At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Rensselaer, in the City of Troy, New York on the 20th day of April 2018

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

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

Plaintiffs,

CLASS CERTIFICATION
DECISION AND ORDER
Index No. 253835

- against -

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

Defendant.

APPEARANCES:

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POWERS & SANTOLA, LLP
WEITZ & LUXENBERG, PC
WILLIAMS CUKER BEREZOFSKY, LLC
CHAFFIN LUHANA, LLP
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Attorneys for the Defendant

McGRATH, PATRICK J., J.S.C.

This matter comes before the Court on Plaintiffs' motion for class certification, to appoint class representatives, and to appoint class counsel. CPLR 901, 902. Defendant opposes the motion and plaintiffs have submitted a reply.

Background

This action stems from the contamination of groundwater and soil in the Town of Petersburgh, New York with perfluorooctanoic acid (hereinafter "PFOA"). Plaintiffs allege that defendant was responsible for this contamination, which came from its manufacturing facility operated in Petersburgh. Between 1961 and the present, Defendant Tonoga Inc., d/b/a Taconic, has owned and operated a facility in Petersburgh, New York, located on Coon Brook Road. Defendant and its predecessors have manufactured fabrics coated with polytetrafluoroethylene (PTFE, also referred to by the tradename Teflon) at its Petersburgh facility since it opened. This process involves mixing a PTFE dispersion (resin) with water supplied by onsite wells and additives such as ammonia, formic acid, surfactants and pigments. The PTFE mixture is then pumped into long, shallow dip pans at the base of multiple multi-story surface coating ovens. Fiberglass cloth (and sometimes other fabric material) is pulled through the PTFE mixture, dispersing the PTFE onto the cloth. It is then pulled vertically through the surface coating ovens where the PTFE is dried, baked and finally sintered onto the fabric. This process is then repeated multiple times to place multiple coats of PTFE on the fabric to produce the final product.

Through at least 2013, Taconic purchased PTFE dispersions from DuPont and other manufacturers containing approximately 1% ammonium perfluorooctanoate (APFO) as a dispersing agent. APFO is a manmade chemical that does not occur naturally in the environment and is used as a surfactant in PTFE dispersions, meaning it helps to evenly coat the PTFE dispersion onto the fabric where it is then heated to affix the dispersion to the surface of the fabric. APFO is largely vaporized during the heating and sintering process and then released into the air. Once released through the stacks and into the environment, APFO vapors cool and condense to form fumes of fine particulate matter that is then carried by the wind until it is washed out of the air by precipitation (wet deposition) or settles down by gravity (dry deposition). After APFO particulate matter deposits into the soil it dissolves over time into water as rainfall or other precipitation penetrates the soil. As APFO dissolves into water it dissociates to form perflurooctanoate (PFO-) and ammonium ion (NH4+). Under acidic conditions, PFO- is protonated to form perflurooctanoic acid, or PFOA. Once formed in the environment, PFOA is highly resistant to further degradation and is, therefore, highly environmentally persistent.

Plaintiffs allege that defendant released PFOA, which carried through the air and deposited into the soil, which then migrated to the groundwater. Additionally, but to a lesser extent, that defendant directly contaminated the groundwater beneath its facility by the discharge of waste containing PFOA.

The Petersburgh Public Water System serves 79 residences and 239 residents. Its main water source is Well #2, but it has two other wells that are available to supply water to the system. In February of 2016, after the discovery of PFOA in the drinking water of nearby Hoosick Falls, the state disclosed that the Petersburgh Public Water System was also contaminated with PFOA. All three Petersburgh wells tested positive, with Well #2 measuring PFOA as high as 140 parts per trillion ("ppt"). After the Petersburgh Public Water System was found to be contaminated, Rensselaer County officials began testing private drinking water wells near the Taconic facility and found that many were also contaminated with PFOA. Testing continued with over 200 private wells located within a seven mile radius of Taconic's Petersburgh facility testing positive for PFOA contamination.

In 2004, Defendant tested the groundwater underlying its plant and discovered it was contaminated with high amounts of PFOA. In 2006, Defendant installed carbon filtration systems on its wells to reduce the amount of PFOA in the water used at its facility and began providing bottled water to employees and residents living in homes owned by Defendant Taconic located immediately adjacent to its manufacturing facility. Defendant did not notify the Town or Town residents that it had discovered high amounts of PFOA in wells on and around its facility or make any attempt to test the water of any properties other than the handful that it owned.

On November 10, 2016, defendant entered into a Consent Order with the New York State Department of Environmental Conservation ("DEC") that required it to provide a granulated carbon filtration system for the Petersburgh Public Water System and point-of-entry treatment (POET) granulated carbon systems for contaminated private wells to reduce the levels of PFOA in the drinking water. Until granulated carbon systems (GAC) were installed and proven to be functioning, residents, including Plaintiffs, were instructed not to drink or cook with the water and to avoid exposures during showering to the extent possible.

The New York State Department of Health ("DOH") began offering blood testing for PFOA in Petersburgh in June and July of 2016. Once humans ingest PFOA through drinking contaminated water, PFOA binds to proteins in blood serum and bioaccumulates inside the body. While PFOA is typically detected in drinking water in units of ng/L (nanograms per liter = parts per trillion (ppt)), it is typically found in the blood serum of those exposed to PFOA-contaminated drinking water in ug/L (micrograms per liter = parts per billion (ppb)). Some 477 Petersburgh residents participated in the blood testing with over 400 of those tested had PFOA blood levels above the 2013-14 U.S. general population geometric mean of 1.86 ug/L (parts per billion). Plaintiffs allege that the accumulation of PFOA in the body has been associated in the medical and scientific literature with increased incidence of cancerous and non-cancerous conditions in humans and animals.

