigation would be substantial, making it difficult for many to obtain counsel. While the statute of limitations remains tolled for minors until they reach the age of majority, the practical realities mean that for those minors who have not filed claims, proceeding as part of the proposed Minors Subclass is the only viable means of obtaining justice. It would benefit no one to impose rigid procedural "protections" for children that, in effect, render their likelihood of future recovery small, if not altogether non-existent.

The Flint Water Crisis was a catastrophe that harmed people throughout the City of Flint. Plaintiffs have class-wide claims for property and business damages that are based on a common course of conduct and class-wide methodologies. These are textbook examples of claims that can and routinely are certified and pursued through trial as class actions. Likewise, certifying the Minors Subclass and proceeding with Plaintiffs' proposed Trial Plan is the most fair and efficient way to adjudicate minors' claims.

The proposed Class and Subclasses could expedite justice to *thousands*—not just the handful lucky enough to be selected for a bellwether trial—preserving judicial resources and moving the case towards resolution. As such, class certification is the, "more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct." *Sterling v. Velsicol*

Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988); *see also id.* at 1197 n.10 (collecting cases). Accordingly, Class Plaintiffs' motion to certify a General Issue Class and Residential Property, Business, and Minors Subclasses should be granted.[5]

ARGUMENT

I. Threshold Liability Issues Should Be Resolved on a Class-Wide Basis.

The crux of the Parties' disagreement regarding the appropriateness of class certification turns on the extent to which central elements of the case against the Engineering Defendants can be determined in a manner that is common to the Class. Many of the core liability issues are *entirely* common to the Class. The Court, therefore, can certify any of these issues for class-wide determination under Rule 23(c)(4). This section addresses the propriety of certifying these core issues for class-wide determination. Plaintiffs then turn to whether, on balance, common questions—including these core liability issues—predominate over individual issues.

Class Plaintiffs allege that the professional negligence of Veolia and LAN caused the dissemination of highly corrosive and contaminated water to Flint residents and that exposure to this contaminated water injured Flint residents in a

[5] In light of the partial Settlement with the State of Michigan, the City of Flint, and individual State and City Defendants, Class Plaintiffs do not address certification against those parties here; Class Plaintiffs reserve the right to address the appropriateness of certification as to the Settling Defendants.

variety of ways including damage to their property, personal injuries, and reduced business income.

Under Michigan law, a claim for negligence requires showing that: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v. Ann Arbor Ceiling & Partition Co. L.L.C.*, 809 N.W.2d 553, 556 (Mich. 2011). Additionally, "[a]s against professional engineers," a claim for negligence "requires proof of simple negligence based on a breach of a professional standard of care." *Guertin v. Michigan*, No. 16-cv-12412, 2017 WL 2991768, at *2 (E.D. Mich. July 14, 2017) (citation omitted).

Proving each of these elements will largely require evidence common to all Plaintiffs. As explained more fully in Sections II and V.C of this brief, some Class members' injuries—those of the Residential Property Subclass, Minors Subclass, and Business Subclass—can be proven using common evidence rendering those Subclass members' claims appropriate for class-wide resolution under Rule of 23(b)(3) and, in the case of the Minor Subclass, Rule 23(b)(2).

To the extent members of the broader Class do not fall within one of the Subclasses for which Class Plaintiffs seek certification under Rule 23(b)(3), or to the extent the Court certifies some Subclasses but not others, Class Plaintiffs seek to certify certain foundational issues related to the Engineering Defendants' liability.

Issue certification is appropriate "where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution." *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018).[6] "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation and internal quotation marks omitted). As demonstrated below, issue certification is appropriate with respect to several, core liability issues.[7]

A. Threshold Liability Issues Present Exclusively Common Questions Satisfying Rule 23(c)(4)'s Predominance Requirement.

Analyzing predominance *within* each of the above issues is an easy task: none require *any* individualized inquiries. *See* Class Cert. Br., Section IV.B.,

[6] Veolia acknowledges that *Behr* represents binding authority in the Sixth Circuit regarding issue class certification but claims the Sixth Circuit's approach is "mistaken." Opp'n of Veolia Defs. to Pls.' Mot. for Class Certification ("Veolia Br.") at 137, Jan. 7, 2021, ECF No. 1369, PageID.45482. Plaintiffs disagree but see no need to expound on that disagreement given Veolia's acknowledgement that *Behr* is binding precedent.

[7] Certification under Rule 23(c)(4) also requires that all the factors identified in Rule 23(a) be satisfied. As described in Plaintiffs' opening brief, Section IV.A., Class Cert. Br., PageID.34472-34483, and in Section IV *infra*, these factors are satisfied.

PageID.34483-34516 (explaining that liability issues will be resolved using exclusively common evidence). Nor has any party raised a colorable argument to the contrary.[8]

Courts routinely use issue certification to resolve threshold liability issues in a fair an efficient manner in cases in which aspects of causation and damages require individual inquiry. *See, e.g.*, *Behr*, 896 F.3d at 414-15.[9] Here, key liability issues

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[8] Liaison counsel suggests that the issue of duty presents an individualized issue. *See* Co-Liaison Counsel's Opp'n to interim Co-Lead Counsel for the Putative Class's Mot. for Class Certification ("Liaison Br.") at 108, Jan. 13, 2021, ECF No. 1392, PageID.54103. Not only have multiple courts deemed duty to be a common question in cases such as this, the notion that *some* common questions exist among the cases coordinated within the Flint Water Litigation is the reason to proceed with a class action *or bellwether trials*. Were the cases entirely unique, there would be no efficiencies gained by proceeding in some type of coordinated manner. Liaison Counsel's argument really goes to the question of causation, not duty. As discussed herein, substantial elements of causation can and should be established on a class-wide basis.

[9] *See also, e.g.*, *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 222 (2d Cir. 2006) (directing the district court to certify a class as to the issue of liability); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (affirming certification of liability issues in a contamination case); *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 334 F.R.D. 96, 117 (E.D. Mich. 2019) (certifying issue class to determine threshold liability issues in defect case); *Parker v. Asbestos Processing, LLC*, No. 11-CV-01800, 2015 WL 127930, at *4 (D.S.C. Jan. 8, 2015) (certifying threshold liability issues for class-wide determination); 5 Moore's Federal Practice § 23.23 (3d ed. 2014) (explaining that, "under Rule 23(c)(4), a court may fashion a class action limited to trying a particular defense that is common to a large number of putative class members; resolving certain common preliminary issues; or determining liability, with proof of damages left to each class member in a later proceeding"); Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 106 (1966) ("For example, in a fraud or similar case the action may retain its "class"

regarding the Engineering Defendants' duty, breach, and role in causing or prolonging the Flint Water Crisis are indisputably common.

As this Court recognized in preliminarily approving certain Settlement Subclasses, "[t]he factual underpinnings that must be resolved in order to determine liability and damages to the governmental defendants are common to the class. There would not and could not be different factual findings in separate cases." Op. & Order Granting Pls.' Mot. to Establish Settlement Claims Procedures & Allocation & for Prelim. Approval of Class Settlement Components ("Prelim. Approval Op.") at 40-41, Jan. 21, 2021, ECF No. 1399, PageID.54437-54438. Those same underpinnings—requiring the resolution of issues such as, "(1) the decision to switch the source of Flint's water; and (2) a failure to address the consequent contamination of the water, which in turn lead to exposure and damage," *id.* at 40—apply with equal force to the common questions relating to the Engineering Defendants.

Moreover, as the following chart demonstrates, the issues identified for class-wide resolution, closely mirror those deemed "common" by courts and appropriately certified under 23(c)(4).

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character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims").

Common Liability Question:	**Factual Underpinnings & Causation:** The role of LAN and Veolia in creating the contamination of Flint's water supply including their involvement in the decisions to switch to the Flint River as a water source, refrain from using corrosion control at the Flint Water Treatment Plant ("FWTP"), and conceal information related to the safety of Flint's water supply.
Supporting Authority:	*Behr*, 896 F.3d at 410 (affirming issue certification regarding, "[e]ach Defendant's role in creating the contamination within their respective Plumes, including their historical operations, disposal practices, and chemical usage"); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (affirming certification of "the core questions, i.e., whether or not and to what extent [Defendants] caused contamination of the area in question"); *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 334 F.R.D. 96, 117 (E.D. Mich. 2019) (certifying issue related to threshold case issue regarding the existence of "a design defect that renders the class vehicles unsuitable for the ordinary use"); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 184 (4th Cir. 1993) (affirming certification of several issues related to the factual precedents relevant to plaintiffs' suit for damages caused by asbestos manufacturers); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 469 (D. Wyo. 1995) (certifying an issue class including questions regarding contaminants involved extent of contamination).
Common Liability Question:	**Duty:** Did LAN and/or Veolia owe a duty to Plaintiffs as a result of their contracts with the City and, if so, what was the scope of that duty? What is the applicable standard of care in a professional engineering case?
Supporting Authority:	*Behr*, 896 F.3d at 410 (affirming certification of threshold issue related to the appropriate duty of care that asked if defendants "engaged in abnormally dangerous activities for which they are strictly liable");

	Parker v. Asbestos Processing, LLC, No. 0:11-CV-01800-JFA, 2015 WL 127930, at *4 (D.S.C. Jan. 8, 2015) (holding resolution of duty question was entirely common to the proposed class and certifying issue class as to "[w]hether the Plaintiffs' had an attorney-client relationship with any of the attorneys").
Common Liability Question:	**Breach:** Whether LAN and/or Veolia breached their duty of care by failing to provide appropriate advice to the City of Flint regarding treating the water?
Supporting Authority:	*Behr*, 896 F.3d at 410 (affirming issue asking, "[w]hether Defendants negligently failed to investigate and remediate the contamination at and flowing from their respective facilities"); *Parker v. Asbestos Processing, LLC*, 2015 WL 127930, at *4 (holding questions regarding breach were entirely common to the proposed class and certifying issue class as to "whether the attorneys committed malpractice or breached any fiduciary duty"); *In re Copley Pharm., Inc.*, 161 F.R.D. at 469 (certifying an issue class including question of, "[w]as the defendant negligent in allowing the contaminants into its product"); *Wesleyan Coll.*, 6 F.3d at 184 (affirming issue certification of several issues including, "whether defendants breached a duty of due care in selling friable asbestos products for use in colleges").
Common Liability Question:	**Common But For Causation:** Did LAN and/or Veolia conduct cause corrosive water conditions in the Flint water distribution system? To what extent were other actors at fault for causing corrosive water conditions in the Flint water distribution system and how should fault be allocated among all those responsible?
Supporting Authority:	*Sterling*, 855 F.2d at 1200 (affirming certification of general causation questions regarding whether the defendant was responsible for the contamination and whether the contaminants were capable of producing injuries of the type asserted by plaintiffs);

	Wesleyan Coll., 6 F.3d at 184 (affirming issue certification of question regarding the general health hazards caused by asbestos); *In re Copley Pharm., Inc.*, 161 F.R.D. at 469 (certifying several issues related to the nature and extent of contamination to asthma inhalers as well as questions regarding whether the contaminants were capable of causing damage to the human body).
Common Liability Question:	**Common But For Causation**: Did the corrosive water conditions caused by LAN and/or Veolia harm to Flint residents, property, and businesses?
Supporting Authority:	*Behr*, 896 F.3d at 410 (affirming certification of issue regarding, "[w]hether [Defendants'] contamination, and all three Defendants' inaction, caused class members to incur the potential for vapor intrusion").
Common Liability Question:	**Common Proximate Causation:** Was it foreseeable that LAN's and/or Veolia's conduct would cause corrosive water conditions in the Flint water system? What, if any, precautions should LAN and Veolia have taken to prevent the resulting harm to human health and property?
Supporting Authority:	*Behr*, 896 F.3d at 410 (affirming certification of issue regarding, "whether or not it was foreseeable to [defendants] that their improper handling and disposal of [the contaminants] could cause the Behr-DTP and Aramark Plumes, respectively, and subsequent injuries"); *Wesleyan Coll.*, 6 F.3d at 184 (affirming issue certification of question regarding "whether defendants' asbestos products can release asbestos fiber in the course of foreseeable use, including maintenance, renovation, and demolition").

None of these issues are unique to individual Class members. Nor will the evidence required to determine these issues overlap in any meaningful way with that required to adjudicate individual damages. Rather, the evidence required to prove

these issues will be the same for all Class members and will advance all of their claims regardless of damages.

The Engineering Defendants assert that resolution of even these core liability issues is inappropriate. Notably, however, the Sixth Circuit has expressly rejected the reasoning espoused in many of the cases upon which the Engineering Defendants base their opposition. For example, Veolia cites *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 751 (5th Cir. 1996) and *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479 (8th Cir. 2016)[10] as support for its position that the efficiency gains from issue certification would be minimal. Veolia Br. at 139, PageID.45484.[11] However, both

[10] *Ebert* did not expressly opine on the appropriate analysis to be conducted under Rule 23(c)(4)—rather, the opinion was limited to holding that the case in question did not satisfy the predominance requirement under Rule 23(b)(3). 823 F.3d at 479. In doing so the Eighth Circuit held the district court had erred by evaluating predominance for certain issues rather than for the entire case—essentially the same analysis adopted by *Castano*. *Id.*

[11] Veolia also cites *In re National Prescription Opiate Litigation*, 976 F.3d 664, 672-77 (6th Cir. 2020)—a case from the Sixth Circuit reversing the district court's certification of an issue class for purposes of settlement negotiation, explaining that "[t]he negotiation class was expressly certified for the purposes of fostering global settlement, rather than litigating common issues," but "Rule 23 permits litigation classes primarily for the purposes of aggregating and adjudicating common claims for trial . . . ." *Id.* at 674. The proposed issue class does not suffer from this impairment. The express purpose of certification would be to streamline resolution of as many class-wide issues as possible to expedite the administration of justice. Additionally, the negotiation class in *Prescription Opiate Litigation* ostensibly sought to resolve federal claims but was authorized to negotiate settlements premised on a "common factual predicate" which could include disparate state law claims. *Id.* at 675. The Sixth Circuit held that district court's

the Fifth and Eighth Circuits embrace the minority view that common issues must predominate over individual issues for the *entire claim* to certify an issue class under Rule 23(c)(4)—a position the Sixth Circuit has expressly rejected, requiring instead that common issues predominate *within* the issue proposed for class-wide resolution. *Behr*, 896 F.3d at 414-15.

For its part, LAN cites *Millman v. United Technologies Corp.*, No. 1:16-cv-312-HAB, 2019 WL 6112559, at *6 (N.D. Ind. Nov. 18, 2019) for a similar principle, but fails to note that the *Millman* decision analyzed the appropriateness of issue certification under a Third Circuit case, *Gates v. Rohm & Haas Co.*, 655 F.3d

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failure to analyze whether common issues could be resolved in light of potential differences in the federal and state claims—as well as the lack of clarity regarding the scope of the negotiation class's authority—rendered certification under Rule 23(c)(4) inappropriate. This case presents none of these concerns: Plaintiffs seek resolution of *one* claim under *one* state law.

Their citation to the recently decided case, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2021 WL 320754 (N.D. Ohio Feb. 1, 2021), is similarly misplaced. Unlike this case, the court denied issue certification there, because, in part, "[p]laintiffs did even not try" to establish the appropriateness of issue certification. *Id.* at *11. It seems that plaintiffs in that case raised the possibility of issue certification as an afterthought on reply. Because plaintiffs had not fully raised the possibility of issue certification, the court did not undertake an extensive analysis. But it should also be noted that plaintiffs in that case were proceeding under the laws of several states, making it vulnerable to the same problems discussed by the Court of appeals. None of these potential hurdles to certification exist in this case.

255, 273 (3d Cir. 2011).[12] As it turns out, Third Circuit also takes a divergent approach to issue certification, requiring several findings in order to obtain certification under Rule 23(c)(4).[13] Applying the binding authority of this Circuit, common issues predominate *within* each of the liability elements identified above as required for issue certification under Rule 23(c)(4).

B. Class-Wide Resolution of Liability Issues Is the Superior Way to Move this Case Forward.

The superiority analysis with respect to Rule 23(c)(4) is identical to that required under Rule 23(b)(3). *Behr*, 896 F.3d at 415-16. To determine superiority, courts compare the difficulties managing the class action with the availability of other means of resolution by taking into account judicial resources, prejudice to the rights of those not before the court, and the relative value of individual damages

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[12] Similarly, LAN's citation to *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 651 (M.D. Fla. 2001) should be given no weight because in analyzing whether to certify an issue class, the district court expressly applied the Fifth Circuit's framework as articulated in *Castano*, 84 F.3d 734. As noted previously, the Sixth Circuit has expressly rejected this approach. *See Behr*, 896 F.3d at 412-13 (rejecting *Castano* and adopting the "broad view" that issue certification is appropriate when common issues predominate "within" a particular issue and class treatment of those issues is the superior method of resolution).

[13] Specifically, the Third Circuit has a non-exhaustive list of nine factors courts should consider in deciding whether to grant issue certification. *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011). With regard to the correct interpretation and application of Rule 23(c)(4), extensive citation to cases from other districts and circuits provides little insight into how this Court should rule because the law differs among the Circuits.

awards. *Id.* Plaintiffs analyze the superiority of class certification more broadly in Section IV.C. of our opening brief and Section III, *infra*—that analysis applies with equal force to the superiority of issue certification. Those sections and the analysis below demonstrate that the resolution of key liability issues conserves substantial resources by moving tens-of-thousands substantially closer to justice while reserving judicial resources is superior to alternative forms of adjudication.

Here, as in *Behr*, "[r]esolving the[se liability] issues in one fell swoop would conserve the resources of both the court and the parties." *Id.* at 416. The Engineering Defendants and Liaison Counsel emphasize that resolution of the common liability issues identified by Plaintiffs will not obviate the need to address individual issues in subsequent proceedings. But even if "[c]lass treatment of the [] certified issues will not resolve Defendants' liability entirely, . . . it will materially advance the litigation." *Id.* This is especially so when, as here, "[a]ll the class members are residents of the same state and are proceeding under the same federal and state laws." *Mejdrech*, 319 F.3d at 912.

Many of the Engineering Defendants' arguments in opposition to class certification are, at their heart, arguments on the merits—suggestions that other actors are more at fault or the contaminants at issue could not have caused the damages alleged. But, as the court in *In re FCA US LLC Monostable Electronic*

Gearshift Litigation explained, these arguments further demonstrate the appropriateness of issue certification:

> the prospect that the answer to a common question may favor the defendant rather than plaintiffs certainly does not mean that class litigation will of the issue is barred . . . [i]n fact, it weights in favor of addressing the issue expeditiously in a single proceeding to avoid the needless expense of adjudicating the same question in thousands of individual cases that might be doomed to founder on the same common shoal.

334 F.R.D. at 111.

Regardless of whether these common liability issues are resolved in favor of Plaintiffs or the Engineering Defendants, class-wide resolution is superior to alternative forms of adjudication for the additional reason that it reduces the risk of inconsistent rulings. *See Mejdrech*, 319 F.3d at 912 (holding issue certification to be the superior form of adjudication because, in part, "[w]hen enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue." (citation omitted)).

Much of the Engineering Defendants' opposition to issue certification stems from their mistaken belief that the same evidence will need to be presented repeatedly to multiple juries. This concern is premised on a fundamental misunderstanding of Class Plaintiffs' liability theory. Class Plaintiffs' causation theory involves two steps in establishing causation:

- **Step One: Common Causation.** This includes elements of but for and proximate causation. For example, but for Defendants' conduct, Flint Residents would not have received contaminated water; it therefore was reasonably foreseeable that Defendants' conduct would cause harm; and

- **Step Two: Specific Causation.** Whether Class members were, in fact, exposed to contaminated water from the FWTP resulting in injuries and whether those injuries were due in part or in whole to the exposure.

The questions in Step One can be determined using evidence common to all Class members and the elements in Step Two can further be established using evidence common to members of the proposed Subclasses. All of the arguments in opposition to issue certification wrongly subsume Step One into Step Two. For example, Veolia argues that, following a class-wide determination on negligence, in the subsequent "individual trial, to prove causation and for allocation of fault, Plaintiffs likely would present essentially the same evidence to argue that VNA's failure to give more forceful advice in fact resulted in increased damage to the Flint water system." Veolia Br. at 139, PageID.45484.[14] This is not the case.

[14] Veolia erroneously suggests that *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) stands for the principal that mass tort cases *necessarily* present situations in which the "causal mechanism" of plaintiffs' injuries present individualized issues. Veolia Br. at 138, PageID.45483. That is not a fair reading of *Steering* which recognized that, "it is theoretically possible to satisfy the predominance and superiority requirements of Rule 23(b)(3) in a mass tort or mass accident class action, a proposition this court has already accepted," it was just not the case under the facts of that particular case. *Steering*, 461 F.3d at 603 (citing *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022-23 (5th Cir.1992) (affirming class certification of claims arising from refinery explosion)).

Just as the question regarding whether Veolia breached its duty of case can be determined on a class-wide basis, so too can questions regarding whether Veolia caused contaminated water to be disseminated to Flint residents. In that same proceeding, assuming the jury finds that Veolia did cause contaminated water to be disseminated to Flint residents, jurors could also allocate fault among Veolia and any other entities deemed responsible by the jury. Damages could be determined for any of the Subclasses certified by the Court and then, in subsequent proceedings, individuals could seek damages for any injuries not subject to class-wide resolution. If the Engineering Defendants argue that the alleged injuries resulted from something other than the contaminated water, then this second stage would allow for that. And if the jury determines that an individual or subclass suffered injuries as a result of the contaminated water, then it also would determine what damages are owed as a result.

In *Sterling v. Velsicol Chemical Corp.*, the Sixth Circuit endorsed a two-part framework for adjudicating causation that closely tracks Plaintiffs' proposal. 855 F.2d at 1200. The Court explained that it was "appropriate in this type of mass tort litigation," to "divide[] its causation analysis into two parts. It was first established that [the Defendant] was responsible for the contamination and that the particular contaminants were *capable* of producing injuries of the types allegedly suffered by the plaintiffs" before then turning to the question of specific causation and damages.

Id.; *see also In re Copley Pharm., Inc.*, 161 F.R.D. at 468-69 (certifying issue case in product contamination case and distinguishing between those aspects of causation that could be determined using common evidence from those that would be decided in subsequent proceedings).

The Oppositions make numerous references to the complexity of this case. Those same Oppositions vehemently go on to oppose any sort of class device as a means of adjudicating a complex case such as this, but do not propose any real alternative. As the Court noted in its preliminary approval decision, "after four years of very expensive class discovery, [] individualized litigation [would not] be economically preferable for those plaintiffs who have not already elected to file as individuals." Prelim. Approval Op. at 50, PageID.54447; *see also Behr*, 896 F.3d at 415-17. Were Class members able or interested in filing their own case, they would have done so by now. Prelim. Approval Op. at 50, PageID.54447. Tens of thousands have not which highlights the need for class treatment of common questions. Determining threshold liability issues would not only reserve judicial resources, it would reduce the costs and burdens of individual litigation and preserve the timeliness of those residents' claims. For these reasons as well as the reasons stated in Section III, resolution of these threshold liability issues on a class-wide basis is the superior (likely only) method of adjudication.

C. Sound Case Management Procedures Obviate Any Seventh Amendment Concerns.

Certifying a class in this case as to specific issues does not violate the Seventh Amendment. Indeed, the issues Plaintiffs propose for class-wide determination are nearly identical to those certified for class-wide determination in *Behr*, including: (1) each Defendants' role in causing or prolonging the contamination; (2) whether it was foreseeable that Defendants' conduct would cause injuries; (3) whether Defendants' conduct did, in fact, cause contamination; and (4) whether Defendants' conduct violated the appropriate duty of care.

In affirming the District Court's grant of class certification under Rule 23(c)(4), the Sixth Circuit specifically rejected the notion that hypothetical concerns regarding the Seventh Amendment rendered issue certification improper. *Behr*, 896 F.3d at 416-17. The Engineering Defendants argue that the *possibility* of Seventh Amendment concerns requires that the Court reject out of hand Plaintiffs' request that the Court certify a class as to certain issues. Not so.

The Court may grant certification of a class under Rule 23(c)(4) and wait to establish procedures for deciding any remaining individualized issues after class-wide issues have been decided. Indeed, this is exactly the approach that the Sixth Circuit expressly approved in *Behr*. *Id.* at 417 (rejecting arguments that Seventh Amendment arguments where the district court had "not settled on a specific procedure"); *see also Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 30 (E.D.N.Y.

2001) ("By bifurcating issues like general liability or general causation and damages, a court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members."). Not only is a phased approach of this nature permissible, it may be advisable when—as is often the case where certain issues are certified for class-wide determination—decisions at either the summary judgment stage or jury determinations regarding certain threshold issues could materially change what, if any, individualized issues need be decided.

As discussed in the preceding section, adjudicating those issues common to the Class does not require subsequent juries to re-evaluate elements or evidence already decided. Accordingly, the issues identified for class-wide resolution are cleanly severed from those relevant to a particular Subclass or individual. Special verdict forms, jury instructions, and other mechanisms can and will ensure the case is adjudicated in accordance with the Seventh Amendment.

LAN argues, without citation, that "[c]omparative fault could not be separated from breach of duty or causation because in assessing comparative fault the jury would necessarily be examining relative degrees of both culpability and causation. Nor could causation be separated from fact of injury." LAN Defs.' Opp'n to Class Pls.' Mot. for Class Certification ("LAN Br.") at 53, Jan. 8, 2021, ECF No. 1390, PageID.53957. But courts have successfully bifurcated exactly that, in affirming certification of certain issues for class-wide resolution, the Fifth Circuit expressly

rejected the notion that issues of comparative fault necessarily raised Seventh Amendment concerns explaining that, "in considering comparative negligence, the phase-two jury would not be reconsidering the first jury's findings of whether [defendant's] conduct was negligent . . . , but only the degree to which those conditions were the sole or contributing cause of the class member's injury." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 629 (5th Cir. 1999). What's more, even if the second jury were to examine some of the same evidence as the first, this alone would not raise Seventh Amendment concerns as the Seventh Amendment, "is not against having two juries review the same evidence, but rather having two juries decide the same essential issues." *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir. 1997) (citation omitted).

The Engineering Defendants' hypothetical Seventh Amendment concerns need not "pose a significant obstacle to the use of issue classes, even in the mass tort context, so long as courts are careful to certify only those issues for class treatment that are sufficiently separable from individual issues." 2 William B. Rubinstein, *Newberg on Class Actions* § 4:92 (5th ed. 2020). Newberg on Class Actions counsels that, "[t]his may be readily accomplished through the myriad case management tools at trial courts' disposal." *Id.*; *see also* Manual for Complex Litigation, Fourth, § 22.755 (listing some management tools that can be used for this purpose).

II. Common Issues Predominate Which Warrant Certification of the Subclasses under Rule 23(b)(3).

The prior section addressed the extent to which common questions predominate *within* various issues. To determine predominance under Rule 23(b)(3), courts assesses the extent to which common questions exist with respect to the *entire claim* such that the claim for damages may be resolved on a class-wide basis.

The predominance standard "is essentially a pragmatic one: '[w]hen common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis.'" *Widdis v. Marathon Petroleum Co., LP*, No. 13-CV-12925, 2014 WL 11444248, at *7 (E.D. Mich. Nov. 18, 2014) (alteration in original) (quoting 7AA C. Wright A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2005)).

Predominance does not require that every question of fact or law be common to the class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013) ("Rule 23(b)(3) does not mandate that a plaintiff seeking class certification prove that each element of the claim is susceptible to classwide proof." (citation omitted)); *see also* 2 William B. Rubenstein, *Newberg on Class Actions* § 4:51 (5th ed. 2020) ("[C]ommon issues must predominate, not be the *only* questions of law or fact."). Even "[a] single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous

remaining individual questions." *Chavez v. Don Stoltzner Mason Contractor, Inc.*, 272 F.R.D. 450, 455 (N.D. Ill. 2011) (quoting 2 Newberg on Class Actions § 4:51 (5th ed. 2020)).

In Section II.A., Plaintiffs address arguments that apply to predominance generally across subclasses. Sections II.B., C., and D. address predominance within the Property, Business, and Minors Subclasses respectively.

