IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document Relates to:** ***City of Camden v. 3M Co.*** ***Case No. 23-03147-RMG*** ***Town of East Hampton v. 3M Co.*** ***Case No. 19-01639-RMG*** ***Shipman v. 3M Co.*** ***Case No. 18-03340-RMG*** ***Town of Harrietstown v. 3M Co.*** ***Case No. 21-cv-00862 (RMG)*** ***Town of Islip, New York v. 3M Co.*** ***Case No. 21-01915 (RMG)***

AFFIRMATION IN SUPPORT OF THE OBJECTION OF THE TOWN OF EAST HAMPTON, TOWN OF ISLIP AND TOWN OF HARRIETSTOWN TO FINAL APPROVAL OF THE PROPOSED 3M SETTLEMENT

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Nicholas C. Rigano, Esq., an attorney duly admitted to practice law in the Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the Eastern District of New York, the Southern District of New York and the State of New York, hereby affirms under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Partner with the firm Rigano LLC, attorneys for Town of East Hampton, Town of Islip, and Town of Harrietstown (collectively, the "Towns"). I am fully familiar with the facts and circumstances set forth herein and know them to be true, except for those stated to be based on information and belief, and as to those matters, I believe them to be true. This objection is submitted on behalf of Towns and those similarly situated in opposition to final approval of the proposed class action settlement (the "Proposed Settlement") among a class of public water systems and 3M Company ("3M"). For the reasons below, Towns respectfully request that: (i) the Proposed Settlement be amended in accordance with this Objection, (ii) approval of the Proposed Settlement be denied, and/or (iii) such other, further and different relief be granted as is deemed just and proper.

2. Towns have filed a Motion to Intervene in this action [Dkt. No. 3933], which has not yet been fully briefed or decided by this Court. Towns motion to intervene is fully incorporated herein to the extent necessary. Towns also fully incorporate and restate herein all objections to the Proposed Settlement filed by other parties.

3. I have been legally authorized to object on behalf of Towns. I wish to appear and be heard at the Final Fairness Hearing. At this time, Towns do not intend to call any witnesses at the Final Fairness Hearing, but Towns reserve their rights to do so. My address is set forth in the signature block below.

4. Town of East Hampton's address is Town of East Hampton, c/o Town Attorney, 159 Pantigo Rd. East Hampton, NY 11937, Tel: (631) 324-8787, Fax: (631) 329-5371, rconnelly@ehamptonny.gov.

5. Town of Harrietstown's address is Town of Harrietstown, c/o Town Supervisor Jordanna Mallach, 39 Main Street, Saranac Lake, NY 12983, Tel: (518) 891-1470, Fax: (518) 891-6265, jmallach@harrietstown.org.

6. Town of Islip's address is Town of Islip, c/o Town Attorney 655 Main Street, Islip, NY, Tel: (631) 224-5550, Fax: (631) 224-5573, mwalsh@islipny.gov.

PRELIMINARY STATEMENT

7. The Proposed Settlement broadly defines the term "Releasing Parties" to include many parties across the country, such as Towns, that have no apparent ability to opt out fully from the Proposed Settlement or to recover money thereunder. Under the agreement, "Releasing Parties" broadly release 3M from all historical claims associated with PFAS.

8. Towns operate airports in New York State that have been designated as superfund sites. Towns are required to remediate those sites to applicable standards under the direction of the New York State Department of Environmental Conservation ("NYSDEC"). Towns are not "Active Public Water Systems" as defined by the Proposed Agreement, so they may not be "Eligible Claimants". In instances where drinking water appears to be impacted by PFAS originating from a Town's airport, such Town has been required to remediate drinking water, which triggers the instant concern that Towns may be Releasing Parties.

