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52-CV-2002-000408.00
CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA
CHRIS PRIEST, CLERK

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CIVIL ACTION NO.: CV-2002-000408

James St. John, Jr.; Christi Dolbeer; John Scherff; Kimberly Scherff; Darden Bridgeforth and Sons Land Company, an Alabama Company; Hillsboro Gin Company, Inc., an Alabama Corporation; Hamilton Farms, an Alabama Partnership; G. T. Hamilton, individually and as a partner of Hamilton Farms; Mark Hamilton, individually and as a partner of Hamilton Farms; Lisha Felkins, individually and as a partner of Hamilton Farms; Kathleen Hamilton; Michael Letson; Don Alexander; and Reda Alexander,

Plaintiffs,

vs.

3M Company; Daikin America, Inc.; Dyneon, LLC; Synagro WWT, Inc.; Synagro South, LLC; Toray Fluorofibers (America), Inc.; BFI Waste Systems of Alabama, LLC; BFI Waste Systems of North America, LLC; The City of Decatur, Alabama; Morgan County', Alabama,

Defendants.

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS-ACTION SETTLEMENT

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I. INTRODUCTION AND SUMMARY

Come now the plaintiffs and the Class Representatives[1] and seek final approval of the Class Settlement Agreement ("Settlement Agreement") (Document 662) which was attached as Exhibit A to Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

This is a class action related to PFAS[2] contamination in north Alabama allegedly caused by the defendants named herein. The class sought to be certified (for settlement purposes) is defined in § 1.9 of the Settlement Agreement as:

> All Persons that have owned, occupied, otherwise had an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in, resided at, maintained a business of any kind at, worked at, or recreated on any real property (including the Tennessee River, its tributaries, and all other bodies of water) located in Morgan County, Lawrence County, Franklin County, Limestone County, Colbert County, or Lauderdale County, Alabama, at any time between April 21, 2003, and the date of the Preliminary Approval Order, excluding the Defendants, counsel for the Parties, and the Court.

The Sludge Application Subclass sought to be certified (for settlement purposes) is defined in § 1.45 of the Settlement Agreement as:

> All Class Members that, as of the date of the Preliminary Approval Order, own, occupy, or have an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in real property in Morgan County, Lawrence County, Franklin County, or Limestone County, Alabama, on which biosolids containing PFAS compounds were applied at any time."

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[1] Paragraph 1 of the Order Preliminarily Approving Settlement and Providing for Notices to the Class (Document 671, 12/17/2021) says: "John Scherff, Kimberly Scherff, Darden Bridgeforth and Sons Land Company, and G. T. Hamilton, are designated as Class Representatives for purposes of this Settlement. Further, G. T. Hamilton is designated as the representative of the Sludge Application Subclass."

[2] A scientific definition of "PFAS" is at § 1.36 of the Settlement Agreement. "PFAS are widely used, long lasting chemicals, components of which break down very slowly over time." See www.epa.gov/pfas/pfas-explained.

In its Order Preliminarily Approving Settlement and Providing for Notices to the Class (Document 671, 12/17/2021), this Court examined the relevant class-action fairness and certification factors and gave preliminary approval to the Settlement Agreement. This motion and the Fairness Hearing (set for April 21, 2022) provide the Court with a second, final opportunity to review those same factors. "A class action settlement must be approved by the trial court (normally after appropriate notice to the class). The normal procedure is a preliminary approval order by the court which authorizes notice to the class, and sets a schedule for review of the full settlement and an opportunity for class members to object (or to opt-out if the settlement is a Rule 23(b)(3) class). After full briefing (normally 90 days or more), the court holds a hearing on the settlement and determines if the settlement is fair and adequate to the class and may (or may not) enter a final judgment approving the settlement." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.20 (5th ed.) (Sept. 2021 update). "Review of a proposed settlement generally proceeds in two stages, a hearing on the preliminary approval followed by a final fairness hearing; at the preliminary approval stage, the court determines whether the proposed settlement is within a range of possible approval and whether notice should be sent to class members, and at the final approval stage, the court takes a closer look at the proposed settlement, taking into consideration the objections and any other further developments in order to make the final fairness determination." 7B Mary Kay Kane, Federal Practice and Procedure (Wright & Miller) § 1797.5, n. 6 (3d ed.) (April 2021 update) (emphasis added).

The plaintiffs and the Class Representatives move the Court to enter an order identical to, or substantially identical to, the proposed Final Approval Order, attached hereto as Exhibit A. This proposed final order was first submitted to the Court on 12/10/2021 as Exhibit 2 to the

Settlement Agreement (Document 662). In the proposed Final Approval Order, this Court would finally approve of the fairness of the Settlement Agreement and, in addition, specifically would finally, *inter alia*: (i) certify (for settlement purposes) the Class defined above pursuant to Ala. R. Civ. P. 23(b)(2) as a mandatory, non-opt-out class for purposes of injunctive relief; (ii) certify (for settlement purposes) the Class defined above pursuant to Ala. R. Civ. P. 23(b)(3) as an opt-out class for money-damage claims related to PFAS contamination to real property and ancillary damages not excluded by the release; (iii) certify (for settlement purposes) the Sludge Application Subclass, defined above, as a Rule 23(b)(3) opt-out subclass, and approve the plan of distribution of monetary relief; and (iv) approve the Class notice plan.[3]

The movants adopt and incorporate herein by reference the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021), and the Motion for Attorneys' Fees, Costs, and Expenses (Document 680, 1/14/2022), and all exhibits thereto. This Plaintiffs' Motion for Final Approval of Class-Action Settlement (2/11/2022) is necessarily significantly-duplicative of the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021). This repetition is unavoidable because the Court must examine the same, identical fairness factors and certification factors in considering both preliminary approval and final approval.[4] The only difference is that a higher burden applies in a

[3] The proposed Final Approval Order would also decide whether to grant, in whole or in part, the Motion for Attorneys' Fees, Costs, and Expenses (Document 680, 1/14/2022).

[4] See *Fire & Police Retiree Health Care Fund, San Antonio v. Smith*, No. CV CCB-18-3670, 2020 WL 6826549, at *2 (D. Md. Nov. 20, 2020) ("At the final approval stage, the standard and the factors to be considered are 'exactly the same' as during the preliminary approval stage"), and *Anderson Living Tr. v. Energen Res. Corp*., No. CV 13-909 WJ/CG, 2021 WL 1686491, at *2 (D.N.M. Apr. 29, 2021) ("In determining fairness at the preliminary approval step, the court considers the same factors that it will also ultimately consider at the final approval step").

final hearing.[5] But, the factors to be considered are exactly the same.

A short summary of the "PFAS Problem" is provided in section II ("General Factual Background"), pp. 6-13, of the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021). See also, *id*., at section III, pp. 13-16, for a "Short Summary of Relevant Procedural History."

II. THE PROPOSED RELIEF

A. Overview

The largest portion of the relief for the Class is injunctive. The money already spent, or that will shortly be committed to projects required by the Settlement Agreement, exceeds $300,000,000.[6] Further, there is generally no dollar cap on the amounts of money the defendants will spend in the future to carry out the programs and projects required by the Settlement Agreement. There are known locations of legacy PFAS contamination around north Alabama: former and existing manufacturing plants; previously- or currently-permitted landfills; water-treatment facilities; old dump sites; etc. PFAS does not quickly disintegrate in the environment. There is no dispute that the best strategy is to promptly contain existing PFAS contamination and minimize further leaching of PFAS into the general environment of north Alabama.

In exchange, class members will release all injunctive claims, all property-damage-based

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[5] "After granting preliminary approval and allowing the notice process to move forward, the Court conducts a more thorough and rigorous analysis of the same factors in order to determine the appropriateness of granting final approval. Manual for Complex Litigation § 21.6." *Claudet v. Cytec Ret. Plan*, No. CV 17-10027, 2020 WL 3128611, at *3 (E.D. La. June 12, 2020) (emphasis added). [Note that "the Alabama Supreme Court has stated that federal decisions are persuasive authority for class action determinations." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.1, p. 723 (5th ed.) (Sept. 2021 update).]

[6] See, e.g., section V ("Estimating the Dollar Value of this Settlement"), pp. 8-15, of the Motion for Attorneys' Fees, Costs, and Expenses (Document 680, 1/14/2022).

money-damage claims, and certain other money-damage claims related to the contamination.[7] However, the Settlement Agreement expressly preserves claims for "all manifest personal bodily injury" "without respect to the date on which said personal bodily injury became or becomes manifest." Settlement Agreement, §§ 4.2 & 4.3. Class members who believe that they can prove some quantifiable legal damage to their property or persons that is released in this settlement have the right to opt out of this settlement and to pursue their individual money-damage claims, although their injunctive relief claims are released. Settlement Agreement § 4.4. Further, for those persons in the Sludge Application Subclass, that is, those persons whose property received contaminated sludge deposited on their property, defendants have agreed to pay $5,000,000, which will be distributed pro rata - mainly to current owners - such that they should receive approximately $1000 per acre (depending upon expenses and claims).

B. <u>The City's Websites</u>

The City of Decatur has a dedicated website, www.decaturpfas.info, that explains the major components of this Settlement Agreement, the similar *Riverkeeper* settlement, and 3M's separate settlement with the City and County. Copies of those three agreements are linked to the website, as well.

The Decatur City Council and the Morgan County Commission approved these three

[7] The release is quoted in full in section III.C., *infra*. Section 4.2 of the Settlement Agreement states, in pertinent part, that Class Members (who do not opt out) are releasing all claims "for any type of relief (including but not limited to compensatory damages, mental-anguish damages, property damages, consequential damages, incidental damages, statutory damages, punitive or exemplary damages, disgorgement, restitution, penalties, injunctive relief, declaratory relief, attorneys' fees, court costs, and expenses) - except as expressly set forth in Section 4.3 and Section 4.4 below - that the Releasing Parties have or could have asserted against the Released Parties arising out of or relating in any way to the presence of or exposure to PFAS. . . ."

settlements after a two-hour, detailed presentation by lawyers and experts during a special joint Council-Commission meeting on October 26, 2021. This Court, or any Class Member, can get a comprehensive overview of the relief provided by this Settlement Agreement and the settlement processes that lead to these settlements from the City's websites.

The City of Decatur's Youtube channel is at www.youtube.com/c/cityofdecatural. A recording of the entire October 26, 2021, meeting and presentation is available for viewing at: www.youtube.com/watch?v=HgcXGsmILqg&ab_channel=CityofDecatur%2CAL. The event is labeled as "Special Called Meeting 10:26:2021," and the run time is 2 hours and 33 minutes. The informational presentation (the first speaker is Mr. Barney Lovelace, the attorney for the City and County) begins at around the 19:30 minute mark.

C. <u>Injunctive Relief</u>

The *St. John* and *Riverkeeper* plaintiffs jointly reached this Settlement with 3M and the other defendants, who plaintiffs allege have caused PFAS contamination in northern Alabama. Under the agreement, those defendant entities will abate potential threats to people and to the general environment created by their disposals and discharges of PFAS. The *St. John* and *Riverkeeper* cases have been actively in mediation for the past six years. This Settlement creates a process by which investigations will inform what further remediations are necessary to improve the environmental health of the Tennessee River and the water and soil in the six counties within the Class area: Morgan, Limestone, Lawrence, Lauderdale, Colbert, and Franklin. All the experts agree that all PFAS presently in the environment cannot be completely collected and disposed of, so this settlement is the result of plaintiffs' and defendants' experts collaborating on the best economically- and scientifically-viable projects for containing PFAS, so as to minimize further

seepage into the general environment (and, a non-detect cleanup is neither necessary for safety nor feasible because such PFAS is now ubiquitous throughout the country at very small levels due to the widespread use of such chemicals by many companies for many uses over many years).[8]

This Settlement is not the end; it is a new beginning for more remediation projects to be conducted in the future. Important decisions, and work to remediate PFAS, will take place in the future, and this Settlement provides the *St. John* Class and the Tennessee Riverkeeper, working together, with a voice in the selection of remedial options and a meaningful seat at the table to ensure that appropriate steps to address PFAS continue to be taken by these defendants in the future. Most importantly, this Settlement will ensure that the PFAS issues are addressed and handled in a way that protects the Class and the public. It spends money on fighting the contamination rather than fighting among the parties.

3M's Investigations: All experts agreed that a remediation plan for the 3M plant site cannot be devised without knowing more about how, and how much, PFAS is getting into the Tennessee River from it. This Settlement proposes a comprehensive investigation to address PFAS at the 3M plant site. The investigation plan was achieved through plaintiffs'/defendants' experts' collaborations. It predates, and to some extent is tracked in, the 2020 ADEM-3M Interim Consent Order ("Consent Order"). Accordingly, much of the remedial investigation that 3M undertakes will be done under the auspices of both settlement agreements (*St. John* and *Riverkeeper*) and the Consent Order. The investigation includes sampling of soil, groundwater,

[8] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶¶ 7, 11-12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

surface water from the Tennessee River, fish, sediments, and many more activities to diagnose the full extent of the problem.

3M's Remediation Processes: 3M must devise a remediation plan to abate its legacy PFAS contamination. 3M must pay the *St. John* and *Riverkeeper* experts to review 3M's remediation plans, look for any deficiencies, and come up with any recommended additions or alternatives. If there are any discrepancies between the 3M and the *St. John/Riverkeeper* remediation plans, the two sides must try to hash out those differences via negotiation and mediation. If those processes fail to reach a consensus, 3M must submit the *St. John/Riverkeeper* alternatives and/or suggested additional remedial actions to ADEM/EPA for a decision.

Other 3M Sites Known to Have Elevated Concentrations of PFAS: For any and all 3M dump sites that exist now or are found later, 3M will have to investigate each site, develop a remediation plan, and submit that plan to *St. John* and *Riverkeeper* lawyers and experts for review before it submits it to ADEM for a final decision.

The 3M Escrow Agreement: 3M has created an escrow account overseen by the mediator, retired Alabama Supreme Court Justice Bernard Harwood, that will be funded up to $2.5 million to pay for expert oversight by *St. John* and *Riverkeeper* experts. This escrow fund will pay expert expenses associated with their monitoring and offering of remedial recommendations for the 3M plant site and other 3M locations.

The Decatur-Morgan County Landfill (operated day-to-day by Decatur via agreement with the County): 3M will pay to cap the landfill and fund a comprehensive groundwater investigation. If 3M and Decatur/Morgan County do not agree to treat groundwater at the landfill, the *St. John* and *Riverkeeper* plaintiffs can submit to Decatur/Morgan County and 3M a

recommendation to treat the groundwater, and Decatur/Morgan County will have to submit that to ADEM. And, the *St. John/Riverkeeper* experts can also make recommendations on any treatment proposal. When Decatur/Morgan County submits their next State Indirect Discharge ("SID") permit application in 2025, they must include a review of scientific literature regarding leachate treatment (which leachate is now sent untreated to Decatur Utilities and then, after treatment, discharged to the Tennessee River) because there is currently no effective technology to pre-treat leachate. If Decatur/Morgan County do not elect to treat leachate, but *St. John/ Riverkeeper* experts believe leachate treatment is feasible, Decatur/Morgan County must submit plaintiffs' experts' comments on leachate treatment to ADEM. If Decatur/Morgan County ends up treating groundwater or treating leachate, 3M must pay those costs. 3M is also paying for plaintiffs' experts' oversight expenses associated with monitoring and offering of remedial recommendations connected to the Decatur-Morgan County Landfill. Remediation science is still developing, and there are no existing technologies that perfectly remove all PFAS - so this settlement is good because the defendants commit to continuing investigations and potential future remediations that might be developed from those investigations.[9]

The Morris Farm Landfill: BFI will construct a large temporary cover over a portion of the landfill to reduce infiltration and leachate discharge. BFI will semiannually monitor groundwater beneath the landfill to ascertain whether PFASs exist and submit the results to ADEM and the plaintiffs. If BFI does not agree to treat groundwater at the landfill but the plaintiffs' experts recommend groundwater treatment is necessary, BFI will submit any

[9] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶¶ 11-12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

comments from the plaintiffs to ADEM about the feasibility of groundwater treatment, as well as any comments from the plaintiffs regarding the type of any potential groundwater-treatment system BFI develops. BFI has with its 2022 SID permit renewal application, and will with its next subsequent SID permit renewal application, submit to ADEM a review of scientific literature regarding the feasibility of PFAS treatment in leachate. BFI will also fund plaintiffs' experts' costs for the review of the leachate-treatment literature to determine whether effective technology to treat leachate has been developed up to $50,000 for each SID permit renewal application due in 2022 and the next subsequent permit renewal. If BFI does not elect to treat leachate, but the plaintiffs' experts believe treatment should be required, plaintiffs can timely submit comments on leachate treatment to BFI, and BFI will submit those comments to ADEM along with comments in response.

The DAI Facility: Daikin America, Inc. ("DAI") will perform an environmental compliance audit of its facility and will then consider and discuss with the *St. John/Riverkeeper* plaintiffs whether additional action should be taken. If the parties cannot agree, DAI has agreed to present its and the plaintiffs' positions to ADEM for ADEM to decide whether additional action is needed. The compliance audit will be performed by an independent consultant mutually agreed upon by DAI and plaintiffs, and will include an inspection of the DAI Facility (such as drains and outfall points), a review of DAI's permit compliance and practices, and a review of DAI's Discharge Monitoring Reports, including to ascertain discharges of PFAS into the Tennessee River. Plaintiffs may rely on anything for its counter-remedial proposal, ranging from a previous site investigation of the DAI Facility, and up to and including the 3M remedial investigation (which was expanded to add additional groundwater-monitoring wells between the

DAI site and the Tennessee River and Baker's Creek, to help experts understand what might be coming from the DAI Site to the area's waterways). Additionally, DAI will be provided with split-samples of certain 3M sampling of river surface water, sediment, and the aforementioned groundwater wells near the DAI facility, in order to test for the proprietary chemical DAI now uses in place of PFOA. DAI will pay $200,000 into an escrow fund for the Tennessee Riverkeeper to use for expert and legal costs associated with monitoring DAI activity under the settlements and making recommendations to ADEM and/or by the Tennessee Riverkeeper for environmentally beneficial purposes.