A. Common Issues Predominate Over Individual Issues.

1. Plaintiffs' Liability Claims All Turn on Common Evidence.

As described in Plaintiffs' opening brief at Section IV.B. and Section I.A., the majority of the central issues in this case are common to the Class and Subclasses including questions of duty, breach, and elements of causation. Resolution of each issue will be the same for all Plaintiffs regardless of their exact time of exposure or amount of damages, and common evidence addressing these issues "will advance the litigation by resolving [them] 'in one stroke' for all members of the Class. *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d at 855 (citation omitted).[15] "[W]ere plaintiffs to bring separate actions, these questions would necessarily be relitigated over and over, and the same evidence would be presented

[15] Although *Whirlpool* excluded personal injuries from the class in that case, 722 F.3d at 849, it *did not* hold that a personal injury class could not ever be certified, and indeed did not even address this issue. Thus, Liaison Counsel's attempt to distinguish *Whirlpool* on this basis, Liaison Br. at 27-28, PageID.54022-54023, is inapposite.

in each case." *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 389 (D. Colo. 1993) (certifying class and subclasses of property owners that alleged company released radioactive and non-radioactive substances into the surrounding causing injury to their property and health despite some individual issues).[16]

The Oppositions to class certification both overstate the issues that will require individual inquiries and fail to adequately address the predominance requirement.[17] In evaluating predominance, a court must *both* "*characterize* the issues in the case as common or individual and then *weigh* which predominate." *Behr*, 896 F.3d at 413 (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 (5th ed. 2020)). The process of weighing the issues is "is more of a qualitative than quantitative analysis." 2 William B. Rubenstein, *Newberg on Class Actions*

[16] *See also Sterling*, 855 F.2d at 1197 (certifying class where it would "avoid[] duplication of judicial effort and prevent[] separate actions from reaching inconsistent results with similar, if not identical, facts."); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67 (S.D. Ohio 1991) ("If these claims were tried separately, the amount of repetition would be manifestly unjustified."). Moreover, in light of the lengthy and detailed expert testimony necessary in this case, "[i]t would serve no purpose to force multiple trials to hear the same evidence and decide the same issues." *Cook*, 151 F.R.D. at 389; *see also* 7AA C. Wright A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2005) (class treatment of mass tort cases may be particularly appropriate where "[t]he central issue of liability . . . may be a difficult one that . . . will require lengthy expert testimony.").

[17] Indeed, Liaison Counsel provide no basis for their specious assertions that these issues will not "advance the resolution of the litigation," and that it is "irrelevant" whether "common evidence establishes the Engineering Defendants' professional negligence." Liaison Br. at 24-25, PageID.54019-54020 (citation and emphasis omitted).

§ 4:50 (5th ed. 2020). None of the Oppositions engage in the required balancing analysis and the Oppositions' repeated references to the existence of individualized issues does not defeat predominate.

The Oppositions rely heavily on the argument that common issues do not predominate simply because this case involves a mass tort. But that fact alone is not dispositive. *Widdis*, 2014 WL 11444248, at *7 ("The text of Rule 23(b)(3) . . . does not categorically exclude mass tort cases from class certification." (quoting *Amchem*, 521 U.S. at 625)). The Sixth Circuit has affirmed class certification in mass tort cases when, as here, the allegations are based on "single course of conduct which is identical for each of the plaintiffs . . . ." *Sterling*, 855 F.2d at 1196-97.[18] Other circuits and district courts have reached similar conclusions in mass tort cases. *See,*

[18] The cases on which Liaison Counsel rely to distinguish *Sterling* do not compel a different conclusion. *See* Liaison Br. at 30 & 30-31 n.3, PageID.54025-54026. In *Ball v. Union Carbide Corp.*, the court held that it was not an abuse of discretion to deny class certification, *not* that denial was required. 385 F.3d 713, 727 (6th Cir. 2004). Moreover, where, as here, the relative fault of multiple defendants could be determined in a single proceeding—as opposed to many—this would weigh in favor of certification. The plaintiffs in *Modern Holdings* attempted to certify a class based on "events occurring sometime during a span of over six decades . . . ." *Mod. Holdings, LLC v. Corning, Inc.*, No. 13-CV-00405, 2018 WL 1546355, at *14 (E.D. Ky. Mar. 29, 2018). In *Mays v. Tennessee Valley Authority*, 274 F.R.D. 614, 620 (E.D. Tenn. 2011), the court went far further than most, holding that the plaintiffs had failed to satisfy even the numerosity requirement for certification. And in *Snow v. Atofina Chemicals, Inc.*, the court denied class certification in large part because the class definitions were impermissibly vague, which is not the case here. *See* No. 01-72648, 2006 WL 1008002, at *7 (E.D. Mich. Mar. 31, 2006).

e.g., *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999) (holding that common issues—including liability for negligence—predominated in case brought by former casino employees alleging injury from casino's ventilation system); *Widdis*, , 2014 WL 11444248, at *1 (certifying class of residents whose homes were harmed by a fire); *Stepp v. Monsanto Rsch. Corp.*, No. 3:91cv468, 2012 WL 604328, at *9 (S.D. Ohio Feb. 24, 2012) (local community exposed to radiation from nuclear weapons facility; granting certification under Rule 23(b)(3)).[19]

[19] *See also Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 485 (S.D. Ohio 2004) (granting certification under Rules 23(b)(2) and (b)(3) in case where local community's domestic water supply contaminated by toxic substances from Honeywell facility); *Boggs*, 141 F.R.D. at 67 (finding that a local community exposed to radiation from uranium processing facility gives rise to a class could be certified under 23(b)(3) because common issues predominated but granting certification under Rule 23(b)(1)(A) to avoid inconsistent adjudications); *Collins v. Olin Corp.*, 248 F.R.D. 95, 104 (D. Conn. 2008) (rejecting defendants' argument that the case was not appropriate for certification merely because it involved a mass tort, in a case where residents of a town sought damages against a company that had dumped waste that contained lead arsenic into a local landfill); *Mejdrech*, 319 F.3d at 911 (J. Posner) (affirming class certification where questions of whether TCE contamination "reached the soil and groundwater beneath the homes of the class members are common to all the class members"); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993) (certifying a class where "the core issues of liability and exposure are common to all class members."); *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 400, 402 (M.D. Tenn. 1996) (certifying subclasses of "829 women who were all exposed to radioactive iron during [an experiment], as well as the children born to those women"). *See also Sterling*, 855 F.2d at 1196-97 n.10 (collecting cases).

Defendants' argument that a class can only be certified if liability can be *entirely* resolved class-wide, *see* Veolia Br. at 93-94, PageID.45438-45439, misstates the law. Predominance does not require that common questions "be dispositive of the entire action." 7AA C. Wright A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2005). In negligence cases such as this one, where the defendants' "course of conduct" is common to the class, the presence of certain individual damages or causation issues does not necessarily defeat predominance. *See, e.g.*, *Collins*, 248 F.R.D. at 104 (certifying class in toxic tort case even where some elements of negligence, nuisance, and intentional infliction of emotional distress claims would require individualized proof because other significant parts of the claims were class-wide issues).[20]

The cases on which the Engineering Defendants rely do not compel a different conclusion. In *Randleman v. Fidelity National Title Insurance Co.*, the Sixth Circuit held that it was not an abuse of discretion to deny class certification where state law

[20] *See also Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 607 (E.D. La. 2006) ("[T]he predominant issues in the negligence inquiry will be centered on the scope of Murphy's duty, if any, to the Plaintiffs. The remaining issues of whether there is crude oil on a plaintiff's property, and how much oil, do not require the type of extensive individualized proof that would preclude class treatment of the negligence claim."); *Bentley*, 223 F.R.D. at 487 (certifying class in contamination case and holding that individual issues of damages "can be handled separately after a trial to determine whether Defendants are liable for the commingled plume and water supply contamination.").

"necessitate[d] substantial, individual inquiries to determine liability under [plaintiffs'] theory of the case . . . ." 646 F.3d 347, 354 (6th Cir. 2011). This is meaningfully different from the situation here, in which Plaintiffs' theory of the case raises significant common issues as to liability. *See* Section I.A., *supra*. Likewise, in *Parkhurst v. D.C. Water & Sewer Authority*, unlike in the instant case, the plaintiffs had no way to show damages with common evidence, and there were individualized questions about the defendant's communications with plaintiffs. *See* No. 2009-CA-000971-B, 2013 D.C. Super. Lexis 4, *40-41 (D.C. Super. Ct. Apr. 8, 2013).[21] Neither requires denial of class certification where there are significant common issues, even if certain issues regarding the amount of damages will be individualized.[22]

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[21] Moreover, *Parkhurst* does not address property or business loss issues, and provides no guidance as to certification of those subclasses. A copy of this case was submitted as Exhibit 41 to Veolia's opposition. ECF No. 1370-9.

[22] *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), which Veolia invokes as supplemental authority, does not alter this conclusion. Veolia Defs.' Notice of Suppl. Authorities in Opp'n to Pls.' Mot. for Class Certification, Mar. 4, 2021, ECF No. 1453, PageID.57114-57117. *Prantil* is not reflective of the approach the Sixth Circuit has taken on these issues, and moreover did not hold that certification was necessarily inappropriate. In that case, the Fifth Circuit reversed certification because it found the district court had not adequately addressed how the case would proceed at trial. *Prantil*, 986 F.3d at 578. And the Court specifically explained that its opinion "[did] not suggest that [defendant] is entitled to prevail on its counterarguments to certification." *Id.* at 580. To the extent Veolia relies on *Prantil* for the proposition that Plaintiffs must satisfy the *Daubert* standard at class certification, ECF No. 1453 at 2-3, PageID.57115-57116, the Sixth Circuit has not

2. The Oppositions to Class Certification Conflate Common Issues Regarding Liability with Amount of Damages.

Though Defendants attempt to show individualized issues in each element of negligence, many of the issues they raise ultimately relate to the specific *amount* of damages to which each Plaintiff may be entitled. *See* Veolia Br. at 95-99, PageID.45440-45444. Veolia's and LAN's liability for professional negligence turns on a single course of conduct for each Defendant—their abdication of their responsibilities as professional engineering firms providing services to the City of InFlint and the consequent prolonged water crisis in Flint. As long as liability and impact can be demonstrated through Class-wide evidence, variations among Subclass members' damages does not defeat certification. *In re Scrap Metal Antitrust Litig*., 527 F.3d 517, 535 (6th Cir. 2008) (class certification is appropriate where common liability issues predominate, "even where there are individual variations in damages"); *Beattie v. CenturyTel, Inc*., 511 F.3d 554, 564 (6th Cir. 2007) ("[C]ommon issues may predominate when liability can be determined on a

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adopted that argument. *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 465 (6th Cir. 2020) (explaining that courts of appeals have taken different approaches to this issue, but that the Sixth Circuit has not yet ruled on it definitively). And, for the reasons stated in Class Plaintiffs' omnibus response to Defendants' *Daubert* motions, the Court should not adopt the Fifth Circuit's approach here. Class Pls.' Omnibus Resp. on the Law Regarding Defs.' Mots. to Exclude Expert Testimony at Section I.A., Mar. 29, 2021, ECF No. 1516, PageID.58364-58369.

class-wide basis, even when there are some individualized damage issues." (citation omitted)).[23] Indeed, one of the cases on which Defendants rely acknowledges that "the need to prove damages or establish class membership on an individual basis is not fatal to class certification. . . ." *Randleman*, 646 F.3d at 353.

The Oppositions similarly conflate the fact of damages with the extent or amount of damages, but Michigan law distinguishes between the two. As reflected in Michigan's jury instruction on professional negligence, the jury must first decide whether plaintiffs sustained injury and damages, and whether proximate cause exists, M Civ JI 30.03, after which the jury is instructed to address the separate question of the nature and extent of the injury, M Civ JI 50.01. Michigan case law reflects this same distinction. *See*, *e.g.*, *Thompson v. Paasche*, 950 F.2d 306, 313 (6th Cir. 1991) (noting "distinguishes between the *fact* of damages and the *amount* of damages."); *Wolverine Upholstery Co. v. Ammerman*, 1 Mich. App. 235, 244-47, 135 N.W.2d 572, 576 (1965) (citation omitted) ("There is a clear distinction between

[23] *See also In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2014 WL 6461355, at *44 (N.D. Ohio Nov. 17, 2014) ("[T]he presence of 'some individualized damages issues' will not preclude class treatment if common issues otherwise predominate." (citation omitted)); *Allan v. Realcomp II, Ltd.*, 10-CV-14046, 2013 WL 12333444, at *8 (E.D. Mich. Mar. 30, 2013) ("[No] matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action." (citation omitted)); *Craft*, 174 F.R.D. at 402 ("[D]espite a need for later investigation of damages, scientific and medical evidence as to the health risks and injuries of radiation . . . would be common to all class members.").

the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount."). In other words, individual issues related to the *amount* of damages do not defeat or undermine the extent to which fact of damages can be proven using common evidence.

The timing of Veolia's (or any other Defendants') actions likewise may affect the amount of damages to which each Class member may be entitled, but does not alter that the broader, common issue of each Defendants' responsibility for Flint's contaminated water. "Though the level of claimed injury may vary throughout the class—a common feature of class actions routinely dealt with at a remedial phase—the basic injury asserted is the same . . . ." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 885 (6th Cir. 1997); *see also Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 683 (6th Cir. 2013) (affirming certification of (b)(3) class where "issue of whether Plaintiffs were entitled to whipsaw benefits predominated over any individual issues involved in calculating the amount of those benefits for each class member").

For example, in *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597 (E.D. La. 2006), the court held that common issues predominated in an oil spill case even though defendants argued that "the oil did not spread uniformly throughout the affected area, and that different homes in the area received differing degrees, if any,

of oil contamination" because "the central factual basis for all of Plaintiffs' claims [was] the leak itself—how it occurred, and where the oil went." 234 F.R.D at 606. *See also Randleman*, 646 F.3d at 353-54 (acknowledging that "the need to prove entitlement to participate in the class on an individual basis will . . . not necessarily mean that common issues do not predominate."). Similarly, here, the central factual basis of Plaintiffs' claims—that LAN and Veolia were professionally negligent in treating Flint River water, leading to contamination of that water—is the same for all Class members.[24]

3. The Purported Causation Issues Defendants Raise Do Not Defeat Predominance.

Defendants' contention that Plaintiffs propose no method for adjudicating "but for" or proximate causation on a class-wide basis, Veolia Br. at 74, PageID.45419, *see also* LAN Br. 24-25, PageID.53928-53929, is inaccurate. As Plaintiffs explained in their opening brief, both "but for" and proximate causation involve class-wide questions and evidence: for example, whether LAN and/or Veolia's conduct caused corrosive water conditions in the Flint water distribution system, and whether it was foreseeable that LAN's and/or Veolia's conduct would cause corrosive water conditions in the Flint water system, can be adjudicated using

[24] Defendants' argument that Plaintiffs provide no viable method of demonstrating class-wide injury, Veolia Br. at 44, PageID.45389, ignores Plaintiffs' expert testimony. *See* Sections II.B., II.C., II.D., II.A.6, *infra*.

evidence common to the Class. Class Cert. Br. at Section IV.B.1.b., PageID.34488-34500; *see also* Section I.A. (outlining causation questions common to the Class).

Veolia argues that in order to prove proximate causation, "[e]ach class member would have to introduce fact-witness testimony, documentary evidence, and expert testimony to establish that VNA's actions were a substantial factor contributing to the harm, that the harm was foreseeable, and that it is reasonable to hold VNA liable for that harm." Veolia Br. at 98, PageID.45443. In doing so, Veolia ignores that much of that evidence would be applicable class-wide. Evidence that the failure to properly evaluate Flint's water system caused increased corrosion and whether that result was foreseeable raises no individual questions. *Id.*[25]

Defendants' argument that a jury could find their actions "too attenuated" to support a claim, Veolia Br. 74, PageID.45419, and that other parties' actions may be a "superseding cause" of Plaintiffs' injuries, address the merits of the claim, not its suitability for certification.[26] Moreover, Defendants' own arguments demonstrate that these issues would be adjudicated with evidence common to the Class and Subclasses. For example, Veolia contends that "a jury reasonably could find" that

[25] The individualized issues Defendants cite as affecting "but for" causation, Veolia Br. at 96-98, PageID.45441-45443, largely repeat the allocation of damages issues.

[26] Veolia makes similar arguments regarding individualized defenses, which fail for the same reasons.

Flint's falsification of test results is a superseding cause that absolves them of liability. Veolia Br. at 75, PageID.45420. But whether that is true will be the same for all Class members. *See also id.* at 74, PageID.45419 (relying on record evidence that is common to the class to demonstrate examples of its defenses). Regardless whether Defendants prevail or lose on their superseding cause defense, that determination can (and should) be made on a class-wide basis. These issues do not present "fatal dissimilarit[ies,]" but rather "a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d at 859 (citation omitted).

Many of the cases on which the Oppositions rely specifically distinguish cases like this one in which "questions and answers regarding the [defendants'] conduct [are] the same." *Mod. Holdings, LLC v. Corning, Inc.*, No. 5:13-CV-00405-GFVT,

2018 WL 1546355, at *8 (E.D. Ky. Mar. 29, 2018).[27] Others are distinguishable on their facts, and none require denial of certification in this case.[28]

To the extent some issues of causation may require individualized inquiries, those issues are not fatal to certification. "[I]ndividual issues of causation do not preclude class certification." *Collins*, 248 F.R.D. at 104; *see also McMahon v. LVNV Funding, LLC*, 807 F.3d 872, 875 (7th Cir. 2015) (reversing denial of certification on this basis, explaining, "Although '[p]roximate cause ... is necessarily an individual issue,' . . . 'the need for individual proof alone does not necessarily

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[27] *See also Jones v. Allercare, Inc.*, 203 F.R.D. 290, 303-04 (N.D. Ohio 2001) noting, in "some mass tort cases arising from a common cause or disaster may satisfy the predominance requirement."); *In re Am. Com. Lines, LLC*, No. 00-cv-252, 2002 WL 1066743, at *13 (E.D. La. May 28, 2002) (explaining, "[t]his is not a case where one set of operative facts establishes liability," which the court acknowledged could be suitable for certification); *City of St. Petersburg v. Total Containment, Inc.*, 265 F.R.D. 630, 636 (S.D. Fla. 2010) (denying certification in products liability case where plaintiffs had used "many different models of [the product at issue], manufactured and distributed by different Defendants. . . ."); *Rink*, 203 F.R.D. at 666 (explaining that "[u]nlike a mass tort arising from an isolated occurrence or accident," the circumstances of defendants' conduct differed based on location).

[28] For example, in *Gates*, 655 F.3d at 262, the court affirmed the denial of certification based on the finding that plaintiffs' expert testimony could not be used for class-wide proof, which is not the case here. In *Snow v. Atofina Chemicals, Inc.*, the court denied certification in large part because the class definitions were impermissibly vague, which is also distinguishable from this case. *See* No. 01-72648, 2006 WL 1008002, at *7 (E.D. Mich. Mar. 31, 2006); *see also Lankford v. Carnival Corp.*, No. 12-cv-24408, 2014 WL 11878384, at *10 (S.D. Fla. July 25, 2014) (addressing predominance in dicta after holding that the class definitions were impermissibly vague).

preclude class certification." (citation omitted)). Significant class-wide issues exist in this case that will be the same for all Plaintiffs, and those issues will drive the resolution of each Plaintiffs' claim. Any individual causation issues that might arise need not deter that.[29]

4. Plaintiffs' Damages Models Align with Their Theories of Liability.

Defendants' argument that *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), precludes certification, Veolia Br. at 76-77, PageID.45421-45422, is incorrect. The Supreme Court in *Comcast* held that in order to meet the predominance standard under Rule 23(b)(3), plaintiffs' damages model needed to align with their theory of liability. 569 U.S. at 37-38. But *Comcast* is inapplicable here because Plaintiffs' proposed methods for demonstrating class-wide damages align to their theories of

[29] *Cf. Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D. Cal. 1987) (certifying class of plaintiffs that alleged they were damaged by dioxin contamination where common issues existed regarding "whether the defendants were negligent in the manufacture, transportation, and distribution of the dioxin," even though the case involved individual issues including "the amount of damages each plaintiff has sustained and the issue of causation as to each plaintiff"); *Bates v. Tenco Servs., Inc.*, 132 F.R.D. 160, 163 (D.S.C.) (certifying class notwithstanding that "[i]ndividual offers of proof of proximate cause and damages for each plaintiff will become an inevitable necessity"), *amended on other grounds*, 132 F.R.D. 165 (D.S.C. 1990).

liability for each of the three Subclasses for which Plaintiffs seek a damages class under Rule 23(b)(3).[30]

Veolia argues that Dr. Georgopoulos' opinion "do[es] not match" the Class definition of the Minors Subclass as it relates to ingestion of water, suggesting that children in the Class will have to ingest water for a full 90 days to "match" the assumptions for modeling presented in the Integrated Exposure and Uptake Biokinetic ("IEUBK") Model as presented in the expert declaration of Dr. Georgopoulos. *See* Veolia Br. at 42, PageID.45387. This argument mischaracterizes the requirements necessary to model ingestion of water in the IEUBK Model, as Dr. Georgopoulos explained in his deposition and set forth in his declaration[31] and rebuttal declaration.[32] For the sake of brevity, Class Plaintiffs incorporate their

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[30] As Defendants acknowledge, the Sixth Circuit has held that *Comcast* has limited, if any application in cases where class certification is based only on liability. *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d at 860 ("Where determinations on liability and damages have been bifurcated . . . the decision in *Comcast* . . . has limited application.").

[31] *See* Decl. by Theodore J. Leopold in Support of Motion to Certify Class, Ex. 123, Georgopoulos Decl. ¶ 14(b)(iii), July 16, 2020, ECF No. 1208-137, PageID.37958. As Dr. Georgopoulos plainly states in his Criterion 3, "Eligible duration of exposure: . . . must have drank or ate food prepared with unfiltered Flint tap water for *at least 14 of the 90 days during the 'eligible period of exposure*,'" *Id.* (emphasis added). All exhibits to Leopold's July 16, 2020 declaration will herein be referred to as "Class Cert. Ex. _".

[32] *See* Class Pls.' Resp. to Defs.' Mot. to Exclude Test. & Decl. of Panagiotis (Panos) Georgopoulos ("Georgopoulos Br."), Ex. 2, Georgopoulos Rebuttal Decl. ¶¶ 2-3, Mar. 29, 2021, ECF No. 1518-3, PageID.58617-58619.

response to this same argument in opposition to the Veolia Defendants' motion to exclude Dr. Georgopoulos. *See* Georgopoulos Br. at 11-12, ECF No. 1518, PageID.58604-58605.

The Engineering Defendants' respective citations to *Comcast* to challenge the Residential Property Subclass fare no better. *Comcast* says nothing, and indeed could not say anything, about whether a plaintiff's damages model must attribute specific damage to particular defendants. Here, Class Plaintiffs' theory of liability is that Defendants' professional negligence enabled, exacerbated, and failed to mitigate the Flint Water Crisis, resulting in, *inter alia*, property-value decreases across the City. In demonstrating the decrease in property values directly attributable to the Flint Water Crisis, Dr. Keiser's reliable damages model fits squarely within that theory of liability. Defendants offers nothing but obfuscation to the contrary.[33]

Veolia's claim that Professor Simons's use of revenue data to determine impact on businesses somehow creates a mismatch between his opinion and Plaintiffs' theory of the case, likewise has no merit: by using revenue data—the only data available to Class Plaintiffs at this time—and analyzing declines compared to other geographic areas, Professor Simons demonstrates that Flint businesses were

[33] LAN's claim that each Subclass member will have to establish that LAN's negligence was a proximate cause of his or her damages ignores the fundamental nature of the class-action vehicle, which is that it is a representative litigation. *See* 1 William B. Rubenstein, *Newberg on Class Actions* § 1:2 (5th ed. 2020).

negatively impacted by the water crisis. *See* Class Pls.' Resp. to Defs.' Mot. to Exclude Test. & Reports of Dr. Robert A. Simons ("Simons Br.") at 13-15, Mar. 29, 2021, ECF No. 1535, PageID.59312-59314; *see also Popovich v. Sony Music Entm't, Inc.*, No. 1:02 CV 359, 2005 WL 5990223, at *4 (N.D. Ohio May 9, 2005) (admitting expert testimony and stating, "[w]hile the data and assumptions used by DiMattia may not be perfect, perfect information is not always available, and making assumptions based on the best available data is commonplace"). That class-wide impact is precisely in line with Class Plaintiffs' theory of this case. The fact that certain businesses may have attempted to mitigate their damages by cutting costs is a question of amount of damages that has no impact on whether Professor Simons's opinion fits Class Plaintiffs' *liability* theory. That is the key consideration for class certification purposes.

Veolia's further attempt to point to supposed "increased revenue" for named Plaintiff 635 S. Saginaw LLC as somehow out of step with Plaintiffs' claims is baseless. As tax data cited by Veolia's own expert Dr. Edelstein demonstrates, 635 S. Saginaw saw significant decreases in revenue at the onset of the crisis, from 2012-2015. *See* ECF 1367-12, Edelstein Rep. (under seal), Ex. 6. The fact that the Reference USA data relied on by Professor Simons does not capture this decrease simply underscores the conservative nature of his damages opinion; and the fact that 635 S. Saginaw saw increases at the tail end of the Class Period does not conflict

with Professor Simons's methodology, which, as he confirmed at his deposition, could be modified with additional data to account for changes on an annual basis. *See* Ex. 1, Simons Dep. Tr. 509:2-9.[34]

5. Individualized Issues Regarding Amount of Damages Do Not Defeat Predominance.

To the extent some individualized damages issues exist, those issues do not defeat certification. Courts in the Sixth Circuit and others have certified classes where liability issues are largely common, even when plaintiffs' specific injuries or allocation of damages require individualized inquiries. *See, e.g.*, *Sterling*, 855 F.2d at 1197 (affirming certification even where the "major issue distinguishing the class members is the nature and amount of damages, if any, that each sustained"); *Stepp v. Monsanto Rsch. Corp.*, 2012 WL 604328, at *8 ("[E]ven though individual issues of whether the named Plaintiffs or members of the redefined class suffered damages as a result of diminished property values, lost income, being forced to drink bottled water, suffering emotional distress and/or being subjected to a nuisance also remain to be resolved, the Court concludes that common issues predominate over those individual issues."); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. at 607 ("Murphy's liability would be appropriate for class treatment. The presence or degree of injury

[34] Unless otherwise noted, all exhibits referenced herein are exhibits to the declaration of Theodore J. Leopold, filed in support of this reply.

or damage is an issue of quantum that may be dealt with individually in a bifurcated proceeding, if necessary."); *Collins*, 248 F.R.D. at 104 ("As for the negligence claims, although the element of causation may require more individualized proof, the proof as to the other elements of negligence will be class-wide.").

The principle "that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal," and "it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d at 861 (citations omitted). Indeed, "courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:54 (5th ed. 2020); *Hicks v. State Farm Fire and Cas. Co.*, 2019 WL 846044, at *5.[35]

[35] *See also In re Suboxone (Buprenorphine Hydrochlorine and Naloxone) Antitrust Litig.*, 967 F.3d 264, 272 (3d Cir. 2020) (noting that even though "there could be differences among the class members concerning the precise damages they suffered," "[i]ndividualized determinations . . . are of no consequences in determining whether there are common questions concerning liability"); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014) ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification."). The cases on which Liaison Counsel rely, Liaison Br. at 37 n.4, PageID.54032, do not compel otherwise, and indeed largely ignore how Plaintiffs propose to demonstrate subclass-wide damages in this case.

6. Class Plaintiffs Use Reliable Economic Analysis to Establish Class-Wide Damages for Each Subclass.

Individual Liaison Counsel point to Class Counsel's use of expert witnesses to support the existence of class-wide injury and damages as somehow improperly utilizing statistical evidence. Liaison Br. at 31, PageID.54026. However, the sole purported example they provide fundamentally misrepresents what the expert in question, Dr. Keiser, has been offered to prove. Liaison Counsel argue that "knowing the aggregate increase in the statistically expected number of cancer cases in Flint (for example) will not identify which class members developed cancer caused by contaminated water," and that "[b]y Professor Keiser's own admission, only a certain percentage of cancer cases are attributable to Flint water, and his methodology offers no help to the critical task of identifying which ones." *Id.* at 32, PageID.54027 (emphasis omitted). This is ridiculous.