Procedural History

Plaintiffs Burdick and Marpe, individually and as parent and natural guardian of E.B., an infant, and G.Y., an infant, commenced this action by filing a proposed class action complaint on August 8, 2016. Plaintiffs Connie and Edward Plouffe, and Frank and Suzanne Seymour filed a

second class action complaint, asserting similar claims, on September 22, 2016. Defendant thereafter moved to dismiss each of these complaints. In each case, this Court denied Defendant's motion to dismiss Plaintiffs' negligence, trespass, and strict liability claims, and also denied Defendant's motion to dismiss nuisance claims alleged on behalf of plaintiffs with privately owned wells. This Court granted Defendant's motion to dismiss nuisance claims alleged on behalf of plaintiffs who received their drinking water from the Petersburgh Public Water System.

The Court then granted Plaintiffs' motion to consolidate the cases. Plaintiffs filed a consolidated Second Amended Complaint on September 26, 2017, which named Plaintiffs who appear herein. Defendant answered this pleading on October 23, 2017. Although CPLR 902 requires a party to move for class certification within sixty days after Defendant's service of a responsive pleading, the parties jointly requested that Plaintiffs' motion would be filed on February 5, 2018, and by order dated November 13, 2017, the Court granted that request, and ordered Defendant to file an opposition to Plaintiffs' motion on or before March 30, 2018.

The Proposed Classes and Proposed Class Representatives

Plaintiffs propose four (4) classes that seek damages for injury to person, property and nuisance. The proposed classes, and the plaintiffs who seek to represent those classes, are as follows:

1) Town Water Property Damage Class: All individuals who are or were owners of real property and who obtain or obtained their drinking water from the Town of Petersburgh, New York Public Water System, and who purchased their property on or before February 20, 2016. The proposed class representative is Jay Burdick, who has owned a home supplied with drinking water from the public water system since 1995.

2) Private Well Water Property Damage Class: All individuals who are or were owners of real property within a seven (7) mile radius of defendant's facility in Petersburgh, New York, and who obtain or obtained their drinking water from a privately owned well contaminated with PFOA, and who occupied that property at or around February 2016. The proposed class representatives are plaintiffs Mark Denue, Megan Dunn, Jacqueline Monette, Edward Perrotti-Sousis, Connie Plouffe, Edward Plouffe, and William Sharpe. Each plaintiff owns property within seven (7) miles of the defendant's facility and obtains water from a privately owned well on that property which is contaminated with PFOA.

3) Private Well Nuisance Class: All individuals who are or were owners of real property within a seven (7) mile radius of defendant's facility in Petersburgh, New York, and who obtain or obtained their drinking water from a privately owned well contaminated with PFOA, and who occupied that property at or around February 2016. The proposed class representatives are plaintiffs Mark Denue, Megan Dunn, Jacqueline Monette, Edward Perrotti-Sousis, Connie Plouffe, Edward Plouffe, and William Sharpe. Each plaintiff owns property within seven (7) miles of the defendant's facility and obtains water from a privately owned well on that property which is contaminated with PFOA.

4) PFOA Invasion Injury Class: All individuals who have:

(i) ingested PFOA-contaminated water from the Petersburgh Public Water System or from a contaminated private well located within a seven (7) mile radius of defendant's facility in Petersburgh, New York, and

(ii) who have suffered invasion of their bodies and accumulation of PFOA in their blood as demonstrated by blood serum tests disclosing a PFOA level in their blood above the recognized average background level of 1.86 ug/L.

The proposed class representatives are Mark Denue, Megan Dunn, Emily Marpe as parent and natural guardian of E.B., infant, and G.Y., infant, Jacqueline Monette, Frank Seymour, and William Sharpe. Each plaintiff has had his or her blood tested by the NYSDOH in 2016, and each received test results demonstrating blood serum level well in excess of the recognized average background level of 1.86 ug/L.

CPLR 901

CPLR 901 provides the "[p]rerequisites to a class action":

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

These requirements are otherwise known, respectively, as numerosity, commonality, typicality, adequacy of representation, and superiority.

"Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action." CPLR 902. The party or parties seeking class certification have the burden of establishing compliance with every requirement of both CPLR 901 and 902. DeLuca v Tonawanda Coke Corp., 134 AD3d 1534, 1535 (4th Dept. 2015), lv denied 137 AD3d 1633. The determination whether to certify a class is "vested in the sound discretion of the court. " Askey v Occidental Chem. Corp., 102 AD2d 130, 137 (4th Dept. 1984); *see* Small v Lorillard Tobacco Co., 94 NY2d 43, 52-53 (1999). The class action statute should be liberally construed in favor of the members seeking class certification. Pruitt v Rockefeller Ctr. Props., 167 AD2d 14, 21 (1st Dept. 1991). However, general and conclusory

allegations in the pleadings or affidavits are insufficient to meet such burden. Rallis v City of New York, 3 AD3d 525, 526 (2d Dept 2004).

In determining the propriety of a class action, the question is not whether the plaintiffs will prevail on the merits, but rather whether the requirements of CPLR 901 and 902 have been met. *See* Kindel v Kaufman & Board Homes, Inc., 67 AD2d 938, 200 (2d Dept. 1979) *citing* Eisen v Carlisle & Jacquelin, 417 US 156 (1974); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194, 1195 (2013) ("[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); Spread Enters., Inc. v. First Data Merchant Servs. Corp., 298 F.R.D. 54, 66 (EDNY 2014) *quoting* Kowalski v. YellowPages.com, LLC, No. 10-7318, 2012 U.S. Dist. LEXIS 46539, 2012 WL 1097350, at *12 (SDNY 2012) ("[t]he dispositive question is not whether the plaintiff ... will prevail on the merits, but rather whether the requirements of Rule 23 are met."). In New York, the Courts have held that "it is appropriate to consider whether the claims have merit (Bloom v Cunard Line, 76 AD2d 237, 240), but that this "inquiry is limited" (id.) and such threshold determination is not intended to be a substitute for summary judgment or trial. Kudinov v. Kel-Tech Constr. Inc., 65 AD3d 481, 482 (1st Dept. 2009). Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham. Brandon v Chefetz, 106 AD2d 162, 168 (1st Dept. 1985).