9. To illustrate, Town of East Hampton has entered into an agreement to extend the public water main at Town's expense with Suffolk County Water Authority ("SCWA"), an "Active Public Water System" and an "Eligible Claimant". This was done to provide an alternative water

source to hundreds of PFAS-impacted drinking water wells that serve individual properties. That water main extension is complete and Town of East Hampton paid SCWA over $7.5 million.

10. This type of remediation appears to cause Towns to be "Releasing Parties" because that term includes: (i) anyone in "privity" (an undefined term) with a "Class Member", and (ii) anyone "legally responsible for funding" a "Class Member". If not revised, the Proposed Settlement may: (i) inequitably cause Towns and similarly situated parties to release 3M from all current and future PFAS claims, and (ii) inhibit Towns and similarly situated remedial parties from remediating drinking water due to concern that such work would trigger the release.

11. Because Towns are not "Active Public Water Systems" they are not "Class Members" and have no ability to opt out of this release. In other words, if approved, the Proposed Settlement requires Towns, and similarly situated parties, to provide sweeping releases to 3M for no consideration and with no ability to do avoid doing so. This unconscionable result cannot stand.

12. Towns were not invited to participate in the negotiations. While Towns do appreciate the effort of all parties and the skill required of all attorneys to negotiate such a complex document, Towns respectfully submit that both the 3M Proposed Settlement and the Dupont Proposed Settlement require rigorous scrutiny because municipalities are at risk meaning the public treasury is at stake.

13. Prior to filing this objection, Towns requested Class Counsel clarify these important issues but did not receive a substantive response. Towns respectfully request that the Proposed Settlement be amended accordingly, approval of the Proposed Settlement be denied, and/or such other, further and different relief be granted as is deemed just and proper.

BACKGROUND

I. Pertinent Terms of the Proposed Settlement

14. "Active Public Water System" means "a Public Water System whose activity-status field in SDWIS states that the system is 'Active.'" Proposed Settlement, § 2.4.

15. Claims-Over: Releasing Party (not Class Member) "shall reduce the amount of any judgment it obtains against the non-Released Party who is asserting the Claim-Over by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." Proposed Settlement, § 11.6.4

16. "Class Member" means "an Eligible Claimant that does not opt out of the Settlement Class . . . ." Proposed Settlement, § 2.16.

17. Dismissal: Releasing Parties are required to dismiss all claims with prejudice unless the Releasing Party affirmatively notifies "the Special Master, Class Counsel, and 3M's Counsel before the date of the Final Fairness Hearing if it intends to seek [] a limited Dismissal . . . . " *See* Proposed Settlement, § 11.5.1.

18. "Drinking Water" means "water provided for human consumption (including uses such as drinking, cooking, and bathing), consistent with the use of that term in the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-27. Solely for purposes of this Agreement, the term 'Drinking Water' includes raw or untreated water that a Public Water System has drawn or collected from a Water Source so that the water may then (after any treatment) be provided for human consumption, but does not include raw or untreated water that is not drawn or collected from a Water Source. It is the intention of this Agreement that the definition of 'Drinking Water' be as broad, expansive, and inclusive as possible." Proposed Settlement, § 2.23.

19. "Effective Date" means "the date five (5) Business Days after the date of Final Judgment". Proposed Settlement, § 2.24.

20. "Eligible Claimant" means "an Active Public Water System that qualifies as a member of the Settlement Class . . . ." Proposed Settlement, § 2.25.

21. "Final Judgment" means " . . . the time for appeal of the Court's approval of this Settlement and entry of the final order and judgment with respect to Released Parties under Federal Rule of Appellate Procedure 4 has expired or, if appealed, approval of this Settlement has been affirmed by the court of last resort to which such appeal …has been taken and such affirmance has become no longer subject to further review by the court of appeals…or by the Supreme Court. . . or the appeal or petition is voluntarily dismissed . . . "Proposed Settlement, § 2.30.

22. "Person" means a " . . . municipality . . . ." Proposed Settlement, § 2.47.

23. "PFAS" includes thousands of chemicals. *See* Proposed Settlement, § 2.48.