Dr. Keiser is an economics professor who has offered an opinion on the reduction of residential property values in Flint—he has not, at this time, offered any opinion on impact of the water on individuals' health, beyond a discussion of possible avenues for further economic analysis. Class Cert. Ex. 114, Keiser Report at 1, 24-28, ECF No. 1208-128, PageID.37480, 37503-37507. The statements regarding "health impacts" quoted by Liaison Counsel are part of a discussion Dr. Keiser provides on potential means of quantifying the economic impact of the health consequences flowing from contaminated water. *Id.* However, Dr. Keiser does not

purport to offer any opinion on the cause of physical injury to residents—indeed he does not even estimate the health damages he discusses, but rather raises them as another possible avenue for analysis and explains various means through which an economist might calculate them based on the body of accepted economic literature. *Id.* at 24-28, PageID.37503-37507.

It is certainly true that the methodology actually applied in Dr. Keiser's report—which consists of a hedonic regression model of property values in Flint—does not indicate which individuals in Flint developed cancer due to exposure from the water. That is because his model has absolutely nothing to do with cancer, or any physical injury, nor does it purport to. Dr. Keiser is an economist, and Class Plaintiffs have offered his opinion to demonstrate the impact of the water on property values, not to opine on the cause of physical injury.

In support of his residential property value opinion, Dr. Keiser uses a hedonic regression methodology well-recognized in economics and commonly accepted as an admissible means of demonstrating damages.[36] Liaison Counsel provide no

[36] *See, e.g.*, Fed. Jud. Ctr., Reference Manual on Scientific Evidence 308 (3d ed. 2011) (noting that "[b]ecause multiple regression is a well-accepted scientific methodology, courts have frequently admitted testimony based on multiple regression studies"); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., Inc.*, 998 F.2d 1224, 1238 (3d Cir. 1993) ("First, we note that the scientific method used by the economists, multiple regression analysis, is reliable."); *Schechner v. Whirlpool Corp.*, No. 2:16-CV-12409, 2019 WL 978934, at *5 (E.D. Mich. Feb. 28,

explanation as to how Dr. Keiser's model bears any resemblance to the concerns raised over a sprawling nationwide group of asbestos exposure plaintiffs in *Amchem*, 521 U.S. at 599. Nor have they explained how Dr. Keiser's commonly accepted economic model relates at all to the "Trial by Formula" in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Neither case categorically precluded using regression analysis to show damages.

Liaison Counsel's entire argument regarding supposedly improper use of statistical methods is a red herring. They cite several cases in which individual issues were found not to predominate, but do not connect any of those cases to the facts at hand (and certainly not to the model of impact on residential property values for which Class Plaintiffs rely on Dr. Keiser). They cite *Gates*, 655 F.3d at 266, to argue that Class Plaintiffs "cannot substitute evidence of exposure of actual class members with evidence of hypothetical, composite persons" in order to support class certification; but Class Plaintiffs have not sought to rely on any such "hypothetical, composite person." Class Plaintiffs have—in their briefing and their reports that actually deal with physical injury—pointed to real men, women, and children in the City of Flint who were personally exposed to lead-tainted water. In *Gates*, plaintiffs sought to certify a medical monitoring class of residents exposed to the airborne

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2019) (admitting hedonic regression model as reliable means of modeling class-wide damages and collecting cases).

vinyl chloride, but did not offer evidence that any individuals had exposure levels above a minimum threshold and therefore could not establish a need for the requested medical monitoring. *Id.* at 261. Here, by contrast, common exposure to the lead-contaminated water is established by Class Plaintiffs' experts Drs. Goovaerts, Weisel, Georgopoulos, Hu, and Lanphear: (1) Dr. Goovaerts determined the universe of properties built prior to 1986 or with demonstrated elevated lead levels; (2) Dr. Weisel determined that those properties would have increased lead in the water at the tap, thereby demonstrating exposure for residents receiving that water; (3) Dr. Georgopoulos explains that children exposed to lead at these properties would be likely to have elevated blood lead levels; and (4) Drs. Hu and Lanphear opine on the health effects of such lead exposure. *See* Class Cert. Br. at 73-77, PageID.34510-34514. None of Class Plaintiffs' experts have offered the sort of "hypothetical, composite person" rejected in *Gates*.

Liaison Counsel's citation to *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) is no more on point—as their own description of the matter makes clear. Class Plaintiffs have not, as in *American Tobacco*, simply estimated the percentage of the class harmed. Rather, their experts have explained how *each* member of the Class would have been exposed to and harmed by the water. *See* Class Cert. Br. at 73-77, PageID.34510-34514. Liaison counsel may disagree with these

opinions; but their disagreement is with the merits of Class Plaintiffs' contention, not the nature of it as common to the Class.

The concerns expressed in dicta in *In re "Agent Orange" Prod. Liability Litigation*, MDL No. 381, 818 F.2d 145 (2d Cir. 1987) over a hypothetical litigation class's inability to provide common evidence of causation, are distinguishable: unlike the plaintiffs there at issue, for which the circumstances and effects of exposure would be highly varied, here the Class members were each exposed to lead through the same circumstances—it was delivered to their taps—and Class Plaintiffs' experts have explained the well-documented effects of such exposure.

Finally, Liaison Counsel's misleading citation of the warning in *Tyson Foods* regarding the use of statistical proof is entirely inapposite: Class Plaintiffs cite that case merely for the unremarkable proposition that a class should be certified to address common issues of liability, causation, and injury. Class Cert. Br. at 73, PageID.34510. They do not rely on it as supporting the use statistics to mask individual issues, nor have Liaison Counsel pointed to any instance in which Class Plaintiffs have relied on anything other than well-established forms of common evidence to demonstrate class-wide harm.

7. Defendants' Affirmative Defenses Do Not Defeat Predominance.

The Engineering Defendants' potential use of affirmative defenses does not defeat predominance in this case. "[T]he fact that a defense may arise and may affect

different class members differently does not compel a finding that individual issues predominate over common ones." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (citation and quotation marks omitted). Indeed, in cases such as this one, in which Defendants' liability toward all Class members arises from the same course of conduct, the Sixth Circuit has held that "the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 544 (6th Cir. 2012) (quoting *Beattie*, 511 F.3d at 564). This principle holds true even in cases involving mass torts.[37]

Defendants' contention that comparative fault is an individualized issue rests on each Plaintiff potentially having different exposure to the water. *See* Veolia Br. at 86, 99, PageID.45431, 45444. As discussed, issues of timing of exposure can be addressed with allocation of damages to Plaintiffs, and do not defeat Class certification. *See* II.A.2 and II.A.5. Moreover, Defendants' comparative fault

[37] *See, e.g.*, *Craft*, 174 F.R.D. at 402 (rejecting argument that individualized defenses defeat certification in case where pregnant women were exposed to radioactive iron isotope, reasoning, "despite a need for later investigation of damages, scientific and medical evidence as to the health risks and injuries of radiation to pregnant women and their children would be common to all class members"); *Collins*, 248 F.R.D. at 105 ("[E]ven if some of the plaintiffs' claims are found not to be timely, courts have been reluctant to deny class action status because affirmative defenses might be available against different class members as long as the defenses do not overshadow the primary claims.").

defenses will rest heavily on the same courses of conduct by other Defendants and parties, regardless of any exposure timing issues. The cases on which Defendants rely do not require a different conclusion. For example, in *Rivers v. Chalmette Med. Ctr., Inc.*, the defendants' comparative fault defenses did not relate to a common course of conduct by other defendants. No. 06-8519, 2010 WL 2428662, at *9 (E.D. La. June 4, 2010). In addition, the court in that case found that even duty and breach were not common issues due to specific requirements under Louisianan state law. *See id.* at *6. *See* Veolia Br. at 86, 87 n.16, 99, PageID.45431-45432, 45444.[38]

The presence of multiple Defendants does not defeat certification, nor does it preclude a finding that Defendants' liability in this case is based on a "course of conduct." *See* Liaison Br. at 30, PageID.54925 (citation omitted). In this case, each Plaintiff will need to demonstrate the same course of conduct by LAN and Veolia in order to prove their professional negligence claims. It is therefore similar to other mass tort cases in which courts have certified classes against multiple defendants. *See, e.g.*, *Boggs*, 141 F.R.D. at 67 (certifying (b)(3) class against multiple defendants where local community exposed to radiation from uranium processing facility); *Cook*, 151 F.R.D. at 386 (certifying class even though two defendants had operated

[38] None of the out of state or district court cases on which Veolia relies compel a different conclusion. *See* Veolia Br. at 87 n.16, PageID.45432.

the plant at issue at different times, because the plaintiffs' "claims arise from the same set of circumstances").[39]

B. Common Issues Predominate within the Residential Property Subclass.

1. Plaintiffs Sufficiently Demonstrate But for Causation for the Residential Property Subclass.

Defendants are incorrect that each residential-property owner will require individualized proof of but for causation. The entire purpose of Dr. Keiser's model is to avoid the need for subclass-member-by-subclass-member proof. *See In re Polyurethane Foam Antitrust Litig.*, No. 1:10-MD-2196, 2015 WL 4459636, at *8 (N.D. Ohio July 21, 2015) ("The point of proving aggregate damages is to avoid plaintiff-by-plaintiff proof."). Dr. Keiser's model precludes the need for such proof by showing that the Flint Water Crisis—and those responsible for exacerbating or failing to prevent it—caused property values across Flint to fall. And Veolia's refrain that Dr. Keiser's model does not "take into account any variation in individual properties," Veolia Br. at 69, PageID.45414, goes to the amount of damages, and does not offer a persuasive reason for why this Court should not certify the Subclass, *see Andrews v. Plains All Am. Pipeline, L.P.*, No. 15-CV-4113 PSG, 2018 WL 2717833, at *10 (C.D. Cal. Apr. 17, 2018) (explaining that "variability in injury and

[39] The cases on which Liaison Counsel rely do not require otherwise. *See* II.A.1., n.19.

damages . . . need not preclude class certification"); *see also Merenda v. VHS of Mich., Inc.*, 296 F.R.D. 528, 542-43 (E.D. Mich. 2013) (disregarding defendants' argument that plaintiffs failed to show predominance because expert's class-wide model adopted a "one size fits all" approach that didn't account for variations between subclass members).

2. Injuries and Damages to the Residential Property Owners Subclass Can Be Established Using Common Evidence.

Harm to residential property owners can be demonstrated through common evidence in three ways: *First*, Dr. David Keiser's economic model demonstrates that the water crisis had a negative impact on residential home prices in Flint, causing losses to residential property owners. *Second*, Dr. Larry Russell demonstrates that as a consequence of the corrosive water in Flint, any resident whose home plumbing was exposed to the water require plumbing replacement. The damages flowing from the need for remediation can further be calculated on a class-wide basis, as set forth in the expert reports of Mr. David Pogorilich and Mr. Bruce Gamble. *Third*, common evidence will demonstrate that homes in Flint received unsafe water, such that residential property owners suffered damages class-wide in the form of payment of water bills for that unsafe water. Nothing in the Oppositions to Class certification changes that each of these harms to property owners in Flint can and will be proven through evidence common across the Residential Property Subclass.

(i) Impact on Residential Property Values

Using a hedonic regression analysis and a "difference-in-differences" model, Dr. Keiser has shown that home values across Flint decreased from 17% to 32% as a direct result of the Flint Water Crisis. *See* Keiser Report at 45, ECF No. 1208-128, PageID.37524. The lack of individualization in this impact is apparent both from the inherent nature of the "difference-in-differences" model, which is designed to isolate specific causes and control for possible alternatives, *see, e.g.*, *id.* at 29, PageID.37508, and the fact that Dr. Keiser did not find any statistically significant differential price impacts among homes across the City. *See* Class Pls.' Resp. to Defs.' Motion to Exclude the Test. & Report of Dr. David Keiser & Defs.' Mot. to Exclude the Second Report of David A. Keiser ("Keiser Br."), Ex. 1, Keiser Resp. at 65, Mar. 29, 2021, ECF No. 1517-2, PageID.58533.

Dr. Keiser's model proves that residential property owners in Flint were all impacted by the same event, and largely to the same degree. This renders the fact of this subclass's injury a common question. *See Bouaphakeo*, 577 U.S. at 453 ("[A] common question is one where 'the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.'" (internal brackets omitted) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 (5th ed. 2020))).[40]

[40] To the extent Dr. Keiser's model does not account for recent events, *see* Liaison Br. at 79, PageID.54074, that can be remedied with updated data, much as

Defendants' arguments to the contrary have no merit. Any attacks against the reliability and accuracy of Dr. Keiser's model—and that model's findings—have already been addressed in Dr. Keiser's rebuttal report, *see generally* Keiser Resp., ECF No. 1517-2, and in Class Plaintiffs' opposition to Veolia's pending motion to exclude Dr. Keiser's expert report, *see generally* Keiser Br., ECF No. 1517. And Defendants' other primary argument—that Dr. Keiser's model does not account for variability in degree of injury among subclass members, *see* Veolia Br. at 48-49, PageID.45393-45394; LAN Br. at 32, PageID.53936; Liaison Br. at 78-79, PageID.54073-54074—ignores how class actions work.

Class Plaintiffs are permitted to calculate property damage on a subclass-wide basis. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 198 (1st Cir. 2009) ("The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 350 (E.D. Mich. 2001) ("[T]he use of an aggregate approach to measure class-wide damages is appropriate."). The use of aggregate damages is rendered no less appropriate because

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Dr. Keiser has already been able to update his model with more recent ZTRAX data, *see, e.g.*, Keiser Resp. at 21-22, ECF No. 1517-2, PageID.58489-58490, and has no bearing on whether his methodology demonstrates class-wide impact from the water crisis.

there may be variability among subclass members. *See Allan*, 2013 WL 12333444, at *11 (finding that "damages are susceptible to class-wide calculation," even though "[i]t may be true the actual dollar amount of damages will be, strictly speaking, individualized—after all, each class member likely bought a house for a different price"). It is black letter law that such variability does not defeat predominance. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d at 861 (explaining that "recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal," (quoting *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564-66 (6th Cir. 2007))). *See also* Section II.A.5, *supra*. Defendants' concern that Dr. Keiser's subclass-wide proof does not account for purely hypothetical variations between properties has no relevance at the Class certification stage.

Defendants' cases do not counsel otherwise. In *Dvorak v. St. Clair Cnty.*, No. 14-CV-1119, 2018 WL 514326, at *8 (S.D. Ill. Jan. 23, 2018), and *Cannon v. BP Prods. N. Am., Inc.*, 2013 WL 5514284, at *15 (S.D. Tex. Sept. 30, 2013), individualized proof was needed because plaintiffs lacked a reliable method of calculating class-wide damages. That is not the case here, when Class Plaintiffs have provided such a model. And in *Mays*, 274 F.R.D. at 635-36, plaintiffs were unable to provide common proof of anything beyond the occurrence of a mass-

contamination event. The expert reports from Dr. Keiser and Dr. Russell show that Class Plaintiffs do not share the same problem.[41]

Veolia's repeated argument that Class Plaintiffs' experts do not isolate the effects of Veolia's conduct on homes in Flint fares no better. Class Plaintiffs' burden in this case as to Veolia is very simple—they must prove that Veolia "was professionally negligent in one or more. . . ways," that Class Plaintiffs and Class members "sustained injury and damages," and "that the professional negligence or malpractice of [Veolia] was a proximate cause of the injury and damages to" Class Plaintiffs and Class members. M Civ JI 30.03. None of the above requires Class Plaintiffs, in a case with multiple Defendants, to determine precisely which

[41] Other cases on which Veolia relies are similarly inapposite. *See Ebert*, 823 F.3d at 479–80 (finding that district court abused its discretion in certifying class where "the district court limited the issues and essentially manufactured a case that would satisfy the Rule 23(b)(3) predominance inquiry"); *Cannon*, 2013 WL 5514284, at *15 (denying class certification because of plaintiffs' inability to present any model for class-wide damages); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 676-78 (S.D. Ala. 2005) (denying class certification because plaintiffs' damages expert had "not yet performed *any* analysis of the diminution in value of the plaintiffs' property," expert himself admitted "that he w[ould] have to perform property-specific appraisals," and thus court had to "conclude that damages . . . are not amenable to computation by an easy or essentially mechanical method" (emphasis added)). Class Plaintiffs have provided a reliable and straightforward model of computing aggregate damages, and thus these cases have no relevance.

corrosion or lead contamination is attributable to Veolia. Moreover, it is the province of the jury to decide how to allocate fault among the responsible actors.[42]

LAN, like Veolia, attempts to argue that the Court should not certify a class action because LAN has the ability to present individualized evidence at trial, but tellingly cites no such evidence. *See* LAN Br. at 37-38, PageID.53941-53942. The question for the Court at this stage is whether, on the record currently before the Court, "issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Hicks*, 965 F.3d at 460. Because LAN fails to offer *any* evidence showing individualization of property damage, there is no basis to find that predominance is not met. And even if LAN could offer such individual proof, that alone will not preclude class certification. *See Andrews*, 2018 WL 2717833, at *10 (explaining that "variability in injury and damages . . . *need not* preclude class certification").

The purpose of Dr. Keiser's model—indeed, the purpose of all models that calculate aggregate, class-wide damages—"is to avoid plaintiff-by-plaintiff proof." *In re Polyurethane*, 2015 WL 4459636, at *8. And Dr. Keiser's model succeeds in

[42] *See Wrobbel v. Int'l Brotherhood of Elec. Workers*, No. 07-10110, 2010 WL 940279, at *5 (E.D. Mich. Mar. 12, 2010) ("Whether and to what extent the Union and Asplundh share responsibility for Plaintiff's injuries, is a question for the jury to decide."); *see also* Mich. Comp. Laws Ann. § 600.2957(1) (West 2021) ("In an action based on tort or another legal theory seeking damages for . . . property damage . . . the liability of each person shall be allocated under this section by the trier of fact").

this effort by demonstrating that homes across Flint—regardless of where in the City the home was located; who owned the home; whether the home was served by a lead service lateral; and other possible individual characteristics—suffered statistically similar decreases in value as a direct result of the Flint Water Crisis. *See* Keiser Resp. at 65, ECF No. 1517-2, PageID.58533. His model also provides a means of calculating total damages based on that common decrease. *See* Keiser Report at 50, ECF No. 1208-128, PageID.37529. That is all that is required for Class certification. *See Comcast*, 569 U.S. at 35 (explaining that a damages model must "establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)").

Finally, Liaison Counsel seek to twist Dr. Keiser's report by highlighting his statements about Flint's unique macroeconomic characteristics. *See* Liaison Br. at 79, PageID.54074. Those are statements that Dr. Keiser provided by way of introduction, *see* Keiser Report at 4, ECF No. 1208-128, PageID.37483—they have no bearing on his model's ability to calculate class-wide damages. In fact, Dr. Keiser only mentioned those characteristics in order to provide proper context for how he selected his control group for his "difference-in-differences" model. *See id.* at 14, PageID.37493 (explaining that "[a]ssessing damages due to the Flint drinking water contamination requires accounting for the uncommon economic baseline conditions and trends in the city"); *id.* at 39-40, PageID.37518-37519 (describing how Dr.

Keiser selected a control group of cities that "are similar to Flint along every considered statistical dimension").

It's unclear what, if anything, Liaison Counsel's recitation of Dr. Keiser's introductory remarks has to do with commonality or predominance. The same goes for their recitation of Dr. Keiser's explanation of how much public and private support was provided to mitigate and remediate damage caused by the Flint Water Crisis. *See* Liaison Br. at 80, PageID.54075. Dr. Keiser only provides that information to explain that "[e]stimated economic damages in [his] report are net of [those] expenditures." Keiser Report at 14, ECF No. 1208-128, PageID.37493.

(ii) Plumbing Remediation

Veolia's argument regarding remediation damages boils down a dispute over Dr. Russell's opinion that exposure to the water in Flint caused damage to residents' plumbing such that remediation will be needed class-wide. *See* Veolia Br. at 46-47, PageID.45391-45392. As Dr. Russell sets forth in both his opening and rebuttal reports, "[a]ll Flint plumbing systems were impacted by the corrosive water during the Flint Water Crisis," a conclusion that he supports with meticulously cited analysis and thorough responses to each criticism levied by Veolia's cadre of experts. Class Pls.' Resp. to Defs.' Mot. to Exclude the Test. & Report of Dr. Larry L. Russell ("Russell Br."), Ex. 2, Russell Rebuttal Report at 20, Apps. 1-7, Mar. 29, 2021, ECF No. 1543-3, PageID.59999, 60009-60117. Defendants raise the same

arguments in response that they assert in their motion to exclude Dr. Russell; as Class Plaintiffs' opposition to that motion explains, they fail. *See generally* Russell Br., ECF No. 1543.

Defendants argue first that Dr. Russell improperly failed to examine "actual" properties in Flint. But Dr. Russell was unable to do so due to public health concerns and restrictions regarding COVID-19. Russell Br. at 10-11, ECF No. 1543, PageID.59919-59920. Furthermore, Defendants present no basis for requiring that he travel in person to Flint in the first place beyond pointing out that he has, in other cases, performed in-person examinations as part of his analysis. Of course "experts in various fields may rely properly on a wide variety of sources and may employ a similarly wide choice of methodologies in developing an expert opinion," *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1020 (7th Cir. 2000) (cited with approval in *United States v. Ramer*, 883 F.3d 659, 680 (6th Cir. 2018)); *see* Russell Br. at 11-12, ECF No. 1543, PageID.59920-59921 (citing cases explaining that an expert may use different methodologies in different circumstances).

Furthermore, Veolia's *own evidence* corroborates Dr. Russell's opinion regarding in-home lead levels: Defendants performed inspections of the homes of two named Plaintiffs using XRF scanning and, precisely in line with Dr. Russell's opinion, discovered elevated levels of lead in their plumbing. Russell Rebuttal Report at 21, ECF No. 1543-3, PageID.60000. Veolia argues that these inspections

supposedly showed "no damage" to the plumbing; but as Dr. Russell demonstrates in his rebuttal report, the very images provided by Veolia show that to be incorrect. *Id.* at 21-22, PageID.60000-60001; *id.* at A6-16-A6-17, PageID.60103-60105. In a last-ditch effort to disregard Dr. Russell's opinion, Veolia latches on to the word "likely" in one of the named Plaintiffs' interrogatory responses as somehow presenting a shift in Class Plaintiffs' position regarding whether each home experienced damage. Veolia Br. at 47, PageID.45392. It is not. Dr. Russell has demonstrated that each home exposed to corrosive water in Flint was damaged by exactly the same corrosive water, and his rebuttal report confirms that opinion.

Veolia next argues against remediation as a form of class-wide impact by claiming that each Class member will need to present evidence that the damage to his or her home was caused solely by Veolia, but it again cites to no on-point caselaw, Veolia Br. at 67-68, PageID.45412-45413. Instead, Veolia points to *Crutchfield v. Sewerage & Water Bd. of New Orleans*, 829 F.3d 370 (5th Cir. 2016), which does not stand for the proposition that Veolia can avoid liability simply because the amount of harm Veolia caused has not yet been apportioned. Rather, in that case the court found a district court had permissibly exercised its discretion in not certifying a class when individual questions of as to liability would predominate, and plaintiffs proposed no plan for calculating class-wide damages. *Id.* at 377. It held nothing regarding any damages apportionment requirement at the class certification

stage. As already discussed with respect to diminished property value, this presents a quintessential question for the jury. Veolia later misleadingly quotes language from *Comcast* out of context to suggest that Class Plaintiffs must "measure only those damages attributable to" Veolia, Veolia Br. at 77, PageID.45422; but that quoted language pertains to measuring damages attributable to a *liability theory*, not a specific defendant. *See Comcast*, 569 U.S. at 35.

Veolia raises the same challenges to the amount of remediation damages that it offers in its motions to exclude Mssrs. Pogorolich and Gamble, which Class Plaintiffs have addressed in their combined opposition to those motions. *See* Class Pls.' Combined Resp. to Defs.' Mot. to Exclude the Test. & Report of R. Bruce Gamble & Defs.' Mot. to Exclude the Test. & Report of David A. Pogorilich ("Gamble & Pogorilich Br."), Mar. 29, 2021, ECF No. 1532. In particular, Veolia presents a number of "assumptions" purportedly made by Mr. Pogorilich with which Veolia (or its expert, an insurance adjustor with no formal construction experience) disagrees. Veolia Br. at 79-80, PageID.45424-45425. As Class Plaintiffs have explained, Mr. Pogorilich's assumptions are reasonable based on the available data and his professional expertise. *See* Gamble & Pogorilich Br. at 15-17, ECF No. 1532, PageID.58963-58965. Veolia's disagreement goes to the weight of his opinion, not its admissibility: "Because the Court acts merely as a gatekeeper and not a factfinder, an expert whose methodology is otherwise reliable should not be excluded simply

because the facts upon which his or her opinions are predicated are in dispute, unless those factual assumptions are 'indisputably wrong.'" *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 382 F. Supp. 3d 687, 698–99 (E.D. Mich. 2019) (quoting *In re MyFord Touch Consumer Litig.*, 291 F. Supp. 3d 936, 967 (N.D. Cal. 2018)); *see also* Fed. R. Evid. 702, Adv. Comm. Notes on Rules—2000 Amendment (2000) (explaining that "[w]hen facts are in dispute, experts sometimes reach different conclusions" and a trial court is not "authorize[d] . . . to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other").

Veolia's assertion that some individuals have had water service lines replaced is a red herring; such individuals can easily be identified in the claims administration process. And the fact that both Veolia and LAN claim they intend to put on individual testimony is no more relevant here than with respect to diminished property value.

LAN argues, without citation, that "[i]t is undisputed that Flint had periods of high water lead levels before the crisis, and it is entirely possible that a given plumbing system was already damaged before any acts of the Defendants could have affected it." LAN Br. at 37, PageID.53941. LAN cites no evidence for this point, and Dr. Russell has explained in detail his opinion that the vast majority of lead corrosion occurred in Flint after the switch to Flint river water. *See, e.g.*, Russell

Rebuttal Report at 15, A7-1-A7-10, ECF No. 1543-3, PageID.59994, 60106-60115 (explaining why Edwards's paper regarding sewage sludge does not indicate that significant corrosion occurred prior to the switch). And regardless, this raises a quintessential dispute on the merits and does not weigh against certifying a class, as the evidence regarding this dispute will be common across the Class.

(iii) Water Bills

Every residential property owner that received and paid for water with elevated lead levels paid for water that was unsafe for their personal use and consumption, and they consequently suffered damages in the amount of their payment for that unsafe water. Class Cert Br. at 69-70, PageID.34506-34507. Demonstrating this harm plainly turns on class-wide evidence: Class Plaintiffs' experts will demonstrate that (1) the water—which was the same for each resident receiving water from the City of Flint—had elevated lead levels following the switch to the Flint river, and (2) elevated lead levels in water are unsafe for personal use and consumption. Neither the fact of the water's contamination nor the fact of whether such contaminated water is safe for drinking, bathing, cooking, or washing raises any individual question, and payment of these water bills thus presents a third indisputable manner of demonstrating class-wide harm to property owners in Flint.

Defendants raise only two arguments to the contrary, neither of which bears any weight.

First, Veolia claim that the water would be unsafe "only if a class member's residence had service lines, pipes, or fittings made of lead that had leached into the water," and that, according to Veolia, "many homes in Flint did not have detectable levels of lead" during the Class Period. Veolia Br. at 52, PageID.45397. However, as Dr. Russell explains, particulate lead—non-soluble lead that has built up in a water distribution system as a result of prior corrosion—was a significant source of lead contamination. *See* Class Cert. Ex. 58, Russell Report at 36, ECF No. 1208-67, PageID.35447. Such particulate lead can contaminate water regardless of what an individual's pipes are made of. Dr. Russell also explains that the Flint River water destabilized internal pipe scales that had built up inside the Flint water distribution system for decades, leading to the release of lead into the drinking water—which also does not depend on an individual's plumbing. *Id.* at 65, PageID.35476. And Dr. Russell has explained that "[e]very home and business in Flint received the highly corrosive Flint River water from April of 2014 through at least October 2015," which "impacted plumbing components by accelerating corrosion and increasing lead release into the drinking water," providing a detailed analysis of why this is so in both his opening and rebuttal reports. *See* Russell Rebuttal Report at 12, ECF No. 1543-3, PageID.59991. As a consequence, "[e]very home and business suffered property damage to the premises plumbing and the residents were exposed to elevated levels of lead and iron in their drinking water." *Id.* Veolia and its experts

disagree—and Dr. Russell explains why they are wrong, *see generally* Russell Rebuttal Report, ECF No. 1543-3—but it cannot deny that the question of whether residents received unsafe water is one common to the subclass of property owners.