The City of Moulton's Wastewater Treatment Plant: DAI will pay to remove and remediate the sludge-retention lagoon at the Moulton WWTP, which lagoon contains PFAS. BFI will accept the lagoon sludge and permanently store it in lined and capped landfill cells, as set out in the Settlement Agreement. DAI will perform quarterly groundwater sampling for three years and report results to Moulton, ADEM, and the plaintiffs. DAI will pay for any groundwater treatment ordered by ADEM due to PFAS to be done at the Moulton WWTP site as a result of the above sampling, subject to an overall cap of $4 million on DAI's liability for expenses incurred in remediation and related expense at the Moulton WWTP.

The Toray Plant: Like DAI, Toray will do a "compliance audit" followed by a presentation to ADEM of possible remedial actions, with *St. John* and *Riverkeeper* input, including potential counter-proposals for different remedial actions. Again, the investigation to be performed by 3M should be helpful in understanding what PFAS is coming from the Toray site into the Tennessee River. Toray will pay $17,500 toward expert-monitoring costs related to its actions. Toray is also agreeing to undertake a pilot study to develop means to further reduce

the amount of "GenX" chemicals it sends to Decatur Utilities.

During the past five years of mediation, the Tennessee Riverkeeper collaborated closely with the experts and counsel for the *St. John* Class. The settlements in the two cases were negotiated and concluded together, as a package deal. The remedies provided in the two settlements are intended to closely mirror the other and the settlement of those matters would not have occurred without the settlement of this action, also. Into the future, counsel and experts for the *St. John* and *Riverkeeper* plaintiffs will participate jointly in the monitoring of the defendants' actions, and they will cooperate in any offerings of remedial recommendations pursuant to the two contemporaneous settlements.

By separate settlement contract, 3M is providing the City and County with an additional nearly $100M of monetary compensation. On October 19, 2021, the City of Decatur released this press release:[10]

> City of Decatur, Morgan County, and Decatur Utilities Reach $98.4 Million Settlement with 3M in PFAS Case
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> Municipal leaders for Decatur, Morgan County, and Decatur Utilities (DU) today announced that settlement agreements have been reached through mediation with 3M, DAI, Toray, BFI, and Synagro in two PFAS lawsuits. Through a court-ordered mediation process, the city, county, and Decatur Utilities will receive a $98.4 million settlement from 3M if the governing bodies of the three public entities approve the agreements.
>
> The Cases and Settlements
>
> The *St. John* case is a civil action pending before the Circuit Court of Morgan County, Alabama. Lead attorney for the plaintiffs is Leon Ashford of Hare, Wynn, Newell & Newton. The Tennessee Riverkeeper case is pending before the U.S. District Court, with Bill Matsikoudis of Matsikoudis & Fanciullo as lead attorney for the plaintiffs. Barney Lovelace and David Langston of Harris,

[10] At drive.google.com/file/d/1b0PuD6AAHB-NgKMpTSoEAlRihBlMVnlc/view.

Caddell & Shanks represent Decatur, Morgan County, and Decatur Utilities.

In an unusual move, the two cases were ordered into mediation together, resulting in settlements that work together for the good of the residents of Decatur and Morgan County, as well as the other plaintiffs in both cases - under the laws that govern each type of case.

The settlement of $98.4 million includes the following:

$9.2 Million Reimbursement for past PFAS costs
$7.0 Million for Future sludge disposal costs for DU
$25.0 Million Payment to Decatur, Morgan County and Decatur Utilities
$22.2 Million Payment to cap Cells 2-11 of the Decatur Morgan County Regional Landfill (DMCRL)
$35.0 Million for a New recreational facility and ball fields to replace the Aquadome complex

In addition to the defined settlement amounts, key terms of the agreement require that 3M will pay the entire cost to investigate the extent, if any, of contamination of PFAS in groundwater at the Decatur Morgan County Regional Landfill; to treat groundwater contaminated with PFAS at DMCRL, if required by the Alabama Department of Environmental Management (ADEM); and for any remediation work related to contamination by PFAS required by ADEM or the U.S. Environmental Protection Agency for the City of Decatur's three closed landfill sites. Today, 3M is working under an Interim Consent Order with ADEM which requires 3M to investigate and remediate any site where PFAS waste from the 3M plant site was disposed.

The Path Forward

Decatur Mayor Tab Bowling stated, "I appreciate the work of all parties to bring these lawsuits to a close. We are ready now to look to the future. 3M has long been an involved corporate citizen here and we appreciate how they've stepped up to help remedy issues related to chemicals no longer produced in the U.S. This settlement will fund improvements that will make the environment in Decatur and Morgan County healthier. We are pleased that 3M is funding the development of a replacement rec center that adds a quality of life benefit for the whole city." . . . .

Identifying Sites

"In addition to capping Cells 2 through 11 at the Decatur Morgan County Regional Landfill, 3M is working with ADEM to identify other locations in Morgan and Lawrence Counties that might have received waste with PFAS and to

determine next steps," stated Morgan County Commission Chairman Ray Long. "We are all working together to ensure solutions for a healthier future for our citizens."

One of the impacted sites is the old city landfill that was closed in the 1950's. That site is the home of the current Aquadome complex. 3M has agreed to pay $35 million to the City of Decatur to build a replacement recreation facility that will include an indoor pool and ball fields at an as-yet -undetermined site.

Significant Settlements

Barney Lovelace said, "We are very pleased with the outcome. The significant monetary settlement and the substantial remediation work to be performed will ensure that our environment is preserved for all to enjoy."

D. Cash for the Sludge Application Settlement Subclass

Synagro provided sludge (or biosolids) it obtained from Decatur Utilities to area farmers and landowners for land application as a fertilizer. This material was then applied to approximately 5000 acres of land. This sludge contained PFAS. The application of this fertilizer created a high concentration of PFAS on approximately 5000 acres of land. These 5000 acres are qualitatively different from other land in the six counties because high concentrations of PFAS were directly applied to the land. These lands, when tested, registered a much higher reading of PFAS contamination than other land, in general, in the six counties.[11] Therefore, these 5000 acres are being addressed as a separate Rule 23(b)(3) subclass, the "Sludge Application Settlement Subclass." The defendants are creating a $5,000,000 fund to compensate those who have an ownership or possessory interest in these 5000 acres for the direct and highly-concentrated PFAS contamination. Assuming that all, or mostly all, of these owners do not opt out and file a claim, the owners will receive close to $1000 per affected acre.

[11] See Ashford affidavit, at ¶ 12, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

III. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED

A. Standards for Approval of a Class Settlement

A class action may not be settled, voluntarily dismissed, or compromised without court approval. Ala. R. Civ. P. 23(e). Judicial policy favors voluntary settlement as the means of resolving class-action cases; however, the court has an independent duty to ensure that the settlement is fair, adequate, and reasonable. *Austin v. Hopper*, 28 F.Supp.2d 1231 (M.D. Ala. l998). Courts review a proposed class action settlement for fairness, reasonableness, and adequacy. Ala. R. Civ .P. 23; *Perdue v. Green*, 127 So. 3d 343, 356 (Ala. 2012). Factors for courts to consider in deciding whether a class action settlement is fair, reasonable, and adequate include: (1) likelihood of success at trial; (2) range of possible recovery; (3) range of possible recovery at which settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) opposition to settlement; (6) stage of proceedings at which settlement was achieved; (7) the financial ability of the defendant to withstand a greater judgment; and (8) whether proper notice is given. *Perdue v. Green*, at 393-94. Othni Lathram and Anil A. Mujumdar, Alabama Civil Procedure § 5.83, pp. 5-142 (2020 ed.), points out that these and similar factors were adopted by the Alabama Supreme Court in *Adams v. Robertson*, 676 So. 2d 1265, 1273 (Ala. 1995). See also the similar list of factors in 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.20, p. 752 (5th ed. 2018), 4 William B. Rubenstein, Newberg on Class Actions § 13:15, p. 322 (5th ed. 2014), and *Faught v. American Home Shield Corp*., 668 F.3d 1233, 1240 (11th Cir. 2011). As shown below, all of these factors support a finding of the reasonableness and fairness of the Settlement, except that (7) is irrelevant in this case.

B. Application of the Eight *Adams* Factors[12]

1. The Likelihood of Success at Trial

Probability of success and the range of possible recovery are the most important factors in determining whether a settlement is reasonable. *Campos v. I.N.S.*, No. 98-2231-CIV, 1999 WL 1044233 (S.D. Fla. 1999).[13] In weighing this factor, the trial court does not have "the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." *Cotton v. Hinton*, 559 F. 2d 1326, 1330 (5th Cir. 1977).[14] "The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in the hand instead of a prospective bird in the bush.'"[15] "A generally accepted principle is that unless the proposed

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[12] The application of these factors to the Subclass is more specifically addressed in section IV.D.2., *infra*.

[13] "The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *In re Polyurethane Foam Antitrust Litig*., No. 1:10 MD 2196, 2016 WL 320182, *6 (N.D. Ohio Jan. 27, 2016). "The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015).

[14] In evaluating this factor, the court should not reach any ultimate conclusions with respect to issues of fact or law involved in the case. "The very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise . . . . [Settlements] could hardly be achieved if the test on hearing for approval means establishing success or failure to a certainty." *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1033 (N.D. Ala. 2006) (quoting *In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 212 (5th Cir. 1981)).

[15] *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974). Many courts have applied this quote, including: *Fontes v. Heritage Operating, L.P.*, No. 14CV1413, 2016 WL 1465158, *3 (S.D. Cal. April 14, 2016); *Diakos v. HSS Sys., LLC,* No. CV 14-61784-CIV, 2016 WL 3702698, *3 (S.D. Fla. Feb. 5, 2016); *Faught v. Am. Home Shield Corp*., No. 2:07-CV-1928, 2010 WL 10959223, *23 (N.D. Ala. Apr. 27, 2010), aff'd, 668 F.3d 1233 (11th Cir. 2011).

settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." William B. Rubenstein, Newberg on Class Actions, Appendix VIII-D (4th ed.) (electronic database updated June 2021).

In evaluating the likelihood of success at trial, the Court should take into account the merits of the class members' claims, the defenses raised by the defendants, and the manageability of the trial, but "should not reach any ultimate conclusions with respect to issues of fact or law involved in the case." *Knight v. Alabama*, 469 F.Supp.2d 1016, 1033 (N.D. Ala. 2006). Instead, the Court should determine whether the risks faced by the parties and the difficulty of trial weigh in favor of approving the settlement. *Id*. Here, as shown below, the likelihood of success at trial for either party was undercut by the risk, difficulty, and expense of further litigation.

The final outcome of continued litigation in this case was highly uncertain. As explained below, both sides faced the risk of loss at trial. Defendants have opposed and would continue vigorously to oppose all of plaintiffs' claims through both motion practice and trial. Given that defendants would appeal any plaintiffs' judgment, going to trial would have been essentially an all-or-nothing gamble for both parties on liability and remedies. The fact that settlement prevents further litigation of such issues is a benefit that weighs in favor of approving the settlement. See *Diaz v. Hilsborough County Hospital Authority*, 2000 WL 1682918, *3 (M.D. Fla. 2000) (approving settlement where continued litigation posed risk of defendant's successful assertion of various defenses).

The Settlement Agreement is a win for the citizens of Morgan, Limestone, Franklin, Lawrence, Colbert, and Lauderdale Counties - and for the northern Alabama environment. All known environmental issues for PFAS related to these defendants in these six counties are being

addressed, while also ensuring that the Settlement Class will finish over 19 years of expensive litigation with an exceptional range of investigation, monitoring, and remediation remedies - rather than a diminished, or nonexistent, range of remedies that could have been subject to further uncertainties at trial or on appeal. "[V]ictory - even at the trial stage - is not a guarantee of ultimate success," given the risks and expense of appeal. *In re Michael Miliken & Assoc*., 150 F.R.D. 46, 53 (S.D. N.Y. 1993); *In re Am. Int'l Grp., Inc. Sec. Litig*., 916 F. Supp. 2d 454, 469 (S.D. N.Y. 2013) (same). If the Plaintiff Class were successful at trial, it still faced the certainty of an appeal on any number of difficult issues. With their financial resources, these defendants could well afford to finance a lengthy and expensive appeals process that would, at the very least, postpone any further remediation remedies for years, and might result in the reversal of any trial-court ordered remedies. The fact that settlement allows all parties to avoid the risk and expense of appeals litigation is a significant factor in support of settlement approval.

This first factor, likelihood of success, is the major factor. In fact, this factor, by itself, fully supports the decision to finally approve this Settlement. See *Pinto v. Princess Cruise Lines*, 2007 WL 853431, *4 (S.D. Fla. 2007) (approving settlement where plaintiff's case had merit but "the risk of going forward was substantial").

Proving liability at trial is uncertain.[16] All of the known locations with elevated concentrations of PFAS are being addressed in this Settlement, and further investigations will continue into the future. Outside of the known locations with elevated concentrations of PFAS, and the 5000 sludge-application acres, our extensive testing and investigations do not show the

[16] Plaintiffs would have additionally faced the challenges of contested class certification and summary judgment, before even getting to a trial.

general presence of PFAS throughout the six counties in greater than ordinary, world-wide, background levels.[17] The causes of action are negligence/wantonness, trespass, and nuisance. Proof of the level of "harm or offense" necessary to prove that the six-county class suffered from a "nuisance" might have failed. See 1 Michael L. Roberts, Alabama Tort Law § 31.01, p. 1987 (6th ed. 2015). The nuisance claim might have been barred by Ala. Code § 6-5-121, which provides that private citizens normally cannot sue to abate a "public nuisance." Some of the specific claims, like damage to a water-treatment facility in Moulton, might have been barred by the remoteness doctrine. See Roberts, *supra*, at p. 1990.

Class Counsel's extensive investigations failed to turn up any evidence of wide-spread diminution of real-property values in the six counties.[18] To the contrary, the prices of real estate and farmland are up significantly in north Alabama. *Id*. Damages for nuisance are measured by before-and-after rental values or market values of the land. Roberts, *supra*, at § 31.03, p. 2000. Even proving liability for nuisance might not have garnered the class a remedy. Alabama courts apply the "comparative injury doctrine " (weighing plaintiffs' benefits against burdens on the defendants) when deciding whether to enjoin a nuisance. Roberts, *supra*, at § 31.04, pp. 2002-03.

The trespass claim would have faced similar hurdles. "[T]he gist of the action is the disturbance of possession." Roberts, *supra*, at § 30.01, p. 1953. The existing general background PFAS readings in the six counties have not seemed to interfere with the residents' and visitors' ordinary uses of real property in the six counties. Most of the PFAS emitted into the general

[17] See Ashford affidavit, at ¶ 10, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[18] *Id*., at ¶ 11.

environment was done years prior to the filing of the action.[19] Statute of limitations would have been a significant issue. See the discussion of "continuing trespass" at Roberts, *supra*, at § 30.07, pp. 1970-71. Again, actual money damages could perhaps not be proven because "the measure of damages in a trespass action to realty is the difference between the fair market value of the property before the injury and the fair market value of the property after the injury." Roberts, *supra*, at § 30.10, p. 1977.

Plaintiffs' best liability theory is probably general negligence; however, the "remoteness doctrine" and the "continuing tort" doctrine would have presented hurdles. Even if proof of liability for negligence is viewed as strong, the great uncertainty that remains is the issue of remedies. The "battle of the experts" would not have necessarily worked in plaintiffs' favor. Here, the *St. John* plaintiffs' world-renowned experts worked with the Tennessee Riverkeeper's experts and with the defendants' experts to collaborate and come to a general agreement about the best paths forward to investigate, monitor, and remediate. Class Counsel opines that the Settlement Agreement gives the Class almost everything that the Class could have hoped to win, even if time-consuming and expensive litigation had ended in its favor.[20]

Here, the continuation of the litigation "would require the resolution of many difficult and complex issues," would "entail considerable additional expense," and would "likely involve weeks, perhaps months, of trial time." *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996). This Settlement Agreement represents "an outcome at least comparable, if not far superior, to that

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[19] *Id*., at ¶ 18.