24. "Public Water System" means "a system for the provision to the public of water for human consumption . . . if such system . . . regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year . . . Solely for purposes of this Settlement Agreement, the term 'Public Water System' refers to . . . any Person (but not any financing or lending institution) that has legal authority or responsibility (by statute, regulation, other law, or contract) to fund or incur financial obligations for the design, engineering, installation, operation, or maintenance of any facility or equipment that treats, filters, remediates, or manages water that has entered or may enter Drinking Water or any Public Water System; but does not refer to a Non-Transient non-Community Water System that serves 3,300 or fewer people, according to SDWIS, or to a Transient Non-Community Water System of any size. It is the intention of this Agreement

that the definition of 'Public Water System' be as broad, expansive, and inclusive as possible." Proposed Settlement, § 2.55.

25. "Released Claims": "Upon entry of the Final Judgment, and regardless of any post-Settlement Date change to any federal or state law or regulation relating to or involving PFAS, the Releasing Parties . . . release . . . (i) any Claim that may have arisen or may arise at any time in the future out of, relates to, or involves PFAS that has entered or may reasonably be expected to enter Drinking Water . . . (ii) any Claim that has arisen or may arise at any time in the future out of, relates to, or involves the development, manufacture, formulation, distribution, sale, transportation, storage, loading, mixing, application, or use of PFAS or any product (including AFFF) manufactured with or containing PFAS (to the extent such Claim relates to, arises out of, or involves PFAS) . . . It is the intention of this Agreement that the definitions of "Release" and "Released Claims" be as broad, expansive, and inclusive as possible." Proposed Settlement, § 11.1.1.

26. Released Claims carveout (§ 11.1.2.1): "Paragraph 11.1.1(i)–(iii) does not apply to a Class Member's Claim related to the remediation, testing, monitoring, or treatment of real property to remove or remediate PFAS where (i) the Class Member owns or possesses real property and has legal responsibility to remove contamination from or remediate contamination of such real property . . . ." Proposed Settlement, § 11.1.2.1.

27. Released Claims Supplement: "through payments made under this Settlement, 3M has fully resolved any and all duties or obligations any Released Party might have to contribute funds toward or otherwise address any alleged damages, treatment, filtration, or remediation that in any way arises out of, relates to, or involves PFAS that has entered *or may enter Drinking Water* or any Releasing Party's Public Water System, including any aspect of the provision, treatment,

filtration, remediation, testing, or monitoring of Drinking Water from the Releasing Party's Public Water System." Proposed Settlement, § 11.1.5.

28. "Released Parties" means 3M and related Parties. *See* Proposed Settlement, § 2.60.

29. "Releasing Parties" means "(a) . . . Class Members . . . (d) any Person, other than a State or the federal government, acting in privity with or acting on behalf of or in concert with any of the foregoing, including in a representative or derivative capacity, (e) any Person, other than a State or the federal government, that is legally responsible for funding (by statute, regulation, other law, or contract) a Class Member or its Public Water System . . . (f) any Person, other than a State or the federal government, acting on behalf of or in concert with a Class Member to prevent PFAS from entering a Class Member's Public Water System . . . It is the intention of this Agreement that the definition of 'Releasing Parties' be as broad, expansive, and inclusive as possible." Proposed Settlement, § 2.61.

30. The release is triggered upon entry of "Final Judgment" and upon the "Effective Date" (§§ 3.2, 11.1.1).

31. "Settlement Class" includes: "Every Active Public Water System in the United States of America that — (a) has one or more Impacted Water Sources as of the Settlement Date; or (b) does not have one or more Impacted Water Sources as of the Settlement Date, and (i) is required to test for certain PFAS under UCMR-5, or (ii) serves more than 3,300 people, according to SDWIS." Proposed Settlement, § 5.1.