Second, and most incredibly, LAN asserts that even lead-contaminated water was of value to Class members because "[i]f the water had no value to the class members they would not have used it." LAN Br. at 35, PageID.53939. What LAN expects the people of Flint to have done when they needed water to drink, cook, or clean other than use the contaminated water that came from their faucets is unclear; and its bald assertion that "[t]he fact that the water posed a health risk, if ingested, does not mean that it lacked any value," *id.*, is without any logical, ethical, or legal support. The sole case LAN cites, *In re POM Wonderful LLC Mktg. and Sales Pracs. Litig.*, No. 10-ML-02199, 2014 WL 1225184, at *3 n.2 (C.D. Cal. Mar. 25, 2014), does not stand for the proposition that a consumer must shoulder the cost of purchasing a contaminated necessity. Rather, that case addressed false advertising that led consumers to incorrectly believe they would receive an added benefit from the defendant's fruit juice; the juice did not present any unwanted *danger*. Nothing in the law supports that—and it certainly does not support requiring residents to pay for dangerous water simply because they had no reasonable option but to use what was coming out of their taps.

C. Common Issues Predominate within the Business Subclass.

Class Plaintiffs have demonstrated, through the analysis of their expert Professor Robert Simons, that harm to the subclass of Flint businesses can be shown using common evidence. *See* Class Cert. Br. at 78-79, PageID.34515-34516; Class Cert. Ex. 86, Simons Report, ECF No. 1208-95; Simons Br., ECF No. 1535. Defendants' arguments to the contrary rely on mischaracterizations of Professor Simons's analysis and misapplication of the law. Nothing in the oppositions justifies denying certification of a Business Subclass.

Repeating many of the same flawed arguments from its motion to exclude the testimony of Professor Simons, Veolia argues that Professor Simons has not reliably shown Class impact on Flint businesses because he purportedly makes "implausible" assumptions; uses revenues rather than profits in his analysis; presents a methodology that is purportedly "result-oriented;" and has not apportioned the damages attributable solely to Veolia. Veolia Br. at 70-71, 83-84, PageID.45415-45416, 45428-45429. As explained in Class Plaintiffs' opposition to Veolia's *Daubert* motion, none of these arguments undermines his opinion that provides a class-wide methodology for proving impact on Flint businesses. And indeed, the analysis of Veolia's own proffered expert Dr. Edelstein underscores the harm suffered by Flint businesses during the Class Period as a consequence of the water crisis. *See* Simons Br. at 23-25, ECF No. 1535, PageID.59322-59324.

Contrary to Veolia's statement, Professor Simons does not simply "assume" losses due to the water crisis in certain business sectors, nor does he attribute any and all losses suffered by a Flint business during the Class Period to the water crisis. *See* Veolia Br. at 83, PageID.45428. Rather, Professor Simons employs a four-step filtering process to determine which subsectors of Flint businesses suffered losses compared to various comparators—including Saginaw, Grand Rapids, and the broader Genesee County—in order to determine those business subsectors most clearly impacted by the Flint Water Crisis. *See* Simons Br. at 2-3, ECF No. 1535, PageID.59301-59302. He then calculates estimated lost profits and damages to failed firms, taking into consideration reported national average net profit margins for each business sector (which are further broken down by annual sales range) and, for failed firms, using a combination of Reference USA data and conservative assumptions drawn from basic business economic principles. *Id.* at 3-4, PageID.59302-59303.

Veolia's criticism of Professor Simons's methodology as "result-oriented" is no more compelling. As explained in Class Plaintiffs' opposition to Veolia's motion to exclude, Professor Simons's filtering method for identifying the Flint business subsectors likely to have experienced losses due to the water crisis made no prior assumptions whatsoever regarding outcomes: for each subsequent step, it was possible that the data would reveal no subsectors at all demonstrating potential

damages to Flint businesses—and indeed, the fact that certain subsectors demonstrated no losses indicates that the method worked precisely as it was intended. *Id.* at 16-17, PageID.59315-59316. As Professor Simons explains, "[w]hen there is economic contraction, theory and past evidence from the recent great recession shows that not all types of retail and service enterprises are equally affected," which is precisely why his methodology proceeds on a sector-by-sector bases. Simons Report at 2-3, ECF No. 1208-95, PageID.36137-26138. Liaison Counsel take this statement out of context and present it as purportedly showing that individual issues predominate with respect to businesses. Liaison Br. at 80, PageID.54075. On the contrary, this difference between business sectors is precisely why certain sectors would be expected to show minimal or no impact, and thus Professor Simons's methodology takes this into account by isolating the categories of enterprises *actually* affected.

Veolia attempts to sweep Professor Simons's opinion away by arguing that the Class cannot be certified because Veolia would assert individual defenses and then asserts a laundry list of hypothetical circumstances that it present as supposedly presenting circumstances in which such defenses would apply. *See* Veolia Br. at 70-71, PageID.45415-45416. But individual defenses do not defeat predominance here. And, as discussed, this argument confuses the issue of liability with that of damages. *See* Section II.A.2., *supra*.

Defendants repeatedly point to *McLaughlin*, 522 F.3d 215 as prohibiting "calculating aggregate damages and then dividing that amount by the number of plaintiffs," Veolia Br. at 84, PageID.45429, but that case has no bearing on the damages model offered by Class Plaintiffs. In *McLaughlin*, the plaintiff proposed a "fluid recovery" process through which aggregate damages would be determined; individuals would make claims; and any remaining unclaimed funds would be distributed evenly for the benefit of the class. 522 F.3d at 231. This sort of "fluid recovery" has been deemed impermissible, LAN notes in its brief—though LAN omits the part of the distribution plan (provision of unclaimed funds on a cy pres basis) that the court in that case actually rejected, mischaracterizing the case as simply one that involved aggregate damages. LAN Br. at 34, PageID.53938. The fluid distribution of unclaimed funds is *not* what Class Plaintiffs have proposed.

Rather, as in *In re Scrap Metal*, Defendants "confuse[] the concept of fluid recovery with aggregate damages." 527 F.3d at 534; and, as in *In re Scrap Metal*, Class Plaintiffs do "not propose a fluid recovery; instead they provided evidence of a class-wide aggregate injury," which the Sixth Circuit permits. *Id.* That aggregate amount will be further distributed to businesses based on further entity-specific information regarding losses; but at the class certification stage, presentation of the aggregate amount as evidence of class-wide impact is entirely proper. *Id.*

Similarly, Veolia's oft-repeated argument that an expert—in this instance, Professor Simons—has not isolated the specific percentage of damages attributable to Veolia is irrelevant. An expert need not apportion damages at the class certification stage. Such attribution of harm is a quintessential question for the jury; and Veolia's argument that expert testimony must identify the percentage of harm attributable to Veolia has been flatly rejected recently in this District. *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4254608, at *6 (N.D. Ohio Sept. 9, 2019) ("[T]he Court rejects Defendants' argument that [the expert] McGuire's calculations do not 'fit' the facts because they aggregate the evidence and do not focus upon the alleged misconduct of any particular Defendant.").

The unpublished memorandum disposition from the Ninth Circuit that Veolia cites, *Andrews v. Plains All Am. Pipeline, L.P.*, 777 F. App'x 889 (9th Cir. 2019), does not support imposing Veolia's novel damages apportionment requirement at class certification. Rather, that matter dealt with "a diverse collection of parties potentially scattered across the globe" who had failed to show common impact from a pipeline shutdown caused by an oil spill. *Id.* at 891. The court there held simply and uncontrovertially that common liability issues must predominate for class treatment to apply. *See id.* It did not create any requirement that a damages expert apportion those damages to defendants at the class certification stage—nor has Veolia pointed to any case imposing such an unprecedented requirement. Professor

Simons need only show that impact to the Business Subclass can be demonstrated using common evidence. He has done so.

None of the remaining cases Defendants cite change the analysis. Veolia cites four out-of-Circuit cases, none of which resemble the current action. In *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), the court reversed certification of a class of past and current franchisees of a muffler business that had asserted breach of contract and various tort and unfair trade practice claims. The court found the proposed class failed to satisfy the Rule 23 requirements on numerous fronts related to class-wide liability, not merely damages; and, with respect to damages, the plaintiffs' expert had not considered lost profits data specific to any particular firm. Here, by contrast, Professor Simons has used firm-specific data from Reference USA, *see* Simons Report at 7, ECF No. 1208-95, PageID.36142, and none of the individual *liability* issues at play in *Broussard* appear here.

The court in *Pioneer Valley Casket Co. v. Serv. Corp. Int'l*, Civil Action No. H-05-3399, 2008 WL 11395528 (S.D. Tex. Nov. 24, 2008), *R&R adopted*, 2009 WL 10695539 (S.D. Tex. Mar. 26, 2009), specifically addressed its analysis to cases "where *antitrust plaintiffs* seek to recover lost profits," and it thus has no application here. *Id.* at *9 (emphasis added). Furthermore, unlike in that matter, lost profits have not here been simply "assumed"; they have been demonstrated on a class-wide basis

through an economic analysis that is appropriately tested on cross-examination at trial. In *Bradford v. Union Pac. R.R. Co.*, No. 05-CV-4075, 2007 WL 2893650, at *14 (W.D. Ark. Sept. 28, 2007), the court found that individualized proof would be required to show even the *fact* of damages to a given business, *id.* at *14—this is different from the potential for the damages amount to vary from one business to the next, which does not preclude class certification. And Veolia cites an unpublished case from the District of New Jersey, *Bayshore Ford Truck v. Ford Motor Co.*, Civil Action No. 99-741, 2010 WL 415329, at *12 (D.N.J. Jan. 29, 2010), for the proposition that "a common class-wide method may not be used to short cut the requirement of individual damage proof"; but in that *very same opinion* the court "acknowledge[d] that the presence of individual damages issues does not automatically preclude a finding that the predominance factor has been satisfied," and ultimately decertified a damages class based on conflicting interests between class members—which Veolia does not contend is an issue here. *Id.* at *13-14.

The cases on which LAN relies are no more relevant than those offered by Veolia. It cites a Texas state court conversion case brought that did not involve any class claims for the generic statement that showing business losses requires "objective facts, figures and data," *Wiese v. Pro Am Services, Inc.*, 317 S.W. 3d 857 (Tex. App. 2010), and similarly point to *Ask Chemicals, LP v. Comput. Packages, Inc.* 593 Fed. Appx. 506 (6th Cir. 2014) for substantially the same point. Neither

case has anything to do with class certification, and thus are irrelevant here. And regardless, Class Plaintiffs have provided evidence of exactly this sort of "expert testimony" and "economic and financial data" in expert reports regarding business loss. *See generally* Simons Report, ECF No. 1208-95; Veolia Mot. To Exclude Dr. Simons, Ex. 3, Simons Suppl. Report, Jan. 7, 2021, ECF No. 1383-4; Simons Br., Ex. 1., Simons Rebuttal Report, ECF No. 1535-2.[43]

Finally, while Liaison Counsel wrongly assert that variation between Class members has led "numerous courts to deny certification of property damage and business loss class actions," Liaison Br. at 81, PageID.54076, the sole case cited by Co-Liasion Counsel—*In re Katrina Canal Breaches Consol. Litig.*, 258 F.R.D. 128 (E.D. La. 2009)—is distinguishable. In rejecting certification, the Eastern District of Louisiana explained that, "[t]he weight of the Fifth Circuit's case law holds that where damages cannot be calculated using a mechanical formula, but instead require individualized assessment, predominance generally does not exist." *Id.* at 134. Setting aside the question of whether the Sixth Circuit applies a similar rule, the

[43] LAN does not explain the purported relevance of *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974), a case that does not deal with any proposed business loss class, other than to cite it in support of its assertion that courts do not permit fluid recovery. LAN Br. at 34, PageID.53938. As already explained, Class Plaintiffs do not propose a fluid recovery distribution plan.

proposed damages methodology in this case has what was missing there: Professor Simons's filtering approach *is* a formula for establishing damages.

D. Common Issues Predominate within the Minors Subclass.

1. Causation can be Shown Using Common Evidence.

Class Plaintiffs' proofs are sufficient to demonstrate both general and specific causation for the Minors Subclass because of the unique toxicological effects of lead. "General causation pertains to whether a toxin is capable of causing the harm alleged." *Lowery v. Enbridge Energy Ltd. P'ship*, 898 N.W.2d 906, 913 (Mich. 2017). Lead is capable of causing the neurological injury and IQ decrement alleged by Class Plaintiffs, and Defendants do not seriously contest this point. They do contest whether a sufficient "*exposure level of the toxin*" may be demonstrated. But as discussed *infra*, when there is "no safe level" of the toxin, Michigan law provides that this is an adequate basis to present causation. *See Chapin v. A & L Parts, Inc.*, 274 Mich. App. 122, 131 (2007).

"'Specific causation' exists when exposure to an agent caused a particular plaintiff's disease." *Restatement (Third) of Torts: Phys. & Emot. Harm* §28 (2010). As set forth below, *Lowery* contemplates that exposure levels may be presented through circumstantial evidence. *Lowery*, 898 N.W.2d at 914 ("[C]ircumstantial evidence of causation *may* be sufficient to establish exposure adequate to prove specific causation."). Virtually none of the children in the Minors Subclass have a

water sample taken at their home during the Class Period documenting what the water lead level was. But the Virginia Tech samples demonstrate that detectable levels of lead were found in *every* home tested.[44] Basic chemistry establishes that when lead is present, there will be more of it in water when that water is corrosive than when it is not.[45] And as explained herein, reconstruction of estimated exposure and ingestion levels is a permissible basis upon which to infer specific causation. This is precisely what Class Plaintiffs have presented in the reports of Dr. Georgopoulos, who modeled the absorption of lead into children's blood through use of the IEUBK model, and Dr. Hu.[46] This evidence is sufficient "such that reasonable inferences can be drawn concerning the plaintiff's exposure level." *Powell-Murphy v. Revitalizing Auto Communities Env't Response Tr.*, No. 348690, 2020 WL 4722070, at *5 (Mich. App. Aug. 13, 2020).

Defendants' reliance on *Lowery* for the proposition that Class Plaintiffs must provide a more specific "estimated amount and duration of exposure," is misplaced. Veolia Br. at 58-59, 65, PageID.45403-45404, 45410. *Lowery* is predicated on the

[44] Class Cert. Ex. 85, Goovaerts Decl. ¶ 24, ECF No. 1208-94, PageID.36086.

[45] Class Cert. Ex. 122, Weisel Decl. at 14, ECF No. 1208-136, PageID.37899.

[46] Class Cert. Ex. 81, Hu Decl., ECF No. 1208-90; Georgopoulos Decl., ECF 1208-137; Class Pls.' Combined Resp. to Defs.' Mots. To Exclude the Test. and Decls. Of Drs. Howard Hu & Bruce Lanphear ("Hu & Lanphear Br."), Ex. 3, Hu Rebuttal Decl., Mar. 29, 2021, ECF No. 1520-3.

notion that "[k]nowledge of the exposure level is crucial to determining whether the toxin can cause the harm because many substances are harmful in certain quantities *but are safe at lower levels* . . . ." 898 N.W.2d at 914 (emphasis added). *Lowery's* framework does not address the context in which there is "no safe level" of the toxin, and the decision recognizes "that the absence of separate proofs regarding general and specific causation does not prevent a plaintiff from establishing a prima facie case of negligence in every toxic tort case." *Id.* at 913, n.10.

Finally, Class Plaintiffs will present common epidemiological evidence demonstrating the cause and effect relationship between lead and IQ decrement, which is a manifestation of the neurological impairment found by Dr. Hu for the children who meet the class criteria for the Minors Subclass.[47] Epidemiological evidence "provides a reasonable basis for determining specific causation in the absence of more particularistic evidence about the cause of the plaintiff's disease." *Restatement (Third) of Torts: Physical & Emotional Harm* § 28 (2010) (Comment c(4)). Veolia's contention that such an injury is not legally cognizable under *Henry v. Dow,* has been rejected by the only court that has reviewed the issue for exposure to lead under Michigan law, the Wayne County Circuit Court in *Brown v. NL*

[47] Hu Decl. § IV, ECF No. 1208-90, PageID.35901-35918; Hu Rebuttal Decl. at 3-9, ECF No. 1520-3, PageID.58723-58729.

Industries, No. 06-602096-CZ.[48] Additionally, the vast majority of the children in the Class will, of necessity, have to rely upon epidemiological evidence to establish IQ decrement. Few, if any, children had IQ tests demonstrating their IQ *before* ingestion of Flint water, to which they could compare their IQ *afterwards*. T.W. was *in utero* during the majority of his exposure to Flint water making Defendants' suggestion that his IQ decrement must be "measurable" (other than through epidemiological evidence) an absurd one. Most children will face similar issues.

Defendants' contention that the Minors Subclass involves too many individualized defenses also fails. Defendants contend that because the pre-existing levels of lead for children will vary, they will need to challenge the claims of each child individually to determine what levels of lead the child was pre-exposed to from soil, dust, paint, and other sources. Veolia Br. at 59, 66, PageID.45404, 45411. But the issue as to whether a child's pre-existing level of lead was high or low is irrelevant to whether a child suffered an incremental increase in lead attributable to ingestion of Flint water. Put differently**,** a child's pre-existing lead level neither

[48] *Brown v. NL Indus. Inc.*, No. 06602096CZ, 2008 WL 6124240, Defs.' Mot. for Partial Summ. Disposition Related to Med. Monitoring Claims (Mich. Cir. Ct. Jan. 8, 2008); *Brown v. NL Indus., Inc.*, No. 06602096CZ, 2008 WL 6124254, Pltfs. Mem. in Opp'n to Defs.' Mot. for Partial Summ. Disposition Related to Med. Monitoring Claims (Mich. Cir. Ct. Feb. 1, 2008); *Brown v. NL Indus., Inc.*, No. 06-602096-CZ, 2008 WL 6135941, Order Denying Defs.' Motion for Summ. Disposition Related to Med. Monitoring Claims (Mich. Cir. Ct. Feb. 29, 2008).

increases nor decreases the likelihood that child was exposed to lead in water attributable to Defendants' conduct. Hu Rebuttal Decl. 14-15, ECF No. 1520-3, PageID.58734-58735 ("irrespective of whether a child's baseline blood lead level from soil, paint, house dust or other factors is high or low, it will still be even higher if the child ingested Flint water."). And to the extent Defendants wish to present defenses that a child's damages are attributable to pre-existing blood levels, or any other pre-existing condition, those issues are appropriately addressed as part of damage adjudication.

2. Injuries and Damages to the Minors Subclass Can Be Established Using Common Evidence.

Class Plaintiffs' opening brief presented a methodical, scientifically-supported basis to demonstrate injury to the Minors Subclass using class-wide evidence. Reports from experts in the fields of water treatment and plumbing, exposure science, geostatistics, biokinetic exposure modeling, toxicology, epidemiology, and medicine collectively demonstrate three factual predicates (exposure, ingestion, and injury) on a class-wide basis:

1. **Exposure**: Unfiltered Flint tap water in 26 identified day care facilities, 26 identified schools, and 40,876 identified homes (for a total of 40,928 properties out of the 56,235 total properties in the City) contained elevated levels of lead during the Class Period (May 1, 2014 through January 5, 2016);[49]

[49] The predicate for elevated lead levels in these locations is based upon the expert reports of Drs. Russell and Weisel, ECF No. 1208-67 and ECF No. 1208-136,

2. **Ingestion:** Children who ingested the lead-tainted water at these locations had higher levels of lead in their blood than they would have otherwise had;[50] and

3. **Injury:** The impacted children experienced increases in blood lead levels and suffered injury because lead "interferes with the formation of nerve connections, which are formed during brain development."[51] Specifically, children so exposed suffered nonnegligible impairment of their neurobehavioral development, manifested as IQ decrement.[52]

Defendants' responses claiming that a host of "individualized" issues preclude certification fail to account for the bifurcated approach Plaintiffs proposed and instead rely on mischaracterizations of what will, and what will not, be addressed through class-wide evidence.

(i) The Oppositions Improperly Conflate Fact and Extent of Injury.

Defendants' argument that Class Plaintiffs must demonstrate that the *nature and extent* of each child's injuries are amenable to proof on a class-wide basis, is legally incorrect and misstates Class Plaintiffs' arguments for certification. Plaintiffs

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respectively. The locations meeting the criteria outlined by Drs. Russell and Weisel were identified by expert geostatistician Dr. Goovaerts. Goovaerts Decl., ECF No. 1208-94.

[50] The predicate for elevated blood levels is based upon the exposure assessment work of Drs. Weisel and Georgopoulos. Georgopoulos Decl., ECF No. 1208-137; Weisel Decl., ECF No. 128-136.

[51] Class Cert. Ex. 99, Lanphear Decl. at 9, ECF No. 1208-108, PageID.36890.

[52] Hu Decl. ¶22, ECF No. 1208-90, PageID.35895-35898.

presented a bifurcated trial plan[53] that proposed a Phase 1 trial in which the Minors Subclass will try the liability, causation, injury, and injunctive relief obligations of the Defendants. If the Minors Subclass prevails, they would subsequently proceed with implementation of the injunctive relief and individual determination of the damages claims to which each child is entitled. This approach is recognized by the Sixth Circuit as an appropriate method of staging the litigation; treating the subsequent issue of the *amount of damages* separately, and individually, is not a basis for defeating class certification. *See Olden v. LaFarge Corp.,* 383 F.3d 495, 509 (6th Cir. 2004) (Court "can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special master or by another method."); *See also* Section II.A.2.

In attempting to defeat class certification, Defendants present a multitude of "individualized" questions associated with the nature and extent of injury (which Class Plaintiffs expressly reserved for individual adjudication) and conflate those issues with the more fundamental issues of exposure, ingestion and injury. To use just one example, Defendants attempt to exploit the individual variability among Class members because they had different preexisting blood lead levels; that is, the

[53] Class Cert. Ex. 84, Class Plaintiffs' Proposed Trial Plan, ECF No. 1208-93, PageID.36063.

levels of lead in their blood attributable to causes *other than* Flint water, such as soil, paint, and dust (and due to differences in diet, biology, etc.), will be different.[54] The crux of these arguments is that some Class members will have *different harm* than other Class members. This may be a relevant distinction for the proposed Phase 2 proceedings. It is of no consequence, however, in proving that *all Class members were harmed,* which is what Class Plaintiffs seek to demonstrate on a class-wide basis in the Phase 1 trial.

(ii) Plaintiffs Demonstrate Exposure on a Class-Wide Basis.

Plaintiffs can prove, using common evidence, that children in Flint were exposed to elevated levels of lead in water at the identified locations. That the underlying cause of an increase in lead in Flint water was a City-wide problem is not in dispute. *See* Veolia Br. at 10-11, PageID.45355-45356 (summarizing City-wide issues).[55] Veolia acknowledges that the failure to implement corrosion control caused a massive City-wide lead contamination issue that led to exposure of Flint's children as lead entered the water supply. *Id.* Professor Marc Edwards similarly concluded that "there was a system-wide lead in water contamination problem," and

[54] *See* Veolia Br. at 59, PageID.45404; LAN Br. at 29-30, PageID.53933-52934; Liaison Br. at 15, PageID.54010.

[55] *See also* Veolia Br. at 37, 110-111, PageID.45382, 45455-45456.

"[t]he incidence of elevated WLLs [water lead levels] was evident throughout the city."[56]

Class Plaintiffs present a common methodology for establishing exposure for the children who drink unfiltered tap water at 40,928 properties identified in Dr. Goovaerts' database. First, the academic literature demonstrates a general scientific consensus that the City of Flint (a) switched to water from the Flint River which was corrosive; (b) terminated corrosion control; (c) experienced corrosion of Flint's water distribution system, service lines, and residential pipes; (d) experienced elevated water lead levels (WLLs) in the drinking water throughout the City; and as a result (e) exposed its residents to lead-contaminated water.[57] Class Plaintiffs will further present two experts to demonstrate class-wide exposure for the Minors Subclass: Dr. Larry Russell, a water treatment and plumbing expert, who identifies

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[56] Kelsey Pieper et al., *Evaluating Water Lead Levels During the Flint Water Crisis,* Env't Sci. & Tech. 52, 8125-126 (2018); *See also,* Siddhartha Roy et al., *Lead release to potable water during the Flint, Michigan water crisis as revealed by routine biosolids monitoring data,* Water Rsch. 160, 475-483 (2019) ("our Virginia Tech research team exposed citywide water lead contamination," and our sampling "reflects citywide release of lead to water from plumbing." *Id.* at 475, 478).

[57] *See e.g.*, Susan Masten et al., *Flint Water Crisis: What Happened and Why?*, J. Am. Water Works Ass'n, 108, 22, 31 (2016) (concluding that "elevated levels of lead found in the drinking water of residences in Flint had a profound effect . . ." and that Flint's "failure to recognize the corrosivity of the water and to add a corrosion inhibitor had devastating effects."); *see also*, Pieper, *Evaluating Water Lead Levels During the Flint Water Crisis,* 8124-125.

the sources of lead in both interior plumbing and exterior service lines that will leach lead into drinking water when corrosive water is present; and Dr. Clifford Weisel, an exposure scientist at Rutgers University who has studied the data and distribution of lead in drinking water throughout the Flint community.

Homes in Flint built before 1986 have interior plumbing with lead components, including lead solder (*e.g.*, copper or other interior piping joined with lead solder) or fixtures (*e.g.*, faucets) that contain lead.[58] Defendants' claim that Plaintiffs cited no evidence or studies supporting this fact is simply false. To the contrary, Dr. Russell, in his report,[59] set forth the factual basis supporting this well-known fact, which Dr. Weisel also discussed.[60] Dr. Edwards, Defendants' "non-

[58] Defendant Veolia criticizes Class Plaintiffs' experts for assuming "that the principal source of elevated water lead levels was interior plumbing containing lead." Veolia Br. at 37, PageID.45382. Plaintiffs make no such assumption. To the extent that an eligible location of exposure has lead in its interior plumbing *and* lead service lines for its exterior water distribution, it will likely have a greater amount of lead than if it has *only* lead content in its interior plumbing. Further, this is an issue relevant to a Class member's amount of injury—not the fact of injury.

[59] Russell Report at 21, ECF No. 1208-67, PageID.35432. Further, it is common knowledge that homes built prior to 1986, as a rule, contained high-lead components. *See, e.g.*, U.S. Env't Prot. Agency, Air Quality Criteria for Lead, Vol. I, 3-35 (2006) ("The primary type of solder used in the United States was 50-50 tin-Pb solder (50% tin, 50% Pb) before the Safe Drinking Water Act amendments of 1986 were enacted. . . .").

[60] Class Pls.' Resp. to Defs.' Mot. to Exclude Test. & Decl. of Dr. Clifford P. Weisel ("Weisel Br."), Ex. 2, Weisel Rebuttal Decl. at 7, Mar. 29, 2021, ECF No. 1522-3, PageID.58873.

retained" expert, similarly confirmed this fact, stating: "Roughly 95% of Flint homes were built in the pre-1986 time period when lead content solder and brass was commonplace."[61]

Thus, lead exposure was an issue for even those Flint homes that did not have lead service lines. For example, named Plaintiff Elnora Carthan's home (which was not serviced by a lead service line) reached water lead levels of 1,051 parts per billion during the Class Period.[62] Dr. Weisel also relied upon the testing performed by Virginia Tech in August/September 2015, which confirmed that *every* home sampled had detectible levels of lead in the water.[63]

Defendants attempt to attack Dr. Weisel's opinion by noting that one home, Class representative Rhonda Kelso's pre-1986 constructed home, was completely re-plumbed in the year 2000. Veolia Br. at 37, PageID.45382. But this fact does not defeat Plaintiffs' common evidence of exposure. As Dr. Weisel noted, "Ms. Kelso's elevated lead levels were confirmed in the August 2015 Virginia Tech sampling,

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[61] Siddhartha Roy et al., *Efficacy of corrosion control and pipe replacement in reducing citywide lead exposure during the Flint, MI water system recovery*, Royal Soc'y of Chemistry, Env't Sci. Water Resch. & Tech. 6, 3024, 3027 (2020).