This Court previously issued an Order dated April 14, 2017, denying the bulk of defendant's motion to dismiss for failure to state a cause of action. Inherent in that decision is the finding that plaintiffs have asserted causes of action here which are not a sham.

As with this Court's prior decision on the motion to dismiss, the instant decision will rely on both New York and Federal case law, as "New York's class action statute (CPLR 901-909) has much in common with Federal rule 23 ... [t]he prerequisites to the filing of a New York class action are virtually identical to those contained in rule 23." Matter of Colt Indus. Shareholder Litig., 77 NY2d 185, 194 (1991). State courts often rely upon Federal case law applying Federal Rules of Evidence rule 23 in determining whether a class action may be certified under CPLR article 9. *See* Stern v Carter, 82 AD2d 321 (2d Dept. 1981); Friar v Vanguard Holding Corp., 78 AD2d 83.

Defendant concedes that the proposed classes meet the numerosity requirement of CPLR 901(a)(1) and the adequacy requirement of CPLR 901(a)(4). *See* Defendant's Memorandum of Law, page 34, n.11. The Court has reviewed plaintiffs' submissions and agrees that these requirements are satisfied here, and will therefore focus on Commonality, Typicality and Superiority.

Commonality requires predominance of common questions over individual questions, not identity or unanimity of common questions, among class members. *See* Pludeman v Northern Leasing Sys., Inc., 74 AD3d 420, 423 (1st Dept. 2010); Friar v Vanguard Holding Corp., 78 AD2d 83, 98 (2d Dept. 198) . "The fundamental issue under CPLR 901(a)(2) is whether the proposed class action asserts a common legal grievance, i.e., whether the common issues predominate over or outweigh subordinate issues that pertain to individual members of the class. When such predominance is established, it follows that the economies of time, effort and expense, envisioned by the class action format, may be achieved ... The use of a predominance test was not meant to create any rigid criteria in determining whether a class action should proceed. It is rather a pragmatic,

functional and *ad hoc* test to determine whether the proposed class members are more bound together by a mutual interest in the adjudication of common questions than they are divided by the individual members' interest in matters peculiar to them." 3 Weinstein-Korn-Miller, NY Civ Prac P 901.11; *see also* Friar v Vanguard Holding Corp., 78 AD2d 83, 97 (2d Dept. 1980) (The decision as to whether there are common predominating questions of fact or law should not be determined by any mechanical test, but rather, "whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.").

Commonality requires that one or more significant questions of law or fact are common to the class. Indeed, the commonality requirement "may be satisfied by a single common issue..." Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." Quick v. Shell Oil Co. (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 435, 444 (SDNY 2007). Where the question of law involves "standardized conduct of the defendant . . . a common nucleus of operative fact is typically presented and the commonality requirement . . . is usually met." Balverde v. Lunella Ristorante, Inc., 15 Civ. 5518, 2017 U.S. Dist. LEXIS 59778, at *15 (SDNY 2015) *citing* Lewis v. Alert Ambulette Serv. Corp., No. 11 Civ. 442 (JBW), 2012 WL 170049, at *10 (EDNY Jan. 19, 2012).

The New York Court of Appeals has held that "the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs, stating 'the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class' (Mem of St Consumer Protection Bd at 3, Bill Jacket, L 1975, ch 207)." Borden v 400 E. 55th St. Assoc., L.P., 24 NY3d 382, 399 (2014); *see also* Ferrari v The Natl. Football League, 61 NYS3d 421, 424 (4th Dept. 2017) (quoting Borden, *supra*); Roberts v Ocean Prime, LLC, 148 AD3d 525, 525 (1st Dept. 2017) ("since the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member."); DeLuca v Tonawanda Coke Corp., 134 AD3d 1534, 1536 (4th Dept. 2015) ("plaintiff established that there are common questions of law or fact whether defendants negligently discharged chemicals into the atmosphere and whether such negligent conduct caused decreases in property values or quality of life in the affected area...Although the individual class members may have sustained differing amounts of damages, it is well settled that 'the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class.'"); Menna v Maiden Lane Props., LLC, 2018 NY Slip Op 30721(U) *citing* Borden v 400 E 55th St. Assoc, LP, 105 AD3d 630, 631 (1st Dept. 2013), affd 24 NY3d 382 ("The need to conduct individualized damages inquiries does not obviate the utility of the class mechanism for this action, given the predominant common issues of liability.").

The commonality and typicality requirements tend to merge such that similar considerations inform the analysis for both prerequisites. Wal-Mart Stores, Inc. v. Dukes , 564 US 338, n.5 (2011); Marisol A. by Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1976). The typicality requirement "'is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" Robinson v. Metro-North

Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001) *quoting* Marisol A., *supra* at 376, abrogated on other grounds by Wal-Mart, 131 S. Ct. at 2541, as recognized in Hecht v. United Collection Bureau, Inc., 691 F.3d 218, 2012 WL 3538269, at *4 (2d Cir. 2012); *see* In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009) *quoting* Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993). "[M]inor variations in the fact patterns underlying [the] individual claims" do not preclude a finding of typicality. Robidoux v. Celani, *supra* at 936-37. "The rule is satisfied . . . if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." Marisol A. v. Giuliani, 929 F.Supp. 662, 691 (SDNY 1996), affd, 126 F.3d 372 (2d Cir. 1997); *see* In re Initial Pub. Offering Sec. Litig., 243 F.R.D. 79 (SDNY 2007); Daniels v. City of N.Y., 198 F.R.D. 409 (SDNY 2001). By contrast, "unique defenses" that "threaten to become the focus of the litigation" may preclude such a finding. Loftin v. Bande (In re Flag Telecom Holdings, Ltd. Sec. Litig.), 574 F.3d 29, 40 (2d Cir. 2009) (citation and internal quotation marks omitted).