[20] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶¶ 10, 12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

which plaintiffs might achieve by proceeding to trial." *Id.* Settlement "has special importance in class actions with their notable uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources, and achieve the speedy resolution of justice." *Janicijevic v. Classica Cruise Operator, Ltd.*, No. 20-CV-23223, 2021 WL 2012366, at *3 (S.D. Fla. May 20, 2021). This Settlement achieves substantial benefits for the Class without expending additional resources and without delay. The Class will obtain immediate relief, as opposed to waiting years for an uncertain outcome.[21]

In addition, the Settlement Agreement spares the parties the difficulties and risks that they would have faced in litigating the issues of appropriate remedies - assuming the trial court found liability. Courts have emphasized that, "[i]n class actions, the 'complexities of calculating damages [or remedies] increase geometrically.'" *Chatelain v. Prudential-Bache Securities, Inc.*, 805 F.Supp. 209, 214 (S.D.N.Y. 1992); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 858 (E.D. Mo. 2005) (same). And, the "risk of proving [remedies can] not be eliminated until after a successful trial and exhaustion of all appeals." *In Re General Instrument Securities Litigation*, 209 F.Supp.2d 423, 430 (E.D. Pa. 2001). Accordingly, courts routinely find that avoiding the difficulties of proving damages or remedies - particularly where the remedies issues will likely

[21] Beyond summary judgment, plaintiffs would additionally face the challenge of trial. And "the prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery." *In Re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003). "Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict." *Id*. Defendants would be expected to mount substantial defenses on the legal and factual basis for all claims, and certification of a class, at all stages of this case, all with significant risk and costs to the relief sought by the Class. For example, defendants would likely argue that the Class experienced no diminution in property value and that the market for home and farmland sales has not been materially impacted.

become "an expensive battle of the experts" - is a benefit to the parties that weighs in favor of approving a class settlement. *Id*; *In re Warner Communications Securities Litigation*, 618 F.Supp. 735, 744 (S.D.N.Y. 1985) (settlement approved where litigation would be "battle of the experts where it was virtually impossible to predict with any certainty which testimony would be credited"); *In re Rent-Way Sec. Litig*., 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003) (same). Here, the remedies may be the very most difficult portion of this case. Conceptually, the Class could be certified, survive summary judgment and then win at trial - but receive no remedy. The injunctive portion of this case involves multiple contamination sites with multiple issues and multiple possible remedies. These are exceptionally-complex issues, and it is likely that any relief could not match what is being achieved right now with this negotiated settlement.[22]

There also is the risk the Court could refuse to certify a contested class or certify only a narrower class, if contested. Defendants are not opposing this motion, but for settlement purposes only. Defendants would oppose a motion to certify a contested/litigated class on multiple grounds. Moreover, there are additional requirements that must be met to certify a contested class that do not apply to a settlement class, and some of the requirements in Rule 23 apply differently if the class is contested. For example, for purposes solely of this Settlement, the defendants do not argue that individualized inquiries prevent the Court from finding the predominance required to certify the class. They could make such an argument if the class was contested and litigated.[23]

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[22] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶¶ 11-12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[23] Also, "a district court asked to approve a settlement-only class need not consider whether the case would be manageable to litigate [and] the court does not need to evaluate as part of its certification analysis whether a class action is superior to other available methods of adjudication." McLaughlin on Class Actions § 6:3 (18th ed.) (Oct. 2021 update).

2. <u>The Range of Possible Recovery</u>

Note that "the 'likelihood of success' and 'range of possible recovery' are overlapping issues that are to be addressed by the Court in determining the fairness of a settlement." 42 No. 2 Class Action Reports ART 4 (March-April 2021). As stated in the previous subsection, the injunctive relief provided in the Settlement Agreement is at the upper end of the relief that could have been won at a successful trial, and plaintiffs' counsel's due diligence failed to discover evidence of general diminution of property values.

Settlements, by definition, are compromises which "need not satisfy every concern of [the] plaintiff class, but may fall anywhere within a broad range of upper and lower limits." *Alliance to End Repression v. City of Chicago*, 561 F. Supp. 537, 548 (N.D. Ill. 1982), quoted at *Adams v. Robertson*, 676 So. 2d 1265, 1291 (Ala. 1995). "In weighing the likelihood of success and the amount of potential recovery if the case continued against the amount offered in settlement, the court need only determine that the settlement falls within the reasonable range of fairness to the class." 6A Federal Procedure, Lawyers Edition § 12:380 (June 2021 update).

This case is mostly about (b)(2) equitable relief, and most of the case law about the "range of possible recovery" involves money-damage cases. Still, the money-damage cases are analogous. Courts have recognized that "[a] recoupment of at least a material portion of the class's damages fits well within the range of reasonableness" that will justify approval of a proposed class action settlement. *Strougo v. Bassini*, 258 F.Supp.2d 254 (S.D.N.Y. 2003). Class action settlements which provide the class with just 20% or less of its claimed damages are commonly found to be a reasonable rate of recovery that will justify the settlement of litigation.

See *City of Detroit v. Grinnell Corp*., 356 F.Supp. 1380, 1386 (S.D.N.Y. 1972).[24] See *In re APA Assessment Fee Litig*., 311 F.R.D. 8, 19 (D.D.C. 2015): "[T]he settlement represents closer to 13% of plaintiffs' best possible recovery. But 13% is hardly a damning figure. Settlements representing a similar percentage of best case recovery have been approved. See, e.g., *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISettlement Agreement" Litig*., 4 F.Supp.3d 94, 103 (D. D.C. 2013) (4–8%); *Trombley*, 826 F.Supp.2d at 198 (12-30%"); *In re Baan Co. Sec. Litig*., 284 F.Supp.2d 62, 65 (D. D.C. 2003) (over 16%)."

The wide ranges of potential remedies recommended by the different expert analyses would clearly have turned the remedies phase of this trial into a "battle of the experts where it was virtually impossible to predict with any certainty which testimony would be credited." *In Re Warner Communications*, 618 F.Supp. 735, 744 (S.D. N.Y. 1985). The fact that the Settlement Agreement provides a broad range of remedial relief - without the cost of battle - is a compelling reason to approve this Settlement.

In evaluating the adequacy of the rate of recovery for a class in money-damage cases, a court compares the amount of the total settlement to the amount that the class as a whole would likely have recovered at trial. *Knight*, *supra*, 469 F.Supp.2d at 1033. Thus, in this case, the Court should evaluate the remedies provided in the Settlement Agreement, compared with the possible

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[24] See also *In Re Medical X-Ray Film Antitrust Litigation*, 1998 WL 661515, *7 (E.D. N.Y. 2000) (settlement representing a 17% rate of recovery on claimed damages for the class was excellent result); *In re Crazy Eddie Sec. Litig*., 824 F.Supp. 320, 326 (E.D. N.Y. 1993) (settlement representing 10% of claimed damages was favorable outcome); *In re General Instr. Sec. Litig*., 209 F.Supp.2d 423, 431, 434 (E.D. Pa. 2001) (approving cash settlement representing 11% of the plaintiffs' estimated damages); *Cullen v. Whitman Medical Corp*., 197 F.R.D. 136, 147 (E.D. Pa. 2000) (same); and *In re Corel Corp., Inc. Sec. Litig*., 293 F.Supp.2d 484, 489-90, 498 (E.D. Pa. 2003) (settlement fund that comprised about 15% of damages found to be reasonable).

combination of remedies that might have been awarded by the trial court after a trial in which the plaintiff class succeeded as to liability. See *Allapatah Services, Inc. v. Exxon Corporation*, 2006 WL 1132371, *11 (S.D. Fla. 2006) (analogous money-damage case).

Because a trial could have resulted in no liability, the predicted range of remedies resulting from a successful liability trial has to factor in the possibility of a defense judgment.[25] In the view of Class Counsel and their experts, the remedies provided for in the Settlement Agreement are close to the maximum remedies they reasonably could have hoped for after a successful liability trial.[26]

A proposed settlement does not have to represent the plaintiffs' "best-case-scenario" trial recovery in order to be fair, reasonable, and adequate. *New Jersey Department of Environmental Protection v. Exxon Mobil Corp*., 453 N.J.Super. 588, 183 A.3d 289 (2015), presents an analogous situation. The New Jersey DEP and Exxon moved the Court to approve a consent judgment over objections by intervenors and objectors. The Court held that: "Relevant standard for approving consent decree in environmental case is not whether settlement is one which court itself might have fashioned or considers ideal, but whether proposed decree is fair, reasonable, and faithful to objectives of governing [environmental] statute," and "Protection of the public interest is the key consideration in assessing whether a consent decree in environmental case is fair, reasonable, and adequate." (Quoting West headnotes 4 and 5.)

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[25] "In evaluating the reasonableness of a proposed settlement, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." 2 McLaughlin on Class Actions § 6:16 (18th ed.) (Oct. 2021 update) (emphasis added).

[26] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶ 12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

3. The Point on or below the Range of Possible Recovery at Which the Settlement is Fair, Adequate, and Reasonable

This factor substantially overlaps with factors # 1 and # 2, above.[27] The adequacy of the remedies offered in settlement is judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig*., 597 F. Supp. 740, 762 (E.D. N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987); *Thompson v. Cmty. Bank, N.A.*, No. 819CV919MADCFH, 2021 WL 4084148, at *8 (N.D.N.Y. Sept. 8, 2021) (same); *Hart v. RCI Hosp. Holdings, Inc*., No. 09 CIV. 3043 PAE, 2015 WL 5577713, *11 (S.D.N.Y. Sept. 22, 2015) (same); *Woodward v. NOR-AM Chem. Co.*, No. CIV. 94-0780-CB-C, 1996 WL 1063670, *17 (S.D. Ala. May 23, 1996) (Butler, J.) (same); *Denver Area Meat Cutters & Employers Pension Plan v. Clayton*, 209 S.W.3d 584, 591 (Tenn. Ct. App. 2006) (same).

"[T]he Court is not to compare the terms of the Settlement with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion." *In re Veeco Instruments, Inc. Sec. Litig*., No. 05 MDL 01695, 2007 U.S. Dist. LEXIS 85629, at *33 (S.D.N.Y. Nov. 7, 2007); *Karic v. Major Auto. Companies, Inc*., No. 09 CV 5708 (CLP), 2016 WL 1745037, *6 (E.D.N.Y. April 27, 2016) (same). Rather, a court need only determine whether the settlement falls within a "range of reasonableness" - i.e., a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman*

[27] "Because these factors overlap, it is appropriate to address them together, in combination." *In re Blue Cross Blue Shield Antitrust Litigation*, No.: 2:13-CV-20000-RDP (MDL NO.: 2406), 2020 WL 8256366, at *15 (N.D. Ala. Nov. 30, 2020) (Proctor, J.).

v. Stein, 464 F.2d 689, 693 (2d Cir. 1972), repeated at *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005). See also *In re Global Crossing Sec. and ERISettlement Agreement Litig*., 225 F.R.D. 436, 461 (S.D.N.Y. 2004) (noting that "the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery"); and *In re Indep. Energy Holdings PLC Sec. Litig*., No. 00-6689, 2003 U.S. Dist. LEXIS 17090, at *12-13 (S.D.N.Y. Sept. 29, 2003) (noting that few cases tried actually result in the full amount of damages [or remedies] claimed).

As noted in subsections 1 and 2, above, the range of possible recoveries has to take into account potential defense victories on appeal, as well as the possibility of winning on liability but receiving a lesser range of remedies than offered in the Settlement Agreement. Taking all reasonable possibilities into account, the range of remedies in the Settlement Agreement represents an excellent settlement (even if measured solely against the best-case plaintiffs' scenario).[28]

Courts ordinarily rely on the considered judgment of experienced counsel in evaluating the fairness of proposed class action settlements. See *Rothe v. Battelle Mem'l Inst*., No. 1:18-CV-03179-RBJ, 2021 WL 2588873, at *6 (D. Colo. June 24, 2021) (citation and internal quotation marks omitted): "Counsel for both sides fully support the Settlement Agreement, and counsels' judgment as to the fairness of the agreement is entitled to considerable weight." See also *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2007 WL 2694029, at *4 (D. Kan. Sept. 11, 2007) ("The endorsement of the parties' counsel is entitled to significant weight.")

[28] See Ashford affidavit, at ¶ 8, and Higgins declaration, at ¶ 12, exhibits to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

(citation and internal quotation marks omitted). "One of the factors most courts consider is the fact that the settlement is supported by experienced counsel." 4 William B. Rubenstein, Newberg on Class Actions § 13:53, p. 477 (5th ed. 2014).

4. The Complexity, Expense, and Duration of the Litigation

In assessing this factor, "[t]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future after protracted and expensive litigation. In this respect, '[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.'" *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) (quoting *In re Shell Oil Refinery*, 155 F.R.D. 522, 560 (E.D. La. 1993)). "Complex litigation . . . can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." *In re Oil & Gas Litig*., 967 F.2d 489, 493 (11th Cir. 1992). See also *Woodward v. NOR-AM Chemical Co.*, No. Civ. 94-078019, 96 WL 1063670, *21 (S.D. Ala. May 23, 1996) (same). Again, the need for the immediate relief in the form of further investigation, monitoring, and remediation, as compared to the potential of perhaps years of litigation and appeals to possibly achieve the same solution - or worse - weighs in favor of giving final approval to the Settlement Agreement. See *McWhorter v. Ocwen Loan Servicing, LLC*, No. 2:15-CV-01831-MHH, 2019 WL 9171207, at *11 (N.D. Ala. Aug. 1, 2019) (Haikala, J.) (internal quotations omitted): "The prospect of a long, arduous trial requiring great expenditures of time and money on behalf of both parties and the Court, all in the hopes of achieving a result on par with the relief offered by the settlement, is not in the interests of any party or Settlement Class Member. *In re Cincinnati Policing*, 209 F.R.D. 395, 400 (S.D. Ohio 2002); see also *Nat'l*

Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004) (noting that in the class action settlement context, it is proper to take the bird in hand instead of a prospective flock in the bush.)."

Complex litigation - like the instant case - can occupy a court's docket for years, depleting the resources of the parties and the court. *Cotton v. Hinton*, 559 F. 2d 1326, 1331 (5th Cir. 1977). For this reason, "public policy strongly favors the pretrial settlement of class action lawsuits." *In re Oil and Gas Litigation*, 967 F.2d 489, 493 (11th Cir. 1992), quoted in *In re HealthSouth Corp. Sec. Litig.*, 572 F.3d 854, 862 (11th Cir. 2009), and *Adams v. Robertson*, 676 So. 2d 1265, 1292 (Ala. 1995); *Braynen v. Nationstar Mortgage, LLC,* No. 14-CV-20726, 2015 WL 6872519, *6 (S.D. Fla. Nov. 9, 2015) (same).

This Settlement is the result of over 19 years of litigation. The length of time necessary to reach a final result would have occupied more years of judicial resources and vast amounts of additional attorney time and case expenses. The evidence regarding decades of PFAS use and disposal and the unique legal theories would have continued to be very difficult and expensive to resolve. Class Counsel have spent nearly a million dollars on experts to date, and a weeks-long trial would probably have doubled that expense.[29] Settlement of this action is in the best interests of judicial economy and the Class.

Defendants would have appealed a judgment that significantly burdened their remediation responsibilities beyond the scope of the Settlement Agreement. This Settlement will spare the delay and expense of continued litigation. This litigation has already been pending for over 19

[29] See Ashford affidavit, at ¶ 6, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

years. Even if the Class could recover a qualitatively "better" range of equitable remedies after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any further remediation efforts for years to come. See generally *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-5173, 2008 U.S. Dist. LEXIS 36093, at *16 (S.D.N.Y. May 1, 2008); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003); *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2005 U.S Dist. LEXIS 24890, at *16 (S.D.N.Y. Oct. 19, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action"). This Settlement eliminates those complexities and expenses, and the probable additional years of continued appellate litigation.

Ultimately, through an extended series of mediation sessions with Justice Harwood, starting almost six years ago, the parties reached the agreement set forth in the Settlement Agreement. The long history of this litigation underscores the vigor with which counsel have represented the Class Members in all respects - including for settlement purposes. Counsel for plaintiffs invested large amounts of their time and money and litigated this case skillfully against well-funded, large corporations that were represented by elite defense counsel, who presented sustained and spirited defenses on their clients' behalf.

Because the science of PFAS and its remediation was in its nascent stage in 2002, and because it continues to evolve rapidly,[30] this litigation presented literally *unique* factual and legal challenges. The complexity, duration, and expense of this class-action litigation surely must rank

[30] See Higgins declaration, at ¶ 11, Exhibit C to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

in the upper 5% of all class action cases filed in the United States in this century.[31]

5. The Substance and Amount of Opposition to the Settlement

This factor cannot be fully addressed as of the date of this filing because the deadline for lodging objections does not expire until March 17, 2022. If objections are filed, Class Counsel will file responses and will be prepared to address them at the Fairness Hearing on April 21, 2022. As of the date of this filing, no written objections have been received.[32] Class Counsel have received and responded to less than 50 phone calls from Class Members who were seeking more information, but none of whom voiced any "objections" to the substance of the Settlement.[33]

The law is that the reaction of the class to the settlement is a significant factor in assessing its fairness and adequacy, and "the absence of objectants may itself be taken as evidencing them fairness of a settlement." *In re PaineWebber Ltd. P'ships Litig*., 171 F.R.D. 104, 126 (S.D.N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997). One court has noted that the reaction of the class to a settlement "is considered perhaps the most significant factor to be weighed in considering its adequacy." *In re Veeco Instruments, Inc. Sec. Litig*., No. 05 MDL 01695, 2007 U.S. Dist. LEXIS 85629, at *21-22 (S.D.N.Y. Nov. 7, 2007). The lack of substantive objections weighs heavily toward approving a proposed class settlement.

The Court can also consider the fact that the Morgan County Commission and City of Decatur Council heard a detailed two-hour presentation about the Settlement from lawyers and

[31] See Ashford affidavit, at ¶ 9, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[32] McKee affidavit, at ¶ 12, Exhibit B hereto.

[33] *Id*., at ¶ 19.

experts, and then wholeheartedly endorsed the Settlement.[34] See section II.B., *supra*, for the citation to the City's websites containing documentary materials and a video recording of the in-person presentations to the Council and Commission. Brian Lawson, 3M, Decatur Sign PFAS Multi-million Dollar Settlement Agreement, Details Outlined, whnt.com/news/decatur/ 3m-decatur-sign-pfas-multi-million-dollar-settlement-agreement- details-outlined/ (Nov 12, 2021), reports: "Attorney Barney Lovelace, who represented the governments and the utility in the litigation, said . . ., 'Officials from the City of Decatur, Morgan County and Decatur Utilities signed the Agreement yesterday. We are very pleased to have this settlement fully executed. We are eager for the remediation work required by the settlement to get underway so our community can have confidence and take comfort knowing that any existing issues will be addressed and cleaned up and that a system of oversight is in place to mitigate any potential environmental issues in the future. . . . This is a great day for the City of Decatur and all of Morgan County.'"

Much of 3M's 2020 consent order with ADEM contains suggestions created by the *St. John* plaintiffs' retained experts.[35] Counsel for all parties have met extensively with ADEM during this process.[36] EPA is in a similar posture. The parties have met multiple times with EPA, and EPA is heavily involved in the proposed settlement.[37] "The policy of the law to encourage

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[34] See Ashford affidavit, at ¶ 23, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[35] See Ashford affidavit, at ¶ 21, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[36] *Id*., at ¶ 15.