[62] Weisel Rebuttal Decl. at 7-8, ECF No. 1522-3, PageID.58873-58874; *Id.* at 24, PageID.37909.

[63] Goovaerts Decl. ¶ 24, ECF No. 1208-94, PageID.36086; *See also*, Class Cert. Ex. 115, VATECH_00212274, 2015 tab, ECF No. 1208-129, PageID.37577-37584.

which detected 66.2 parts per billion of lead at her home."[64] Defendants omitted from their argument the fact that Ms. Kelso's home had elevated water lead levels, confirmed with test results.[65]

Given the ubiquity of lead contamination throughout Flint's water distribution system caused by corrosion control failures and the presence of lead in interior and exterior plumbing, the existence of one "nondetect" water sample at a Class members' home is not dispositive of the existence of lead contamination exposure at such a property. Dr. Weisel notes that homes, schools, and daycares were exposed to increased lead concentrations, "even if a single or small number of water samples collected in those buildings were below the minimum reporting limit since water lead levels vary with time and depend upon the sampling conditions used." Weisel Decl. at 18, ECF No. 1208-136, PageID.37903. Michigan law supports this conclusion. *See Stites v. Sundstrand Heat Transfer Inc.*, 660 F. Supp. 1516, 1527 (W.D. Mich. 1987) (denying summary judgment "simply because a well sample taken on one day failed to disclose any TCE").

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[64] *See* Weisel Rebuttal Decl. at 9, ECF No. 1522-3, PageID.58875; VATECH_00212274, 2015 tab, ECF No. 1208-129, PageID.37577-37584.

[65] Further, Ms. Kelso is not a proposed representative for the Minors Subclass, but rather for the general Class, which does not seek certification for personal injury damages. Class Cert. Br. at 38, PageID.34475.

Even if some nominal number of households have children who were not exposed to lead, the existence of such homes does not defeat certification. *See Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cnty., Tennessee v. Momenta Pharms., Inc.*, 333 F.R.D. 390, 410 (M.D. Tenn. 2019) ("[A] class will often include persons who have not been injured by the defendant's conduct. Such a possibility or indeed inevitability does not preclude class certification . . . .") (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009)). Multiple circuit courts have affirmed certification of classes in the face of similar arguments about "uninjured" class members.[66]

Defendants' attack on Plaintiffs' expert methodology as "hypothetical"[67] and their arguments about the amount of detail Plaintiffs are required to demonstrate,[68]

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[66] The First Circuit agreed that the "'possibility or indeed inevitability'" that some class members were not injured "'does not preclude class certification.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (quoting *Kohen*, 571 F.3d at 677). The Tenth Circuit affirmed class certification in an antitrust case in which it expressly acknowledged that some class members "avoid[ed] injury altogether." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014). The Third Circuit reached a similar result in *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283 (3d Cir. 1998), affirming certification of a class despite defendants' objections that it included "both injured and uninjured policyholders . . . ." *Id.* at 306.

[67] Veolia Br. at 35, PageID.45380.

[68] *Id.* at 54, PageID.45399 (arguing that "[e]ach class member must show that he or she was exposed to a particular amount of a toxic substance in Flint water and that exposure was caused by VNA."); *see also id.* at 37, PageID.45382 ("Plaintiffs. . . do not establish that the properties they identify actually had elevated water lead levels.").

intentionally overstate what Class Plaintiffs must prove, and manufacture undue complexity associated with very basic chemical processes of corrosion applied to exterior and interior plumbing. This Court should be wary when an alleged wrongdoer argues that "the complexity of the very wrong alleged places it beyond the reach of the law." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 192 (D.N.J. 2003).

It is typically the case in toxic torts that the amount of exposure to a toxic substance is not recorded in real time (due to the fact that Class members did not know that they are being exposed to toxic substances, especially when Defendants vouch for the "safety" of the water). During the Minors Subclass Period in Flint, for example, nearly 40,000 of the homes proposed as eligible exposure locations did not have their water tested at all by Virginia Tech or the State of Michigan, and the homes that were tested were likely tested only once in a nineteen-month Class Period. Neither of the children serving as Class representatives, T.W. and K.C., had the water in their home tested during the Class Period. This same issue will confront thousands of children, regardless whether they litigate their claims in a certified class or individually. Defense arguments that Class Plaintiffs' experts never reviewed the

water lead level data[69] at the homes of these children ring hollow; like tens of thousands of other children in the subclass, there was no home-specific data to review.

In light of this lack of sampling for both named Minor Subclass Representatives and members of the subclass, exposure adequate to prove causation may be proved through circumstantial evidence under Michigan law. As Justice Markman explained in his concurrence in *Lowery v. Enbridge Energy Limited Partnership*:

> "[I]t is often…particularly difficult to establish [exposure levels] in a [toxic] tort suit" given "the adventitious, often accidental, and even unkown (at the time) exposures typical of toxic tort cases…" Therefore, as in ordinary negligence claims, circumstantial evidence of causation *may* be sufficient to establish exposure adequate to prove specific causation. (internal citations omitted).

898 N.W.2d 906, 914 (Mich. 2017) (Markman, C.J., concurring). This is precisely the type of evidence Class Plaintiffs will use to demonstrate exposure.

Defendants' arguments about "hypothetical" plaintiffs notwithstanding, courts routinely recognize that reasonable assumptions may be used to reconstruct exposure levels. *In re Asbestos Prods. Liab. Litig. (No. VI),* 714 F. Supp. 2d 535, 545 (E.D. Pa. 2010), *objections overruled sub nom. In re Asbestos Prods. Liab.*

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[69] *See, e.g.*, LAN Br. at 28, PageID.53932 ("The proposed mass diagnosis is made without consideration of any actual water lead level measurement in the environment to which the child is exposed. . . .").

Litig., No. 09-69123, 2010 WL 4676563 (E.D. Pa. Nov. 15, 2010) ("When it is impossible to calculate actual exposure levels, the mere fact that an expert makes reasonable calculations to support his opinion is not enough to render that opinion unreliable.").[70]

Class Plaintiffs will demonstrate through evidence that is common to the Class that all, or nearly all, children in the Minors Subclass confronted increased lead at their homes, schools, and daycare centers. Multiple courts have certified classes under similar circumstances. *Sterling*, 855 F.2d 1188; *Olden*, 383 F.3d at 509; *Mejdrech*, 319 F.3d 910; *Yslava*, 845 F. Supp. 705.

(iii) Ingestion of Flint Water by Children Within the Minors Subclass is Amenable to Class-Wide Proof.

In order to ascertain which children may be members of the Minors Subclass, Dr. Pierre Goovaerts has constructed a database of the approximately 41,000 properties (homes, schools, and daycares) that are eligible locations of exposure for children.[71] Representatives of the children in the Minors Subclass can demonstrate

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[70] *See also* Mary Sue Henifin, Howard M. Kipen & Susan R. Poulter, Reference Guide on Medical Testimony, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE ("FJCR MANUAL") 439, 424 (2d ed. 2000) ("[W]hen direct measurements cannot be made, exposure can be measured by mathematical modeling, in which one uses a variety of physical factors to estimate the transport of the pollutant from the source to the receptor."), *available at*: https://www.fjc.gov/sites/default/files/2012/sciman00.pdf.

[71] Goovaerts Decl. ¶ 20, ECF No. 1208-94, PageID.36083.

the fundamental issue of ingestion of unfiltered water on a class-wide basis through the simple use of an affidavit or questionnaire verifying their ingestion of unfiltered Flint tap water during the Class Period. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 527 (6th Cir. 2015) (Certifying a class where "P & G could verify that a customer purchased Align by, for instance, requesting a signed statement from that customer's physician. Store receipts and affidavits can supplement these methods.").

These affidavits would be used to verify ingestion on a class-wide basis by requiring parents or guardians of Subclass Minors to certify:

> a) That the child was exposed to water at an eligible location of exposure identified in the database;
> b) The age of the child exposed; and
> c) That they ingested the water for the minimum number of days during the class period; and

See, Goovaerts Decl. ¶ 18, ECF 1208-94; PageID.36080-36081. The affidavits can also be used to verify when a child *stopped* ingesting unfiltered tap water.[72]

Defendants both challenge the use of affidavits for the purpose of determining Class membership, arguing that Class members or their parents will not recall the dates when they ingested water. *See* Veolia Br. at 115, PageID.45460; *see also*

[72] As Veolia notes, Class members who discontinued ingestion of Flint Water before Veolia's involvement in Flint in February 2015 may not have a personal injury claim against Veolia since their ingestion of water ceased before Veolia came on the scene. The affidavit process can delineate which children's claims are applicable to Veolia by identifying when their ingestion ceased. *See, e.g.*, Veolia Br. at 42-43, 90, PageID.45387-45388, 45435.

Liaison Br. at 69, PageID.54064. But neither Minor Subclass representative had difficulty determining Class membership with the same information used in the affidavits. The mothers of each child Class representative addressed the question of their water usage during the Subclass Period (May 1, 2014 – January 5, 2016) in their depositions. K.C.'s mother, Ms. Gaines, used unfiltered Flint tap water for the family for drinking until July 2015, when a Culligan unit (for which she produced records of purchase) was installed. *See* Ex. 2, GAINES_0000551 at 1, noting installation on July 1, 2015; Ex. 3, Gaines Dep.

98:16-99:9. The family continued to ingest Flint water from cooking for the entire Class Period. *Id.* T.W.'s mother Tiantha Williams used tap water for the entire Class Period through when T.W. came home from the hospital in late January/early February 2016. Ex. 4, Williams Dep. Tr. 111:12-16.

Further, the Oppositions' arguments about the quantity and frequency of childhood ingestion of water relate more to the *nature and extent* of each child's injury, than to the *fact of injury*. For example, Defendants and Liaison Counsel both raise the unremarkable observation that different children drink different amounts of water. *See* Veolia Br. at 38-39, PageID.45383-45384; Liaison Br. at 11, PageID.54006. These arguments misapprehend Class Plaintiffs' Class definition: it sets forth the minimum criteria necessary for membership in the subclass. It is not intended to determine the quantity of water each child ingested (a *quantum of injury*

question which will be relevant for Phase 2 determination, where individual inquiry regarding the water consumption habits of each child will be conducted), only that they ingested sufficient water to demonstrate exposure.

(iv) The Fact of Injury is Amenable to Class-Wide Treatment.

Class Plaintiffs are not required to demonstrate the fact of injury on a class-wide basis in order to certify the Minors Subclass Under Rule 23. *See Mejdrech*, 319 F.3d at 912 (affirming certification of a class under Rule 23 to determine liability and extent of TCE groundwater contamination, but leaving both the "fact and extent" of class members injuries to individual adjudication). Nonetheless, the demonstration of exposure and ingestion enables Plaintiffs to do so.

First, Class Plaintiffs will present common class-wide evidence showing that the scientific and medical communities, as well as governmental public health organizations, all have coalesced in the finding that there is no safe level of lead for children. *See* Hu Rebuttal Decl. at 3-8, ECF No. 1520-3, PageID.58723-58728; *see also* Hu & Lanphear Br. at 7-10, ECF No. 1520, PageID.58676-58679. These findings are presented by two of the world's leading experts on the toxicology and epidemiology research associated with lead's toxic effects on children, Drs. Bruce

Lanphear and Howard Hu.[73] "Lead damages numerous organ systems and causes permanent, irreversible injuries to children's developing brains." Lanphear Decl. at 8, ECF No. 1208-108, PageID.36889.

Second, Dr. Hu's findings in the specific context of the Flint Water Crisis are that "children who meet these minimum criteria [for membership in the Minors Subclass] are expected to have experienced lead exposure as a result of the Flint water crisis of a sufficient duration and magnitude to have sustained non-negligible impairment of their neurobehavioral development." Hu Decl. at 21, PageID.35895. Dr. Hu presents a range of projected IQ decrement attributable to the varying levels of lead elevation detected in Flint water, using a range of water lead levels consistent with the actual water lead level readings taken by Virginia Tech during the Class Period. He also finds that "there also are physical mechanisms underlying the points of IQ lost, which current neurotoxicologic research indicates involves oxidative stress effects, neurotransmitter effects, neuroendocrine effects, and immune effects. These kinds of physical effects are also seen at extremely low levels of exposure, underscoring the potency of lead as a neurotoxicant." *See* Hu Rebuttal Decl. at 11-12, PageID.58731-58732.

[73] *See generally* Hu Decl., ECF No. 1208-90; *id.*, Ex. 1, Dr. Hu's CV, PageID.35922-35994; Lanphear Decl. at 3-5, ECF No. 1208-108, PageID.36884-36886; *id.*, Ex. 1, Lanphear's CV, PageID.36897-36944.

All of the foregoing is presented using a common methodology that is common to the Subclass of Minors. Defendants' challenges to this methodology and findings do not compel a different result. First, Defendants argue that Class Plaintiffs' position that ingestion of "any amount of lead constitutes an injury" is inconsistent with Michigan law. Veolia Br. at 40, PageID.45385. This misstates both Class Plaintiffs' position and Michigan law; further, it is a question that may be answered on a class-wide basis. The criteria for Class membership requires that each child who is a member of the Subclass ingests unfiltered Flint water (either through drinking water or food) on at least 14 separate days within a 90 day period. "This helps to ensure that the 'subclass of injured children' does not include individuals with trivial, fleeting, or unlikely lead exposure." Hu Decl. at 15, PageID.35889.

Second, Michigan law recognizes that for toxins where there is "no safe level" of exposure, such evidence is an admissible basis upon which to conclude that exposure to the toxin has caused injury. In *Chapin v. A & L Parts, Inc.*, 274 Mich. App. 122 (2007), the Michigan Court of Appeals was presented with the question of whether exposure to asbestos in the occupational setting of grinding brake linings could cause disease. The plaintiffs in that case—like Plaintiffs here—relied on expert testimony and studies to support their argument. *Id.* at 135.

Rather than address *Chapin*, Defendants cite *Henry v. Dow Chem. Co.*, 473 Mich. 63, 72-3 (2005) for the proposition that "mere exposure" to a toxic substance

does not constitute "injury" for tort purposes. The plaintiffs in *Henry,* however, did not allege a present physical injury and, consequently, the Court was not presented with the same question as it is here.[74]

More fundamentally, exposure to a carcinogen, like the dioxin at issue in *Henry,* is toxicologically distinguishable from the exposure to lead in this case. As Dr. Hu explains, for those exposed to a carcinogen, "cancer occurs, or it doesn't…" Hu Rebuttal Decl. at 47, PageID.58767. Consequently, exposure will not cause injury in all who are exposed. In contrast, "lead exposure adversely affects the intelligence of all children. . . ." *Id.* at 48, PageID.58768. Children in the Minors Subclass have suffered a present physical injury—i.e., impairment of neurobehavioral development, as manifested by IQ decrement, inhibition of blood

[74] Defendants' argument regarding *Henry* was rejected in *Brown v. NL Industries*, a class action involving lead exposure filed on behalf of approximately 1,000 plaintiffs. Plaintiffs sought damages for personal injury and property damage as well as medical monitoring. Defendants argued medical monitoring claims are barred under Michigan law, citing *Henry*. *See* Brief in Support of NL Industries Motion for Summary Disposition of Plaintiffs' Medical Monitoring Claims *available at Brown v. NL Indus., Inc.*, No. 06-602096-CZ, 2009 WL 6565502 (Mich. Cir. Ct. Oct. 2, 2009). Plaintiffs argued that *Henry* did not bar medical monitoring claims when there is past or present physical injury, and there was extensive expert testimony that plaintiffs suffered from cognitive impairment, neurological disorder manifested as IQ decrement, and inhibition of blood forming enzymes as a result of their toxic exposure to lead. The trial court denied defendants' Motion for Summary Disposition of Plaintiffs' Medical Monitoring Claims, due to unresolved issues of fact. *Brown v. NL Indus., Inc.* , No. 06-602096-CZ, 2008 WL 6135941 (Mich. Cir. Ct. Feb. 29, 2008).

forming enzymes, oxidative stress effects, neurotransmitter effects, neuroendocrine effects, and immune effects, as well as toxic effects on the growth of neurons and neuronal differentiation, among others.[75]

III. Class-wide Resolution Presents the Superior Means of Adjudication.

Class certification is the superior tool to global resolution. It is the fastest and most streamlined way to resolve all injured parties' claims against Veolia and LAN. In a class action trial, a finding for or against the class resolves that issue for all class members. A jury will decide *once* whether Veolia and LAN committed professional negligence, and whether and to what extent non-parties are at fault. That determination will be binding on all Class members who have not opted out. Individual litigation would be incredibly time consuming and inefficient, risking inconsistent determinations on the same core issues such as whether the Engineering Defendants committed professional negligence.

Importantly, for tens of thousands of absent Class members, the alternative to class litigation is not individual litigation, it is *no litigation.* Given the advanced

[75] *See* Hu Rebuttal Decl. at 11-12, ECF No. 1520-3, PageID.58731-58732; *Basic Information about Lead in Drinking Water,* Ground Water and Drinking Water, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water (last visited Apr. 7, 2021) ("In children, low levels of exposure have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells.").

stage of the case, costs of litigation, and statute of limitations concerns, this proceeding is the only viable path to justice for the majority of Flint's residents. Resolving threshold liability issues for the general class, and the claims of the three Subclasses, is the superior method for moving this case towards resolution.

A. All Four Superiority Factors Favor Certification.

As set forth in their Motion for Class Certification (Class Cert Br. at 79-85, PageID.34516-34522), Class Plaintiffs can and do meet the superiority factors. In preliminarily approving the proposed Class Settlement, the Court explained:

> [C]lass members' interest in individually controlling the litigation weighs in favor of conditional class certification, because individuals seeking individualized relief either already chose to file their own complaints or hire individual counsel to address their claims—as evidenced by the Individual Cases—or may eventually seek exclusion from the settlement class. Nor, after four years of very expensive class discovery, would individualized litigation be economically preferable for those plaintiffs who have not already elected to file as individuals.

Prelim. Approval Op. at 50, ECF No. 1399, PageID.54447. That same analysis holds true here.

The Engineering Defendants argue that the individual Class members have a strong interest in individually controlling the prosecution of their separate actions as evidenced by the large number of individual suits already filed. But despite widespread media attention, ongoing civil and criminal cases, multiple town hall meetings, and extensive on-the-ground recruitment in Flint, a significant portion of

the population of Flint has chosen *not* to retain individual counsel. To be an individual plaintiff in these cases means to have every aspect of one's life placed under a microscope and scrutinized. Indeed, several individuals who were originally chosen as potential bellwether plaintiffs dropped out of the process, presumably because of its intrusiveness. Without the certification of the various classes and subclasses set forth in Class Plaintiffs' Motion for Class Certification, those putative Class members who have been damaged but chosen not to pursue a lawsuit on their own will not have their rights protected, and may even suffer greatly as a result.

On the other hand, those who do wish to proceed with their own individual cases are not prevented from doing so by the certification of a class. They have every right to opt out and proceed on their own. Class Plaintiffs' proposal allows everyone impacted by the Flint Water Crisis to seek justice in the way they determine is best for them. Denial of class certification would leave many litigation-wary residents without recourse, and their choice (or inability) not to retain individual counsel should not deprive them of justice.

Turning to the second factor—the stage of litigation—the Engineering Defendants point out that the individual actions are closer to trial than the Class, and that certification would yield few efficiency gains. But the Individual and Class cases are at roughly the same phase of the litigation. Discovery was consolidated and written discovery, depositions, and expert disclosures and depositions have

proceeded largely in tandem. While a trial date has been set for the bellwether trials, Class Counsel could just as easily be prepared for trial shortly following resolution of the class certification motion. While it is possible that the first bellwether trials may begin and conclude before any class trial, it is unlikely that the first bellwether trials will resolve all the individual cases.

This is not a case in which individual plaintiffs have litigated the case for years and then putative Class Counsel swoops in and attempts to certify a class late in the proceedings. And it is notable that in preliminarily approving the proposed Settlement, the Court held that the stage of the proceedings supported a finding of superiority. Prelim. Approval Op. at 51, PageID.54448. Upon certification, Class Plaintiffs will be ready to conduct one trial to resolve claims on a class-wide basis—a much more economical and realistic approach to ending this longstanding case.

The third factor is largely irrelevant. Nearly all of the Flint Water cases have been consolidated in this Court or the Genesee County Circuit Court, with coordination orders entered in each Court. Whether the Court grants class certification or not, the litigation will be concentrated in this forum.[76]

[76] LAN raises an unusual argument that certification will result in the disqualification of most, if not all, of Flint residents from jury duty in all Flint Water Cases. But the pool of jurors for a trial in this Court would be drawn from the Eastern District of Michigan, Ann Arbor Division, which includes Jackson, Lenawee, Monroe, Oakland, Washtenaw, and Wayne counties, *but not Genesee County*. *See* Administrative Order No. 13-AO-016. Thus a resident of the City of Flint would

Many of the arguments regarding the manageability of a class trial—the fourth factor relevant to superiority—are addressed in Section II.C, and are incorporated herein. The Class Plaintiffs have proposed a three-phase trial plan, which is dependent on the Court certifying the following four classes: (1) General Class, (2) Minors Subclass, (3) Residential Property Subclass, and (4) Business Subclass. Phase One will be a five- to six-week jury trial in which the General Class and all Subclasses will litigate liability questions. Additionally, Class Plaintiffs will litigate the following issues: (1) causation, injury, and entitlement to injunctive relief concerning the Minors Subclass; (2) all issues, including causation, injury damages, and injunctive relief related to the Residential Property Subclass; (3) all issues, including causation, injury, and damages related to the Business Subclass; and (4) liability, causation, injury, and class-wide damages related to the General Class. Proposed Trial Plan at 1-2, ECF No. 1208-93, PageID.36063-36064. Phase Two will involve an adjudicative proceeding for each member of the Minor Subclass to litigate

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not even be in the jury pool for a trial in this Court. Even if a broader jury pool was called up specifically for this case, it would not matter whether the trial was for a class or an individual. If cause exists to excuse a juror from a class trial because he or she was a resident of Flint who drank the water during the applicable time, that juror would surely not be seated on a jury in an individual case either. In any event, finding twelve impartial jurors to serve on this case will not be any more difficult by certifying a class comprised of many Flint residents. This argument from LAN has absolutely no merit.

a minor's entitlement to damages. *Id.* at 3, PageID.36065. Phase Three, which may proceed in parallel with Phase Two, will address individual issues regarding members of the General Class. *Id.* at 4, PageID.36066.[77]

Despite the arguments to the contrary, managing a class action is no more cumbersome than pursuing the bellwether plan. The bellwether process will face the same two Defendants (Veolia and LAN), a single claim (professional negligence), theory of harm (that Veolia and LAN failed to act as a reasonably prudent engineer would under similar circumstances), and injuries as a putative class. Both the Class Plaintiffs' trial plan and the bellwether approach are multi-phased.[78] Arguably, Class Plaintiffs' trial plan is more manageable, because it will address the elements of duty, breach, and aspects of causation upfront for the entire Class, and those issues

[77] Veolia argues that this plan permits different juries to examine the same evidence, and juries seated after the first can re-examine the previous juries' findings in violation of the Seventh Amendment. But, as explained in Section V.B, case management tools can alleviate this concern.

[78] In many ways, the bellwether plan is not much different than the class trial plan. There will initially be four bellwether plaintiffs' cases tried. Fifth Am. CMO at 61-71, Sept. 8, 2020, ECF No. 1255, PageID.39324-39334. The first bellwether group will involve individual plaintiffs whose date of births are between April 25, 2008 and April 25, 2014, and who only claim lead-induced injuries. The second bellwether group will consist of adult plaintiffs alleging both personal injury (excluding alleged exposure to *legionella*) and property damage. According to the Court's Fifth Amended Case Management Order, it "will, on a date to be determined, advise the parties of the number of Pool Four plaintiffs who will proceed to the initial adult bellwether trials." *Id.* at 71-74, PageID.39334-39337.

will be resolved for all parties in a single trial. In the bellwether cases, by contrast, these same elements will be addressed once for the children in the first bellwether and then again for the adults in the second bellwether. Even then, the verdicts will not be binding on additional plaintiffs, so Veolia and LAN could try again and again to achieve more favorable verdicts.

B. A Class Action Is Superior to the Bellwether Process.

The Court need not choose between having bellwether trials and certifying a class—and, indeed, it is perfectly appropriate to have bellwether trials for certain personal injury claims.[79] But insofar as the option available to the Court for the remaining claims and issues are either a class action or an unlimited series of individual bellwether trials, deciding a small number of claims tried at a time, one after the other—a process which could take years or even decades to complete—class certification is the superior alternative.

While it is suggested that a seriatim trial construct could foster a global resolution, hopes of a global resolution are speculative at best and likely illusory as there is no binding effect from the results in one bellwether trial—Defendants could

[79] For that reason, it is curious that Liaison Counsel—whose clients long ago elected to opt out of the proposed Class and pursue their own claims—have any objection to Class certification. Nor do Liaison Counsel have standing to make any such objection.

try case after case, exhausting the Court's and Plaintiffs' counsel's resources, winning the battle by attrition.[80] Pointedly, neither of the Engineering Defendants commits to resolve these cases following a bellwether trial.[81] Nor do they agree to be bound by the disposition of any of the bellwether trials or allocation of fault determined by the bellwether juries. Absent a class-wide verdict, the Engineering Defendants could appeal each and every verdict they find unsatisfactory, a process that would also take many years. For all the claimed inefficiencies and disadvantages of class certification, the bellwethers and individual actions present their own concerns about efficiency and cost.[82]

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[80] There is nothing in Veolia's scorched-earth litigation tactics or steadfast refusal to even attempt to negotiate resolution of these cases that would indicate it would suddenly settle them all after one bad result of a bellwether trial.

[81] For example, Veolia states, "[t]hose [bellwether] trials will provide the parties with *important insights* about the relative strengths and weaknesses of their positions, helping them decide which cases to continue to pursue individually, and which cases to narrow, settle, or abandon." Veolia Br. at 103, PageID.45448 (emphasis added).

[82] Newberg on Class Actions notes that bellwether trials are often more expensive for litigants and attorneys. 4 William B. Rubenstein, *Newberg on Class Actions* § 11:12 (5th ed. 2020). *See* Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2366 (2008) ("[B]ellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial."); Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 636 (2008) ("Because so much is at stake, bellwether trials are likely to be expensive and involve substantial resources of jurors, courts, and litigants.").

Of course those individuals wishing to proceed individually can and have filed their own suits. To the extent absent Class members decide they wish to file their own suit, they will have *another* opportunity to do so by opting out of the Class or subclass. Nothing will impair one's preference proceed individually—that right is secured by Rule 23.[83] But denial of Class certification could do great damage to the rights of the many individually unrepresented Flint residents. In these circumstances, the superiority requirement is satisfied.[84]

None of the authority cited in opposition to Plaintiffs' motion demands a contrary result. Veolia cites *In re Methyl Tertiary Butyl Ether (MBTE) Products*, No. 1:00-1898, MDL 1358, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007), for the proposition that "at least two Courts of Appeal[s] have found that a bellwether trial may be superior to other forms of adjudication without violating any party's substantive or procedural due process rights[,]" Veolia Br. at102, PageID.45447.

[83] Liaison Counsel's arguments against class certification are especially disappointing. While agreeing with Class Counsel that Flint's most vulnerable residents are its children, Liaison Counsel proposes a system by which tens of thousands of those children would receive no remedy for their damages.

[84] Liaison Counsel argue that absent Class members would be hurt if Class Plaintiffs proceed to trial and lose. Liaison Br. at 2, PageID.53997. But no means of adjudication—whether in a class proceeding or bellwether trial—insures against the risk of losing. A class action provides an avenue for absent Class members to obtain justice which is superior to the unlikelihood of the Engineering Defendants resolving the claims of persons and businesses who have not filed their own cases.

As an initial matter, *In re MBTE Products* had *nothing* to do with the superiority of class actions—the case did not involve a request for class certification or even discuss the hypothetical value of bellwethers as compared to class actions.

Moreover, neither of the appellate cases referenced by *In re MBTE Products* find bellwether trials superior to class actions. In *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1017 (5th Cir. 1997), the Fifth Circuit held that the proposed bellwether trials could not be applied to other filed cases—it had nothing to do with class actions. And *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996) upheld a jury verdict in a certified class action seeking damages for personal injuries.