The predominance criterion and the superiority criterion also overlap since the greater the number of individual issues the less likely superiority can be established. Where common issues predominate, class actions are superior to other available methods for fairly and efficiently adjudicating the controversy. *See, e.g.*, In re Scotts EZ Seed Litig., 304 F.R.D. 397, 416 (SDNY 2015); Ebin v. Kangadis Food, Inc., 297 F.R.D. 561, 568 (SDNY 2014).

The Proposed Property Damage/Nuisance Classes

Commonality/Predominance

In this case, plaintiffs argue that the property damage classes and the nuisance class share numerous questions of law and fact related to Taconic's contamination of the water and air surrounding its facility, including:

1) How APFO/PFOA was used in Defendant's manufacturing processes and was discharged to the groundwater beneath Defendant's manufacturing facility;

2) How APFO/PFOA was used in Defendant's manufacturing processes and emitted from its facility into the air;

3) How Defendant handled and disposed of its process waste;

4) Pollution controls utilized (or not) by Defendant and their efficacy;

5) The fate and transport of APFO/PFOA from Defendant's manufacturing facility into the aquifer that provides the drinking water for the Petersburgh Public Water System and individuals living within a seven mile radius of Defendant's facility;

6) Whether Defendant was negligent, grossly negligent, reckless and/or acted in a willful or wanton manner with respect to its manufacturing operations and pollution controls, resulting in:

   a. Discharge of APFO/PFOA to the air; and

   b. Discharge of APFO/PFOA in wastewater;

7) Whether Defendant was negligent, grossly negligent, reckless and/or acted in a willful or wanton manner with respect to its handling of its waste containing APFO/PFOA;

8) Whether Defendant was negligent, grossly negligent, reckless and/or acted in a willful or wanton manner in failing to warn the public that PFOA had contaminated Taconic's on-site wells and the groundwater in areas directly adjacent to Defendant's facility;

9) Whether Defendant is liable for trespass with respect to its contamination of the groundwater that entered class members' properties, as well as air emissions;

10) Whether Defendant is liable for nuisance with respect to contamination of groundwater that entered Private Well Nuisance Class members' homes; and

11) Whether Defendant's contamination of the groundwater and air has caused Plaintiffs' property values to diminish.

In this case, the central factual basis for all of Plaintiffs' claims is defendant's course of conduct and its knowledge of the potential hazards. All class members allegedly suffered a common injury—soil and water contamination emanating from Taconic's facility that interfered with their use and enjoyment of their property. The common contaminant is PFOA. The method of contamination is uniform. It is defendant's common course of conduct which caused injury to all of the proposed members of the property damage/nuisance classes.

Virtually all of what defendants and its experts assert in opposition consists of disputed merit based arguments. Specifically, defendant claims that plaintiffs will not be able to prove Dr. Jeffrey E. Zabel's expert opinion that property values can decline based on groundwater contamination by up to 10% based on PFOA contamination. Further, defendant questions whether Dr. Zabel will be successful in applying an average percent diminution to the property owned by each member of the proposed classes, and whether this model can adequately account for the unique features of each property. Defendant also argues that the representatives of the property damage cases have "atypical properties" for the Petersburgh Market. Defendant's arguments here are focused on disputed issues of fact and whether plaintiff will ultimately be successful at trial. As noted in Dr. Zabel's reply affidavit, whether environmental contamination has impacted the residential property values of the proposed class members, and to what extent, is an empirical matter. As such, defendant's arguments are premature on a motion for class certification. *See* Selzer v. Board of Educ., 112 FRD 176, 178 (SDNY 1986) ("A motion for class certification is not the occasion for a mini-hearing on the merits.").

As noted above, the court should consider merit-based arguments to the extent they are relevant to the issues of class certification. Defendant's expert Paul Wm. Hare, Certified Professional Geologist and technical lead on defendant's plan for remediation, has testified that the seven mile radius surrounding Defendant's facility included other current and former coating facilities. A common source of contamination is a relevant consideration on the issues of commonality and typicality, and therefore, relevant to the instant motion. However, Mr. Ware offers no facts or opinion to suggest that any of the contamination in this case was attributable to these other facilities. He does not identify any portion of the Class Area that defendant did not contaminate. Nor does

defendant contest the central proposition advanced by Plaintiffs and their expert here[1] – that defendant has caused contamination throughout the entirety of the proposed Class Area.