[37] *Id*., at ¶ 16. As an example, see ADEM's letter of 1/25/2021 to 3M attaching EPA's memo of 1/21/2021, at lf.adem.alabama.gov/WebLink/DocView.aspx?id=104449207&dbid=0. The state and federal agencies were generally in approval of the "Instream PFAS Characterization Study Work Plan" that was submitted in October 2020. And, a significant portion of that Work Plan adopted ideas developed by the *St. John* plaintiffs' experts.

settlements has particular force where" governmental environmental-protection agencies participated in constructing the proposed settlement. *New Jersey Department of Environmental Protection v. Exxon Mobil Corp*., 453 N.J.Super. 588, 615, 183 A.3d 289, 305 (2015). Note also that the most relevant environmental watchdog organization, Tennessee Riverkeeper,[38] endorses the *St. John* Settlement, and actually negotiated its settlement in conjunction with the *St. John* parties.[39]

6. <u>The Stage of the Proceedings at Which the Settlement Was Achieved</u>

This factor weighs just as heavily as all the others in support of final approval of the Settlement. This case represents one of the longest-fought and hardest-fought cases on the Court's docket. This factor is designed to "assure the Court that counsel for the plaintiffs have weighed their position based on a full consideration of the possibilities facing them." *In re Global Crossing Sec. and ERISettlement Agreement Litig*., 225 F.R.D. 436, 458 (S.D.N.Y. 2004); *Precision Associates, Inc. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42 JG VVP, 2013 WL 4525323, *8 (E.D.N.Y. Aug. 27, 2013) (same).

If a court finds that a proposed settlement is free from collusion, then "[a] proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-11814, 2004 U.S. Dist. LEXIS 8608, at *5 (S.D.N.Y. May 14, 2004). See also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2d Cir. 2005) (a

[38] See www.tennesseeriverkeeper.org/our-mission: "Tennessee Riverkeeper monitors polluters and their pollution permits, responds to citizen complaints, and utilizes other methods to further protect the Tennessee and Cumberland Rivers and their tributaries. . . . Our mission is to protect the Tennessee and Cumberland Rivers and their tributaries by enforcing environmental laws and educating the public."

[39] See Ashford affidavit, at ¶ 24, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

class action settlement is entitled to a presumption of fairness, adequacy and reasonableness when there were arm's-length negotiations between experienced, capable counsel).

There has been no fraud or collusion between the parties. In approving a settlement agreement, a court must first examine whether the agreement has resulted from fraud or collusion; i.e. " whether the settlement was achieved in good faith after arms-length negotiations." *Knight v. Alabama*, 469 F.Supp.2d 1016, 1033 (N.D. Ala. 2006). This requirement is easily met here, where the Settlement Agreement resulted from arm's-length negotiations after multiple formal and informal mediation processes over many years, and overseen by former Justice Harwood. "Courts also found collusion less likely when settlement negotiations are conducted by a third-party mediator." 4 William B. Rubenstein, Newberg on Class Actions § 13:14, p. 320 (5th ed. 2014).[40] If plaintiffs' counsel were going to "sell out" the Class, they would have done so long before litigating 20 years, spending millions of dollars, and dedicating thousands of lawyer hours to the litigation.

Here, counsel and experts for all parties have continuously investigated and analyzed the facts and the law of this case for over 19 years, through numerous separate phases of mediation. There are very few cases which have lasted so long, had so much litigation and dispute, and been so heavily litigated. This case is a textbook example of a case which has reached the proper stage

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[40] "[T]he involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note (2018 Amendment). See *In re Penthouse Executive Club Compensation Litigation*, 2013 WL 1828598, at *2 (S.D.N.Y. 2013) (granting preliminary approval of proposed settlement reached through negotiations that involved formal mediation, finding that the "assistance of two experienced mediators" supports the conclusion that the proposed settlement is noncollusive, as a settlement "reached with the help of third-party neutrals enjoys a 'presumption that the settlement achieved meets the requirements of due process'").

for resolution. During the joint meetings of experts, where plaintiff and defense experts freely communicated directly with one another, plaintiffs' counsel learned more facts and opinions than years of contested formal discovery would have disclosed. Given the maturity of this case, and the enormous amount of time and work invested in it for so many years, it is clear that the parties had not only an adequate, but a comprehensive, appreciation of the merits of the case before agreeing to a settlement. This factor weighs extremely heavily in favor of final approval of the Settlement Agreement.

This comment from a judge in Kansas fits this *St. John* case precisely: "The contested nature of this suit, the engagement of a neutral mediator, and the extensive negotiation process constitute evidence that the parties negotiated the settlement agreement fairly and honestly." *Tripp v. Rabin*, No. 14-CV-2646-DDC-GEB, 2016 WL 3615572, at *3 (D. Kan. July 6, 2016). A settlement is considered fairly and honestly negotiated when reached after arm's-length negotiations by experienced counsel. *Id*. "[A] court will presume that a proposed class action settlement is fair when certain factors are present, particularly evidence that the settlement is the product of arms-length negotiation, untainted by collusion." 4 William B. Rubenstein, Newberg on Class Actions § 13:45, p. 442 (5th ed. 2014).

7. <u>The Financial Ability of the Defendants to Withstand a Greater Judgment</u>

This is a non-factor or an irrelevant factor in this case. While there has been no concern expressed about the defendants' financial abilities to pay for the future efforts provided for in the Settlement Agreement, the fact that one or more of the defendants might have been able to invest more than $300 million in remediation projects does not render the injunctive aspect of this Settlement unreasonable, however, when the other *Adams* factors favor approval of the

settlement. See, e.g., *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). "[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y.), aff'd, 117 F.3d 721 (2d Cir. 1997). "[A] defendant is not required to 'empty its coffers' before a settlement can be found adequate." *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-5173, 2008 U.S. Dist. LEXIS 36093, at *23 (S.D.N.Y. May 1, 2008); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, *9 (S.D.N.Y. Sept. 9, 2015) (same). "Where, as here, the other ... factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair." *In re Sony* at *23-24.

8. Whether Proper Notice Was Given

The notice plan is discussed below, in section V. This motion urges the Court to find that the notice plan meets and exceeds the requirements of due process. Ala. R. Civ. P. 23 requires the Court to direct notice to the Class. Federal due process requires that notice of a class action settlement "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1983). "It is widely recognized that for the due process standard to be met it is not necessary that every class member receive actual notice, so long as class counsel acted reasonably in selecting means likely to inform persons affected." *In re Prudential Sec. Inc. Ltd. P'Ships Litig.*, 164 F.R.D. 362, 368 (S.D. N.Y.), aff'd, 107 F.3d 3 (2d Cir. 1996); *Lopez v. Hayes Robertson Grp., Inc.*, No. 1310004CIVMARTINEZGO, 2015 WL 5726940, *7 (S.D. Fla. Sept. 29, 2015) (same); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) ("due process does not require that class members actually receive notice"). Here, the

form and method of notice to the class members satisfy both the requirements of Alabama Rule 23 and federal due process.

C. Scope of the Release

From the Settlement Agreement, here are the operative provisions of the release:

> 4.2 Release. Upon the Effective Date, the Releasing Parties shall have expressly, intentionally, voluntarily, fully, finally, irrevocably, and forever released, waived, compromised, settled, and discharged each and every claim, demand, right, and cause of action of any kind for any type of relief (including but not limited to compensatory damages, mental-anguish damages, property damages, consequential damages, incidental damages, statutory damages, punitive or exemplary damages, disgorgement, restitution, penalties, injunctive relief, declaratory relief, attorneys' fees, court costs, and expenses)-except as expressly set forth in Section 4.3 and Section 4.4 below-that the Releasing Parties have or could have asserted against the Released Parties arising out of or relating in any way to the presence of or exposure to PFAS (I) in the Tennessee River or its tributaries, in Morgan County, Lawrence County, Franklin County, Limestone County, Colbert County, or Lauderdale County, Alabama, (ii) from or at sites owned or operated by the Defendants, or (iii) in the soil, groundwater, surface water, pore water, drinking water, well water, waste water, treated water, sludge, sediment, air, and/or fish or other biota, or any other environmental media, whether asserted or not, accrued or not, known or not, matured or not, contingent or not, manifested or not, patent or latent, open or concealed, or past, present, or future ("Released Claims"). The Parties intend the Released Claims to include all claims, including those for future damages, arising out of any release of PFAS into the environment as a result of the past or continuing operations of the Defendants or the remediation efforts that are in compliance with the Interim Consent Decree and this Agreement. The Parties exclude from the definition of Released Claims those claims for concrete, independent harms caused by future conduct that is not related to the following: (a) the prior release, disposal, or use of PFAS, or (b) the ordinary course of future operations of the Defendants, or (c) the obligations imposed on the Defendants in the Interim Consent Decree and this Agreement.
>
> 4.3 First Exception to Release. Notwithstanding the terms of Section 4.2, the Releasing Parties reserve and do not release any claim, demand, right, or cause of action based upon a manifest personal bodily injury to a Class Member (beyond the presence of PFAS in his or her body). This exception applies without respect to the date on which said personal bodily injury became or becomes manifest. Defendants expressly reserve all rights, claims, and defenses they may have with respect to any claim, demand, right, or cause of action preserved by this

> exception. Damages for manifest personal bodily injuries have not been sought in this Action since 2006.
>
> 4.4 Second Exception to Release. Notwithstanding the terms of Section 4.2, any Class Members (including Sludge Application Subclass Members) that Opt Out reserve and do not release any claim, demand, right, or cause of action for monetary relief. Those Class Members will remain in the Class certified under Alabama Rule of Civil Procedure 23(b)(2) and be subject to the release of claims for injunctive and declaratory relief. Defendants expressly reserve all rights, claims, and defenses they may have with respect to any claim, demand, right, or cause of action preserved by this exception.

Injunctive Relief. Because Class Members cannot opt out of the (b)(2) class or opt out of the injunctive relief, all claims for any different equitable relief will be released. This is the nature of a (b)(2) class.

Personal Injury. The *St. John* Class covers all injunctive claims, all property-damage-based money-damage claims, and certain other money damage claims related to the presence of PFAS; however, the Settlement Agreement expressly preserves claims for "all manifest personal bodily injury" "without respect to the date on which said personal bodily injury became or becomes manifest." Settlement Agreement, §§ 4.2 & 4.3. Class members who believe that they can prove some quantifiable legal damage to their property from the presence of PFAS in the environment have the right to opt out of this settlement and to pursue their individual money-damage claims, although their injunctive relief claims are released. Settlement Agreement § 4.4.

Alabama Supreme Court precedent[41] indicates that the mere presence of PFAS in a person's blood (which today probably includes most of the world) is not a manifest personal injury and does not trigger any relief under Alabama law (including any kind of medical-

[41] *Hinton v. Monsanto Co*., 813 So. 2d 827 (Ala. 2001), for example.

monitoring claims). However, if any class member currently has - or later develops - a manifest personal injury, this settlement will not bar his claim. The *St. John* settlement does not release any manifest personal-injury claim.

The *St. John* Class does not involve claims for manifest personal injury or wrongful death. Any Class Member who claims a personal injury from exposure to PFAS remains free to file their own individual lawsuit. The Settlement Agreement (section 4.3) uses the phrase that claims for "manifest personal bodily injury" are not released because that is the current standard in Alabama law to be able to sue for personal injury.

Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001), involved PCB pollution around Anniston. The Alabama Supreme Court reiterated that: "Alabama law has long required a manifest, present injury before a plaintiff may recover in tort." The Court refused to recognize a claim for medical-monitoring expenses, just because a person had been exposed to the presence of PCBs in the environment - but otherwise had no present, manifest injury or disease. The *Hinton* opinion (pp. 831-32) ends by repeating that Alabama "law provides no redress for a plaintiff who has no present injury or illness."

Real-Property Damage. Class Members who do not opt out of the (b)(3) Class will release all PFAS-related money-damages claims for alleged injuries to real property.

If any property owner in the six-county Class believes they can prove that these defendants dumped PFAS on their property or that PFAS has somehow damaged their property, they are free to opt out of the class settlement and file their own individual property-damage claim against these defendants. The class notice explains how to contact the Class Administrator to opt out. The opt-out process is simple.

3M stopped its manufacture of PFAS approximately 20 years ago, so the odds of a Class Member finding dumped PFAS on private land are remote. The relevant defendants believe they have addressed problems at all the known locations with elevated concentrations of PFAS. The plaintiffs and defendants have exercised due diligence to locate and identify PFAS dumps.[42] There have been a very few individual lawsuits by property owners who claimed direct damage from PFAS on or next to their properties. Some of the defendants, usually with plaintiffs' input, have addressed those concerns with remediation projects and have settled some of those claims.[43]

And, the defendants have asserted in this action that there is no provable legal damage to all real property, generally, in these six counties. Class Counsel and the Class Representatives have not been able to locate any facts to dispute the defendants' position, despite the years of effort and publicity, spending nearly a million dollars on experts, and the involvement of regulatory agencies and public-interest groups.[44]

Even though potential property-damage lawsuits in the future regarding any other sites would likely not have any legal merit, defendants have demanded this release, arguing that they would be at risk for litigation-defense costs. Plaintiffs accepted this scope of release because defendants are agreeing to spend hundreds of millions of dollars and give the Class almost all of the injunctive relief that a successful class trial would have likely provided. In Class Counsel's view, what defendants are seeking is the release of what they view as property-damage lawsuits that would be legally-meritless. The defendants made it very plain, from early in our

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[42] See Ashford affidavit, at ¶ 17, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[43] *Id*.

[44] Ashford, *id*., at ¶¶ 6, 10-12, 15-17.

negotiations, that they would not engage in ongoing remediation and would not enter a settlement for future expenditures unless they got this limited release.[45] Again, any class member who really believes they have some legally-provable money damage to their property can opt out of this *St. John* class action and not be bound by the release.

We, undersigned Class Counsel, have done our due diligence. Our law firms, and others that we know about, have spent hundreds of thousands of dollars in having scores of exemplar properties examined for PFAS pollution.[46] In summary, the properties showed nothing beyond general background levels of PFAS, levels that exist in most parts of the world today. Our examination of real-estate records and meetings with real-estate sales professionals failed to turn up any evidence of diminution of property values in or around Decatur or in the six counties.[47] The only potential exception is the approximately 5000 acres of pasture and farm land where fertilizers containing PFAS were applied. Those acres did show higher-than-normal concentrations of PFAS, and this settlement provides $5 million of cash for compensation.[48]

Also, Alabama law does not allow mental-anguish damages, without a manifest personal injury, allegedly caused by a defendant's negligence. See 2 Michael L. Roberts, Alabama Tort Law § 40.06, pp. 374-77 (6th ed. 2016). And, other types of mental-anguish claims, not tied to a manifest personal injury, or for having been in a "zone of danger," are very hard to prove under Alabama law. *Id*., e.g., at pp. 383, 397-400. Therefore, the claims being released have little or no legal value,[49] and, in exchange, the community at large is getting the benefits of a massive PFAS-

[45] *Id*., at ¶ 19.
[46] *Id*., at ¶¶ 10-12.
[47] *Id*., at ¶ 11.
[48] *Id*., at ¶ 12.
[49] *Id*., at ¶ 19.

remediation program. If any Class Members believes they have a viable money-damage, property-damage-based claim, all they have to do is to opt out.

In re Target Corp. Customer Data Sec. Breach Litig., 892 F.3d 968, 974 n. 6 (8th Cir. 2018), is an example of a case that affirmed trial-court approval of a class settlement wherein money-damage claims were released in exchange for purely injunctive remedies (emphases added):

> Littered throughout Olson's materials is his assertion that class members with no proof of loss—documented or undocumented—are barred from receiving anything of value under the agreement. This is, perhaps, why he has chosen to label those class members as the "zero-recovery subgroup." But the injunctive relief offered under the settlement has value to ***all*** class members. See *Marshall v. Nat'l Football League*, 787 F.3d 502, 509 (8th Cir. 2015) ("[T]he financial payment to the third-party organization is not the only, or perhaps even the primary, benefit of the settlement agreement. All class members receive a direct benefit from the settlement. . . ."), cert. denied, —— U.S. ——, 136 S.Ct. 1166, 194 L.Ed.2d 177 (2016); see also *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 329 (3d Cir. 2011) ("This argument fails to acknowledge the injunctive relief offered by the settlement, however, which is intended to benefit all class members regardless of individual monetary recovery."). As a result, we choose to refer to these class members as the "zero-loss subgroup" because that accurately reflects the reality that these members in fact suffered no monetary injury from the data breach. . . . [T]he Third Circuit would recognize that the injunctive relief offered in the settlement has value to all class members. See *Sullivan*, 667 F.3d at 329.

Class Counsel and the Class Representatives represent to the Court that they believe the limited value, if any, of the hypothetical claims being released is a fair exchange for the injunctive relief, which totals hundreds of millions of dollars spent or reserved to date and an uncapped potentially hundreds of millions of additional dollars in the future.[50]

[50] "It is entirely appropriate for class counsel who has determined, in its professional judgment, that settlement is in the best interests of the class to assist the court's settlement evaluation with a candid assessment of the strengths and vulnerabilities of the claims asserted by or available to the class." 2 McLaughlin on Class Actions § 6:16 (18th ed.) (Oct. 2021 update).