32. "Water Source" means "a groundwater well, a surface-water intake, or any other intake point from which a Public Water System draws or collects water for distribution as Drinking Water, and the raw or untreated water that is thus drawn or collected." Proposed Settlement, § 2.82.

II. Preliminary Approval of the Proposed Settlement

33. On July 14, 2023, the Court held a status conference where counsel for Towns was heard. During that hearing, lead Plaintiff's counsel stated: "one of the things that we don't believe [Towns are] prejudiced because [Towns'] claims have not been released. They've not been waived. They've not been impacted by this."[1] As set forth herein, that statement does not appear to be correct.

34. On July 17, 2023, Towns objected to the Proposed Settlement on a preliminary basis. See Dkt. No. 3415.[2] On August 29, 2023, the Court entered the Preliminary Approval Order. See Dkt. No. 3626.

ARGUMENT

POINT I
TOWNS HAVE STANDING TO OBJECT

35. The United States Supreme Court set forth the elements of standing in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not `conjectural' or `hypothetical,'. Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

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[1] Ex 1, p. 39:5-8. Exhibit 1 is a true and correct copy of the transcript of the Jul. 14, 2023 hearing before this Court.

[2] Towns did not object to preliminary approval on some of the grounds set forth herein in reliance on Class Counsel's statement to this Court. Thereafter, Towns' counsel determined that Class Counsel's statement appears to be inaccurate.

Id. at 560-61 (citations omitted); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 454 (4th Cir. 2017).

36. As discussed fully below, the Proposed Settlement appears to include Towns as "Releasing Parties", but not as "Eligible Claimants". This means that the Proposed Agreement requires Towns to involuntarily give a release to 3M of all PFAS claims without receiving any consideration or the ability to opt out. The release could reasonably include Towns' causes of action pending in this MDL against 3M for tens of millions of dollars. Accordingly, as "Releasing Parties", Towns suffer "plain legal prejudice" by the Proposed Settlement, which gives Towns' standing to object here. *See Bragg v. Robertson*, 54 F. Supp. 2d 653, 664 (S.D.W. Va. 1999) ("Formal legal prejudice occurs where a non-settling defendant is 'strip [ped] of a legal claim or cause of action,' or where the agreement interferes with his contract rights or his ability to seek indemnification or contribution. Conversely, a 'showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient' to meet the standard.") (internal citations omitted). Indeed, Towns have moved to intervene on this basis. *See* Dkt. No. 3933.

POINT II
THE PROPOSED SETTLEMENT IS NOT FAIR, REASONABLE OR ADEQUATE

37. The purpose of a Fairness Hearing is to allow the Court to determine whether the Proposed Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations. If the proposed settlement is intended to preclude further litigation by absent persons, due process requires that their interests be adequately represented." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (internal citations omitted).

38. The Fourth Circuit has articulated the role of the Court in a Fairness Hearing as follows:

> First, an objector to a class settlement must state the basis for its objection with enough specificity to allow the parties to respond and the court to evaluate the issues at hand. This requirement is somewhat analogous, though not necessarily identical, to the notice pleading required for complaints. *See* Fed. R. Civ. P. 8(a) ("[A] claim for relief must contain: ... a short and plain statement of the claim showing that the pleader is entitled to relief.").
>
> Second, the parties propounding the settlement, in addition to bearing the initial burden to show that the proposed class meets the Rule 23(a) requirements for certification and that a proposed settlement is fair, reasonable, and adequate, must show that the objection does not demonstrate that the proposed settlement fails one of those requirements. The showing necessary to prevent an objection from derailing a settlement will, of course, vary with the strength of the objection itself; frivolous objections may need very little to overcome them, while weightier objections will require more.
>
> Third, the district court, at all times, remains a fiduciary of the class. *Sharp Farms*, 917 F.3d at 293–94. The district court must protect the class's interests from parties and counsel overeager to settle (who may deny absent class members relief that they would otherwise receive) and frivolous objectors (who may impede or delay valuable compensation to others). The district court may, in its discretion, grant an objector discovery to assist the court in determining an objection's merit. *See* Newberg § 13:32 ("The touchstone for [granting an objector discovery] is that it will ultimately assist the court in determining the fairness of the settlement.").