Defendant also argues that the properties have unique features and different exposure levels, which prevent a finding of predominance. These are questions regarding damages, and as noted *infra*, if the issue of statutory liability is common to the class, the fact that damages may vary for each party does not require that the class action be terminated. *See* Borden v 400 E. 55th St. Assoc., L.P., *supra*; Ferrari v The Natl. Football League, *supra*; Roberts v Ocean Prime, LLC; DeLuca v Tonawanda Coke Corp., *supra*; Menna v Maiden Lane Props., LLC, *supra; see also* Brooks v. Educators Mut. Life Ins. Co., 206 F.R.D. 96, 101 (E.D. Pa. 2002) *citing* Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 191 (3d Cir. 2001) ("the existence of individualized issues in a proposed class action does not per se defeat commonality"). There is ample support for certifying a class action in a contamination case even though there may be individualized issues, including issues of damages. *See* Bano v. Union Carbide Corp., 99 Civ. 11329, 2005 U.S. Dist. LEXIS 32595 (SDNY 2005); LeClercq v. Lockformer Co., 2001 U.S. Dist. LEXIS 2115, 00 C 7164 (HDL), 2001 WL 199840 at *7 (N.D. Ill. Feb. 28, 2001) *citing* Sterling v. Velsicol Chemical Corporation, 855 F.2d 1188, 1197 n10 (6th Cir. 1988) and cases cited therein; Marisol A. v. Giuliani, 929 F. Supp. 662, 691 (SDNY 1996), aff'd, 126 F.3d 372 (2d Cir. 1997); *see also* Bates v. Tenco Svcs., Inc., 132 F.R.D. 160 (D.S.C.1990) (class action was superior because common questions including the cause of the contamination and the defendant's liability predominated over the individual questions of proximate cause and damages for each plaintiff); Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 713 (D.Az.1993) (common issues predominated because factual and legal issues relating to the defendant's liability did not differ between the plaintiffs, and thus certification was appropriate); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D. Ohio 1991) (rejecting defendant's argument that individualized nature of plaintiffs' claims made certification improper and finding that common issues of liability, including nature of the emissions, history of the plant, and the kinds of remedies to address actual and future emissions "overwhelm[ed] individualized issues").

Here, the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members, and thus, the Court finds that common issues predominate.

Two cases on which Defendant places particular reliance require additional discussion. In Osarczuk v. Associated Univs., Inc., 82 AD3d 853, 856-57 (2d Dept. 2011), where the Court found that "questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners, cannot be resolved on a class-wide basis." This Court finds the instant matter factually distinguishable in that the Court in Osarczuk could not find class wide causation. In the instant case, one chemical, emanating from one source has contaminated all of the properties of the proposed class members.

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[1] Plaintiffs' expert, Dr. Hyeong-Moo Shin, testified that all of the private wells, as well as the public water, within the proposed class parameters were contaminated by Defendant. Shin Reply, page 7.

Causation was the issue that prevented class certification in another case relied on by defendant, Evans v. Johnstown, 97 AD2d 1, 2 (3d Dept. 1983), wherein the Court found that "the main issues of whether a specific injury to property or person was caused by the sewerage plant and of the extent of any damages require individualized investigation, proof and determination." In this case, plaintiffs have alleged a specific injury to their property, confirmed by objective testing to confirm the presence of PFOA in their soil, water and wells. Further, defendant does not contest that it was the source of the contamination. Again, while damages may vary between the plaintiffs here, the Court finds that individualized damages inquiries does not obviate the utility of the class mechanism for this action, given the predominant common issues of injury, causation and ultimately, liability. The entire matter of liability can be disposed of and to litigate this issue hundreds of times would be a waste of judicial resources. To deprive a potential group of close to 300 litigants of a practical means to recover would frustrate the intent of the statute. *See* Friar v. Vanguard Holding Corp., 78 AD2d 83, 98-99 (2d Dept. 1980).

Typicality

As noted above, typicality and commonality are closely related "and a finding of one generally compels a finding of the other." Canady v. Allstate Insurance Co., 1997 WL 33384270, at *6 (W.D. Mo. Jun. 19, 1997). Here, the central event in all of the proposed class members' claims is the release of PFOA from defendant's stacks, and to a lesser extent, directly to the ground water beneath its facility, which then contaminated their soil and water. As noted above, plaintiff's claims derive from "the same course of conduct as the class members' claims and [are] based on the same cause of action." Pruitt v Rockefeller Ctr. Props., Inc., 167 AD2d 14, 22 (1st Dept 1991). While the types of properties and the amount of exposure may differ, factual inconsistences between the class are not enough to defeat typicality. Since the named plaintiffs assert claims reflective of those of the members of the putative classes, the factor of typicality is satisfied. *See* Friar v Vanguard Holding Corp., 78 AD2d 83, 99 (2d Dept. 1980).

Superiority

The Court also finds that proceeding as a class action is superior to other methods for adjudication of this case. The proof regarding the history of defendant's facility, its operation, the release of compounds into the air, soil and water, and the impact on the soil and groundwater, possible remedies, etc. would be identical. *See* Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S. Dist. Ohio 1991) ("[i]t would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence"). Repetitive discovery for individual cases on the same core issues would be wasteful for both the courts and the parties.

Practical issues also favor the class action over individual cases. As the Court in Bentley v. Honeywell Int'l, Inc., 223 F.R.D. 471, 488 (S.D. Ohio 2004) noted, "[c]ases like this one, which require sophisticated scientific inquiries and expensive experts to opine about them, cost thousands and sometimes millions of dollars to litigate." With class certification, these complex, expensive inquiries can be resolved once in a single proceeding. Absent class certification, however, plaintiffs would not individually "have damages sufficient to justify such expense, even if they could afford it." Id. The Court therefore finds that class certification for the property damage and the nuisance classes is warranted here.

To the extent class certification should be revisited, the Court retains the discretion to sever certain issues for class determination (CPLR 906 (1)), to divide the class into subclasses (CPLR 906 (2)), to decertify the class (CPLR 902) and to make any appropriate order dealing with procedural matters concerning the conduct of the litigation (CPLR 907 (6)). Additionally, the court may bifurcate the trial into separate phases for liability and damages. *See* LeClercq v. Lockformer, *supra;* Ebert v. General Mills, Inc., 2015 BL 52202, D. Minn., No. 13-3341, 2/27/15; Hammer v. Branstad, 463 N.W.2d 86, 88 (Sup. Ct., Iowa 1990); "Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution", Susan E. Abitanta, SMU Law Review, Vol. 36. In view of the purposes to be served by the class action device and the ability to reverse or revise the status, "the interests of justice require that in a doubtful case...any error, if there is to be one, should be committed in favor of allowing the class action." Friar v Vanguard Holding Co., 78 AD2d 83, 100 (2d Dept 1980) (internal quotation marks and citation omitted).