In re American Medical Systems, Inc., 75 F.3d 1069 (6th Cir. 1996)—another case cited for the principle that a class is not superior here—is distinguishable. There, the court reversed the district court's finding of superiority that failed to consider the feasibility of class adjudication of negligence claims premised on the law of different states, each with potentially unique negligence caselaw, related to ten unique products. *Id.* at 1085. None of these issues are present here: Plaintiffs are proceeding on a single claim of professional negligence under Michigan law stemming from a single causal event.[85]

[85] *In re American Medical Systems,* also involved a grant of certification on the pleadings, without any of the required findings of fact required by Rule 23, in which the district court improperly placed the burden of proof on the defendants to refute certification. *Id.* at 1078-86. Given the extent of the procedural flaws

Finally, the concerns regarding collateral attacks by absent Class members premised on *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L.Ed. 22 (1940) are unfounded. In *Hansberry*, the Supreme Court held defendants were not precluded from challenging the validity of the restrictive covenant because they were not members of the designated class in the previous litigation where the covenant was deemed enforceable. *Id.* at 44. Because defendants were not members of the class—indeed, their interests were antagonistic to those of the class of original plaintiffs which had sought to enforce the restrictive covenant that the defendants in *Hansberry* wished to challenge.[86] It is self-evident that the outcome of the case is

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identified in this matter, it would be unlikely for Plaintiffs to have satisfactorily established the superiority of the class device.

[86] The cases cited by Liaison Counsel in footnote 7 of their Response are all distinguishable, as most deal with collateral attacks from absent Class members whose interests were not protected in the initial litigation. Liaison Br. at 57, PageID.54052. *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978), *aff'd*, 444 U.S. 472, 100 S. Ct. 745, 62 L.Ed.2d 676 (1980) (while a class action is subject to collateral attack, such attacks will be defeated if the absentee class members were adequately represented); *Gonzales v. Cassidy*, 474 F.2d 67, 71 (5th Cir. 1973) (lack of adequate representation due to previous named class plaintiff's counsel failing to appeal a final order that only retroactively applied to the named class plaintiff and not absent class members); *Williams v. Gen. Elec. Cap. Auto Lease, Inc.*, 159 F.3d 266, 275 (7th Cir. 1998) (collateral attack was unsuccessful when a group of plaintiffs filed a new class action in another forum even though these plaintiffs were class members that failed to opt out of settlement despite receiving adequate notice); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1228-29 (11th Cir. 1998) (collateral attack was proper due to insufficient language in the class action notice that failed to inform the class plaintiffs that their claims were being litigated and resolved); *Crawford v. Honig*, 37 F.3d 485, 488-89 (9th Cir.

only binding on those entities that fall within the Class definition. And absent Class members' interests are entirely aligned with Plaintiffs. Thus, any fear of collateral attack is specious.[87]

IV. The Rule 23(a) Factors are Satisfied.

In addition to providing a fair and efficient process for adjudicating the common issues and claims in this case, the general Class and Subclasses also satisfy the requirements of Federal Rule of Civil Procedure 23(a).[88]

A. This Case Presents Factual and Legal Questions Common to the Class and Subclasses.

Plaintiffs satisfy the commonality prerequisite, which requires "only one common question" to warrant class certification. *In re Whirlpool Corp. Front-*

1994), *as amended on denial of reh'g* (Jan. 6, 1995) (modification of an injunction obtained from a previous class action was vacated because said modification went beyond the scope of the previous class settlement and absent class members failed to receive proper notice); *State v. Homeside Lending, Inc.*, 2003 VT 17, 175 Vt. 239, 266-68, 826 A.2d 997, 1019-20 (collateral attack upheld due to insufficient opt-out notice and inadequate representation.).

[87] Nor is class certification foreclosed by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Indeed, *Amchem* explicitly recognized that, "mass tort cases arising from a common cause or disaster may, depending upon the circumstances," satisfy the requirements for class certification. *Id.* at 625. The issues that led to decertification in *Amchen* can be avoided by appointing Subclass Counsel in the event potential conflicts arise between Class members—which is exactly what the Court did in connection with the proposed Settlement.

[88] Defendants do not dispute that Plaintiffs have met the numerosity requirement. Veolia Br. at 27 n.4, PageID.45372. Neither LAN nor Liaison Counsel address this factor in their separate briefs.

Loading Washer Prods. Liab. Litig., 722 F.3d 838, 853 (6th Cir. 2013). Although the Supreme Court clarified the commonality inquiry in *Wal-Mart Stores, Inc. v. Dukes*, it did not overturn—or even question—this basic principle. 546 U.S. 338, 359 (2011) ("We quite agree that for purposes of Rule 23(a)(2), [e]ven a single [common] question will do.") (alteration in original) (internal quotation marks omitted). Plaintiffs have raised more than one "common contention . . . that it is capable of classwide resolution," as required by *Dukes*, *see id.* at 350, including whether the Engineering Defendants (1) owed one or more duties to Class Plaintiffs, and the extent of those duties; (2) breached their duty or duties owed to Class Plaintiffs and whether any such breach was malicious, willful, and wanton as to disregard Class Plaintiffs' rights; and (3) whether their professional negligence directly and proximately caused the Flint water system to be contaminated with corrosive water.

Elements of a negligence claim such as duty and breach are routinely found to constitute common questions warranting class certification. For example, in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, the Sixth Circuit affirmed a district court's determination that "whether [the defendant] had a duty to warn consumers about the propensity for mold growth in" its products and whether it breached that duty were common questions in a negligent failure-to-warn case. 722 F.3d at 853; *see also Widdis*, 2014 WL 11444248, at *8 ("With respect to

both the nuisance and negligence claims, the Court agrees that there are a range of factual and legal issues common to the class."); *Boggs*, 141 F.R.D. at 64 (common questions included whether defendants were liable for negligence).

Engineering Defendants' contention that Plaintiffs cannot demonstrate commonality because of potential differences in Plaintiffs' time of exposure, or proximate cause of their injuries, Veolia Br. at 87-89, PageID.45432-45434, misconstrues the commonality requirement. "The fact that there might be individualized questions unique to each plaintiff 'does not dictate the conclusion that a class action is impermissible' where there is some other common issue of law or fact." *Widdis*, 2014 WL 11444248, at *5 (quoting *Sterling*, 855 F.2d at 1197); *see also* II.A., *supra*.[89]

Plaintiffs allege that Engineering Defendants caused them harm through conduct that is common to all Plaintiffs, and "the factual and legal issues of [each defendant's] liability do not differ dramatically from one plaintiff to the next."

[89] For the same reasons, Liaison Counsel's argument that liability is not a common question, Liaison Br. at 17-21, PageID.54012-54016, and LAN's argument that Plaintiffs have failed to meet *Dukes's* "same injury" requirement, LAN Br. at 16, PageID.53920, fail. Moreover, LAN's argument appears to misunderstand *Dukes* as requiring plaintiffs to have the exact same type of physical or property injury. Not so. It merely requires that common questions "drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. LAN's argument ignores that its conduct is alleged to be the cause of *all* Plaintiffs' injuries, making this a common question. It also ignores that Plaintiffs have proposed Subclasses for Class members that have suffered different *types* of damages.

Sterling, 855 F.2d at 1197. *See also* Class Cert. Br. § IV.B.1.b ("Common Evidence Establishes the Engineering Defendants' Professional Negligence"), PageID.34488-34500. This is sufficient to demonstrate commonality. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 427 (3d Cir. 2016), *as amended* (May 2, 2016) (commonality satisfied where "[e]ven if [plaintiffs] particular injuries are unique, their negligence and fraud claims still depend on the same common questions regarding the [defendant's] conduct."); *Collins*, 248 F.R.D. at 101 (The "course of conduct of [defendant] allegedly leading to the contamination of [plaintiffs'] properties" presented common question in class action seeking damages for that contamination.).

The Engineering Defendants' attempt to distinguish certain cases on which Plaintiffs rely because those cases only had one defendant, Veolia Br. at 88, PageID.45433, fares no better. "[T]he existence of more than one defendant does not defeat class certification." *Cook*, 151 F.R.D. at 385 (holding that "although [defendants] Dow and Rockwell may have operated [a] plant at different times and there may have been differing amounts of releases of hazardous substances affecting different individuals at different times, this does not negate that there are some questions of law or fact common to the two classes."); *Boggs*, 141 F.R.D. at 60 (commonality satisfied in case where different defendants operated the plant at issue at different times).

Moreover, the cases the Engineering Defendants' cite to defeat commonality do not require that result here. For example, in *Modern Holdings, LLC v. Corning, Inc.*, the court determined that commonality was not satisfied in part because the class included plaintiffs that were injured over a large timespan—1952 to 2013, and where the plaintiffs had not created subclasses for different types of injuries. No. 13-cv-405, 2018 WL1546355, at *7. But even in that case, the court acknowledged that "[m]any courts have held that when the legality of the defendant's standardized conduct toward all members of the proposed class is at issue, the commonality factor is ordinarily met." *Id.* at *6 n.5.[90]

LAN further attempts to defeat commonality by arguing the merits of duty, breach, and comparative fault, and then contending that these issues are therefore not common questions. LAN Br. at 16-21, PageID.53920-53925. This argument misunderstands the requirements at the class certification stage.[91] "The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet [the

[90] The two other cases Engineering Defendants rely on for the proposition that commonality is defeated where there is no single proximate cause for each class member, Veolia Br., at 89, PageID.45434, do not even address the issue of proximate cause. *See Paternostro v. Choice Hotel Int'l Servs. Corp.*, 309 F.R.D. 397, 403 (E.D. La. 2015) (explaining that plaintiffs could not certify an injunctive relief class); *Noonan v. Ind. Gaming Co.*, 217 F.R.D. 392, 396-97 (E.D. Ky. 2003) (finding *no* question common to the class).

[91] The cases LAN cites for this argument do not address class certification.

commonality] requirement." *Rikos*, 799 F.3d at 505. Rather, Plaintiffs need only "show that their claims 'depend upon a common contention' that is 'of such a nature that it is *capable* of classwide resolution . . . .'" *Id.* (quoting *Dukes*, 564 U.S. at 350) (emphasis in original). Moreover, although a determination on class certification "may entail some overlap with the merits of the plaintiff's underlying claim, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013) (internal citations and quotation marks omitted).

Plaintiffs' claims raise questions common to the class about the Engineering Defendants' liability and thus this requirement is satisfied here.

B. The Named Plaintiffs' Claims Are Typical of the Claims of the Class and Subclasses.

The named Plaintiffs' professional negligence claims against LAN and Veolia are based on the same legal theory as the Class members' claims and "arise[] from the same . . . course of conduct that gives rise to the claims of other class members," namely, LAN and Veolia's work for the City of Flint and their failures to perform that work in accordance with the standard of care expected of professional engineers, resulting in grievous harm to residents, and to property and business owners in Flint. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 618 (6th Cir. 2007); *see*

also Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 543 (6th Cir. 2012) (commonality and typicality satisfied where "Plaintiffs allege . . . a single . . . course of conduct on the part of each Defendant . . . that gives rise to the claims of each class member and a single theory of liability"). Moreover, in pursuing their professional negligence claims against LAN and Veolia, the named Plaintiffs will provide evidence of LAN and Veolia's misconduct and expert testimony that necessarily "will also advance the interests of the class members." *Id.* at 542 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)). Thus, the typicality requirement is satisfied here. *See Powers*, 501 F.3d at 618 ("To satisfy the typicality requirement, the representative plaintiff's interests must be aligned with those of the class." (citation omitted)).

Defendants' and Liaison Counsel's attempts to defeat typicality by pointing to small differences in exact time of exposure to the water or differences affecting the specific quantity of damages misrepresent the typicality requirement.[92] Named

[92] For example, Defendants' argue that Elnora Carthan's claims are not typical because her pipes were replaced in 2016. Veolia Br. at 90, PageID.45435. To the extent this does differentiate her, it affects quantity of her damages, but does not alter broader questions about LAN and Veolia's liability, which remain common to all Class members. Similarly, their argument that the Business Subclass representatives can only represent certain types of businesses, Veolia Br. at 90-91, PageID.45435-45436, goes to allocation of damages. *See* Prelim. Approval Op. at 43, PageID.54440 (holding that proposed Business Economic Loss Subclass representatives were typical of the Business Economic Loss Subclass); *See also* Sections II.A.2, II.A.5.

Plaintiffs' claims need not be identical to the claims of every Class member in order for those claims to be "typical" of the Class. *Bobbitt v. Acad. of Ct. Reporting, Inc.*, 252 F.R.D. 327, 339 (E.D. Mich. 2008) ("Although the named plaintiffs' claims must fairly encompass the class members' claim, they need not always involve the same facts or law."); *Tomlison v. Kroger Co.*, No. C2-03-706, 2007 WL 1026349, at *4 (S.D. Ohio Mar. 30, 2007) ("The claims of the named plaintiffs and the absent members must be typical, not identical or homogeneous." (citation omitted)). Rather, where the plaintiffs' evidence "follow[s] a pattern, and the people they claim [harmed them] are largely the same people," and where individual difference do not affect the basic claims, those individual differences in evidence "do[] not disqualify the class under Rule 23(a)." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997).

Moreover, Defendants and Liaison Counsel overstate many of the individual differences on which they rely. Defendants argue that "[s]ix of the named plaintiffs . . . stopped drinking Flint water before VNA began its limited engagement in Flint," Veolia Br. at 90, PageID.45435, but two of those Plaintiffs are proposed Subclass Representatives for the Residential Property Subclass, and three others did continue to consume the water in 2015. Class Cert Br. at 38-39, PageID.34475-34476 (listing Carthan and Munoz as proposed representatives for the Residential Property Subclass); Rhonda Kelso Dep. Tr. 112:20-113:2, ECF No. 1222-1, PageID.38335-

38336 (she and her daughter continued to cook, wash, and bathe with the water in 2015); Barbara Davis Dep. Tr. 17:22-18:18, 19:6-21:4, ECF No. 1222-2, PageID.38347-38351 (testifying that she continued to drink water at school where she worked through 2015).[93] Further, neither provide any factual support for their assertions that certain aspects of the named Plaintiffs' claims—for example having pipes replaced or the timing of lead tests[94]—are actually atypical to the Class. See Section II.D.

Similarly, typicality is not defeated merely because some plaintiffs may be subject to individualized defenses. *See Bittinger*, 123 F.3d at 884 (holding that the fact that some named plaintiffs, but not all class members, had signed liability waivers with defendant was "not enough to justify rejection of class certification"); *Young*, 693 F.3d at 543 (typicality satisfied notwithstanding presence of individualized defenses); *Bentley*, 223 F.R.D. at 484 ("Typicality will only be destroyed where the defenses against the named representatives are 'likely to usurp a significant portion of the litigant's time and energy . . . .'"). This holds true even

[93] Liaison Counsel's argument that Rhonda Kelso is not typical of the Class because the opening brief does not describe her personal injuries, Liaison Br. at 38, PageID.54033, is inapposite. Ms. Kelso and her daughter are proposed representatives for the General Class, for which Plaintiffs do not seek certification of personal injury damages.

[94] See Veolia Br. at 90, PageID.45435; Liaison Br. at 39-40, PageID.54034-54035.

where there is a disparity in the amount of each plaintiffs' damages. 7A Fed. Prac. & Proc. Civ. § 1764 (3d ed.) ("In general, the requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other class members.").

The Oppositions make no attempt to show that the issues they claim are individualized would preoccupy named Plaintiffs such that the Class would suffer, nor do the cases they rely on compel a finding that the named Plaintiffs are not typical in this case.[95] *See* Liaison Br. at 39-40, PageID.54034-54035; Veolia Br. at 89-91, PageID.45434-45436. The cases on which Defendants and Liaison Counsel rely largely address situations in which each plaintiff had a distinct interaction or experience with the defendant. For example, in *In re OnStar Contract Litigation*, 278 F.R.D. 352 (E.D. Mich. 2011), the plaintiffs alleged fraud and misrepresentation in relation to vehicle purchases, but the misrepresentations to which they were subjected were not necessarily the same. *See id.* at 377-78. And in *In re Welding Fume Products Liability Litigation*, 245 F.R.D. 279 (N.D. Ohio 2007), the court held that typicality was not met because "even ignoring issues such as an individual

[95] Moreover, many of the issues they raise relate to *amount* of damages, which Plaintiffs have proposed to address separately. *See* Section II.A.2.

plaintiff's age, medical history, lifestyle, . . . and so on, the defendants' conduct in this case cannot be examined consistently across the class." *Id.* at 309.[96] But that is not the case here, where each Plaintiff relies on the same course of conduct by Defendants to prove their claims. Indeed, *In re Welding Fume Products Liability Litigation* actually supports typicality here. In that case, the court acknowledged that "if 'what the defendants did' was to release a hazardous substance to which no person should normally ever be exposed, then the evidence going to the question of whether the defendant was negligent is common to all plaintiffs." 245 F.R.D. at 309.[97]

C. The Named Plaintiffs and Class Counsel Will Fairly and Adequately Protect the Interests of the Class.

1. The Named Plaintiffs Are Adequate Representatives of Their

[96] Similarly, the court in *Stout v. J.D. Byrider*, 228 F.3d 709 (6th Cir. 2000), held that denial of certification was not an abuse of discretion where the plaintiffs' claims turned on their understanding of certain contract terms in an agreement with a used car dealer, but they each had different interactions with the dealer. *Id.* at 717. *See also In re Am. Med. Sys., Inc.*, 75 F.3d at 1082 (plaintiffs in a products liability action each used a different model of the product and had different difficulties with it); *Bostick v. St. Jude Med., Inc.*, No. 03-2626 BV, 2004 WL 3313614, at *7 (W.D. Tenn. Aug. 17, 2004) (finding typicality lacking where claim in products liability case required showing reliance, and named plaintiffs could not recall whether they had even been told the product would be used during their surgeries).

[97] *Jones v. Allercare, Inc.*, 203 F.R.D. 290 (N.D. Ohio 2001), is likewise distinguishable. There, the court concluded that if named plaintiffs proved their claims, it still would not advance the claims of other class members, *id.* at 302, which is not the case here.

Respective Class and Subclasses.

The named Plaintiffs are adequate representatives because they "have common interests with unnamed members of the class," and have and will continue to "vigorously prosecute the interests of the class through qualified counsel." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 757 (6th Cir. 2013) (citation omitted) (class representatives "shared common interests with the unnamed class members" where "they all shared a desire to obtain both monetary and injunctive relief from [defendants]"); *see also* Class Cert Br. at 42, PageID.34479.

Defendants do not dispute that the named plaintiffs have "common interests with the unnamed class members," they instead argue that Plaintiffs cannot demonstrate adequacy for the same reasons they cannot show typicality. Veolia Br. at 92, PageID.45437. For the reasons in Section IV.B., this argument fails.

Veolia's contention that the named plaintiffs cannot "vindicate the claims of absent class members because the named plaintiffs just do not have certain facts in their cases," Veolia Br. at 92, PageID.45437, fares no better. By proving their claims, the named plaintiffs necessarily will advance the claims of other Plaintiffs alleging professional negligence against LAN and Veolia. Moreover, each of the proposed

Subclass representatives shares key injuries common to those Subclasses. Class Cert Br. at 37-42, PageID.34474-34479.[98]

Liaison counsel's argument that the Class members in this case are "too varied" for the named plaintiffs to be adequate representatives, Liaison Br. at 42, PageID.54037, misrepresents the Class and subclasses that Plaintiffs seek to certify. Liaison Counsel refer to legionella injuries and adults with lead poisoning. *Id.* But Plaintiffs do not seek to certify a damages class for either of those groups, and Liaison Counsel do not attempt to demonstrate that the common issues for which Plaintiffs seek certification under Rule 23(c)(4) would not apply to those groups. *See* Section I.A. Further, Liaison Counsel provide no basis for their incorrect assertion that the named plaintiffs have not suffered the "same injury" as children suffering neurological defects. Liaison Br. at 42, PageID.54037. To the contrary, as a result of their exposure to Flint River water, Minors Subclass Representative T.W. alleges developmental delays, and Minors Subclass Representative K.C. alleges serious

[98] *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, on which Defendants rely, Veolia Br. at 92, PageID.45437, is distinguishable. There, one of the named plaintiffs "suffer[ed] from zero of the diseases listed in the complaint as potentially resulting from exposure to the listed toxic substances," and others largely did not suffer the ailments claimed in the complaint. *Mod. Holdings*, 2018 WL 1546355, at 10. That is not the case here.

physical injury due to heightened levels of lead in his blood. Class Cert Br. at 39-40, PageID.34476-34477.[99]

Liaison Counsel's reliance on *Amchem* to challenge adequacy is misplaced. In *Amchem*, conflicts arose as to allocation of a settlement in which *no* subclasses were proposed for plaintiffs with different types of injuries. *Amchem*, 521 U.S. at 608. Here, in contrast, Plaintiffs have addressed any potential conflicts among Class members as to damages by seeking to certify only separate damages subclasses. Moreover, Liaison Counsel's unsupported assertions of these conflicts rely largely on issues related to the amount of damages Plaintiffs might claim based on different exposures to lead, which is applicable only to the Minors Subclass. *See* Liaison Br. at 43, PageID.54038. This assertion is even more tenuous in light of the separate trial phase Plaintiffs propose to determine the amount of each minor plaintiffs' injuries. Proposed Trial Plan at 3, ECF No. 1208-93, PageID.36065.

2. Class Counsel Will Fairly and Adequately Represent the Class.

Class Counsel have vigorously represented the proposed Class in this case, as the Court has acknowledged. In granting preliminary approval of the Class Settlement, the Court noted, "Co-Lead Class Counsel. . . have lived up to their appointments in vigorously representing Plaintiffs through the litigation and

[99] Thus, the cases on which Liaison Counsel relies for this proposition are inapposite.

settlement process." Prelim. Approval Op. at 46, PageID.54443; *see also* Order Reappointing Interim Individual Co-Liaison Counsel and Interim Co-Lead Class Counsel at 2, PageID.39846 (explaining reasons for reappointing Interim Co-Lead Class Counsel). Defendants do not challenge Interim Co-Lead Class Counsel's adequacy, and Liaison Counsel's challenges rely on ad hominem attacks and misrepresentations of the law.

Contrary to Liaison Counsel's assertions, Liaison Br. at 46-47, PageID.54041-54042, representing multiple subclasses in litigation does not present an inherent conflict "so long as the litigants' interests are not inherently opposed." 1 William B. Rubinstein, *Newberg on Class Actions* § 3:75 (5th ed. 2020). The only potential conflict that may arise among the subclasses in this case is one of allocation of damages, and Liaison Counsel have provided no evidence to the contrary.[100] But that conflict can be resolved with separate counsel at an allocation stage. No conflict exists in litigating the common issues that Plaintiffs have identified for certification.[101]

[100] Liaison Counsel provide no factual basis for their assertion that the interests of the class and subclasses are "inherently opposed" for any purpose other than allocation. *See* Liaison Br. at 51, PageID.54046.

[101] Although it is not necessary at this stage, should the Court certify multiple subclasses, it could appoint separate subclass counsel.

The cases cited by Liaison Counsel do not demonstrate otherwise. Indeed, in one of the cases on which they rely to demonstrate counsel's inadequacy, the court actually held that class counsel *satisfied* the adequacy requirement, and acknowledged that "[i]n general, class counsel may represent multiple sets of litigants—whether in the same action or in a related proceeding–so long as the litigants' interests are not inherently opposed." *Sandoval v. M1 Auto Collisions Ctrs.*, 309 F.R.D. 549, 570 (N.D. Cal. 2015) (citation omitted). Moreover, nearly every case on which Liaison Counsel rely for the proposition that a subclass would be required involved either settlements where no subclasses were proposed and there were conflicts over allocation,[102] or conflicts involving class counsel's representation of a class *in a different case*.[103] Others cases on which they rely do not even address the adequacy of class counsel, or are otherwise completely inapplicable here.[104]

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[102] *See, e.g.*, *Amchem*, 521 U.S. at 627; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011); *Walker v. Liggett Grp., Inc.*, 175 F.R.D. 226, 231 (S.D.W. Va. 1997).

[103] *See, e.g.*, *In re Cardinal Health, Inc. ERISA Litig.*, 225 F.R.D. 552, 557 (S.D. Ohio 2005); *LeBeau v. United States*, 222 F.R.D. 613, 618 (D.S.D. 2004); *Sullivan v. Chase Inv. Servs. of Bos., Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978) ("The Court's major concern about counsel involves their role in a parallel securities fraud case").

[104] *Mwantembe v. TD Bank, N.A.*, 268 F.R.D. 548, 559 (E.D. Pa. 2010) (explaining that court need not address adequacy because it denied certification for

Liaison Counsel's challenge to adequacy is riddled with other baseless and inaccurate assertions. Liaison Counsel's assertion that Class Counsel have "impl[ied] that they do not intend to try this case in class form," Liaison Br. at 50-51, PageID.54045-54056, is not based in fact and is directly contradicted by Class Plaintiffs' certification brief and trial plan, detailing how they plan to try this case. They similarly provide no evidence for their assertion that "global resolution has been easier to achieve—and will continue to be easier to achieve—without the disruptive prospect of the sweeping Litigation Class proposed in Class Counsel's motion." *Id.* at 52, PageID.54047.

Finally, Liaison Counsel resort to unsupported ad hominem attacks to explain their assertion of conflicts between Class Counsel and the Class they seek to represent. *See* Liaison Br. at 52-53, PageID.54047-54048. Liaison Counsel provide zero basis for their unfounded contention that Class Counsel seek certification merely to "secure a fee." *Id.* at 53, PageID.54048. Nor do they explain what trade-offs would be required by the classes that Plaintiffs seek to certify. *Id.* The cases on

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other reasons); *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 449 (D.N.M. 2007) (finding *plaintiffs* inadequate in a case with no proposed subclasses); *Jackshaw Pontiac, Inc. v. Cleveland Press Publ'g Co.*, 102 F.R.D. 183, 192-193 (N.D. Ohio 1984) (holding class counsel was inadequate due to deficiencies in their performance including "briefs have been replete with misstatements of law and fact" and the fact that they had "not demonstrated significant prior experience in antitrust or class action cases").

which they rely for this argument provide no further guidance, as they involved conflicts of *allocation*, or of other "questionable features" in a settlement agreement, neither of which is the case here.[105] Liaison Counsel's arguments are not supported by fact or law and thus do not warrant a finding that Counsel is inadequate.

D. The Class and Subclass Definitions are Not Overbroad

Plaintiffs' Class definitions are not overbroad as to Veolia merely because Veolia began its work for the City of Flint in 2015. Veolia Br. at 142-145, PageID.45487-45490. As explained in Section II.A.2., issues regarding timing of exposure and whether Veolia caused a specific person's injury can be addressed at the allocation stage. The issues Veolia raises do not alter its role in the broader course of events that resulted in and prolonged Flint's contaminated water. Even authority on which Veolia relies recognizes that "a class will often include persons who have not been injured by the defendant's conduct" and that "[s]uch a possibility or indeed inevitability does not preclude class certification. . . ." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009). Further, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012), which Veolia invokes to support this argument, actually "reject[ed] Northshore's argument that plaintiffs' proposed class

[105] *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (discussing "questionable features" of settlement agreement); *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 234 (2d Cir. 2016) (discussing conflict regarding settlement allocation).

is impermissibly overbroad," and explained that even if the class was overbroad "the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth." *Id.* at 825-26, 826 n.15. Moreover, like the defendants in *Messner*, Veolia contends that this issue renders the Class overbroad, but "has given us no indication how many such individuals actually exist." *Id.* at 825.

Veolia further argues that the Class definitions are impermissible because the Subclasses are broader than the general Class. Veolia Br. at 145-148, PageID.45490-45493. But Plaintiffs propose the general Class for issue certification only, and the dates in the subclass definitions relate to damages. Further, Veolia's objection can be resolved by including "and any members of the Subclasses" to the general Class definition. Even Veolia's cited authority counsels that this would be the appropriate way to resolve any overbreadth. *See Messner*, 669 F.3d at 826 n.15 (explaining that even if the class was overbroad "the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth.").

Veolia argues without factual support that adding the subclasses to the general Class definition would make the general Class impermissibly broad. Veolia Br. at 148, PageID.45493. But in the sole case on which Veolia relies for this argument, the Seventh Circuit held that the class was *not* overbroad. *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d at 677-78.