1988 Tr. for Allen Children v. Banner Life Ins. Co., 28 F.4th 513, 521 (4th Cir. 2022).

39. As this Court cited in the Preliminary Approval Order, "[f]ormal legal prejudice occurs where a non-settling defendant is 'strip[ped] of a legal claim or cause of action,' or where the agreement interferes with his contract rights or his ability to seek indemnification or contribution. Conversely, a 'showing of injury in fact, such as the prospect of a second lawsuit or the creation of a tactical advantage, is insufficient' to meet the standard." *Bragg*, 54 F. Supp. 2d

at 664 (internal citations omitted). Here, the Proposed Settlement, if approved, will prejudice Towns.

I. Towns Are Harmed By The Proposed Settlement

40. Under the Proposed Settlement, the term "Releasing Parties" is broader than "Class Members." Accordingly, a party that is a "Releasing Party" but is not a "Class Member" could release all of its claims against 3M for no consideration and with no option to avoid doing so. This is precisely at issue for Towns.

41. On July 9, 2018, in accordance with NYSDEC's direction, Town of East Hampton entered into a written agreement with SCWA, an "Active Public Water System" with SDWIS ID NY5110526, to have SCWA extend its public water main approximately nine (9) miles in the Town so that alternative drinking water may be provided to PFAS impacted properties.[3] Town agreed to reimburse SCWA its costs and in fact did so by paying SCWA no less than $7,591,425.93.[4]

42. To the extent SCWA does not opt out (over which Town has no control), Town appears to involuntarily become a "Releasing Party" because: (i) Town is in "privity" (an undefined term) with SCWA (a Class Member), and (ii) Town is "legally responsible for funding (by statute, regulation, other law or contract)" SCWA. *See* Proposed Settlement, § 2.61. Town of Harrietstown and Town of Islip similarly are required to comply with NYSDEC direction to

[3] Exhibit 2 is a true and correct copy of the July 9, 2018 Agreement by and between Town of East Hampton and SCWA.

[4] Exhibit 3 is a true and correct copy of the payment made by Town of East Hampton to SCWA. Suffolk County Water Authority commenced suit against AFFF manufacturers. That litigation is pending in this MDL and is styled *Suffolk County Water Authority v. 3M Co.,* 18-03337-RMG. SCWA seeks cost recovery for PFOA/S impacts in a variety of its wells. SCWA does not allege in its complaint that it seeks recovery of costs expended to extend the public water main in the Town, presumably because SCWA was reimbursed by the Town.

remediate contamination from their airports allegedly entering drinking water of "Eligible Claimants".

43. The release carveout does not cure the issue. That applicable provision provides:

> Paragraph 11.1.1(i)–(iii) does not apply to a Class Member's Claim related to the remediation, testing, monitoring, or treatment of real property to remove or remediate PFAS where (i) the Class Member owns or possesses real property and has legal responsibility to remove contamination from or remediate contamination of such real property . . . .

Proposed Settlement, § 11.1.2.1. As discussed above, Towns do not appear to be "Eligible Claimants" or "Class Members", so this carveout is inapplicable to Towns and all other similarly situated parties required to investigate and/or remediate real property that are not "Active Public Water Systems".