Bodily Invasion Class

Plaintiffs in this proposed class are symptom-free and exhibit no indications of disease related to PFOA exposure. However, all proposed plaintiffs have PFOA in their blood serum above the national background level. They seek to recover medical monitoring costs. *See* Ayers v. Twp. of Jackson, 106 N.J. 557, 599 (1987) (A claim for medical monitoring "seeks to recover the cost of periodic medical examinations intended to monitor plaintiffs' health and facilitate early diagnosis and treatment of disease caused by plaintiffs' exposure to toxic chemicals.").

Plaintiffs who do not present physical injury or changes are generally unable to obtain class certification for medical monitoring. *See* Lowe v. Philip Morris USA, Inc., 183 P.3d 181 (Or. 2008); Cole v. ASARCO, Inc., 256 F.R.D. 690 (N.D. Okla. 2009); Miranda v. DaCruz, No. 04-2210, 2009 R.I. Super LEXIS 129 (Super. Ct. R.I. Oct. 26, 2009); *compare* Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891 (Mass. 2009) (medical monitoring was a cognizable claim because plaintiffs provided proof of a "hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury."). This Court, agreeing with the rationale as stated in Baker v. St.-Gobain Performance Plastics Corp., 1:16-CV-0917 (Kahn, J.), has previously determined that the instant plaintiffs have stated a cognizable claim for medical monitoring based on a present injury, specifically, blood accumulation of PFOA. *See* Caronia v Philip Morris USA, Inc., 22 NY3d 439 (2013); *compare* Rhodes v. E.I. DuPont De Nemours and Co., 2008 WL 4414720 (S.D.W.Va. 2008).

Defendant's arguments in opposition here also focus on disputed issues of fact, specifically, whether PFOA is actually harmful to humans; the efficacy of administering a medical surveillance program for an entire exposed population as opposed to providing a separate surveillance program to each exposed individual; and whether medical monitoring procedures may be harmful to some class members. The Court finds that these arguments are merit based and factually disputed. As such, they are premature on a motion for class certification.

However, defendant's arguments as to whether issues involving causation and damages predominate over common issues is relevant to the instant issue of class certification. Defendant's expert Dr. Joseph V. Rodericks states that whether individuals are at risk for developing diseases that may be related to PFOA exposure, and the magnitude of that risk, will vary depending on his/her

actual PFOA exposure as well as his/her background risk of disease absent PFOA exposure. He notes that there are many factors that are specific to the individual plaintiffs which cannot be determined on a class wide basis. He states that the analysis of increased disease risk depends on factors such as the age and sex of the individual, body weight, smoking habits, disease status, nutritional status, obesity and alcohol consumption. He states that it is not scientifically possible to assess increased disease risk on a group or class basis where the factors that affect risk vary widely among the members of the class. Dr. Rodericks notes that while a number of studies have provided evidence of associations between PFOA exposure and various health conditions, none of these associations rise to the level of causation. Dr. Rodericks notes that an analysis of increased risks for the conditions associated with PFOA exposure could be undertaken, but all would have to be undertaken on an individual basis.

Many of the same issues raised here where also considered in Rowe v. E.I. DuPont de Nemours & Co., No. 06-1810, 2008 WL 5412912, *21 (D.N.J. Dec. 23, 2008), where plaintiffs, who resided near the DuPont plant claimed to have been adversely affected by the presence of PFOA in their drinking water. The Court found that common questions did not predominate for the proposed class of medical monitoring plaintiffs, as individuals had been exposed to different amounts of the chemical, for different durations, during different time periods, and had unique medical histories and background risks of disease, all of "which translate into different monitoring needs."

While *Rowe* is not authoritative, Judge Baum's decision was well reasoned and the same arguments are set forth here. However, there are several significant differences between *Rowe* and the instant case. *Rowe* was decided pursuant to New Jersey law, which requires a plaintiff seeking medical monitoring damages to establish, "through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary." Medical monitoring expenses "may only be awarded if a plaintiff reasonably shows that medical surveillance is required because the exposure caused a distinctive increased risk of future injury, and would require a course of medical monitoring independent of any other that the plaintiff would otherwise have to undergo." Id., *citing* Theer v. Philip Carey Co., 133 N.J. 610, 628 (1993). Judge Baum noted that none of the plaintiffs had offered any evidence of what constitutes "significant exposure," nor did they provide any proof that any class member has reached that level of significant exposure. Instead, plaintiffs relied on a standard "risk assessment" method to demonstrate class-wide significant exposure. This lack of proof prevented the Court from determining the relative increase in the chance of onset of disease. The risk assessment method was simply too generalized to account for the admitted fact that an individual's risk changes based on certain variables. The Court found that "[r]ather than relying on assumptions about exposure, the Rowe Plaintiffs should have conducted more extensive research concerning the proposed class members' characteristics related to their exposure", specifically, "[p]laintiffs could have conducted blood serum tests of the proposed class members to determine whether they indeed have elevated levels of PFOA above the general population, which is useful in determining historical exposure." The Court held that "[t]he risk assessment method provides no evidence of actual common exposure; instead, it attempts to characterize exposure as common by glossing over the

many individualized issues underlying this element. The reality is that the element of significant exposure is fraught with individualized issues. These issues weigh heavily against a finding of cohesion."