IV. THE SETTLEMENT CLASSES SHOULD BE FINALLY CERTIFIED

A. Definition of the Settlement Class

The Class sought to be certified for settlement purposes only,[51] under both Rule 23(b)(2) and (b)(3), is defined as:

> [A]ll Persons that have owned, occupied, otherwise had an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in, resided at, maintained a business of any kind at, worked at, or recreated on any real property (including the Tennessee River, its tributaries, and all other bodies of water) located in Morgan County, Lawrence County, Franklin County, Limestone County, Colbert County, or Lauderdale County, Alabama, at any time between April 21, 2003, and the date of the Preliminary Approval Order, excluding the Defendants, counsel for the Parties, and the Court.[52]

Additionally, certification of a Rule 23(b)(3) Subclass is sought for settlement purposes only. Section 1.45 of the Settlement Agreement defines the "Sludge Application Subclass," as follows:

> [A]ll Class Members that, as of the date of the Preliminary Approval Order, own, occupy, or have an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in real property in Morgan County, Lawrence County, Franklin County, or Limestone County, Alabama, on which biosolids containing PFAS compounds were applied at any time.[53]

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[51] Defendants would oppose certification were there not a settlement.

[52] Section 1.9 of the Settlement Agreement.

[53] Certification of multiple classes or subclasses under different subdivisions of Rule 23 is a permissible and accepted procedure in appropriate cases. Ala. R. Civ. P. 23(c)(4)(B) provides that "a class may be divided into subclasses and each subclass treated as a class." See, for example, *Fogie v. Rent-A-Center, Inc*., 867 F. Supp. 1398, 1407 (D. Minn. 1993), aff'd in part and vacated in part on other grounds sub. nom. *Fogie v. THORN Americas, Inc*., 95 F.3d 645 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997) (equitable relief class certified under Rule 23(b)(2) for state consumer protection statute, separate monetary relief class certified under Rule 23(b)(3) for federal RICO). The application of the Rule 23 factors to the Sludge Application Subclass is addressed in more detail in section IV.D.2., *infra*.

B. Rule 23(a) Requirements are Satisfied

The four listed Rule 23(a) factors in Ala. R. Civ. P. 23(a) are: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Additionally, case law identifies a fifth introductory factor: i.e., the existence of a definable, ascertainable class.

Ascertainability. Although not expressed in Rule 23, courts have recognized the necessity of an objective method of ascertaining who is a member of the class. See Manual for Complex Litigation § 21.222, p. 270 (4th ed. 2004) ("Although the identity of individual class members need not be ascertained before class certification, the membership of the class must be ascertainable."). When, as here, the Class is seeking predominantly injunctive or equitable relief (rather than compensatory damages), the class definition does not require exact precision. See *Cole v. Memphis*, 839 F.3d 530, 541–42 (6th Cir. 2016) (explaining that a Rule 23(b)(2) class need not satisfy the implicit "ascertainability" requirement). Instead, when "attempting to define a (b)(2) class," the proposed class "may in some instances be quite broad in scope." *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974). 1 William B. Rubenstein, Newberg on Class Actions § 3:7, p. 175 (5th ed. 2011), also notes that most courts "eschew the implied requirement of definiteness in Rule 23(b)(2) class actions."

"There are three linguistic formulations commonly used to express the test for definiteness: first, that the class must be 'precise, objective, and presently ascertainable;' second, that the class must be 'adequately defined and clearly ascertainable;' and third, that the class can

be ascertained 'by reference to' or 'based on' 'objective criteria.' . . . All courts essentially focus on the question of whether the class can be ascertained by objective criteria." 1 William B. Rubenstein, Newberg on Class Actions § 3:3, pp. 160-63 (5th ed. 2011). There is nothing "subjective" in the Class or Subclass definitions. Membership can be proven by objective criteria.

Numerosity. Just the current population of the six counties exceeds 440,000 persons. See www.alabama-demographics.com/counties_by_population. Factoring in the parcels of land jointly owned by several persons, the Subclass probably includes around 100 persons and entities. Federal law has generally held that, if a class number is at least 50, numerosity is met." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.2, p. 725 (5th ed. 2018).[54] 1 William B. Rubenstein, Newberg on Class Actions § 3:12, p. 1198 (5th ed. 2011), opines that a group of 40 or more ought to be presumed to meet the numerosity factor. "[W]here the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity." *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645, 654 (M.D. Ala. 1999).[55]

Commonality. This case is about alleged generalized environmental contamination involving the general areas around Decatur, Alabama, and down river (west) of Decatur."[F]or purposes of Rule 23(a)(2) even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (internal quotation marks omitted). Questions common to the

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[54] See, for example, *Olenhouse v. Commodity Credit Corp*., 136 F.R.D. 672, 679 (D. Kan. 1991) ("good faith estimate of at least 50 members adversely affected . . . is of sufficient size to be maintained as a class action").

[55] "[I]f the subclass members are also members of the larger, already certified class, courts have held that the subclass may not be required to satisfy independently the numerosity requirement." 1 William B. Rubenstein, Newberg on Class Actions § 3:16, p. 223 (5th ed. 2011).

Class and all defendants involve whether the defendants had a duty to exercise reasonable care in their use and disposal of PFAS chemicals, and, if so, whether reasonable care was, in fact, exercised. Then, in terms of remediation remedies for the failure to exercise due care, the choices of remedies will be common to all.

"Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus*., 568 F.3d 1350, 1355 (11th Cir. 2009) (internal quotation omitted). There are several common issues here, including: (a) the factual history of the use, development, and discharge of PFAS chemicals which were manufactured or utilized by the defendants in Decatur; (b) when the defendants knew or should have known of the harmful effects to the environment of PFAS; and (c) the extent of the contamination of the defendants' facilities in Decatur, and the extent of the migration of that contamination into the Tennessee River. These common questions of fact and law are sufficient to meet the "low hurdle of Rule 23(a)(2)." *Id.* at 1356.

It is not necessary that all questions in a case be common to all members of the class, but only that some questions be common. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986); *Ex parte AmSouth Bancorporation*, 717 So.2d 357, 363 (Ala. 1998) ("A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions," quoting an earlier edition of Newberg). "For example, factual variations among the class's grievances will not defeat a class action. A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1180 (Ala. 2000) (quoting the trial court with approval).

Dujanovic v. MortgageAmerica, Inc., 185 F.R.D. 660, 667 (N.D. Ala. 1999), notes that: "Commonality may exist where the party opposing the class has engaged in a course of conduct that affects all class members and gives rise to the plaintiff's claims." In this case, the defendants' conduct, whether tortious or not, was certainly "common" to everyone in north Alabama. "It also is well established that the commonality requirement of Rule 23(a) is not high; it is generally met when there is either a common question of fact, or of law." *Id*. "[T]he commonality requirement is not usually a contentious one: the requirement is generally satisfied by the existence of a single issue of law or fact that is common across all class members and is thus easily met in most cases." 1 William B. Rubenstein, Newberg on Class Actions § 3:18, p. 228 (5th ed. 2011).

Typicality. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551, n. 5 (2011), repeats an oft-stated acknowledgment that "the commonality and typicality requirements of Rule 23(a) tend to merge." The Court also noted that the tests for commonality and typicality "also tend to merge with the adequacy-of-representation requirement," as it concerns the Class Representatives. *Id*. "Each subsection of Rule 23(b) overlaps significantly with the commonality requirements." 1 William B. Rubenstein, Newberg on Class Actions § 3:27, p. 257 (5th ed. 2011). "The plaintiff must also show there are common questions of fact or law between all members of the class. . . . [T]he courts have found that this factor blurs with typicality. . . . Courts sometime blur typicality with the requirement that the named plaintiff be an adequate representative of the class." Gregory C. Cook, The Alabama Class Action: Does It Exist Any Longer? And Does It Matter, 66 Ala. Law. 289, 291 (July 2005).

"The typicality requirement of Rule 23 often is considered to require no more than that

there exist no antagonism between the claims of the class representative and the other members of the class." *Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 667 (N.D. Ala. 1999). "The core purpose of typicality appears to be whether the representative will be able to establish the bulk of the class' claim through his own claim." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.4, p. 727 (5th ed. 2018). The gist of this action is a claim that defendants acted negligently and certain injunctive relief should be ordered to remediate, monitor, and contain the PFAS that is already in the environment. The Class Representatives' situations and claims are similar in that regard to every other resident of the six counties. "Where, as here, 'the party seeking certification alleges that the same unlawful conduct was directed at the class representatives and the class itself, the typicality requirement is usually met irrespective of the varying fact patterns which underlie individual claims.' See *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985)." *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1181 (Ala. 2000) (quoting the trial court with approval).

The touchstone of typicality is "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Cutler v. Orkin Exterminating Co., Inc.*, 770 So.2d 67, 70 (Ala. 2000). "The test for typicality ... is not demanding." *Lightbourn v. County of El Paso*, 118 F.3d 422, 426 (5th Cir. 1997). "Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Id*. "In sum, typicality insists that the class representative be a member of the class and have claims similar to those of other class members, and the requirement rests upon the belief that such a representative, pursuing her own interests, will pursue the class's as

well." 1 William B. Rubenstein, Newberg on Class Actions § 3:28, p. 264 (5th ed. 2011). "A plaintiff's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory." *Id*. at § 3:29, p. 266. Factual variations among class members do not defeat the typicality test so long as the class representative's claims and those of the absent members are based on the same legal or remedial theory. *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (citing authorities). Here, the Class Representatives' claims and the claims of the members of the Class all arise from the same alleged conduct by the defendants in negligently permitting PFAS chemicals to escape into the general environment. They seek the same injunctive remedial remedies.

Adequacy of Representation. Whether or not the representation pre-requisite of Rule 23(a), Ala. R. Civ. P., has been satisfied is determined through a two-prong analysis. First, the Court must be satisfied that the Class Representatives have interests that are not in conflict with the absent Class Members. See *Cutler v. Orkin Exterminating Co., Inc*., 770 So.2d 67, 71 (Ala. 2000). Second, it must be demonstrated to the Court that plaintiffs' counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *Id*. at 71 (quoting *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). "Thus, the standard for adequacy splits into two prongs: adequacy of the proposed class representative and adequacy of the attorneys seeking appointment as class counsel." 1 William B. Rubenstein, Newberg on Class Actions § 3:54, 332-33 (5th ed. 2011). Both prongs are satisfied here.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor,*

521 U.S. 591, 625 (1997). "The adequacy-of-representation requirement encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representative and the class; and (2) whether the representative will adequately prosecute the action." *Busby v. JRHBW Realty, Inc.,* 513 F.3d 1314, 1323 (11th Cir. 2008) (internal quotation omitted). For settlement purposes, there are no conflicts of interest between the Class Representatives and members of the Class. Moreover, Class Counsel have extensive experience as litigators in many types of federal and state-court litigations, including many class-action and mass-tort cases.

The Class Representatives have seen the Settlement Agreement and have gone over it with counsel, and they approve of the Settlement and urge the Court to approve it.[56] "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action or that they play a personal role in the direction and management of the action. See *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir. 1982). Indeed, in a complex case such as this one, the plaintiff need not be intimately familiar with every factual and legal aspect of the case. He may rely on counsel to investigate and litigate the case and his reliance does not make him an inadequate representative." *Morris v. Transouth Fin. Corp*., 175 F.R.D. 694, 698 (M.D. Ala. 1997) (John Carroll, Mag. J.). "A proposed representative's knowledge of the case need not be robust." 1 William B. Rubenstein, Newberg on Class Actions § 3:67, p. 377 (5th ed. 2011).

Paragraph 1 of the Order Preliminarily Approving Settlement and Providing for Notices to the Class (Document 671, 12/17/2021) says: "John Scherff, Kimberly Scherff, Darden

[56] See Ashford affidavit, at ¶ 5, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

Bridgeforth and Sons Land Company, and G. T. Hamilton, are designated as Class Representatives for purposes of this Settlement. Further, G. T. Hamilton is designated as the representative of the Sludge Application Subclass." Short biographies of the Class Representatives are provided at pages 63-64 of the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

"Perhaps the most important consideration for adequacy is the adequacy of class counsel, since counsel will likely be far more important in the prosecution of the case than the class representative. The court will examine (1) counsel's competence and experience, (2) counsel's conflicts, and (3) counsel's ethics and actions in this litigation." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.5, p. 730 (5th ed. 2018). "The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are 'qualified, experienced and generally able to conduct the litigation' and whether counsel will 'vigorously prosecute the interests of the class.' These standards are easily met, with members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary. The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action." 1 William B. Rubenstein, Newberg on Class Actions § 3:72, pp. 394-96 (5th ed. 2011).

This case has been litigated for 19 years. "When counsel has already devoted significant effort or resources to the prosecution of the action prior to submitting a class certification motion, courts will usually presume that counsel will continue to devote the same level of resources going forward and this presumption weighs in favor of a finding of adequate representation." *Id.* at § 3:74, p. 400. "Adequate representation is usually presumed." *Moore v. Walter Coke, Inc.*,

294 F.R.D. 620, 632 (N.D. Ala. 2013) (quoting earlier edition of Newberg)). The qualifications of Class Counsel are summarized at pages 64-72 of the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

C. Rule 23(b)(2) Requirements have been Satisfied

As to the injunctive relief provided in the Settlement Agreement, movants seek final certification, for settlement purposes, pursuant to Ala. R. Civ. P. 23(b)(2) ("the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"). In their uses and releases of PFAS over a range of years, the defendants did not single out specific residents of the six counties. The defendants' conduct was uniform as to all.[57] Further, their conduct warrants "appropriate final injunctive relief" pursuant to this settlement and the allegations in the complaint - that is, the injunctive relief for particular defined sites. Thus, a mandatory, non-opt-out (b)(2) class for injunctive relief is appropriate. Obviously, 3M, for example, should not be subject to one injunctive suit that requires 3M to dig up and incinerate the contents of the Acme Landfill, while a court in a competing injunctive suit inconsistently orders 3M to encapsulate the contents of the Acme Landfill, in situ.

Environmental-pollution class actions are a common example of the appropriate use of Rule 23(b)(2). Othni Lathram and Anil A. Mujumdar, Alabama Civil Procedure § 5.76, pp. 5-121 (2020 ed.) (emphasis added), notes that: "A class action falls within category (b)(2), speaking broadly, if the same judgment for 'final injunctive relief or corresponding declaratory relief'

[57] However, "the defendant's conduct . . . need not be directed or damaging to every member of the class." 2 William B. Rubenstein, Newberg on Class Actions § 4:28, p. 103 (5th ed. 2012).

would be appropriate as to every class member. Many civil rights actions, consumer actions, and environmental protection actions fall in this category." 2 William B. Rubenstein, Newberg on Class Actions § 4:26, p. 99 (5th ed. 2012) (emphasis added), also notes that "(b)(2) class actions are not limited to civil rights cases and other types of suit regularly fall within its purview, including class actions in antitrust, environmental, . . . medial monitoring, and other types of class litigation." "Courts will certify (b)(2) classes in cases involving environmental claims where, for example, it is alleged that the defendant's pollution of groundwater has harmed a group of individuals." *Id*., at § 4:43, p. 175. "In addition to its frequent application to civil rights cases, courts have extended Rule 23(b)(2) to, *inter alia*, classes . . . seeking institutional or environmental reform." 1 McLaughlin on Class Actions § 5:15 (18th ed.) (Oct. 2021 update) (emphasis added). "Rule 23(b)(2) also has been invoked in . . . an environmental suit to enjoin certain activities or projects as harmful to the health or property of the class members." 7AA Mary Kay Kane, Federal Practice and Procedure (Wright & Miller) § 1775 (3d ed.) (April 2021 update).

"Thus, a class action is properly certified under (b)(2) where the claims seek to define the relationship between the defendant and a group uniformly situated in relation to the defendant. Because such limited relief 'must perforce affect the entire class at once,' due process does not require that absentee class members be afforded notice or an opportunity to opt out of a (b)(2) class. In order to obtain certification under Rule 23(b)(2), plaintiffs must show that the defendant's actions or omissions are based on grounds that apply generally to the class because the essence of a (b)(2) class is that it is cohesive and homogeneous without meaningful divergent interests among the members of the class. Thus, the rule seeks to redress group, as opposed to

individual injuries. . . .” 1 McLaughlin on Class Actions § 5:15 (18th ed.) (Oct. 2021 update). “Rule 23(b)(2) classes are limited to situations where the injuries to be remedied are really group, as opposed to individual injuries, and the requested injunctive relief does not necessitate examination of the particular circumstances of each member of the class.” *Id*. The injunctive relief sought and consented to in the Settlement Agreement - e.g., to investigate, remediate, and monitor known locations with elevated concentrations of PFAS around north Alabama - is relief that is common to all Class Members and does not require remedies to be individualized for specific, differing groups of six-county residents. Thus, a (b)(2) certification is appropriate for the injunctive-relief aspect of this Class. “[A] Rule 23(b)(2) class is proper despite the fact that not all class members may have suffered the injury posed by the class representatives so long as the challenged policy or practice was generally applicable to the class as a whole. The requirement focuses on the defendant and questions whether the defendant has a policy that affects everyone in the proposed class in a similar fashion.” 2 William B. Rubenstein, Newberg on Class Actions § 4:28, pp. 104-6 (5th ed. 2012).

“The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy.” *Cmty. Refugee & Immigration Servs. v. Registrar, Ohio Bureau of Motor Vehicles*, 334 F.R.D. 493, 507 (S.D. Ohio 2020) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)). This type of “mandatory” class under Rule 23(b)(2) means that the alleged wrongful conduct “is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” *Id*. (quoting *Dukes*, 564 U.S. at 360). Put differently, the class claim “is susceptible to a single proof and subject to a single injunctive remedy.” *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Class actions “will usually satisfy this requirement”

when the proposed class seeks "to define the relationship between the defendant and the 'world at large.'" *Sullivan v. DB Invs., Inc*., 667 F.3d 273, 317 (3d Cir. 2011) (citation omitted); accord *Huguley v. Gen. Motors Corp*., 925 F.2d 1464 (6th Cir. 1991) (table) (citing *Laskey v. United Auto. Workers*, 638 F.2d 954, 956 (6th Cir. 1981) ("courts should generally certify classes pursuant to 23(b)(2) when the class members are seeking injunctive relief.")). The *St. John* Class meets this standard and falls squarely within Rule 23(b)(2). Plaintiffs predominantly seek injunctive and equitable relief, which would provide relief to every member of the class. Defendants treated Class Representatives, like the Scherffs, no differently than every other potential Class Member: they (allegedly) contaminated everyone with equal impunity.