44. To be clear, as "Releasing Party", but not "Eligible Claimant", Towns appear to be entitled to $0 from this Proposed Settlement but will provide 3M with sweeping releases from Towns' multi-million causes of action for contribution and affirmative claims, as well as future unknown claims. Towns have no ability to opt out of this release. This is contrary to Class Counsel's statement at the July 14, 2023 hearing (prior to entry of the Preliminary Approval Order) that Town's claims are not released, waived or prejudiced.[5]

45. Further, the Proposed Agreement requires any Releasing Party to provide an overbroad letter upon request of 3M or any "Released Party" for use in litigation that provides that "3M has fully resolved any and all duties or obligations any Released Party might have to contribute funds toward or otherwise address any alleged damages, treatment, filtration, or remediation that in any way arises out of, relates to, or involves PFAS that has entered ***or may enter Drinking Water*** or any Releasing Party's Public Water System . . . ." Proposed Settlement,

[5] *See* Ex. 1, p. 39:5-8.

§ 11.1.5 (emphasis added). Of course, groundwater contamination emanating from superfund sites, such as Towns' airports "may enter Drinking Water", so all of Towns' claims are at risk.

46. Notably, these concerns do not represent an isolated circumstance. Responsible parties at superfund sites throughout the country are being required to provide alternative water supplies and treat downgradient impacted wells of "Active Public Water Systems" at an enormous cost. Like Towns, the Proposed Settlement here requires those parties to release 3M for no consideration.

47. Further, the "claims-over" provision appears to require Towns as "Releasing Party" to indemnify 3M for all known and unknown current and future PFAS claims that have been or may be brought by or against the Towns. *See* Proposed Settlement, § 11.6. The provision expressly states that "a claim by a Releasing Party against any non-Party arising out of a Released Claim should not result in any additional payment by any Released Party." Proposed Settlement, § 11.6.1.2. Further, a "Releasing Party" (not "Class Members") "shall reduce the amount of any judgment it obtains against the non-Released Party who is asserting the Claim-Over by whatever amount is necessary . . . to fully extinguish the Claim-Over under applicable law." Proposed Settlement, § 11.6.4.

48. The "claims-over" provision is illegal as it violates the prohibition under the New York State Constitution for any municipality: (i) to "be liable for the payment of any obligations issued by . . . a public corporation"; and (ii) "to contract indebtedness for any purpose or in any manner which, including indebtedness, shall exceed an amount equal to [7%] of the average full valuation of taxable real estate of such [town]". *See* N.Y. Const. Art. X, § 5, Art. VII § 4(c).

49. Further, both the expansive release terms and the "claims-over" provision create a real non-hypothetical concern that Towns will not be able to sue 3M for contribution. For example,

Town of East Hampton has already been sued along with 3M by a putative class seeking medical monitoring and recovery of property damage; that action is pending before this Court. *See Shipman v. 3M Co. Case No. 18-03340-RMG*. Town of East Hampton has asserted contribution claims against 3M. *See Town of East Hampton v. 3M Co. Case No. 19-01639-RMG.* As currently written, the Proposed Settlement may extinguish these contribution claims, as well as Towns' contribution rights for future claims, if any.

II. Even If The Foregoing Issues Are Addressed, The Proposed Settlement Still Is Not Fair, Reasonable or Adequate Because It Arbitrarily Settles Remediation Claims of Public Water Systems But Not Remediation Claims of Superfund Plaintiffs

50. The Manual for Complex Litigation requires lead MDL attorneys to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel." David F. Herr, *Manual for Complex Litigation* (2018) at § 10.22. The interwoven connection between superfund remediation and public water remediation cannot be ignored. Superfund remediation often requires remediation of upgradient water to standards to protect downgradient water sources. Superfund remediation also often requires collaborative remediation of and with water systems themselves.

51. Like water systems, the Towns are forced to remediate to government standards under the direction of government regulators. In fact, Towns have severe detections of PFOS and PFOA requiring remediation of nearly 10,000 times regulatory criteria. And like water systems, Towns filed complaints asserting tort-based causes of action against the cast of defendants in this MDL, including 3M, for, *inter alia*, cost recovery resulting from defendants' AFFF products. From the outset of this MDL, the Court has prudently directed the parties to commence the bellwether process with remediation cases first, relying on the wisdom that if those plaintiffs cannot prove their case, no one can. That is because unlike damages for personal injury, cost

recovery for remediation does not require proof that exposure causes latent disease. Towns cases fall into the remediation bucket.