Liaison Counsel's argument that the general Class is overbroad, Liaison Br. at 58-61, PageID.54053-54056 fares no better. The general Class is proposed for certification under Rule 23(c)(4) only, and any questions about whether members of the subclasses are specifically entitled to damages can be addressed at allocation.[106] *Johnson v. BLC Lexington, SNF, LLC*, on which Liaison Counsel relies, does not counsel otherwise. Civil Action No. 5:19-064-DCR, 2020 WL 3578342 (E.D. Ky. July 1, 2020). There, the court found that the class definition was impermissibly "fail-safe," which is not the case here. *Id.* at *4. *Rink v. Cheminova, Inc.*, 203 F.R.D. 648 (M.D. Fla. 2001), is likewise inapplicable. In that case, the district court applied a framework that the Sixth Circuit has rejected. *See Behr*, 896 F.3d at 412-13 (rejecting *Castano* and adopting the "broad view" that issue certification is appropriate when common issues predominate "within" a particular issue and class treatment of those issues is the superior method of resolution); *see also* Section I.A., *supra*.[107]

[106] Liaison Counsel provides no support for its contention that the business and property subclasses are not ascertainable. Liaison Br. at 58, PageID.54053.

[107] *Snow v. Atofina Chemicals, Inc.*, No. 01-72648, 2006 WL 1008002, at *9 (E.D. Mich. Mar. 31, 2006), also relied on the *Castano* framework rejected by the Sixth Circuit in *Behr*, and therefore is not applicable.

V. Class Certification Is the Best Means of Protecting Minors' Rights.

Certifying the Minors Subclass is both allowed and preferable in this case. While many children have filed their own cases, thousands have not. To the extent individual attorneys represent individual children, they are *not* advancing the interests of unrepresented minors. For more than five years, the proposed Class has sought to protect the interests of these absent Class members—advancing their legal position and developing facts uniquely relevant to their cases. The proposed Minors Subclass allows these unrepresented Minors a voice in this litigation and should be certified.

A. The Minors' Subclass Satisfies Ascertainability.

Sixth Circuit law requires that, "[f]or a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria." *Rikos*, 799 F.3d at 525 (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012)); *see also* Prelim Approval Op. at 52, PageID.54449. The proposed Minors Subclass satisfies this requirement. Membership in the Minors Subclass depends on the following objective criteria: age, place of residence (or location of the school or day care attended), and exposure to unfiltered Flint public water for a particular period of time. No part of the proposed definition requires an inquiry into a Subclass Member's state of mind to determine membership.

Veolia argues that because, "Plaintiffs identify no databases or other records that reliably show whether any minor drank 'unfiltered' Flint water . . . 'for at least 14 days within a 90 day period'" the certification should be denied for failure to satisfy Rule 23's ascertainability requirement. Veolia Br. at 113-14, PageID.45458-45459. But its own cited authority expressly rejects the suggestion that some type of comprehensive database is required to satisfy Rule 23, explaining that, "the need to review individual files to identify its members are not reasons to deny class certification." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d at 539-40.[108]

Veolia next suggests that affidavits are the only proposed mechanism through which Plaintiffs propose to demonstrate membership in the Minors Subclass and then asserts that the Sixth Circuit's "decisions view affidavit-only classes with considerable skepticism." Veolia Br. at 114, PageID.45459. Veolia's cited authority

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[108] *See also, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), (holding that the sheer size of a class and the concomitant size of liability "alone cannot defeat an otherwise proper certification"), *superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722 (9th Cir. 2010) (holding that if the size of the defendant's potential liability alone was a sufficient reason to deny class certification, "the very purpose of Rule 23(b)(3)—'to allow integration of numerous small individual claims into a single powerful unit'—would be substantially undermined" (citation omitted)); *Perez v. First Am. Title Ins. Co.*, No. CV–08–1184–PHX–DGC, 2009 WL 2486003, at *7 (D. Ariz. Aug. 12, 2009) ("Even if it takes a substantial amount of time to review files and determine who is eligible for the [denied] discount, that work can be done through discovery."), *amended on other grounds*, 2010 WL 1507012 (D. Ariz. Apr. 14, 2010).

for this proposition—footnote 10 in *Rikos*—in no way supports this characterization of the law. That footnote discusses two Third Circuit cases involving affidavits and ascertainability—cases asserting an approach to ascertainability that the Sixth Circuit had unequivocally rejected. *Compare Rikos*, 799 F.3d at 525-27 & 526 n.10 (cited by Veolia) *with Rikos*, 799 F.3d at 525 (expressly stating, "We see no reason to follow *Carrera*, [*v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)] particularly given the strong criticism it has attracted from other courts." (citation omitted)).

With regard to the appropriateness of using affidavits as one means of demonstrating class membership, the district court in *Rikos* explained, "claim forms and affidavits reviewed by class action claims administrators for indicia of fraud are routinely accepted methods of proving class membership and amount awarded. If needed, the Court has a number of management tools available to address distribution issues, including using a special master to review individual claims." *Rikos v. Procter & Gamble Co.*, No. 1:11-CV-226, 2014 WL 11370455, at *6 (S.D. Ohio June 19, 2014), *aff'd,* 799 F.3d 497 (6th Cir. 2015). The Sixth Circuit affirmed this conclusion and there is no reason for this Court to find otherwise.

Nothing in *Sandusky* requires a different result. *Sandusky* involved an alleged violation of the Telephone Consumer Protection Act (TCPA) in which the defendant no longer had records reflecting those individuals who received an unsolicited advertisement via fax seven years ago—a criteria that was critical to the claim. The

Sixth Circuit held that district court had not abused its discretion in finding affidavits insufficient given the unlikelihood of proposed class members remembering such a mundane fact seven years after it occurred. *Sandusky* does not suggest a general distrust of affidavits—it appropriately distinguished the facts of that case from others in which affidavits were effectively used.

To the extent affidavits are used in this matter, they would be submitted in support of the assertion that a minor child had ingested contaminated water for the requisite duration—a fact far from trivial. The Flint Water Crisis made international news and water is a life necessity. Given the significance of the issue, it is much more likely that Subclass members will recall whether they did, in fact, drink the water. Additionally, and unlike the situation in *Sandusky*, other materials exist to refresh Subclass members' recollection regarding water consumption and support their assertions including water bills, physician records, and their own correspondence from the relevant time period.

As the Minors Subclass is defined by objective criteria. That some part of that criteria may be established using affidavits is acceptable under Sixth Circuit precedent and reasonable given the particular facts of this case. For these reasons, the Minors Subclass is sufficiently ascertainable.[109]

[109] Veolia's citation to *In re Nat'l Prescription Opiate Litig.*, 2021 WL 320754 in its Notice of Supplemental Authority does not counsel a different result.

B. Robust Procedures Exist to Protect Minors' Interests.

The procedures proposed in Plaintiffs' Supplemental Brief in Support of Class Certification at 4-6, November 20, 2020, ECF No. 1327, PageID.41432-41434, adequately protect Minors' interests. Indeed, many of the processes proposed for protecting Minors' rights with regard the proposed Minors Subclass[110] mirror those the Court deemed fair and in the best interests of Minors in connection with the proposed Settlement. Prelim. Approval Op. at 16, PageID.54413.[111]

There the court was concerned because the nature of the class definition would allow for membership to change over time. It is not difficult to see how this could create a multitude of problems including but not limited to the ability to effectively execute notice. That is not the case here—minors either ingested the water during the critical time period or they did not. Moreover, members of the proposed Minors Subclass are limited to a discrete geographic area for a set period of time. It is not the case, as in *National Prescription Opiate Litigation*, that the Court could be faced with crafting a process for the appointment of guardians for minors in several different states. Notably, the court explicitly stated that a class of guardians (of minors) could be appropriate, it just was not under the specific facts of that matter. *Id.* at *5-6. The court cited with approval a Third Circuit case affirming certification of a class of children who could proceed via their legal guardian. *Id.* citing *Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir. 1977). Like this case, Evans involved a class of minors from a discrete geographic area—there the Wilmington, Delaware School system. *Evans*, 555 F.2d at 381. Here, appointment of representatives for members of the Class should be even easier than in *Evans* because many unrepresented minors will have already had a next friend appointed in connection with the proposed Settlement.

[110] As referenced in Class Plaintiffs' Supplemental Brief in Support of Class Certification, ECF. 1327.

[111] As discussed in Plaintiffs' Supplemental Brief In Support of Class Certification some federal courts in Michigan have deemed Michigan's procedural requirements regarding minors applicable in federal court and others have not. *See*

While the Settlement with respect to Minors is not a class settlement, it does seek to appoint next friends within a short period of time and allow those next friends to decide whether to register minors to participate in the Settlement—in other words, to determine the legal rights of minors. The time afforded for this process in connection with the Settlement was similar to what is proposed here. The Court explained that these procedures "mirror[] the requirements set forth in Michigan Court Rule 2.201" and are sufficient to efficiently allow for the registration of Minors while protecting those Minors' interests. Prelim. Approval Op. at 18-19, PageID.54414-54415; *see also* Prelim. Approval Op. at 21, PageID.54418 ("The establishment of jurisdiction over probate proceedings with the Genesee County Circuit Court, the procedures for appointing a Next Friend, and the procedures for resolving any Next Friend-related disputes are all thorough, clear, and designed to promote consistency.").

The procedures suggested for appointing next friends in connection with the proposed Minors Subclass are nearly identical to those approved in the Settlement

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id. at 4 n.5, PageID.41432. In opposition to Plaintiffs' Motion it is contended that Michigan's procedural requirements for children are substantive in nature and must govern. Plaintiffs are not so sure. The power of federal courts to determine, for example, who has capacity to sue is well-founded. Because processes exist to comply with Michigan's procedures in an efficient manner, however, Plaintiffs believe the parties and Court can refrain from a protracted discussion regarding the extent to which Michigan's procedures are "substantive" or "procedural" in nature.

as fair. Both processes seek to balance the interests in protecting minors with the need to efficiently and expeditiously determine whether minors wish to proceed as part of the Proposed Settlement or proposed Minors Subclass. Thus far, in connection with the proposed Settlement, the process has proven manageable and there is no reason to believe it would be any different in the context of a Minors Subclass. Indeed, because many Minors have had next friends appointed in connection with the proposed Settlement, it could be even easier with regard to the Minors Subclass.

Similarly, should Class Plaintiffs obtain a judgment and damages award in favor of the Minors Subclass, additional procedures could be implemented to abide by the procedures outlined in Michigan Court Rule 2.420. Prelim. Approval Op. at 26-28, PageID.54423-54425.

The opposition contests Plaintiffs' position that Minors' legal rights can be decided via a class action because Plaintiffs support this position in part by citing cases for injunctive relief certified under Federal Rule of Civil Procedure 23(b)(2) as opposed to 23(b)(3).[112] But all that distinction stands for is the notion that Courts

[112] Veolia also seeks to dismiss Plaintiffs' discussion on this point by asserting, "Plaintiffs rely primarily on a Washington intermediate appellate court decision. . . ." Veolia Br. at 125, PageID.45470. This characterization is disingenuous in the extreme. Plaintiffs cited a decision from the Supreme Court of the United States that affirmed a decision from the Supreme Court in Washington that had determined the legal rights of minors in a class proceeding. Plaintiffs cited

will release Minors' claims *without* the procedural safeguards of an opt-out right. Here, Plaintiffs seek to certify a Minors Subclass that explicitly provides an alternative to proceeding as part of the Subclass while also establishing an avenue for thousands to obtain relief in an efficient and cost-effective way. And, as evidenced in *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) and others,[113] while damages classes of children are far from common, they are not unprecedented.[114]

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decisions from the Washington Supreme Court and Superior Court to provide context for the Supreme Court's decision. Veolia also seeks to dismiss Plaintiffs discussion of *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), because, they assert, Michigan and Washington rules regarding the representation of minors differ. But the suggestion that a federal procedural device may be used to determine the rights of children in Washington—as affirmed by the Supreme Court of the United States—but not Michigan is patently absurd.

[113] *See also, e.g.*, *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015), *amended*, No. 2:12-md-02323-AB, 2015 WL 12827803 (E.D. Pa. May 8, 2015), *aff'd as amended*, 821 F.3d 410 (3d Cir. 2016); *Hodecker v. Blum*, 525 F. Supp. 867, 869 (N.D.N.Y. 1981), *aff'd*, 685 F.2d 424 (2d Cir. 1982); *Wilder v. Bernstein*, 499 F. Supp. 980, 994 (S.D.N.Y. 1980).

[114] Veolia's statement that Plaintiffs, "rely exclusively on cases in which the class sought injunctive relief," Veolia Br. at 125, PageID.45470, is untrue.

These cases involved damages classes certified for purposes of settlement under Rule 23(e). Certification of a damages settlement class requires that all the factors in Rule 23(a) and (b)(3) be satisfied except manageability. These cases are cited here and in Plaintiffs' Supplemental filing for the proposition that courts have certified classes of children for damages and that courts have effectively crafted procedures—such as the extended opt out period utilized in *In re Silicone Gel Breast Implant Prods.*—to provide minors with the benefits of class adjudication while still protecting their rights.

Much of the opposition to certifying a Subclass of Minors suggests that individual litigation might afford more protections to minors. But missing among the list of concerns is any discussion regarding viable alternatives for minors. For those minors who believe individual litigation is preferable to proceeding as part of a Class, they have filed suit and are pursuing that option. Should other minors exist who decide, after certification of the proposed Minors Subclass, that they wish to pursue their own litigation, they will have an opportunity to opt-out. But that leaves thousands of children without the means or desire to file their own suit.

Although children retain the ability to file suit until after they have reached the age of majority, given the passage of time and resolution of other claims, the likelihood of success at some unknown point in the future seems small. In deciding what is in the best interests of the unrepresented minors in this case, the Court must decide if the possibility of filing suit some time in the future does more to protect children than allowing Class Counsel versed in the facts and overseen by a federal judge to represent these minors' interests in aggregate. Plaintiffs contend that proceeding as part of the Minors Subclass is the better choice for protecting children.

C. The Minors Subclass Is Entitled to Medical Monitoring.

Flint's children need ongoing medical surveillance which includes screening to assess the extent of the neurodevelopmental and neurobehavioral harm they have sustained. Class Plaintiffs have requested ongoing medical monitoring as a form of

injunctive relief for the Minors Subclass. The Minors Subclass is entitled to this relief and, should the Court decline to certify a Minors Subclass under Rule 23(b)(3), it could still certify the Minors Subclass for injunctive purposes only under Rule 23(b)(2).[115]

1. The Minors Subclass Suffered Common Injury in the Form of Non-Negligible Neurobehavioral Impairment.

The Minors Subclass suffered a common injury entitling the Subclass to medical monitoring.[116] Dr. Hu explained that, within the Minors Subclass:

> Each child who meets the criteria proposed in the subclass definition, and . . . the criteria on which the definition is based, will more likely than not have experienced increased lead exposure as a result of the Flint water crisis. It is my opinion that the exposure is of a sufficient duration and magnitude such that each child will have sustained non-negligible impairment of their neurobehavioral development.

[115] Should the Court certify the Minors Subclass under Rule 23(b)(3), it need not *also* certify the Subclass under 23(b)(2) as the Minors Subclass could seek damages *and* injunctive relief. Because medical monitoring is necessary for members of the Minors Subclass to determine the full extent of their neurodevelopmental harm, even if the Minors Subclass cannot pursue damages on a class-wide basis, it would still benefit Minors to obtain medical monitoring.

[116] Class Plaintiffs do not seek broader class-wide injunctive relief from the Engineering Defendants. Should litigation against the State, City, or other Government Defendants resume, Plaintiffs reserve the right to reinstate their request for broader injunctive relief against those Defendants.

Hu Decl. ¶ 9(3), ECF No. 1208-90, PageID.35883-35884.[117] This is precisely the type of "injury to person" that Michigan law requires to state a tort claim for which equitable relief of medical monitoring or surveillance is available to help determine the *full extent* of harm. *Henry*, 473 Mich. at 73.

Under Michigan law, Plaintiffs need only demonstrate "an actual injury" to qualify for medical monitoring. They need not establish the full extent of their injuries as a precondition for medical monitoring. *Henry*, 473 Mich. at 73. Nor would such a requirement make any sense—were the full extent of one's injuries known, the requested monitoring and assessment would be unnecessary. Confronted with this same argument, the Northern District of New York explained:

> [T]he Court finds that the blood accumulation of PFOA [perfluorooctanoic acid] . . . is sufficient to permit a claim for negligence seeking medical monitoring damages.
>
> While Defendants categorize this accumulation as exposure without injury, this view of the law promotes an absurdity: requiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy. The entire point of medical monitoring is to provide testing that would detect a patient's disease *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment that carries a better chance of success. 'Medical monitoring' provides small comfort to someone already suffering

[117] *See also* Hu Rebuttal Decl. at 11, ECF No. 1520-3, PageID.58731 ("Given the estimated exposures to increased lead in drinking water as well as the resulting estimated increases in blood lead levels that can be anticipated among the minors subclass as defined in my declaration, it can be concluded that the associated individuals suffered common physical injuries.").

> outwardly apparent symptoms if the only benefit is to track the continued advance of the disease.

Baker v. Saint-Gobain Perf. Plastics Corp., 232 F. Supp. 3d 233, 252 (N.D.N.Y. 2017) (citation omitted), *aff'd in part and appeal dismissed in part*, 959 F.3d 70 (2d Cir.2020).[118] The Minors Subclass likewise demonstrates a common injury to persons sufficient to support awarding medical monitoring or surveillance relief under Michigan law in order to assess the full extent of each child's harm.[119]

Plaintiffs need not show that their injuries were caused by any one Defendant specifically to qualify for this relief because the evidence shows that all members of Minors Subclass suffered "non-negligible impairment of their neurobehavioral development." Hu Decl. ¶ 9(3), 1208-90, PageID.35884; *see also* Hu Rebuttal Decl. at 11, ECF No. 1520-3, PageID.58731 (Minors Subclass members "suffered common physical injuries."). To the extent Veolia or any Defendant is absolved from

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[118] *See also Benoit v. Saint-Gobain Perf. Plastics Corp.*, 959 F.3d 491, 502 (2d Cir. 2020) ("Accordingly, the district court correctly ruled that the [PFOA] Accumulation Plaintiffs sufficiently alleged personal injury under New York law to permit them to request the costs of medical monitoring.").

[119] *See* Class Cert. Ex. 119, Keating Decl. ¶ 15, ECF No. 1208-133, PageID.37700 ("Evaluating the extent of harm/damages: The basis and need for neuropsychological/neurodevelopmental assessment, and indicated interventions . . . , is well established in the research literature."); *id.* ¶ 24(d), PageID.37711 ("Screening would serve several purposes: indicating that the child should be referred for more detailed assessment to identify specific clinical interventions; . . . referrals to medical providers for possible pharmaceutical and clinical intervention (e.g., for ADHD, anxiety, depression).").

responsibility during certain times, its obligation to provide medical monitoring would extend only to those Minors who qualified for membership during the period for which that Defendant is deemed accountable. As Plaintiffs need only show the Minors Subclass suffered a common threshold injury—as opposed to the full extent of their injuries—they have satisfied *Henry*'s "injury" requirement and are entitled to monitoring in the form of common neuropsychological/neurodevelopmental assessment in order to determine the full extent of injuries each member suffered and the appropriate intervention and amelioration.[120]

Whether the extent of Minors' injuries may differ, such differences do not preclude class certification because all Subclass members suffered a common threshold injury in the form of non-negligible impairment. The *purpose* of the requested relief is to assess the extent of the impairment present in each subclass member so that they can obtain the necessary intervention and treatment to ameliorate the harm. As explained *supra* Section II.A.5., differences in the amount of Class members' injuries are not sufficient to defeat certification under Rule 23(b)(3) and this is similarly true for Rule 23(b)(2). *Cf. Braggs v. Dunn*, 317 F.R.D. 634, 668 (M.D. Ala. 2016) ("Fundamentally, defendants err in forgetting that the

[120] *See* Keating Decl. ¶ 15, ECF No. 1208-133, PageID.37700 ("The basis and need for neuropsychological/ neurodevelopmental assessment, and indicated interventions . . . , is well established in the research literature.").

language of Rule 23(b)(2) focuses on the nature of defendants' acts and omissions and the suitability of class-wide relief, and does not require that the class-wide relief benefit each class member in precisely the same way.").

Relatedly, differences among Subclass members' individual medical histories and exposures to other substances, do not undermine Rule 23(b)(2) certification because neurobehavioral and neurodevelopmental impairment caused by lead exposure is *cumulative*, as Class Plaintiffs have demonstrated.[121] Indeed, other exposures actually exacerbate the effects of lead in an already vulnerable population.[122] Thus, an individual Class or subclass member's medical or prior exposure history does not obviate the need for monitoring or intervention, even if it bears on what the intervention might find.

Any reliance on the Fifth Circuit case, *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), is misplaced. *Stukenberg* rejected an attempt to use

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[121] *See* Keating Decl. ¶ 24(e), ECF No. 1208-133, PageID.37711 ("[T]here is sound evidence that lead exposure interacts with existing vulnerabilities, exacerbating the impact on impairment (De Felice et al. 2015) and contributing to cumulative risk facts (Sameroff et al. 2003), thus implying a need for *increasing* resources for intervention and amelioration.").

[122] *See Childhood Lead Poisoning Prevention, Populations at Higher Risk*, CDC (Nov. 2, 2020), https://www.cdc.gov/nceh/lead/prevention/populations.htm; *see also* Hu Rebuttal Decl. at 15, ECF No. 1520-3, PageID.58735 ("[I]rrespective of whether a child's baseline blood lead level from soil, paint, house dust or other factors is high or low, it will still be even higher if the child ingested Flint water.").

individualized assessments to determine the appropriate form of injunctive relief for individual class members—essentially injunctive relief to establish the scope of injunctive relief. *See* 675 F.3d at 847. Here, by contrast, Class Plaintiffs seek a *common* screening or assessment protocol available to all Minors Subclass members. *See* Keating Decl. ¶ 24(c), ECF No. 1208-133, PageID.37710. Only the *outcomes* of that screening would vary. *See id.* ¶ 24(d), PageID.37711 ("Screening would serve several purposes: indicating that the child should be referred for more detailed assessment to identify specific clinical interventions . . . .").[123]

Finally, there is no risk that, if "the Court were to certify the proposed injunctive classes, *all* class members would be forced to accept the 'programmatic relief' selected by Plaintiffs' counsel, and could not seek different relief more suited to their needs," Veolia Opp. at 135, PageID.45480, because the Court can, in its discretion, allow opt-outs from a 23(b)(2) class. *See*, *e.g.*, *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588, 605 (E.D. Mich. 1996) ("[T]he most prudent course here is

[123] Veolia thus misconstrues Dr. Keating when it contends he "admits that not all Flint residents will require those [surveillance] services." Veolia Br. at 134, PageID.45479 (citing Veolia Br., Ex. 53, Keating Dep. Tr. 369:19-371:19, ECF No. 1370-21, PageID.46916-46918). Dr. Keating testified just the opposite, that "there are a very wide range of *potential negative outcomes*, and so it's necessary to have appropriate screening and services provided with respect to that." Keating Dep. Tr. 369:7-9, ECF No. 1370-21, PageID.46916 (emphasis added).

to require that notice and the opportunity to opt out be provided to all members of both subclasses.").[124]

2. Medical Monitoring Is a Form of Injunctive Relief.

In *Boler v. Earley*, 865 F.3d 391 (6th Cir. 2017), the Sixth Circuit held that Flint residents' claims against the State arising from the water crisis were not barred by sovereign immunity under the *Ex Parte: Young*, 209 U.S. 123 (1908), exception to immunity for claims seeking prospective relief to the extent Flint residents sought "compensatory education, medical monitoring, and evaluation services." 865 F.3d at 413. Since medical monitoring and evaluation services for Flint residents already have been held to be prospective in nature, and *not* "retroactive damages," *id.*, Class Plaintiffs' claim for this relief falls squarely within, and is appropriate for certification under Rule 23(b)(2).

The Oppositions suggest that the requested relief is designed to assess past damage.[125] Not so. As an initial matter, the Sixth Circuit rejected this precise

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[124] To the extent the Court grants certification only of claims for injunctive relief pursuant to Rule 23(b)(2), Minors Subclass members' separate and uncertified damages claims would not be subject to release under a judgment for the (b)(2) Subclass. *See Morrow v. Washington*, 277 F.R.D. 172, 204 (E.D. Tex. 2011) ("[T]he Court is persuaded that any putative class members who wish to pursue individual claims for monetary damages will not be adversely affected by the fact that the Court has chosen to certify a class for injunctive and declaratory relief and not monetary damages.").

[125] Nor does the requested monitoring constitute "social engineering" or otherwise extend beyond the Court's authority. *See* Liaison Br. at 102,

argument when made by the State in *Boler*. *See* 865 F.3d at 413. Moreover, Veolia's own cited authority—*Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 895 (7th Cir. 2011)—supports Plaintiffs' position. There, the Seventh Circuit explicitly distinguished medical monitoring from the relief deemed insufficient for purposes of Rule 23(b)(2), explaining that, "A medical-monitoring injunction is designed to relieve class plaintiffs of the *prospective costs* associated with medical supervision. In this sense, *it is a final remedy* because it permanently defrays *future* costs of medical supervision." *Id.* at 894 (first two emphases added) (citation omitted).[126]

Nor does the payment of money strip injunctive relief of its equitable nature, as recognized in this Circuit and others.[127] Indeed, the Michigan Supreme Court in *Henry*, relied on heavily in the Oppositions, recognized the equitable nature of

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PageID.54097. In *Boler*, the Sixth Circuit deemed medical monitoring to be injunctive in nature and hyperbolic statements to the contrary should be given no weight.

[126] *See also*, *e.g.*, *Ayers v. Jackson Twp.*, 525 A.2d 287, 314 (N.J. 1987) ("[T]he use of a court-supervised fund to administer medical-surveillance payments in mass exposure cases . . . is a highly appropriate exercise of the Court's equitable powers.").

[127] *See*, *e.g.*, *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 132 (2017) ("The [public nuisance] abatement fund was not a 'thinly-disguised' damages award. The distinction between an abatement order and a damages award is stark. An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm.").

medical monitoring by analogizing it to the MDEQ's statutory authority to undertake "response activity" or "remedial action." *See Henry*, 473 Mich. at 93-94.[128] Since the purpose of the requested medical monitoring is to prospectively remediate or mitigate against future harms, and not to compensate for past harms, it is injunctive relief for which Rule 23(b)(2) class certification can, and in this case should be granted.[129]

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[128] Liaison Counsel's assertion that what is being asked is to "enmesh the federal judiciary in making political and administrative decisions," Liaison Br. at 102, PageID.54097, is completely off the mark and represents a failure to understand the proposed programmatic relief sought by Class Counsel. It is also disingenuous given what they have asked the Court to do in the context of a Class Settlement. They misconstrue Class Plaintiffs' Counsel's experts, who rather than suggest the Court take on supervision of the program, actually opine that the enhanced level of coordination essential to ensure efficacy and equity in accessing services, should be managed through community oversight by existing program and service providers. *See, e.g.*, Keating Decl. ¶ 26(i)(2), ECF No. 1208-133, PageID.37718 ("The principle of community control of intervention and prevention services is essential for several reasons.").

[129] As discussed throughout this brief, Liaison Counsel's reasons for opposing Class certification lack merit. But their arguments should be stricken for the additional reason that they lack standing to take a position regarding the propriety of Class certification. To the extent Liaison Counsel represent individuals who fall within the definition of the proposed Class but wish to independently seek redress in Court, the proper mechanism for doing so is to opt-out of the Class—and the law is quite clear that individuals who opt out of a Class lack standing to object. *See, e.g.*, 4 William B. Rubinstein, *Newberg on Class Actions* § 13:22 (5th ed. 2020); *In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *13 (N.D. Ohio Sept. 23, 2016).

Liaison Counsel have not and cannot demonstrate any risk of legal prejudice sufficient to warrant their participation in a motion that does not involve them. To

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion.

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the extent their clients intend to opt-out of any Class—which, Liaison Counsel have repeatedly represented in their intent—they are not parties to the action and lack standing. Should something change and Liaison Counsel's clients wish to remain part of the Class and object, the appropriate time for objections would be after notice.