The instant plaintiffs sue under New York law, where exposure in fact is also a necessary component to a medical monitoring case. Abusio v. Consolidated Edison Co. of New York, 656 NYS2d 371, 372 (2d Dept. 1997) *quoting* Wolff v. A-One Oil, Inc., 216 AD2d 291(2d Dept. 1995) (plaintiff must establish "that he or she was in fact exposed to [a] disease-causing agent and that there is a 'rational basis' for his or her fear of contracting the disease." Abusio v. Consolidated Edison Co. of New York, 656 NYS2d 371, 372 (2d Dept. 1997) *quoting* Wolff v. A-One Oil, Inc., *supra*; *see also* Allen v. Gen. Elec. Co., 32 AD3d 1163 (4th Dept. 2006) (per curiam). Here, there is no dispute that exposure above background levels has been established through blood serum tests. One cannot be part of the bodily invasion class otherwise.

New Jersey law also requires that plaintiffs establish that each class member's "exposure caused a distinctive increased risk of future injury," such that the risk of serious disease is "significant." However, the evidence before the New Jersey Court established that each class member's risk of disease would differ depending on his/her background risk of disease and susceptibility to PFOA. Both of these factors depended largely on individual circumstances, such as gender, age, drug/alcohol use, nutrition, body mass index, physiology, behavior, medical history and general state of health.

In order to obtain medical monitoring damages in New York, plaintiff must demonstrate "a rational basis for his or her fear of contracting the disease." The Court in *Abrusio*, *supra,* held that "[t]his 'rational basis' has been construed to mean the clinically demonstrable presence of PCBs in the plaintiff's body, or some indication of PCB-induced disease, i.e., some physical manifestation of PCB contamination." The instant plaintiffs have all demonstrated that they were in fact exposed to PFOA, and have clinically demonstrated the presence of PFOA in their blood serum, above background levels. Proof on this issue is available on a class wide basis.

Plaintiffs in New York have an additional proof requirement: "[d]amages for the prospective consequences of a tortious injury are recoverable only if the prospective consequences may with reasonable probability be expected to flow from the past harm." Askey v Occidental Chem. Corp., 102 AD2d 130, 136 (4th Dept. 1984); *see* Ace v State of New York, 207 AD2d 813, 815 (1994), affd for reasons stated below 87 NY2d 993 (1996). The term "reasonable certainty" is generally accepted to mean more likely than not - greater than a 50% chance - that the risk will occur or, stated another way, a statistical likelihood that the disease will result. Bossio v Fiorillo, 210 AD2d 836, 838 (3d Dept. 1994); Doner v Adams Contr., 208 AD2d 1072 (3d Dept 1994); Fusaro v Porter-Hayden Co., 145 Misc 2d 911, 916-17 (New York County 1989), affd 170 AD2d 239 (1st Dept. 1991); Swearingen v Long, 889 F.Supp 587, 590 (NDNY 1995). While *Askey* requires a plaintiff to establish with a degree of reasonable medical certainty such expenses will be incurred" (*supra*, at 137), this is a statement of the burden of proof. The Court specifically recognized that "[t]he proof problems are, of course, formidable." Askey v Occidental Chem. Corp., *supra* at 136.

In this case, plaintiff's expert Dr. David A. Savitz has testified that while it is unclear whether exposures at or below background are associated with health harm, a "dose response relationship

has emerged for a number of associated illnesses," including thyroid disease, ulcerative colitis, kidney cancer, testicular cancer and hyperlipidemia. Biomarkers associated with PFOA exposure include elevations of uric acid levels, which can lead to gout, high cholesterol that can lead to coronary artery disease, as well as elevations of liver enzymes that can indicate liver disease. He opines that "as exposure increases above background, so does risk of harm." He states that "elevated exposure above background levels significantly increases the risk of the development" of the aforementioned health conditions. The Court finds that plaintiffs have alleged with a reasonable degree of medical certainty that medical monitoring expenditures are "reasonably anticipated" to be incurred by reason of the plaintiffs' exposure above background levels. Defendants disagree, but these are proof issues, not a bar to class action treatment. Whether Plaintiffs are able to prove their theory is, at this stage, irrelevant.

In this case, the Court finds that the following issues relevant to medical monitoring are common to all class members: whether defendant was negligent in releasing PFOA from its facility into the surrounding air, soil and water; whether PFOA is hazardous to human health; and whether medical monitoring is available for the diseases linked to PFOA exposure. Plaintiffs have met their burden of demonstrating that there is at least one common issue of law or fact. Further, even though there are factual differences among the named plaintiffs and the proposed class members, such differences do not overcome the facts that all plaintiffs' medical monitoring claims arise from the same course of conduct by defendant and are based on the same legal theory. The medical monitoring issue affecting the entire putative class is based upon the common and overriding fact of an above background level of PFOA exposure caused by a single source by a defined method at a level which Plaintiffs allege will significantly increase their risk of the development of numerous health conditions. As common issues predominate, a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

CPLR 902

CPLR 902 provides that "[a]mong the matters which the court shall consider" in evaluating a motion for class certification are:

1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. the impracticability or inefficiency of prosecuting or defending separate actions;

3. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action."

The additional factors stated in CPLR 902 do not suggest a different result. Defendant has not established that pursuant to CPLR 902(1) there is an economic interest of other class members in bringing separate actions. The impracticality or inefficiency of prosecuting separate actions as stated in CPLR 902 (2) was already addressed in this decision under CPLR 901(a)(5), and is not a

block to certification. The other factors also cut in favor of certification. Under CPLR 902 (1), there is no evidence before the Court that individual members of the class have an interest in controlling the prosecution of separate actions. As for CPLR 902 (3), the parties have alerted the court to no other litigation involving this subject matter brought by members of the putative class. As for the CPLR 902 (4), defendant does not challenge venue. Further, Rensselaer County is a desirable forum as the alleged contamination occurred in Petersburgh. Defendant's contentions that pursuant to CPLR 902(5) certification should be denied because of the plaintiffs' inability to manage the damages claims, fails to address the similar factual issues running through all of the classes and those class members that might otherwise find separate actions cost prohibitive.