52. Within the *City of Stuart* bellwether case, all material global issues associated with Towns' remediation cases and other superfund cases have been assessed. Those issues include: (i) the constituents in AFFF, (ii) impacts of AFFF to environmental media, (iii) the characteristics of PFOA/S, (iii) defendant production of PFOA/S and AFFF, (iv) fate and transport of PFOA/S, (v) alternative sources of PFOA/S in the environment, etc.

53. While thousands of cases remain in this MDL, the vast majority of them are personal injury cases. Unlike Towns' remediation cases, these cases are not similarly situated to water provider cases due to the personal injury causation burden. Further, personal injury bellwethers are on deck, while superfund cases have no schedule to proceed.[6] Absent being included in this settlement, Towns' cases and other superfund remediation cases will not be adjudicated for years.

54. This is problematic because 3M does not have enough money to remediate the world.[7] The proposed $10+ billion settlement here will strip 3M of its limited assets, which prejudices stayed superfund plaintiffs like Towns because: (i) 3M's actions and resulting contamination of the planet have been well-documented;[8] (ii) 3M's remediation liabilities are

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[6] *See id.*, pp. 47-49.

[7] *See* Dkt. No. 2601 (Decision on Defendants' Motion for Summary Judgment), p. 20, n.14 ("Plaintiffs note that 'PFOA and PFOS have been found in virtually every corner of the earth, in nearly every living thing: from house dust, to human blood, to wildlife everywhere, including in fish and animals as far away as the Arctic circle.'").

[8] *See, e.g.,* Dkt. No. 2063, p. 6 (Pl. Government Contractor Brief) ("3M was aware that PFOS, a unique compound made almost exclusively by 3M . . . was found in the blood of the general population."); *id.*, p. 6, n. 17 ("3M is the likely source of PFOS in global environmental media."); Dkt. No. 2963, p. 9 (Pl. Motion in Limine Br.) ("In 1998, 3M informed the EPA that PFOS, its proprietary chemical, had been found widespread in the environment and human blood."); Dkt. No. 2601, p. 15-20 (the Court's Order and Opinion on Defendant's Motion for Summary Judgment regarding Government Contractor Defense) (3M's Manager of Corporate Toxicology, Dr. John Butenhoff,

enormous;[9] and (iii) 3M has insufficient liquidity and may be insolvent.[10] 3M is also subject to potentially billions of dollars in liability with respect to the ongoing MDL styled, *3M Combat Arms Earplug Products Liability Litigation*, MDL No. 2885 (N.D. Fl.).

55. 3M's possible insolvency was referenced in an exchange between the Court and Plaintiff Co-Lead Counsel during the July 14, 2023 status conference where Class Counsel admitted that a driving motivation for the instant settlement was 3M's plausible insolvency and

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concluded PFOS to be "insidiously toxic" and an internal 3M document found "PFOS 'water soluble', 'resistant to microbial degradation,' 'highly mobile' in soil and 'waterways [were an] environmental sink for the product'" . . . "'Plaintiffs note that 'PFOA and PFOS have been found in virtually every corner of the earth, in nearly every living thing: from house dust, to human blood, to wildlife everywhere, including in fish and animals as far away as the Arctic circle.'"); Pl. Motion, Dkt. No. 3370, p. 5 (3M was the primary manufacturer of PFOA for decades).