D. Rule 23(b)(3) Requirements have been Satisfied

1. The Overall Class. Certification is sought for the general Class under both (b)(2) and (b)(3) for settlement purposes. This is a property-damage class action. The general rule is that money damages for harm to real-property are measured by the diminution of market value. After 19 years, and after spending hundreds of thousands of dollars in testing the soil and water at many varying locations, and after investigating real-estate records and talking to real-estate sales professionals, plaintiffs' counsel found no viable evidence of wide-spread diminution in land values in any of the six counties.[58]

The practice of certifying a class under both (b)(2) and (b)(3) is often referenced as

[58] See Ashford affidavit, at ¶ 11, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021). Because the scope of the release (in exchange for $300 million of remediation efforts) is reasonable and adequate, it is likely that no (b)(3) class certification is necessary except for the Sludge Application Subclass. However, in an abundance of caution, Class Counsel has negotiated for a (b)(3) class to allow any class member to opt out of the limited release if they so choose. This is yet another benefit for the class.

certifying a "hybrid class action." In 2 William B. Rubenstein, Newberg on Class Actions § 4:38, pp. 159-66 (5th ed. 2012), Prof. Rubenstein discusses hybrid class actions and says they are "the most attractive of the alternatives" when a primarily-injunctive class also contains some elements of money-damages claims. *Id*. at p. 161. The notes to Rubenstein's § 4:38 cite many cases where a class has been certified under both (b)(2) and (b)(3). "Certification of a hybrid action is often thought to be the best of both worlds, achieving the judicial economies associated with group litigation while also respecting the due process rights of individuals with monetary claims. . . ." *Id*. at p. 166. Here, (b)(3) notice to the Class and the right to opt out give due respect to Class Members who prefer to opt out and to bring individual money-damage, property-damage claims.

Except as to the 5000-acre Sludge Application Subclass, money damages are not provided in the Settlement Agreement. Class Counsel found no factual evidence to support any legal theory as to why the defendants should simply send a check to hundreds of thousands of landowners in the six counties. That said, the Class is receiving over $300 million worth of valuable injunctive relief in the settlement that should further remediate any property damage in the area covered by the settlement, and such relief could not occur without this broader settlement.[59] But, still, the actions of the defendants present a uniform issue appropriate for (b)(3) class certification in this particular context. That is why a dual (b)(3) certification is sought - e.g., so that (b)(3)-type notice is given to the Class, which notice provides every Class Member with the right to opt out and seek to prove some specific, individual money-damage injury.

"Rule 23(b)(3) lists two requirements for class actions: (1) common questions

[59] See Ashford affidavit, at ¶¶ 19-20, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

predominate, and (2) the class action is superior to other methods. It also lists four factors (not intended to be exhaustive) to be analyzed: (1) individual interest in controlling litigation, (2) other ongoing litigation, (3) desirability of concentrating litigation in this forum, and (4) the manageability of the potential class action. The paradigm for a Rule 23(b)(3) class is when there are a large number of small dollar claims. . . .” 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.10, p. 735 (5th ed. 2018).

In order to certify a class under Rule 23(b)(3), the questions of law or fact that are common to the members of a class must predominate over any questions affecting only individual members. In this particular context, a common fact question is the actions of the defendants. The defendants’ conduct was not directed differently toward different individual Class Members. To the extent a Class Member claims some wholly-different and direct application of larger volumes of PFAS onto his specific land, and that claim will likely be a rare one, that rare Class Member may opt out and sue for individualized money damages. See *Avis Rent A Car Systems, Inc. v. Heilman*, 876 So. 2d 1111, 1120 (Ala. 2003) (“the predominance requirement is met if there is a common nucleus of operative facts relevant to the dispute and as common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication”), and *Cheminova America Corp. v. Corker*, 779 So. 2d 1175, 1181-82 (Ala. 2000) (describing predominance as when “rulings on common issues of law was significantly advanced but resolution of identical or substantially similar questions and issues which would require resolution in connection with the individual’s claims,” “individual damages issues also did not destroy predominance, since the claim is based upon the amount paid for the product may be confirmed by a special master, or some other device which

will lessen the burden on the court").

Courts have certified property-damage classes in PFAS-related cases. In *Sullivan v. Saint-Gobain Performance Plastics Corp*., No. 5:16-cv-125, 2019 WL 8272995 (D. Vt. Aug. 23, 2019), the federal district court certified two classes relating to PFAS exposure: plaintiffs with property damage, and plaintiffs with identifiable levels of PFAS in their blood. A state court reached the same result in *Hermens v. Textiles Coated Inc*., Nos. 216-2017-CV-524 and 216-2017-CV-525 (N.H., Hillsborough Super. Ct., July 20, 2019) (a property damage class and a medical monitoring class). The New Jersey Court of Appeals affirmed class certification against Hoffman-La Roche for its alleged contamination of ground water. *Sutton v. Hoffman-La Roche Inc*., Nos. A-5545–49 (N.J. Super. Ct. App. Div. May 27, 2020). The court explained that "[c]ommonality was properly found because the claims shared by the class arise out of a common set of circumstances: defendants' chemical releases . . . commingled and spread off the [defendants' property]"—and contaminated the plaintiffs' property. The many common questions, including "whether defendants are liable to the members of the class for their release of abnormally hazardous substances." Ms. at 19. The Court found predominance. Ms. at 29; see also *id*. at 32–33 (listing the many common questions, such as whether Roche released hazardous chemicals into the groundwater, whether Roche was negligent in doing so, and whether other companies contributed).

"The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other

important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal citations and quotation marks omitted).

In this particular context, a class is superior because individual claimants would have to litigate identical facts and legal issues, over and over. The actions of the defendants were uniform to the Class.[60] Judicial economy certainly argues for concentrating the PFAS litigation in Morgan County, where the PFAS originated.

In the context of a proposed settlement, the "manageability" factor is an irrelevant issue. "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231, 2248 (1997).

2. The Sludge Application Settlement Subclass. Movants assert that (b)(3) "fits" this Subclass (e.g., those with an ownership or possessory interest in the 5000 acres) perfectly. All the elements of Rule 23(a) exist. The identities of most of the owners of the 5000 affected acres are known from Synagro's records and county tax records. Because all Subclass Members are also members of the general Class, numerosity is not a required factor. However, the Subclass

[60] See, as examples, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987) (granting class certification because "each of the complaints alleges a single conspiracy and fraudulent scheme against a large number of individuals and thus is particularly appropriate for class action" (quotation marks and citation omitted), and *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983) (granting class certification where the defendants "committed the same unlawful acts in the same method against an entire class").

exceeds the usual 40-50 minimum number that commonly satisfies the numerosity requirement.[61]

The questions of law and fact that would be tried are identical for each Subclass Member, so the factors of commonality and typicality are met. Mr. G. T. Hamilton is an adequate Subclass Representative. He is one of the largest landowners within the 5000-acre Subclass, and his claims are similar to, and not in conflict with, all other 5000-acres owners. As to the factors of (b)(3), see Cook, *supra*, at § 23.10, common questions of law and fact dominate. The defendants' conduct toward each Subclass Member was identical. There are no alleged affirmative defenses that apply uniquely to some, but not all, Subclass Members. A class is clearly superior to mirror-image individual litigations. Individuals have not shown an interest in individually directing the litigation. Judicial economy is served by class treatment in Morgan County. Manageability is not a necessary factor to prove in a class settlement, but there would be no such issues in a hypothetical trial of the claims of the 5000-acres owners.

Consideration of the *Adams* factors supports the fairness of the (b)(3) Settlement for Subclass Members. Besides the differences in the number of sludge-applied acres owned, the only factual difference among the Subclass Members is that some acres had different volumes of sludge applied, and some acres had sludge applied for more years than other acres. Class Counsel had samples of various lands tested for residual PFAS. By late 2022, it is unlikely that any significant differences still exist among the 5000 acres in regard to residual volumes of PFAS remaining in the soil.[62] Counsel for the parties and their experts considered possible classifications for compensating each acre differently, but could not find a plan that made

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[61] See Ashford affidavit, at ¶ 14, Exhibit B to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement (Document 658, 12/10/2021).

[62] *Id*., at ¶¶ 12-13.

workable, scientific sense. *Id*. The money being paid represents possible or potential diminution of market value of the land. After discussions with real-estate professionals, Class Counsel found no factual basis for determining that one acre suffered greater diminution (or potential future diminution) than others. *Id*. Thus, Class Counsel and the Subclass Representative represent to the Court that they believe paying each acre an identical amount (approximately $1000) is the best and fairest method, administratively, scientifically, and factually. *Id*.

The first three *Adams* factors substantially overlap. The likelihood of success at a trial is low and the range of recovery (if recovery was made) is unlikely to exceed $1000 per acre because the *St. John* parties, after litigating for nearly 20 years, are not aware of any evidence of diminution of market value in regard to the 5000 acres. The complexity, expense, and duration of a trial would not be a reasonable use of resources because, again, any recovery would be unlikely to exceed $1000 per acre. The *Adams* factors support the requested final approval of the Subclass Settlement.

V. NOTICE TO THE CLASS

In its Order Preliminarily Approving Settlement and Providing for Notices to the Class (Document 671, 12/17/2021), this Court designated KCC Class Action Services, LLC ("KCC"), as the Class Administrator and approved the proposed notice plan. The Class Notice Plan (Exhibit 11 to the Settlement Agreement, Document 662) was explained through the declaration of KCC's Carla A. Peak. KCC obtained a list of current (and many former) real-property owners in the six counties. That database includes over 400,000 postal addresses, and KCC reported that it may have over 200,000 email addresses for those property owners.

The Class Notice (both the Long-Form and Short-Form notices) is Exhibit 1 to the

Settlement Agreement. As KCC stated that it would, on January 7, 2022, it transmitted the summary, or Short-Form Notice (which contains, *inter alia*, an internet link to the Long-Form Notice and other documents) via email where an email address exists. For emails that were not successfully delivered, KCC mailed a Short-Form Notice (postcard notice) to that person. For persons with no known or working email address, KCC mailed the Short-Form Notice postcard.

The Short-Form Notice contains a summary of the major aspects of the Long-Form Notice, and it directs Class Members to the settlement website, where the Long-Form Notice and other case documents are available for viewing or downloading. The Short-Form Notice also lists KCC's toll-free telephone number that Class Members can use to seek further information. Postcards that are returned as undelivered are being investigated and they will be re-mailed if KCC can locate a newer, better address for that person.

A summary notice was published in major newspapers within the six counties. In addition, a robust digital media campaign is being conducted by KCC. KCC expects that over 2.5 million "digital impressions will be targeted to reach adults located in" the six counties. Ms. Peak's declaration opines that notice "is expected to reach approximately 90% of likely Class Members via the digital media effort alone."

The notices (see Exhibit 1 to the Settlement Agreement) explain the timing and the process for opting out of the (b)(3) aspect of the settlement. The notices also explain how and when [by March 17, 2022] to object to the merits of the settlement, and how to request a personal appearance at the Fairness Hearing. Sections 8.7 and 9.3 of the Settlement Agreement forbid "mass" or "class" opt-out requests or objections. Many courts have recognized that it is entirely proper and reasonable to prevent attorney-driven tactics by barring counsel from filing en masse

opt-outs or objections.[63]

This Notice Plan exceeds the requirements of due process. "[R]ule 23(e) requires that absent class members be informed when the lawsuit is in the process of being voluntarily dismissed or compromised." *Juris v. Inamed Corp*., 685 F.3d 1294, 1317 (11th Cir. 2012). The notice should be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). It is well-established that the trial court has great discretion in determining the kind of notice to employ in alerting class members to a proposed settlement and settlement hearing, subject to "the broad reasonableness standards imposed by due process." *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); *Battle v. Liberty National Life Insurance Company*, 770 F. Supp. 1499, 1521 (N.D. Ala. 1991).

As amended, effective on May 1, 2021, Ala. R. Civ. P. 23(c)(2) specifically provides for

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[63] E.g., *Moulton v. U.S. Steel Corp*., 581 F.3d 344, 355 (6th Cir. 2009) ("Given the real risk that the attorney-signed opt-out forms did not reflect the wishes of class members, the district court appropriately exercised its power by requiring individually signed opt-out forms (and rejecting the attorney-signed forms)") (citing cases); *In re Diet Drugs*, 282 F.3d 220, 241 (3d Cir. 2002) ("[I]t was clearly within the [district] court's discretion to turn away attempts by lawyers to opt out class members en masse[.]"); *Good v. Am. Water Works Co.*, No. CV 2:14-01374, 2016 WL 5746347, at *3 n.3 (S.D. W. Va. Sept. 30, 2016) ("[T]he court observes that requiring individual signatures [in opt-out requests] is standard practice in many class actions and in fact serves to protect the due process rights of absent class members."); see also *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 939 (E.D. La. 2012) ("[T]he mass unsigned opt outs are highly indicative of a conclusion that such counsel did not spend very much time evaluating the merits of whether or not to opt-out in light of the individual circumstances of each of their clients and in consultation with them."), aff'd sub nom. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014); *Hallie v. Wells Fargo Bank, N.A.,* No. 2:12-CV-00235-PPS, 2015 WL 1914864, at *4 (N.D. Ind. Apr. 27, 2015) ("The personal signature requirement also seems to be a standard requirement in class actions, and it's not onerous.") (citing cases).

email or electronic service: "[T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." Email and digital media are widely-used methods of class-action notice today. 3 William B. Rubenstein, Newberg on Class Actions § 8:30, pp. 320-211 (5th ed. 2013), notes that "the Internet . . . has rapidly become an important part of class action notice programs," and that "the Internet has become widely accepted as a supplement to traditional means of primary notice." "The breadth, accessibility, and widespread usage of the internet make it a possible alternative means of publishing notice and satisfying the notice requirement." Jordan S. Ginsberg, Class Action Notice: The Internet's Time Has Come, 2003 U. Chi. Legal F. 739, 741 (2003). "[T]he internet generally provides a better, more comprehensive, more accessible form of notice to a greater number of potential class members than the national newspapers do." *Id.* at 772. "Today, however, the Internet has become entrenched in the American way of life and provides a mechanism through which absent class members' right to participate meaningfully in class action litigation can be realized." Robert H. Klonoff, Mark Herrmann, Bradley W. Harrison, Making Class Actions Work: The Untapped Potential of the Internet, 13 J. Internet L. 1, 13 (2009). In *Gaylor v. Comala Credit Union*, No. 2:10CV725-MHT, 2012 WL 2045351, at *1 (M.D. Ala. June 6, 2012), Judge Myron Thompson noted that the notice plan he approved included notice "provided to the class by way of the internet, newspaper publication, and postings on Comala's ATMs."

All required information has been posted on the settlement website. The Manual for Complex Litigation, Fourth, § 21.311, p. 288 (Federal Judicial Center 2004), notes that "referring

class members to an Internet site for further information can provide complete access to a wide range of information about a class settlement. Many courts include the Internet as a component of class certification and class settlement notice programs." See *Stoffels ex rel. SBC Tel. Concession Plan v. SBC Commc'ns, Inc*., 254 F.R.D. 294, 299 (W.D. Tex. 2008) (same). "[N]umerous courts and commentators have approved of the use of websites in class action litigation." *Wilson v. Anthem Health Plans of Kentucky, Inc*., No. 3:14-CV-743-TBR, 2017 WL 1089193, at *3 (W.D. Ky. Mar. 21, 2017).

KCC has performed (and continues to perform) its service duties. Thus, the notice requirements of Rule 23 and constitutional due process have been met, and exceeded. Attached hereto as Exhibit B is the affidavit of co-Class Counsel Bruce J. McKee. He has been Class Counsel's primary contact person vis-a-vis KCC, and his affidavit summarizes the present status of the Class Notice Plan.

On January 7, 2022, KCC mailed 173,118 Short-Form Notices via USPS postcards. Also on January 7, 2002, KCC sent the Short-Form Notice via email blast to 230,469 email addresses. These approximately 400,000 persons and entities are current and past owners of real property in the six counties. If emails are undelivered, postcards are mailed. If postcards are returned undelivered, KCC strives to find current, valid new addresses and re-mails the Notice. On January 14, 2022, KCC mailed the Long-Form Notice and a customized cover letter with a customized claim form to approximately 50 persons or entities identified by Class Counsel's research as being likely Members of the Sludge Application Subclass. Several Subclass claim forms have been received by KCC and are being processed. No written objections have yet been received. Only two opt-out notices have been filed, as of February 9, 2022.

Shortly prior to January 7, 2022, the settlement website operated by KCC went live. The internet address (URL, or Uniform Resource Locator) is: www.StJohnSettlement.com. Class Counsel and KCC are constantly monitoring the website, and several edits and additions have been made in further effort to make the website as informative and user-friendly as possible. As of February 9, 2022, 10,056 unique visitors have viewed the website. The website contains FAQs, Frequently Asked Questions. Under the tab for Case Documents, Class Members can read and download documents, including: the Complaint; the *St. John* Settlement Agreement with exhibits; Plaintiffs' Motion for Preliminary Approval with exhibits; the *Tennessee Riverkeeper* Settlement Agreement; the Settlement Agreement between 3M and the City of Decatur and Morgan County; Internet Links to the City of Decatur's Websites; the Preliminary Approval Order; the Motion for Attorneys' Fees, Costs, and Expenses; the Long-Form Notice; Subclass claim forms; etc. Also, since January 7, 2022, KCC has operated a toll-free telephone help-line [1-888-890-6718] for Class Members. This help line operates as an IVR telephone system.[64] As of February 9, 2022, 2308 callers have phoned the help-line.