In accordance with the foregoing, it is hereby

ORDERED that Plaintiffs' Motion for Class Certification is **GRANTED**, and it is further

ORDERED that the Court certifies the following classes:

(a) The Town Water Property Damage Class, defined as "All individuals who are or were owners of real property and who obtain or obtained their drinking water from the Town of Petersburgh, New York Public Water System, and who purchased their property on or before February 20, 2016;

(b) The Private Well Property Damage Class, defined as "All individual who are or were owners of real property located within a seven (7) mile radius of the Defendant's Taconic Plastics Facility in Petersburgh, New York, and who obtain or obtained their drinking water from a privately owned well contaminated with PFOA, and who occupied that property at or around February 20, 2016;

(c) The Private Well Nuisance Class, defined as "All individuals who are or were owners or lessors of real property located within a seven (7) mile radius of the Defendant's Taconic Plastics Facility in Petersburgh, New York, and who obtain or obtained their drinking water from a privately owned well contaminated with PFOA, and who occupied that property at or around February 20, 2016; and

(d) The PFOA Invasion Injury Class, defined as "All individuals who have (I) ingested PFOA-contaminated water from the Petersburgh Public Water System or from a contaminated private well located within a seven (7) mile radius of the Taconic Plastics Facility in Petersburgh, New York, and (ii) who have suffered invasion of their bodies and accumulation of PFOA in their blood as demonstrated by blood serum tests disclosing a PFOA level in their blood above the recognized average background level of 1.86 ug/L.

IT IS FURTHER ORDERED that the following class representatives are appointed:

(a) Jay Burdick as the class representative for the Town Water Property Damage Class;

(b) Mark Denue, Megan Dunn, Jacqueline Monette, Edward Perrotti-Sousis, Connie Plouffe, Edward Plouffe, and William Sharpe for the Private Well Water Property Damage Class;

(c) Mark Denue, Megan Dunn, Jacqueline Monette, Edward Perrotti-Sousis, Connie Plouffe, Edward Plouffe, and William Sharpe for the Private Well Nuisance Class;

(d) Mark Denue, Megan Dunn, Emily Marpe, as parent and natural guardian of E.B., infant, and G.Y., infant, Jacqueline Monette, Frank Seymour, and William Sharpe for the PFOA Bodily Invasion/Injury Class.

IT IS FURTHER ORDERED that Weitz & Luxenberg, P.C. are appointed as lead counsel.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to Weitz & Luxenberg, P.C. All original supporting documentation is being forwarded to the Rensselaer County Clerk's Office for filing. The unredacted versions of Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and Affidavit of Jessica Kaplan, Esq. are filed under seal pursuant to this Court's Confidentiality Order dated July 10, 2017. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: July 3, 2018
Troy, New York

PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. Notice of Motion for Class Certification, to Appoint Class Representatives, and to Appoint Class Counsel, dated February 5, 2018; Affidavit of Stephen G. Schwarz, dated January 31, 2018 together with exhibits A-F annexed thereto; Affidavit, James J. Bilsborrow, dated February 5, 2018; Affidavit, Hon. Thomas A. Dickerson, dated February 1, 2018, together with exhibits A-E annexed thereto; Affidavit, Alan Ducatman,, dated January 29, 2018, with exhibits A-F annexed thereto; Affidavit, David A. Savitz, dated January 29, 2018, with exhibits A-B annexed thereto; Affidavit, Hyeong-Moo Shin, dated January 29, 2018, with exhibits A-B annexed thereto; Affidavit, Jeffrey E. Zabel, dated January 30, 2018, with exhibits A-C annexed thereto; Affidavit Jay Burdick, dated January 24, 2018; Affidavit, Mark Denue, dated February 3, 2018; Affidavit, Megan Dunn, dated February 3, 2018; Affidavit, Emily Marpe, dated January 23, 2018; Affidavit, Jacqueline Monette, dated January 25, 2018; Affidavit, Edward Perrotti-Sousis, dated February 3, 2018; Affidavit, Connie Plouffe, dated February 3, 2018; Affidavit, Edward Plouffe, dated February 3, 2018; Affidavit, Frank Seymour, dated February 3, 2018; Affidavit, William Sharpe, dated February 3, 2018; Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, James J. Bilsborrow, Esq.

2. Affidavit, Paul Wm. Hare, dated March 29, 2018, together with exhibits annexed thereto; Affidavit, Jessica Herzstein, dated March 28, 2018, together with exhibits annexed thereto; Affidavit, William H. Desvousges, dated March 24, 2018, together with exhibits annexed thereto; Affidavit, Joseph V. Rodricks, dated March 28, 2018, together with exhibits annexed thereto; Affidavit, Karen Toth, dated March 28, 2018; Affidavit, Dawn Ramasco, dated March 27, 2018; Affidavit, Peter J. Skalaban. Jr., dated March 29, 2018, together with exhibits A-I annexed thereto; Affidavit, Jessica L. Kaplan, Esq., dated March 29, 2018, together with exhibits A-I annexed thereto; Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, Thomas R. Smith, Esq.; Appendix of Unreported Cases.

3. Reply in Suppoty of Plainitffs' Motion for Class Certification, James J. Bilsborrow, Esq.; Reply Affidavit, Hyeong-Moo Shin, dated April 6, 2018, with exhibits A-B annexed thereto; Reply Affidavit, David A. Savitz, dated April 9, 2018; Reply Affidavit, Jeffrey E. Zabel, dated April 17, 2018; Reply Affidavit, James J. Bilsborrow, Esq., dated April 20, 2018,together with exhibits A-E annexed thereto.