[9] Plaintiffs state that the proposed settlement class comprises over 12,000 public water systems. *See* Pl. Motion, Dkt. No. 3370, p. 20. Similarly, a recent study published by the American Chemical Society on October 12, 2022 reveals that there are presumed to be over 57,000 sites with PFAS contamination in the United States alone. *See* Salvatore, et al., *Presumptive Contamination: A New Approach to PFAS Contamination Based on Likely Sources*, Environ. Sci. Technol. Lett. 2022, 9, 11, 983-990 (2022), available at https://pubs.acs.org/doi/10.1021/acs.estlett.2c00502 (last accessed July 17, 2023). In many instances, the owners of those sites, like Towns, may have strict liability to remediate such contamination regardless of fault, particularly when EPA soon designates PFOA and PFOS as CERCLA hazardous substances. *See* 42 U.S.C. 9607(a); US EPA, Proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, available at https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos (last accessed July 17, 2023). The United States Chamber of Commerce estimates that "[p]rivate sector cleanup costs at Superfund sites alone resulting from the proposed hazardous substance designation of PFOA and PFOS are estimated to cost between $700 million and $800 million in annualized costs ($11.1 billion and $22 billion present value costs)." *See* United States Chamber of Commerce, PFOS and PFOA Private Cleanup Costs at Non-Federal Superfund Sites, Jun. 8, 2022, available at https://www.uschamber.com/environment/pfos-and-pfoa-private-cleanup-costs-at-non-federal-superfund-sites (last accessed July17, 2023). This cost estimate excludes: (i) remediation of airports, landfills and other properties by municipalities, such as Towns, and (ii) remediation outside the United States, meaning this figure will likely be billions more.[9] Due to the events that have unfolded in this MDL, 3M has no apparent defense to contribution claims for these damages.

[10] In its 2022 10-K, 3M reported only $3.655 billion of cash on hand, a decline of approximately $1 billion from 2021. This suggests a lack of liquidity to satisfy the claims of excluded plaintiffs, including the Towns. *See* 3M Co. Form 10-K dated February 9, 2023, available at https://d1io3yog0oux5.cloudfront.net/_72aef66556c78b4df67dd1e64ddfe0a6/3m/db/3235/30170/annual_report/3M+2022+Annual+Report_Updated.pdf, p. 50 (last accessed July 17, 2023). Further, 3M is a publicly traded company with a market cap of $56.44 billion. Its market cap has been in consistent decline since early 2018, dropping by approximately 50% during that period. *See* https://www.google.com/search?q=3m+stock+googler&rlz=1C1VDKB_enUS1028US1028&oq=3m+stock+googler&aqs=chrome..69i57j0i22i30l2j0i15i22i30l2j0i390i650l4.2989j1j4&sourceid=chrome&ie=UTF-8 (last accessed July 17, 2023).

potential chapter 11 bankruptcy filing.[11] While the proposed settlement may be beneficial to public water systems included in the class, other remedial plaintiffs, such as the Towns, may be left in the dust if the settlement is approved.[12]

56. Defendants have enjoyed a case-specific stay of Towns' litigations for years without having any apparent meritorious defense to the claims. If the Proposed Settlement is approved in its current form, the Towns and others similarly situated will be unfairly prejudiced.

CONCLUSION

57. The court has wide discretion in deciding whether to certify a proposed class and grant final approval. *See Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 179 (4th Cir. 2010). Indeed, this Court exercised that discretion by requiring the narrowing of the initially proposed release contemplated in the settlement of the action styled *Campbell v. Tyco Fire Products LP, et al.,* Case No 19-00422.[13] Final approval is not warranted in the Proposed Settlement's current form.

WHEREFORE, Towns respectfully request that the Proposed Settlement be amended to address the concerns herein, approval of the Proposed Settlement be denied, and/or such other, further and different relief be granted as is deemed just and proper.

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[11] Ex. 1, pp. 13, 14, 25-29.

[12] *See id.*

[13] *See* Dkt. No. 1814.

Dated: Melville, New York
November 11, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2023, a true and correct copy of the foregoing with referenced exhibits: (i) was electronically filed with this Court's CM/ECF and was therefore served electronically, and (ii) served by mail upon all counsel of record set forth in the Notice of Proposed Class Action Settlement and Court Approval Hearing.

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