On January 7, 2022, KCC sent a press release about the St. John Settlement to news sources. That press release can be viewed at: www.prnewswire.com/news-releases/if-you-owned-occupied-or-used-land-or-bodies-of-water-in-morgan-lawrence-franklin-limestone-colbert-or-lauderdale-counties-you-will-be-affected-by-a-class-action-settlement-301452900.html.

[64] "Interactive voice response or IVR is an automated business phone system feature that interacts with callers and gathers information by giving them choices via a menu. It then performs actions based on the answers of the caller through the telephone keypad or their voice response. The choices of the caller decide the actions of the IVR — it can provide information or, if the issue is more complex, route callers to a human agent who can better handle their needs." www.ringcentral.com/contact-center/interactive-voice-response.html.

The Class Notice was published in the Decatur, Huntsville, and Florence newspapers on January 11, 2022, and in the Moulton newspaper on January 13, 2022.

Paragraph 15 of the Class Notice Plan (Exhibit 11 to the Settlement Agreement, Document 662) says: "KCC will also cause approximately 2.55 million digital impressions to be distributed via various websites and the social media platform, Facebook. The impressions will be targeted to reach adults located in Colbert, Franklin, Lauderdale, Lawrence, Limestone, and Morgan counties. The notices will appear on both desktop and mobile devices, including tablets and smartphones, in display and native ad formats. All digital media notices will include an embedded link to the case website." As of February 6, 2022, KCC reports that 2,647,844 internet impressions[65] had been achieved.

Class Counsel represent to the Court that KCC has diligently performed its duties under the Class Notice Plan, and continues to cooperate with Class Counsel on an almost-daily basis in furtherance of its remaining duties as Class Administrator.

VI. ATTORNEYS' FEES AND EXPENSES

The Motion for Attorneys' Fees, Costs, and Expenses (Document 680, 1/14/2022), incorporated herein by reference, seeks the Court's approval for the defendants to pay Class Counsel $48 million for their attorneys' fees, costs, and expenses. The fee will be paid entirely by the defendants. No attorneys' fees will come from the Class or the Subclass. The fee Motion, since 1/14/2022, has been posted on the settlement website, www.StJohnSettlement.com, so every Class Member has had an opportunity to review the fee Motion, and well before the March

[65] "An impression (also known as a view-through) is when a user sees an advertisement. In practice, an impression occurs any time a user opens an app or website and an advertisement is visible." www.adjust.com/glossary/impression.

17, 2022, deadlines for filing objections or opt-out notices.

CONCLUSION

The plaintiffs and Class Representatives respectfully request that the Court finally approve the Settlement Agreement and find, based on the Court's in-depth, final review, that the Settlement is fair and reasonable and worthy of final approval. They also request the Court to, *inter alia*: (i) certify (for settlement purposes) the Class defined above, at page 3, pursuant to Ala. R. Civ. P. 23(b)(2) as a mandatory, non-opt-out class for purposes of injunctive relief; (ii) certify (for settlement purposes) the Class defined above, at page 3, pursuant to Ala. R. Civ. P. 23(b)(3) as an opt-out class for money-damage claims related to PFAS contamination to real property and ancillary damages not excluded by the release; (iii) certify (for settlement purposes) the Sludge Application Subclass, defined above, at page 3, as a Rule 23(b)(3) opt-out subclass, and approve the plan of distribution of monetary relief; (iv) approve the Class Notice Plan; and (v) grant the Motion for Attorneys' Fees, Costs, and Expenses (Document 680, 1/14/2022).

The Court is asked to enter the Final Approval Order that is Exhibit A hereto (also filed as Exhibit 2 to the Settlement Agreement). Section 1.23 of the Settlement Agreement states (emphasis added):

> "Final Approval Order" means the Court's order (a) granting final approval to the Settlement; (b) directing that the Agreement be implemented in accordance with its terms; (c) dismissing the Action with prejudice; (d) ruling that each of the Releasing Parties has expressly, intentionally, fully, finally, and forever released, waived, compromised, settled, and discharged all Released Claims; (e) barring each of the Releasing Parties from asserting any of the Released Claims against any of the Released Parties; (f) awarding any attorneys' fees, costs, and expenses payable by Defendants; (g) finding that the Class Notice complied with Alabama Rule of Civil Procedure 23, Alabama law, and the U.S. Constitution; and (h) reserving exclusive and continuing jurisdiction over the interpretation, performance, enforcement, and administration of this Agreement and the Court's orders in the Action; <u>where such order will be in substantially the</u>

same form as the proposed Final Approval Order attached as Exhibit 2 to this Agreement.

Section 13.1(b) of the Settlement Agreement gives the defendants the right to terminate the Agreement if "the Court materially changes the terms of the requested . . . Final Approval Order."

Respectfully submitted this the 11th day of February, 2022.

s/ D. Leon Ashford
D. Leon Ashford (ASH001)
One of the Attorneys for Plaintiffs
and the Plaintiff Class

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I electronically filed the foregoing using the AlaFile system, which will send notification of such filing to all counsel of record.

s/ D. Leon Ashford
D. Leon Ashford
One of the Attorneys for Plaintiffs
and the Plaintiff Class

LIST OF EXHIBITS

A. Proposed Final Approval Order

B. Affidavit of co-Class Counsel Bruce J. McKee

EXHIBIT A

PROPOSED FINAL APPROVAL ORDER

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CIVIL ACTION NO.: CV-2002-000408

James St. John, Jr.; Christi Dolbeer; John Scherff; Kimberly Scherff; Darden Bridgeforth and Sons Land Company, an Alabama Company; Hillsboro Gin Company, Inc., an Alabama Corporation; Hamilton Farms, an Alabama Partnership; G. T. Hamilton, individually and as a partner of Hamilton Farms; Mark Hamilton, individually and as a partner of Hamilton Farms; Lisha Felkins, individually and as a partner of Hamilton Farms; Kathleen Hamilton; Michael Letson; Don Alexander; and Reda Alexander,

Plaintiffs,

vs.

3M Company; Daikin America, Inc.; Dyneon, LLC; Synagro WWT, Inc.; Synagro South, LLC; Toray Fluorofibers (America), Inc.; BFI Waste Systems of Alabama, LLC; BFI Waste Systems of North America, LLC; The City of Decatur, Alabama; and Morgan County, Alabama,

Defendants.

FINAL APPROVAL ORDER

Before the Court is the Motion for Final Approval of the class-action settlement filed by the Class Representatives, which has not been opposed by the defendants. The Class Representatives have moved the Court, pursuant to Alabama Rule of Civil Procedure 23, for a final order: (1) finally certifying the Settlement Class and Subclass pursuant to Rule 23(a) and Rule 23(b)(2) and 23(b)(3); and (2) granting final approval of the proposed Settlement

Agreement as fair, reasonable, and adequate under Rule 23(e). In addition, Class Counsel have moved for approval of attorneys' fees, costs, and expenses, to be paid by the defendants. The parties' Class Settlement Agreement ("Settlement Agreement"), which was previously filed with the Court as Exhibit A to the Plaintiffs' Motion for Preliminary Approval of Class-Action Settlement, sets forth the terms and conditions for the settlement of the class claims, and was preliminarily approved by the Court on December 17, 2021. The Court also, on December 17, 2021, pursuant to Rule 23(b)(2) and (3), certified the Settlement Class and Subclass.

WHEREAS, the Court has considered the Settlement Agreement, accompanying exhibits, and other documents;

WHEREAS, the Court held a Fairness Hearing on April 21, 2022, with the parties present through Counsel, heard presentations by counsel concerning the settlement, certification of the Settlement Class, the implementation of the Notice Plan, and Class Counsels' Motion for Attorney Fees, Costs, and Expenses; and

WHEREAS, the Court considered objections filed with the Court and the arguments of objectors.

IT IS HEREBY ORDERED THAT:

1. The Court hereby finds that final certification, for purposes of settlement, of this action as a Rule 23(b)(2) and (3) class action is appropriate.

2. The Court, pursuant to Rule 23(b)(2) and (b)(3), finally certifies, for purposes of settlement, a Settlement Class, defined, as follows:

> All Persons that have owned, occupied, otherwise had an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in, resided at, maintained a business of any kind at, worked at, or

> recreated on any real property (including the Tennessee River, its tributaries, and all other bodies of water) located in Morgan County, Lawrence County, Franklin County, Limestone County, Colbert County, or Lauderdale County, Alabama, at any time between April 21, 2003, and the date of the Preliminary Approval Order, excluding the Defendants, counsel for the Parties, and the Court.

3. Further, pursuant to Rule 23(b)(3), the Court finally certifies, for purposes of settlement, a Settlement Subclass (the "Sludge Application Subclass"), defined, as follows:

> All Class Members that, as of the date of the Preliminary Approval Order, own, occupy, or have an ownership or possessory interest (including through a lease, easement, or joint or common tenancy) in real property in Morgan County, Lawrence County, Franklin County, or Limestone County, Alabama , on which biosolids containing PFAS compounds were applied at any time.

4. The Court finds that each of the elements of Rule 23(a) have been met. The four listed Rule 23(a) factors in Ala. R. Civ. P. 23(a) are: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Additionally, the majority-view American case law identifies a fifth introductory factor: the existence of a definable, ascertainable class. In this case, class membership can be proven by purely objective criteria, so the requirement of ascertainability is easily met. If challenged, a purported class member could produce objective evidence of an ownership or possessory interest in land, and/or evidence that they resided in, did business in, or recreated in one or more of the six counties since 2003. Membership in the Subclass can be proven by Synagro's sludge application records and objective real estate deeds or leases.

5. The Class is so numerous that joinder of all members is impracticable. The current 2021 population of the six counties exceeds 400,000, and the defined Class is larger than just the

current population. All Subclass members, by definition, are members of the overall Class. Even if the law required a separate numerosity examination relative to the Subclass, the Court finds that the membership of the Subclass probably exceeds 50, which is legally sufficient to meet the numerosity requirement of Rule 23(a)(1).

6. For settlement purposes, the Court finds that there are multiple and significant common questions of law or fact. Questions common to the Class and all defendants involve whether the defendants had a duty to exercise reasonable care in their use and disposable of PFAS chemicals, and, if so, whether reasonable care was, in fact, exercised. There are several common factual issues, such as: the factual history of the use, development, and discharge of PFAS chemicals which were manufactured or utilized by the defendants in Decatur; when the defendants knew or should have known of PFAS's potential for harming the environment; and the extent of the contamination of the defendants' facilities in Decatur, and the extent of the migration of that contamination into the Tennessee River. And, as to remedies, the specific items of remediation would be common to all Class Members. As to the Sludge Application Subclass, the questions of law and fact appear to be similar for each Subclass Member. Unlike the Class as a whole, the approximately 5000 acres in the Subclass definition had high volumes of PFAS-laced sludge directly applied to the land. The alleged damages to the 5000 acres are similar.

7. For settlement purposes, the Court finds that the claims of the Class Representatives and the Subclass Representative are typical of their Class and Subclass. The Class Representatives and Subclass Representative are landowners in the subject counties and they and their legal claims against these defendants are not different from, or antagonistic to, any other absent Class Member or Subclass Member.

8. The court finds that the Class Representatives and Subclass Representative have fairly and adequately represented their Class and Subclass. The Representatives are long-time landowners and residents of counties within the Class definition (and Mr. Hamilton owns a substantial portion of the 5000 acres within the Subclass definition). They are important and reputable members of their local communities and they have demonstrated an interest in environmental concerns regarding PFAS.

9. Further in regard to Rule 23(a)(4), the Court finds that Class Counsel have adequately represented the Class and Subclass. Class Counsel are members of established Alabama law firms with good reputations for ethics and competency, and with deep experience in class-action and mass-tort lawsuits. Their devotion to this litigation, and their advancing of considerable litigation expenses, for nearly twenty years is further evidence of Counsel's adequacy.

10. As to the injunctive relief provided in the Settlement Agreement, the Court grants certification, for settlement purposes, of a Class pursuant to Ala. R. Civ. P. 23(b)(2) ("the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"). In their uses and releases of PFAS over a range of years, the defendants did not single out specific residents of the six counties. Thus, the defendants' acted in ways uniform as to the Class. Their conduct is subject to "appropriate final injunctive relief" pursuant to this settlement and the allegations in the complaint. The injunctive relief for particular defined sites will be uniform and will benefit the Class in a uniform manner, and the utilization of Rule 23(b)(2) will prevent the defendants from potentially being subjected to multiple lawsuits that might result in logically-inconsistent injunctive remedies.

11. In addition to certification pursuant to Rule 23(b)(2), the Court also certifies this same Class under Ala. R. Civ. P. 23(b)(3) for settlement purposes. The practice of certifying a class under both (b)(2) and (b)(3) is often referenced as certifying a "hybrid class action." In 2 William B. Rubenstein, Newberg on Class Actions § 4:38, pp. 159-66 (5th ed. 2012), Prof. Rubenstein discusses hybrid class actions and says they are "the most attractive of the alternatives" when a primarily-injunctive class also contains some elements of money-damages claims. *Id*. at p. 161. In this case, as to money-damage claims being released, (b)(3) notice was provided to the Class, and Class Members were provided the right to opt and to preserve their right to litigate their individual money- damage claims related to PFAS.

12. "Rule 23(b)(3) lists two requirements for class actions: (1) common questions predominate, and (2) the class action is superior to other methods. It also lists four factors (not intended to be exhaustive) to be analyzed: (1) individual interest in controlling litigation, (2) other ongoing litigation, (3) desirability of concentrating litigation in this forum, and (4) the manageability of the potential class action. The paradigm for a Rule 23(b)(3) class is when there are a large number of small dollar claims. . . ." 1 Gregory C. Cook, Alabama Rules of Civil Procedure Annotated § 23.10, p. 735 (5th ed. 2018). In this situation, the Court finds, for settlement purposes, that the questions of law or fact common to the Class (such as the examples mentioned in paragraph 6, above) predominate over any questions affecting individual members and that a class action is superior to other available methods to fairly and efficiently adjudicate this controversy. The defendants' conduct in connection to PFAS was directed generally in the same manner toward each Class Member. Individual questions do not predominate. Class Members who believe that they have been impacted directly and differently by PFAS had the

right to opt out and to preserve their individual money-damage claims. In this situation, a class is superior because individual claims would have to litigate identical facts and legal issues, over and over. The actions of the defendants were uniform to the Class. Judicial economy certainly argues for concentrating the PFAS litigation in Morgan County, where the PFAS originated. And, in the context of a proposed settlement, the manageability factor is a necessary or relevant factor. The Rule 23(b)(3) factors easily fit the Subclass claims: the 5000 acres were affected in similar ways, and individual lawsuits would involve repetitive presentations of facts, law, and remedies or damages.

13. The Rule 23 standards for certification of a hybrid Rule 23(b)(2) and (b)(3) Class have been shown to exist for settlement purposes. And, the Rule 23(b)(3) standards also support certification of the Sludge Application Subclass for settlement purposes.

14. The Court will now address the factors that support approval of the proposed settlement as being fair, reasonable, and adequate. The Court has reviewed the Settlement Agreement and approves its terms. The Court finds that the Settlement Agreement is the product of informed, arm's-length negotiation by counsel and is fair, just, reasonable, valid and adequate, notwithstanding the objections that were raised at the Fairness Hearing.

15. Factors for courts to consider in deciding whether a class action settlement is fair, reasonable, and adequate include: (1) likelihood of success at trial; (2) range of possible recovery; (3) range of possible recovery at which settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) opposition to settlement; (6) stage of proceedings at which settlement was achieved; (7) the financial ability of the defendant to withstand a greater judgment; and (8) whether proper notice is given. *See Adams v. Robertson*,

676 So. 2d 1265, 1273 (Ala. 1995).

16. The likelihood of success at trial for either party was uncertain and permeated by high levels of risk, difficulty, and expense of further litigation. Defendants have opposed and would continue to vigorously oppose all of plaintiffs' claims through motion practice, trial, and appeal. Also, there is the risk that the Court could refuse to certify a contested class or certify a narrower class, if contested. Defendants would have opposed a motion to certify a contested class, and would have appealed any contested certification. It is by no means certain or probable that plaintiffs would have succeeded at a contested trial on their pleaded claims of negligence/ wantonness, trespass, and nuisance. And, a finding of liability might have resulted in only nominal injunctive relief or nominal damages. For instance, in general, the measure of damages is diminution of the real property's market value, and evidence of diminution would have been very difficult to procure and the Court specifically notes the testimony from Class Counsel regarding the lack of such evidence. Further, the evidence is overwhelming that the injunctive remedies needed at these sites is complex and varied. The proposed process for finding the right remedy for each site is far preferable for the class and the public to the uncertain outcome for possible remedies for multiple sites in a contested trial.

17. The Court agrees with plaintiffs' assertions that the range of remedies provided in the Settlement Agreement are near the upper end of remedies that could have been won after a successful trial. The third *Adams* factor (the Point on or below the Range of Possible Recovery at which the Settlement is Fair, Adequate, and Reasonable) substantially overlaps the first two (likelihood of success at trial, and range of possible recovery). Class Counsel and their experts opine that the remedies they would have sought at a contested trial are already substantially

provided for in the Settlement Agreement.

18. Consideration of the anticipated complexity, expense, and duration of the litigation weighs very heavily on the side of approval of the Settlement Agreement. A trial of this class action (assuming certification was won and affirmed on appeal) would have consumed enormous judicial resources and would have cost the parties an enormous amount of money. Such time and expense would have been wasteful for all, especially because the Settlement Agreement provides much of what plaintiffs would have sought as remedies at a contested trial.