Interim Co-Lead Class Counsel and Liaison Counsel have coordinated their cases with respect to discovery. But that coordination does not extend to allowing Liaison Counsel to take positions on issues which are entirely irrelevant to their interests. Should Liaison Counsel assert they have some sort of "management" or "tactical" interest in the motion, it should be noted that courts have rejected these interests as sufficient to establish standing in similar contexts. 4 William B. Rubenstein, *Newberg on Class Actions* § 13:24 (5th ed. 2020).

Dated: April 7, 2021

Respectfully submitted,

/s/ Theodore J. Leopold
Theodore J. Leopold
Leslie M. Kroger
COHEN MILSTEIN SELLERS & TOLL PLLC
11780 U.S. Highway One
Suite N500
Palm Beach Gardens, FL 33408
(561) 515-1400 Telephone
tleopold@cohenmilstein.com
lkroger@cohenmilstein.com

Joseph M. Sellers
Kit A. Pierson
Emmy L. Levens
Jessica B. Weiner
Alison S. Deich
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500
Washington, DC 20005
(202) 408-4600 Telephone
jsellers@cohenmilstein.com
kpierson@cohnemilstein.com
elevens@cohenmilstein.com
jweiner@cohenmilstein.com
adeich@cohenmilstein.com

Vineet Bhatia
Shawn Raymond
SUSMAN GODFREY, L.L.P.
1000 Louisiana Street
Suite 5100
Houston, TX 77002
(713) 651-3666 Telephone
vbhatia@susmangodfrey.com

/s/ Michael L. Pitt
Michael L. Pitt
Cary S. McGehee
PITT MCGEHEE PALMER BONANNI & RIVERS, P.C.
117 West 4th Street
Suite 200
Royal Oak, MI 48067
(248) 398-9800 Telephone
mpitt@pittlawpc.com
cmcgehee@pittlawpc.com

Paul Novak (P39524)
Diana Gjonaj (P74637)
Gregory Stamatopoulos (P74199)
WEITZ & LUXENBERG, P.C.
3011 West Grand Boulevard
Suite 2150
Detroit, MI 48226
(313) 800-4170 Telephone
pnovak@weitzlux.com
dgjonaj@weitzlux.com
gstamatopoulos@weitzlux.com

Robin L. Greenwald
WEITZ & LUXENBERG, P.C.
700 Broadway
New York, NY 10003
(212) 558-5500 Telephone
rgreenwald@weitzlux.com

Esther E. Berezofsky
MOTLEY RICE LLC
210 Lake Drive East
Suite 101
Cherry Hill, NJ 08002
(856) 667-0500 Telephone

sraymond@susmangodfrey.com

Stephen Morrissey
Jordan Connors
SUSMAN GODFREY, L.L.P.
1201 Third Ave.
Suite 3800
Seattle, WA 98101
(206) 516-3880 Telephone
smorrissey@susmangodfrey.com
jconnors@susmangodfrey.com

Peretz Bronstein
Shimon Yiftach
BRONSTEIN, GEWIRTZ & GROSSMAN, LLC
60 East 42nd Street
Suite 4600
New York, NY 10165
(212) 697-6484 Telephone
peretz@bgandg.com
shimony@bgandg.com

Bradford M. Berry
Anson C. Asaka
NAACP
4805 Mt. Hope Dr.
Baltimore, MD 21215
(410) 580-5777 Telephone
bberry@naacpnet.org
aasaka@naacpnet.org

Kathryn P. Hoek
SUSMAN GODFREY, L.L.P.
1901 Avenue of the Stars
Suite 950
Los Angeles, CA 90067
(310) 789-3100 Telephone
khoek@susmangodfrey.com

eberezofsky@motleyrice.com

Teresa Caine Bingman (P56807)
THE LAW OFFICES OF TERESA A. BINGMAN, PLLC
120 N. Washington Square
Suite 327
Lansing, MI 48933
(877) 957-7077 Telephone
tbingman@tbingmanlaw.com

William Goodman (P14173)
Julie H. Hurwitz (P34720)
Kathryn Bruner James (P71374)
GOODMAN & HURWITZ PC
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 567-6170 Telephone
bgoodman@goodmanhurwitz.com
jhurwitz@goodmanhurwitz.com
kjames@goodmanhurwitz.com

Deborah A. LaBelle (P31595)
LAW OFFICES OF DEBORAH A. LABELLE
221 N. Main St.
Suite 300
Ann Arbor, MI 48104
(734) 996-5620 Telephone
deblabelle@aol.com

Trachelle C. Young (P63330)
TRACHELLE C. YOUNG & ASSOCIATES PLLC
2501 N. Saginaw St.
Flint, MI 48505
(810) 239-6302 Telephone
trachelleyoung@gmail.com

Brian McKeen (P34123)

Neal H. Weinfield
THE DEDENDUM GROUP
(312) 613-0800 Telephone
nhw@dedendumgroup.com

Cirilo Martinez (P65074)
LAW OFFICE OF CIRILO MARTINEZ, PLLC
3010 Lovers Lane
Kalamazoo, MI 49001
(269) 342-1112 Telephone
martinez_cirilo@hotmail.com

David J. Shea
SHEA AIELLO, PLLC
26100 American Drive
2nd Floor
Southfield, MI 48034
(248) 354-0224 Telephone
david.shea@sadplaw.com

Mark L. McAlpine (P35583)
Jayson E. Blake (P56128)
MCALPINE PC
3201 University Drive
Suite 100
Auburn Hills, MI 48326
(248) 373-3700 Telephone
mlmcalpine@mcalpinelawfirm.com
jeblake@mcalpinelawfirm.com

Claire Vergara (P77654)
McKEEN & ASSOCIATES, PC
645 Griswold Street
Suite 4200
Detroit, MI 48226
(313) 961-4400 Telephone
bjmckeen@mckeenassociates.com
cvergara@mckeenassociates.com

Cynthia M. Lindsey (P37575)
Shermane T. Sealey (P32851)
CYNTHIA M. LINDSEY & ASSOCIATES, PLLC
8900 E. Jefferson Avenue
Suite 612
Detroit, MI 48214
(248) 766-0797 Telephone
cynthia@cmlindseylaw.com
shermane@cmlindseylaw.com

Andrew P. Abood (P43366)
ABOOD LAW FIRM
246 East Saginaw Street
Suite One
East Lansing, Michigan 48823
(517) 332-5900 Telephone
andrew@aboodlaw.com

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on April 7, 2021.

Dated: April 7, 2021

/s/ Emmy L. Levens
Emmy L. Levens
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500
Washington, DC 20005
(202) 408-4600 Telephone
elevens@cohenmilstein.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Elnora Carthan, *et al.*, Plaintiffs, -v- Rick Snyder, *et al.*, Defendants.	Case No.: 5:16-cv-10444-JEL-MKM Hon. Judith E. Levy Magistrate Judge Mona K. Majzoub

DECLARATION OF THEODORE J. LEOPOLD IN SUPPORT OF REPLY IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I, Theodore J. Leopold, declare as follows:

1. I am a partner of the law firm Cohen Milstein Sellers & Toll PLLC and I, along with Michael L. Pitt of the law firm Pitt McGehee Palmer & Rivers, P.C., serve as Court-appointed Interim Co-Lead Class Counsel in the above captioned matter. I have personal knowledge of the matters stated in this Declaration.

2. Attached as Exhibit 1 is a true and correct excerpt of the transcript of the deposition of Robert A. Simons.

3. Attached as Exhibit 2 is a true and correct redacted copy of a document produced as GAINES_0000551. This copy has been redacted to protect personal identifying information. An unredacted copy will be filed provisionally under seal.

4. Attached as Exhibit 3 is a true and correct excerpt of the transcript of the deposition of Darnella Gaines.

5. Attached as Exhibit 4 is a true and correct redacted excerpt of the transcript of the deposition of Tiantha Williams. This excerpt has been redacted to protect personal identifying information. An unredacted copy will be filed provisionally under seal.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 7, 2021
Palm Beach, Florida

/s/ Theodore J. Leopold
Theodore J. Leopold

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the U.S. District Court through the ECF filing system and that all parties to the above case were served via the ECF filing system on April 7, 2021.

Dated: April 7, 2021

/s/ Emmy L. Levens
Emmy L. Levens
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave. NW
Suite 500
Washington, DC 20005
(202) 408-4600 Telephone
elevens@cohenmilstein.com

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: FLINT WATER CASES	Civil Action No. 5:16-cv-10444-JEL-MKM (consolidated)
	Hon. Judith E. Levy
	Mag. Mona K. Majzoub

Elnora Carthan et al. v. Governor Rick Snyder et al.
Civil Action No. 5:16-cv-10444-JEL-MKM

HIGHLY CONFIDENTIAL
CONTINUED REMOTE VIDEOTAPED
DEPOSITION OF ROBERT A. SIMONS, Ph.D.
VOLUME II
Friday, October 30, 2020

Continued remote videotaped deposition of ROBERT A. SIMONS, Ph.D., conducted at the location of the witness in Beachwood, Ohio, commencing at 9:02 a.m., on the above date, before Carol A. Kirk, Registered Merit Reporter, Certified Shorthand Reporter, and Notary Public.

GOLKOW LITIGATION SERVICES
877.370.3377 ph | 917.591.5672 fax
deps@golkow.com

BY MS. PEASLEE:

Q. So in your reports, you've assessed business losses for the period from 2014 to 2018; is that correct?

A. Yes.

Q. Using your current methodology, could you analyze those losses on an annual basis?

A. Yes, we probably could.

Q. You testified both last time and today that you used the ReferenceUSA data to develop a single typical firm model that applies to all of the analyzed business sectors, correct?

A. Yes.

Q. Could you develop a typical firm on a per sector basis?

A. I believe so, yes.

Q. Would doing so require changes to your methodology?

A. No.

Q. Similarly, you talked a bit today with Mr. Campbell about average profit margins for small and medium businesses.

EXHIBIT 2

REDACTED VERSION OF DOCUMENT TO BE SEALED

You could give your people

Culligan Water

CULLIGAN WATER CONDITIONING
5383 HILL 23 DRIVE
FLINT, MI 48507-3906
810-232-1117

Account Transaction Reconciliation for Account: [redacted]7608

As of: September 9, 2020 at 12:44:03 PM
For 11/01/2013 - 09/30/2020
Primary User: Customer Service
Purpose: Report provides posted transactions for a selected period of time to help answer billing inquiries and act as a "duplicate" bill.

GAINES, DARNELLA
[redacted]
FLINT, MI 48504-2815
[redacted]

Billing Type: Balance Forward
Statement Frequency: MONTHLY

		CP	1-30	31-60	61-90	91-120	121+	UC
Current Balance:	**$0.00**							
Deferred Balance:	**$0.00**	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Next Installment Date:								

Date	Ticket/ Invoice #	Batch #	Terms	Product	PO #	Qty	Price	Extension Amount	Balance
07/01/2015 - 07/31/2015									
Beginning Balance									**$0.00**
07/01/2015	65887 /	2111	CHRG	310 INSTALLATION LABOR		1	$10.00	$0.00	
				710 5 GALLON DRINKING WATER DELIVERED		2	$5.50	$0.00	
07/01/2015	65887 /	2111	CHRG	770 BOTTLE DEPOSIT		2	$7.00	$14.00	
07/06/2015		7899	CHRG	PAYMENT				-$14.00	
07/10/2015	65922 /	7846	CHRG	710 5 GALLON DRINKING WATER DELIVERED		2	$5.50	$11.00	
				770 BOTTLE DEPOSIT		2	$7.00	$14.00	
07/10/2015	65922 /	7846	CHRG	771 BOTTLE RETURN		-1	$7.00	-$7.00	
07/31/2015		8191	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE		0	$0.00	$7.00	
Ending Balance 07/01/2015 - 07/31/2015									**$25.00**
08/01/2015 - 08/31/2015									
08/07/2015	67268 /	8146	CHRG	710 5 GALLON DRINKING WATER DELIVERED		0	$0.00	$0.00	
				770 BOTTLE DEPOSIT		0	$0.00	$0.00	
08/07/2015	67268 /	8146	CHRG	771 BOTTLE RETURN		0	$0.00	$0.00	
08/11/2015	69050 /	8062	CHRG	710 5 GALLON DRINKING WATER DELIVERED		2	$5.50	$11.00	
				770 BOTTLE DEPOSIT		2	$7.00	$14.00	
08/11/2015	69050 /	8062	CHRG	771 BOTTLE RETURN		-2	$7.00	-$14.00	
08/26/2015		8475	CHRG	PAYMENT				-$18.00	
08/28/2015		8496	CHRG	PAYMENT				-$7.00	
08/31/2015		8526	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE		0	$0.00	$7.00	
Ending Balance 08/01/2015 - 08/31/2015									**$18.00**

09/01/2015 - 09/30/2015								
09/05/2015	70006 /	8320	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
09/05/2015	70006 /	8320	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
09/09/2015	72393 /	4710	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
09/09/2015	72393 /	4710	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
09/30/2015		8813	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
09/30/2015		8815	CHRG	997 LATE CHARGE	0	$0.00	$0.90	
Ending Balance 09/01/2015 - 09/30/2015								**$36.90**
10/01/2015 - 10/31/2015								
10/02/2015	73152 /	8407	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
10/02/2015	73152 /	8407	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
10/05/2015		8843	CHRG	PAYMENT			-$36.90	
10/30/2015	75585 /	8408	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
10/30/2015	75585 /	8408	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
10/31/2015		9164	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 10/01/2015 - 10/31/2015								**$29.00**
11/01/2015 - 11/30/2015								
11/09/2015		9239	CHRG	710 5 GALLON DRINKING WATER DELIVERED	-2	$5.50	-$11.00	
11/28/2015	78805 /	8409	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
11/28/2015	78805 /	8409	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
11/30/2015		9459	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
11/30/2015		9460	CHRG	997 LATE CHARGE	0	$0.00	$0.90	
Ending Balance 11/01/2015 - 11/30/2015								**$36.90**
12/01/2015 - 12/31/2015								
12/18/2015		9637	CHRG	PAYMENT			-$20.90	
12/21/2015		9657	CHRG	PAYMENT			-$27.00	
12/26/2015	81931 /	8410	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
12/31/2015		9766	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 12/01/2015 - 12/31/2015								**$21.00**
01/01/2016 - 01/31/2016								
01/22/2016	84853 /	8411	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
01/22/2016	84853 /	8411	CHRG	771 BOTTLE RETURN	-4	$7.00	-$28.00	

01/31/2016		10039	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
01/31/2016		10040	CHRG	997 LATE CHARGE	0	$0.00	$0.90	
Ending Balance 01/01/2016 - 01/31/2016								**$25.90**
02/01/2016 - 02/29/2016								
02/19/2016	87529 /	8416	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
02/19/2016	87529 /	8416	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
02/19/2016		10291	CHRG	PAYMENT			-$7.00	
02/29/2016		10417	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
02/29/2016		10418	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 02/01/2016 - 02/29/2016								**$37.25**
03/01/2016 - 03/31/2016								
03/01/2016	91663 /	10415	CHRG	330 SERVICE CALL/TRIP CHARGE	1	$50.00	$0.00	
03/01/2016		10419	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
03/18/2016	90577 /	10271	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
03/18/2016	90577 /	10271	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
03/22/2016		10708	CHRG	PAYMENT			-$23.25	
03/31/2016		10822	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 03/01/2016 - 03/31/2016								**$32.00**
04/01/2016 - 04/30/2016								
04/15/2016	93874 /	8412	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
04/15/2016	93874 /	8412	CHRG	771 BOTTLE RETURN	-4	$7.00	-$28.00	
04/22/2016		11053	CHRG	PAYMENT			-$29.00	
04/30/2016		11143	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 04/01/2016 - 04/30/2016								**$7.00**
05/01/2016 - 05/31/2016								
05/13/2016	96109 /	8414	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
05/13/2016	96109 /	8414	CHRG	771 BOTTLE RETURN			$0.00	
05/31/2016		11497	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
05/31/2016		11498	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 05/01/2016 - 05/31/2016								**$39.35**
06/01/2016 - 06/30/2016								
06/10/2016	100179 /	8413	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
06/10/2016	100179 /	8413	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
06/30/2016		11865	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	

06/30/2016		11866	CHRG	997 LATE CHARGE	0	$0.00	$1.60	
Ending Balance 06/01/2016 - 06/30/2016								**$47.95**
07/01/2016 - 07/31/2016								
07/02/2016		11870	CHRG	PAYMENT			-$47.95	
07/09/2016	103348 /	11626	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
07/09/2016	103348 /	11626	CHRG	771 BOTTLE RETURN	-3	$7.00	-$21.00	
07/31/2016		12141	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 07/01/2016 - 07/31/2016								**$11.00**
08/01/2016 - 08/31/2016								
08/05/2016	105571 /	11627	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
08/05/2016	105571 /	11627	CHRG	771 BOTTLE RETURN	-3	$7.00	-$21.00	
08/31/2016		12512	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
08/31/2016		12513	CHRG	997 LATE CHARGE	0	$0.00	$0.55	
Ending Balance 08/01/2016 - 08/31/2016								**$22.55**
09/01/2016 - 09/30/2016								
09/06/2016		12532	CHRG	PAYMENT			-$11.00	
09/30/2016	111938 /	12451	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
09/30/2016	111938 /	12451	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
09/30/2016		12800	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
09/30/2016		12801	CHRG	997 LATE CHARGE	0	$0.00	$0.55	
Ending Balance 09/01/2016 - 09/30/2016								**$30.10**
10/01/2016 - 10/31/2016								
10/03/2016	LATE FEE /	12808	CHRG	999 LATE CHARGE ADJ	0	$0.00	-$0.55	
10/04/2016		12820	CHRG	PAYMENT			-$11.55	
10/28/2016	114104 /	12478	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
10/28/2016	114104 /	12478	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
10/31/2016		13151	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
10/31/2016		13152	CHRG	997 LATE CHARGE	0	$0.00	$0.87	
Ending Balance 10/01/2016 - 10/31/2016								**$25.87**
11/01/2016 - 11/30/2016								
11/02/2016		13162	CHRG	PAYMENT			-$25.87	
11/30/2016		13406	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 11/01/2016 - 11/30/2016								**$7.00**
12/01/2016 - 12/31/2016								
12/22/2016	120155 /	13102	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	

				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
12/22/2016	120155 /	13102	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
12/31/2016		13741	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
12/31/2016		13743	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 12/01/2016 - 12/31/2016								**$25.35**
01/01/2017 - 01/31/2017								
01/31/2017		14038	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
01/31/2017		14040	CHRG	997 LATE CHARGE	0	$0.00	$0.90	
Ending Balance 01/01/2017 - 01/31/2017								**$33.25**
02/01/2017 - 02/28/2017								
02/10/2017		14159	CHRG	PAYMENT			-$33.25	
02/17/2017	126127 /	13702	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
02/17/2017	126127 /	13702	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
02/28/2017		14423	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
Ending Balance 02/01/2017 - 02/28/2017								**$7.00**
03/01/2017 - 03/31/2017								
03/17/2017	130000 /	13344	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
03/17/2017	130000 /	13344	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
03/31/2017		14751	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
03/31/2017		14753	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 03/01/2017 - 03/31/2017								**$14.35**
04/01/2017 - 04/30/2017								
04/14/2017	132163 /	14390	CHRG	710 5 GALLON DRINKING WATER DELIVERED	0	$0.00	$0.00	
				770 BOTTLE DEPOSIT	0	$0.00	$0.00	
04/14/2017	132163 /	14390	CHRG	771 BOTTLE RETURN	0	$0.00	$0.00	
04/30/2017		15048	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
04/30/2017		15050	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 04/01/2017 - 04/30/2017								**$21.70**
05/01/2017 - 05/31/2017								
05/31/2017		15371	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
05/31/2017		15373	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 05/01/2017 - 05/31/2017								**$29.05**
06/01/2017 - 06/30/2017								
06/30/2017		15741	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
06/30/2017		15743	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 06/01/2017 - 06/30/2017								**$36.40**

07/01/2017 - 07/31/2017								
07/08/2017	141782 /	15523	CHRG	710 5 GALLON DRINKING WATER DELIVERED	2	$5.50	$11.00	
				770 BOTTLE DEPOSIT	2	$7.00	$14.00	
07/08/2017	141782 /	15523	CHRG	771 BOTTLE RETURN	-2	$7.00	-$14.00	
07/10/2017		15800	CHRG	PAYMENT			-$25.00	
07/31/2017		16024	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
07/31/2017		16026	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 07/01/2017 - 07/31/2017								**$29.75**
08/01/2017 - 08/31/2017								
08/31/2017		16435	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
08/31/2017		16437	CHRG	997 LATE CHARGE	0	$0.00	$0.90	
Ending Balance 08/01/2017 - 08/31/2017								**$37.65**
09/01/2017 - 09/30/2017								
09/30/2017		16706	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
09/30/2017		16708	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 09/01/2017 - 09/30/2017								**$45.00**
10/01/2017 - 10/31/2017								
10/31/2017		17025	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
10/31/2017		17027	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 10/01/2017 - 10/31/2017								**$52.35**
11/01/2017 - 11/30/2017								
11/30/2017		17314	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$7.00	
11/30/2017		17316	CHRG	997 LATE CHARGE	0	$0.00	$0.35	
Ending Balance 11/01/2017 - 11/30/2017								**$59.70**
12/01/2017 - 12/31/2017								
12/01/2017		17318	CHRG	PAYMENT			-$52.35	
12/11/2017	159253 /	17413	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	1	$23.75	$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	1	$16.00	$16.00	
12/11/2017	159253 /	17413	CHRG	771 BOTTLE RETURN	-4	$7.00	-$28.00	
				310 INSTALLATION LABOR	1	$100.00	$0.00	
12/12/2017		17412	CHRG	008 BOTTLED WATER EQUIPMENT RENTAL SERVICE	19	-$0.37	-$7.00	
12/13/2017		17427	CHRG	PAYMENT			-$39.75	
12/31/2017		17595	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	0	$0.00	$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$16.00	
Ending Balance 12/01/2017 - 12/31/2017								**$12.10**
01/01/2018 - 01/31/2018								
01/05/2018	ADJUSTMENT /	17636	CHRG	007 DRINKING WATER EQUIPMENT RENTAL SERVICE	-1	$7.00	-$7.00	
				999 LATE CHARGE ADJ	0	$0.00	-$0.35	
01/31/2018		17912	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	0	$0.00	$23.75	

				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$16.00	
01/31/2018		17913	CHRG	997 LATE CHARGE	0	$0.00	$0.24	
Ending Balance 01/01/2018 - 01/31/2018								**$44.74**
02/01/2018 - 02/28/2018								
02/01/2018		17918	CHRG	PAYMENT			-$1.08	
02/07/2018		18006	CHRG	PAYMENT			-$43.66	
02/28/2018		18281	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	0	$0.00	$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$16.00	
Ending Balance 02/01/2018 - 02/28/2018								**$39.75**
03/01/2018 - 03/31/2018								
03/04/2018		18306	CHRG	PAYMENT			-$39.75	
03/31/2018		18637	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	0	$0.00	$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$16.00	
Ending Balance 03/01/2018 - 03/31/2018								**$39.75**
04/01/2018 - 04/30/2018								
04/02/2018		18647	CHRG	PAYMENT			-$39.75	
04/30/2018		18972	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	0	$0.00	$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	0	$0.00	$16.00	
Ending Balance 04/01/2018 - 04/30/2018								**$39.75**
05/01/2018 - 05/31/2018								
05/01/2018	173374 /	18967	CHRG	330 SERVICE CALL/TRIP CHARGE	1	$50.00	$0.00	
				335 REPAIR LABOR	1	$40.50	$0.00	
05/02/2018		18985	CHRG	004 FILTER EQUIPMENT RENTAL SERVICE (AUTO AND MANUAL)	30	-$0.79	-$23.75	
				007 DRINKING WATER EQUIPMENT RENTAL SERVICE	30	-$0.53	-$16.00	
Ending Balance for 05/01/2018 - 05/31/2018								**$0.00**

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Flint Water Cases	Civil Action No. 5:16-cv-10444-JEL-MKM (consolidated) Hon. Judith E. Levy Mag. Mona K. Majzoub
Elnora Carthan, et al. v. Governor Rick Snyder, et al.	Civil Action No. 5-16-cv-10444-JEL-MKM

HIGHLY CONFIDENTIAL

September 14, 2020

REMOTE VIDEOTAPED DEPOSITION OF

DARNELLA GAINES

Remote videotaped deposition of DARNELLA GAINES, conducted at the location of the witness in Flint, Michigan, commencing at 9:06 a.m., on the above date, before CORINNE T. MARUT, C.S.R. No. 84-1968, Registered Professional Reporter, Certified Realtime Reporter and Notary Public.

GOLKOW LITIGATION SERVICES
877.370.3377 ph / 917.591.5672 fax
deps@golkow.com

Q. Perfect.

A. Because it go pre-Head Start, Head Start, kindergarten, 1st, 2nd, 3rd, 4th, 5th and up.

Q. Okay. Now, the public statements that you said that you relied on, those were all from government officials?

A. That was reported on the news and in papers.

Q. Okay. So -- and I'm talking like directly relying.

Did you directly rely on any statement that VNA, my client, made?

A. I relied on what the Government issued on the news about the water being safe.

Q. Okay. And can you tell me the exact month that you stopped drinking the water?

A. Like I said, I never really stopped drinking the water.

MS. LINDSEY: Objection. Objection; asked and answered.

Go ahead and answer.

BY THE WITNESS:

A. I never really stopped drinking the

water. I still had to use the water.

BY MR. PERKINS:

Q. But didn't you get Culligan?

A. Yes.

Q. And when you got Culligan, did you and KC stop drinking tap water?

A. Not completely. We still had to wash dishes, cook with it, all that. That still -- you know, we still consuming the water.

Q. Let me clarify.

Drinking meaning like putting it in a glass of water and consuming it that way.

When you contracted with Culligan, is that the time that you stopped consuming the water like drinking a glass of water --

A. Yes.

Q. -- from the tap? Okay. And you --

A. If you consider brushing your teeth, then I'm going to say no because we still had brushed our teeth with the water regardless if we had Culligan. We still used the water to brush our teeth.

Q. And that never stopped for you?

A. No. I mean, we got to brush our teeth.

LAWYER'S NOTES

PAGE	LINE	

EXHIBIT 4

REDACTED VERSION OF DOCUMENT TO BE SEALED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re FLINT WATER CASES	Civil Action No. 5:16-CV-10444-JEL-MKM (Consolidated)
	Hon. Judith E. Levy
	Mag. Mona K. Majzoub
Elnora Carthan, et al., Plaintiffs, -vs- Governor Rick Snyder, et al, Defendants.	Civil Action No. 5:16-CV-10444-JEL-MKM

HIGHLY CONFIDENTIAL

VIDEOTAPED DEPOSITION OF TIANTHA WILLIAMS - VOL 1

Thursday, December 12, 2019

at 10:05 a.m.

Taken at: Butzel Long
41000 Woodward Avenue
Bloomfield Hills, Michigan 48304

REPORTED BY: LAURA STEENBERGH, RPR, CRR, RMR, CSR-3707

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about that?

MS. BINGMAN: Objection, misstating prior testimony.

BY MR. PENHALLEGON:

Q. Am I correct? You stopped using water for those purposes from the day [redacted] was born?

A. Until it was free.

Q. Until what was free?

A. The water.

Q. The water out of the tap?

A. No. The bottled water.

Q. Okay. So when [redacted] came home in late January, early February --

A. Um-hum (affirmatively).

Q. -- were you still using tap water?

A. Yes.

Q. Okay. And for how long did you continue to use tap water?

A. Until bottled water was free.

Q. When was that?

A. I can't remember.

Q. You understand that the water out of the taps in Flint since October of 2015 came from Detroit?

A. I don't know.

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, LAURA J. STEENBERGH, Certified Shorthand Reporter, a Notary Public in and for the above county and state, do hereby certify that the above deposition was taken before me at the time and place hereinbefore set forth; that the witness was by me first duly sworn to testify to the truth, and nothing but the truth, that the foregoing questions asked and answers made by the witness were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party nor interested in the event of this cause.

Laura Steenbergh

LAURA J. STEENBERGH
CSR 3707 Notary Public,
Macomb County, Michigan

My Commission expires: 2/14/21