19. The substance and amount of opposition to the Settlement Agreement has not been significant. The Court has considered and weighed each objection and finds that the criticisms of the Settlement Agreement do not outweigh the value to the Class of receiving now, voluntarily and without contested certification and trial processes, the considerable benefits provided to the Class by the Settlement Agreement. The Court has especially considered the fact that the City of Decatur, Morgan County, and Tennessee Riverkeeper strongly endorse the settlement.

20. Consideration of the stage of the proceedings at which the settlement was achieved also weighs heavily in favor of judicial approval of the settlement. In this case, counsel and experts for all parties have continuously investigated and analyzed the facts and the law of this case for over 19 years, through numerous separate phases of mediation. This case is clearly one which has reached the proper stage for resolution. During the joint meetings of experts, where plaintiff and defense experts freely communicated directly with one another, Class Counsel represent that they learned more facts and opinions than years of contested formal discovery would have probably disclosed. Given the maturity of this case, and the qualifications of all of the lawyers and scientific experts involved, this case is primed for a reasonable and fair

settlement.

21. The Court finds that this proposed settlement is free from fraud or collusion. This settlement was achieved in good faith and after several years of multiple, mediator-led, arms-length negotiations. The involvement of former Alabama Supreme Court Justice Bernard Harwood as mediator adds even more evidence to the finding these negotiations were conducted in good faith and at arm's length.

22. The Court agrees with Class Counsel that the factor of the financial ability of the defendants to withstand a greater judgment is a neutral or irrelevant factor in this case. Once the Court determines that the relief offered in the settlement is near the best the plaintiffs could probably have achieved after a successful contested trial, the fact that some defendants might have been financially able to spend even more money on remediation projects is not a ground for refusing to approve a settlement that is otherwise fair, reasonable, and adequate.

23. The Court finds that the proposed injunctive relief will benefit the Class Members. Based on the Court's final analysis, the class benefits, and the class release, represent a reasonable compromise of the relief sought by the Class Members through their Rule 23 class claims against the Defendants. The Court specifically notes that the proposed *St. John* Class covers all injunctive claims, all property-damage-based money-damage claims, and certain money damage claims related to the presence of PFAS; however, the Settlement Agreement expressly preserves claims for "all manifest personal bodily injury" "without respect to the date on which said personal bodily injury became or becomes manifest." Settlement Agreement, §§ 4.2 & 4.3. Class members who believe that they can prove some quantifiable legal damage to their property from the presence of PFAS in the environment have the right to opt out of this

settlement and to pursue their individual money-damage claims, although their injunctive relief claims are released. Settlement Agreement § 4.4. The Court notes that Class Counsel have thoroughly investigated, for 20 years (spending around a million dollars in expert fees), and not located additional PFAS sites beyond those addressed in this Settlement. Further, Class Counsel have conducted extensive investigation and failed to turn up any evidence of diminution of real-property values in the six counties. To the contrary, the prices of real estate and farmland are up significantly in north Alabama. The Defendants likewise insisted upon negotiating this action and the much later filed *Riverkeeper* action (*Tennessee Riverkeeper, Inc. v. 3M Company, et al.*, No. 5:16-cv-01029-AKK (N.D. Ala.)) together, as a single-package settlement, and insisted upon resolving the claims with the City of Decatur and Morgan County as a condition to a *St. John* Settlement, as well. In addition, PFAS in a person's blood, by itself, is not a compensable injury; Alabama tort law requires that plaintiffs demonstrate a manifest present illness, injury, or disease. Given this law and facts, Plaintiffs represent that they have accepted this scope of release (1) because of the weakness of any such damages, (2) because defendants are agreeing to spend more than $300 million in injunctive relief and give the Class almost all of the injunctive relief that a successful class trial would have likely provided, and (3) because defendants made it very plain that they would not engage in ongoing remediation and would not enter a settlement for future expenditures without this release. The Court finds that the compromise reflected by this release is fair and reasonable and the Court further notes that any class member can opt out of the money damage release if they disagree or have unique facts.

24. The Court finds that the Class Settlement, including the proposed plan of distribution of settlement proceeds to Subclass Members, is fair, adequate, and reasonable.

25. The Court finds that the Class Notice and Notice Plan were appropriate under the circumstances and were reasonably calculated to inform Class Members of the proposed Settlement, afforded Class Members an opportunity to opt out or present their objections to the Settlement, and complied in all respects with the requirements of Rule 23 and applicable due process requirements.

26. The Court finds that Class Counsel and the Class Administrator implemented the Notice Plan in compliance with this Court's Preliminary Approval Order.

27. The Court has considered the due-process rights of absent Class Members and finds that such rights are adequately protected.

28. Under the Settlement Agreement, e.g., as defined in sections 1.41, 1.42, and 1.43, each of the Releasing Parties has released, waived, compromised, settled, and discharged all Released Claims.

29. This Order giving final court-approval to this class-action settlement incorporates by reference all of the terms, provisions, and conditions set forth in the Settlement Agreement and adopts all defined terms as set forth therein.

30. The parties are directed to consummate this class-action settlement in accordance with all applicable terms and provisions of the Settlement Agreement. Without further order of this Court, the parties may mutually agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

31. Only those Sludge Application Subclass Members who submit an appropriate, valid, and timely claim form shall be entitled to participate in the Subclass Settlement and receive a distribution from the Sludge Application Settlement Fund.

32. The defendants have denied wrongdoing and liability in connection with the allegations in this Class Action. Nothing in this Order or in the Settlement Agreement constitutes an admission by the defendants or a ruling by the Court as to the merits of the allegations made in this Class Action, the validity or invalidity of any defenses that could be or have been asserted by the defendants, or the suitability of this case for class certification for litigation purposes.

33. All further litigation by the plaintiffs and participating Class Members with respect to the Released Claims is hereby enjoined.

34. The Court reserves exclusive and continuing jurisdiction over the interpretation, performance, implementation, enforcement, and administration of the Settlement Agreement, and the Court's orders in this Action.

35. Class Counsel's Motion for Attorneys' Fees, Costs, and Expenses is hereby granted, and Class Counsel are awarded $_____ as a lump sum for all fees, costs, and expenses, per the Settlement Agreement and the agreement of the parties. The defendants are responsible for making this payment within 14 days of the "Effective Date," as defined in section 1.21 of the Settlement Agreement. The defendants have allocated their respective shares of this payment in a separate agreement among the defendants. Pursuant to section 3.7 of the Settlement Agreement, 3M will receive a credit for the $6,000,000 it earlier advanced to Class Counsel.

36. "Alabama recognizes an equitable exception to the common-law rule of not awarding attorney's fees. Two doctrines - the 'common fund' doctrine and the 'common benefit' - have been recognized as applications of the exception. . . . The common-benefit doctrine allows a court to require the defendant to pay attorney's fees, regardless of whether a fund has been generated by the litigation, when the 'plaintiff's attorneys render a public service or there is a

benefit to the general public in addition to serving the interests of the plaintiff.'" Jenelle Mims Marsh, Alabama Law of Damages § 9:5 (6th ed.) (Feb. 2021 update). *Brown v. State*, 565 So. 2d 585, 591-92 (Ala. 1990) (a contested class action, not a settlement, which challenged the validity of trying citizens on unsworn and unverified traffic ticket complaints), held that the lack of "a monetary recovery does not preclude an award of attorney fees." Because the *Brown* "litigation clearly resulted in a benefit to the general public," the Supreme Court directed the trial court to make an award of attorneys' fees, giving consideration to this non-exclusive list of factors: "(1) The measure of success achieved; (2) The nature and value of the subject-matter of the attorney's employment, including the novelty and difficulty of the questions presented; (3) The learning, skill, and labor requisite to perform the legal service properly; (4) The time consumed and reasonable expenses incurred by the attorney; (5) The professional experience, reputation and ability of the attorney; (6) The weight of his responsibility; (7) The fee arrangement between attorney and client, including whether a fee was fixed or contingent; (8) The fee customarily charged in the locality for similar legal services and awards in similar cases; (9) The time limitations imposed by the client or by the circumstances; (10) The likelihood that the attorney's employment in this case precluded other employment; (11) The nature and length of the professional relationship with the client; (12) The undesirability of the case; (13) Any non-monetary benefits conferred upon the class in this class action." *Id*. at 592. "This list is not exhaustive and all need not be met when reviewing the reasonableness of attorney's fees." Jenelle Mims Marsh, Alabama Law of Damages § 9:1 (6th ed.) (Feb. 2021 update). On return from remand, in *State v. Brown*, 577 So. 2d 1256 (Ala. 1991), the Supreme Court affirmed the trial court's use of a common-fund, percentage method in a non-pecuniary class-action case. The

trial court found that a reasonable attorneys' fee was 25% of the total of fines paid by the class (around $4.8 million) even though no common fund was created for the class nor was there any monetary recovery for the class. *Union Fid. Life Ins. Co. v. McCurdy*, 781 So. 2d 186, 190 (Ala. 2000) (internal citation and quotation omitted), also approved of the concept of basing attorneys' fees on a percentage of the potential value to the class ($4.5 million) in a non-monetary-recovery class action: "We do not find the existence of a separate fund determinative of the relevance of the common-fund approach. . . . Courts have relied on common-fund principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund."

37. The Court finds that application of the *Brown* factors to this case supports the award of attorneys' fees, costs, and expenses in the amount stated above because, *inter alia*:

(1) The measure of success achieved is very high, with probably over $300 million worth of environmental investigation and remediation benefitting all of north Alabama;

(2) The novelty and difficulty of the questions presented in this case were also at a high level, with both scientific and legal issues of almost unique, first-impression qualities;

(3) The learning, skill, and labor requisite to perform these legal services properly required lawyers of great learning, ability, and tenacity;

(4) The time consumed, over 20 years, was enormous, and plaintiffs' counsel expended around one-million dollars just on scientific consulting experts;

(5) The professional experiences, reputations, and abilities of the plaintiffs' attorneys are of the highest qualities;

(6) The weight of responsibility on plaintiffs' counsel was high because the

environmental health of the Tennessee River and the surrounding counties is at stake in this litigation;

(7) The fee arrangement is not relevant to this class-action attorneys' fee issue;

(8) To the extent it might be relevant, the Court is aware that contingency-fee cases in north Alabama are usually handled on a 33% - 45% basis, and that the best lawyers can bill (or be court-awarded) over $800 per hour in complex, high-risk cases;

(9) The time limitations imposed by this litigation on Class Counsel has been great - evidenced, in part, by 20 years of litigation and near non-stop mediation processes for the past six years;

(10) The likelihood that the attorneys' employment in this case precluded other profitable employment is very high;

(11) The nature and length of the professional relationship with the client is probably not a relevant factor in this case, but the length of the relationship with this action (20 years) is relevant and supportive of the award;

(12) The undesirability of this case was high because of uncertain science and uncertain legal principles, and the fact that many years of hard-fought litigation was probable;

(13) "Any non-monetary benefits conferred upon the class in this class action" is the most relevant factor here. This factor, by itself, adequately supports the award. More than $300 million worth of environmental investigation and remediation will benefit the Class. Elements of the Settlement create the potential that some future projects will place uncapped monetary obligations on some of the defendants. Still, using only $300 million as a conservative figure, the fees and expenses awarded herein amount to no more than 16% of the value of benefits conferred

upon the Class, which is 9% less than the Supreme Court affirmed in *Brown*.

38. The Court finds that this Settlement was the product of arm's-length negotiations. The Court finds that attorneys' fees were not negotiated until after close to 100% of the remedies had been agreed upon, and that fee negotiations were also at arm's-length and hotly contested. Neither the merits of the Settlement nor that amount of fees and expenses were affected by collusion. Former Alabama Supreme Court Justice Bernard Harwood served as the mediator in this case. This Court finds that what the Supreme Court wrote in *Perdue v. Green*, 127 So. 3d 343, 401-02 (Ala. 2012), is applicable to this case, as well: "[C]lass counsel's fee was negotiated only after class-based relief had already been resolved. Furthermore, at the hearing on the attorney-fee award, the deposition of the mediator in this case, retired Associate Justice Bernard Harwood, was entered into evidence 'for the limited purposes to show that it was an arm length's negotiation.' It stated: '[Counsel:] . . . Was that issue as to attorney's fees also negotiated at an arm's length good faith manner during the course of this mediation? [Mediator:] Very much so. [Counsel:] Would it be fair to say that that issue was hotly debated at times? [Mediator:] It was hotly debated.' We see nothing indicating that the trial court exceeded its discretion in failing to find that a conflict of interest affected the attorney-fee award in this case. . . ."

39. This Action is DISMISSED WITH PREJUDICE.

DONE this the ___ day of _____, 2022.

_____
Hon. Glenn Thompson
SPECIAL CIRCUIT JUDGE

EXHIBIT B

AFFIDAVIT OF CO-CLASS COUNSEL BRUCE J. MCKEE

IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA

CIVIL ACTION NO.: CV 2002 000408

James St. John, Jr.; Christi Dolbeer; John Scherff; Kimberly Scherff; Darden Bridgeforth and Sons Land Company, an Alabama Company; Hillsboro Gin Company, Inc., an Alabama Corporation; Hamilton Farms, an Alabama Partnership; G. T. Hamilton, individually and as a partner of Hamilton Farms; Mark Hamilton, individually and as a partner of Hamilton Farms; Lisha Felkins, individually and as a partner of Hamilton Farms; Kathleen Hamilton; Michael Letson; Don Alexander; and Reda Alexander,

Plaintiffs,

vs.

3M Company; Daikin America, Inc.; Dyneon, LLC; Synagro WWT, Inc.; Synagro South, LLC; Toray Fluorofibers (America), Inc.; BFI Waste Systems of Alabama, LLC; BFI Waste Systems of North America, LLC; The City of Decatur, Alabama; Morgan County', Alabama,

Defendants.

AFFIDAVIT OF BRUCE J. McKEE

1. My name is Bruce J. McKee and I am a partner in the Birmingham, Alabama, law firm of Hare, Wynn, Newell & Newton, LLP.

2. I am one of the Class Counsel in this *St. John* case. I have worked closely with lead plaintiffs' attorney, Leon Ashford, on this case since 2002.

3. I am the primary liaison between Class Counsel and the Class Administrator, KCC

Class Action Services, LLC ("KCC").

4. Since around December 1, 2021, I have communicated by telephone and/or email with staff at KCC on an almost-daily basis.

5. As to the events detailed below, I either have personal knowledge, or these facts have been verified to me by staff at KCC, orally and in writing.

6. On January 7, 2022, KCC mailed 173,118 Short-Form Notices via USPS postcards.

7. Also on January 7, 2022, KCC sent the Short-Form Notice via email blast to 230,469 email addresses.

8. These approximately 400,000 persons and entities are current and past owners of real property in the six counties within the Class definition.

9. If emails are undelivered, postcards are mailed. If postcards are returned undelivered, KCC strives to find current, valid new addresses and re-mails the Notice.

10. On January 14, 2022, KCC mailed the Long-Form Notice and a customized cover letter with a customized claim form to approximately 50 persons or entities identified by Class Counsel's research as being likely Members of the Sludge Application Subclass.

11. Several Subclass claim forms have been received by KCC and are being processed.

12. No written objections have yet been received; but, two opt-out notices have been filed, as of February 9, 2022.

13. Shortly prior to January 7, 2022, the settlement website operated by KCC went live. The internet address (URL, or Uniform Resource Locator) is: www.StJohnSettlement.com. Class Counsel and KCC are constantly monitoring the website, and several edits and additions have been made in further effort to make the website as informative and user-friendly as possible. As

of February 9, 2022, 10,056 unique visitors have viewed the website.

14. The website contains FAQs, Frequently Asked Questions. Under the tab for Case Documents, Class Members can read and download documents, including: the Complaint; the *St. John* Settlement Agreement with exhibits; Plaintiffs' Motion for Preliminary Approval with exhibits; the *Tennessee Riverkeeper* Settlement Agreement; the Settlement Agreement between 3M and the City of Decatur and Morgan County; Internet Links to the City of Decatur's websites; the Preliminary Approval Order; the Motion for Attorneys' Fees, Costs, and Expenses; the Long-Form Notice; Subclass claim forms; etc.

15. Since January 7, 2022, KCC has operated a toll-free telephone help-line [1-888-890-6718] for Class Members. This help line operates as an IVR telephone system. As of February 9, 2022, 2308 callers have phoned the help-line.

16. On January 7, 2022, KCC sent a press release about the *St. John* Settlement to news outlets. That press release can be viewed at: www.prnewswire.com/news-releases/if-you-owned-occupied-or-used-land-or-bodies-of-water-in-morgan-lawrence-franklin-limestone-colbert-or-lauderdale-counties-you-will-be-affected-by-a-class-action-settlement-301452900.html.

17. The Class Notice was published in the Decatur, Huntsville, and Florence newspapers on January 11, 2022, and in the Moulton newspaper on January 13, 2022.

18. Paragraph 15 of the Class Notice Plan (Exhibit 11 to the Settlement Agreement, Document 662) says: "KCC will also cause approximately 2.55 million digital impressions to be distributed via various websites and the social media platform, Facebook. The impressions will be targeted to reach adults located in Colbert, Franklin, Lauderdale, Lawrence, Limestone, and Morgan counties. The notices will appear on both desktop and mobile devices, including tablets

and smartphones, in display and native ad formats. All digital media notices will include an embedded link to the case website." As of February 6, 2022, KCC reported that 2,647,844 internet impressions had been achieved.

19. Since notices went out on January 7, 2022, Class Counsel have received less than 50 telephone calls from persons who received the notice and had questions. Those questions were answered. None of the Class-Member callers voiced any objections about the terms of the Settlement.

Bruce J. McKee

STATE OF ALABAMA)
JEFFERSON COUNTY)

Sworn to me and subscribed in my presence this 10th day of February, 2022.

Kristi G. Roan
Notary Public

My Commission Expires: 12/31/22

(Seal or Stamp)

KRISTI G. ROAN
Notary Public, Alabama State At Large
My Commission Expires 12/31/22