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 **PRELIMINARY APPROVAL ORDER** **This Order Relates To Case No. 2:19-cv-0422-RMG**

Before the Court is a joint motion for preliminary settlement agreement approval and class certification in the matter of *Campbell v. Tyco Fire Products, et al.*, No. 2:19-cv-0422-RMG. (Dkt. No. 1087.) For the reasons set forth below, the motion is granted.

I. Background

This is a putative class action brought by property owners Joan and Richard Campbell of Marinette County, Wisconsin against Tyco Fire Products L.P. (as successor in interest to The Ansul Company), Chemguard, Inc., and Chemdesign, Inc. The complaint alleges that AFFF is manufactured, tested and used at the Ansul Fire Technology Center ("AFTC"), an active fire suppressant training, testing and research site in Marinette that is owned and operated by Defendant Tyco. Per- and polyfluoroalkyl substances ("PFAS") in the AFFF, alleged to be manufactured by Defendants and used at the AFTC, allegedly contaminated certain water well systems that supply potable water to Marinette County residences such as the Campbells. This well contamination required identification and supply of alternative water sources.

The Campbells allege that, as a result of their exposure to the PFAS-contaminated water, Joan developed thyroid disease and thyroid cancer and Richard is at an increased risk to develop

certain serious health conditions. In the complaint, they seek to represent a medical monitoring class and a property damage class. They bring claims for (1) negligence, (2) trespass, (3) abnormally dangerous activity and absolute/strict liability, (4) private nuisance, and (5) products liability by failure to warn. (No. 2:19-cv-0422, Dkt. No. 1-1.) The parties' First Amended Class Settlement and Release Agreement encompasses "three categories of injuries": personal injury, individual harms without current manifest disease, and diminution of real property value. (Dkt. No. 1087 at 15-16, No. 1087-1 § 4.) Plaintiffs, with Defendants' consent, now move the Court to conditionally certify the settlement class, to preliminarily approve the settlement terms and conditions (subject to a fairness hearing and subsequent final approval), to approve the Notice Plan and Class Notice, to appoint and designate class counsel, to appoint and designate Plaintiffs as class representatives, and to preliminarily approve the settlement distribution plan.

II. Legal Standard

Rule 23(e) governs settlement of a class proposed to be certified for purposes of settlement and provides that settlement may occur "only with the court's approval" subject to "the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). First, Rule 23(e)(2) provides that if "the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether" the class representatives and counsel adequately represented the class, the proposal is the result of an arm's length negotiation, the relief provided is adequate, and the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2)(A)-(D). Second, a court will likely be able to certify a class that satisfies the Rule 23(a) prerequisites and is a type of class provided for by Rule 23(b). The Rule 23(a) prerequisites are that: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"), (2) questions of law or fact common to

the class ("commonality"), (3) the representative's claims are typical of the class's claims ("typicality"), and (4) the representative will fairly and adequately protect the class's interests ("adequacy"). Fed. R. Civ. P. 23(a)(1)-(4).

An acceptable type of class provided for by Rule 23(b) is where the class is superior to other methods of adjudication because common questions of law or fact predominate over those of individual class members ("superiority requirement"). Fed. R. Civ. P. 23(b)(3). For this Rule 23(b) inquiry, the Court may consider issues including: the members' interests in individually controlling separate actions' prosecutions, the extent and nature of other pending litigation about the controversy by the members, the desirability of concentrating the litigation in a particular forum, and difficulties likely to be encountered in managing the class action. Fed. R. Civ. P. 23(b)(3)(A)-(D). Rule 23(b) "requires the court to find that the objectives of the class-action procedure really will be achieved in the particular case. . . . [T]he court initially must consider what other procedures, if any, exist for disposing of the dispute before it. The court must compare the possible alternatives to determine whether Rule 23 is sufficiently effective to justify the expenditure of the judicial time and energy that is necessary to adjudicate a class action and to assume the risk of prejudice to the rights of those who are not directly before the court." 7AA Wright & Miller, *Fed. Practice and Procedure* § 1779 (3d ed. 2005). "'Where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.'" *Stillmock v. Weis Markets, Inc.*, 385 Fed.Appx. 267, 273 (4th Cir. 2010) (quoting *Smilow v. Southwestern Bell Mobile Sys, Inc.*, 232 F.3d 32, 40 (1st Cir. 2003)).

Regarding Rule 23 generally, "[c]hief among the justifications for this device is its efficiency." *Thorn v. Jefferson–Pilot Life Ins. Co.,* 445 F.3d 311, 318 (4th Cir. 2006). "To ensure

this benefit is realized, however, and to protect both the rights of the absent plaintiffs to present claims that are different from those common to the class and the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a rigorous analysis to ensure compliance with Rule 23 . . . paying careful attention to the requirements of that Rule." *Id.* (internal citations and quotation marks omitted). Similarly, the party seeking class certification must do more than plead compliance with the Rule 23 requirements; the party "must present evidence that the putative class complies with Rule 23." *EQT Prod. Co. v. Adair,* 764 F.3d 347, 357-58 (4th Cir. 2014). The plaintiff bears the burden of demonstrating compliance with Rule 23, "but the district court has an independent obligation to perform a rigorous analysis to ensure that all of the prerequisites have been satisfied." *Id.* at 358. "Although Rule 23 does not give district courts a license to engage in free-ranging merits inquiries at the certification stage, a court should consider merits questions to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 357–58 (internal quotation marks omitted). "Thus, federal courts should give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (internal citations and quotation marks omitted).

III. <u>Discussion</u>

A. The Rule 23 Implicit Threshold Requirement is Satisfied.

As an initial matter, "Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *Adair*, 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). The district court must be able to "readily identify the class members in reference to objective criteria." *Id.* "If a class description is not sufficiently definite

so that it is administratively feasible for the court to determine whether a particular individual is a member, a class should not be certified." *Anselmo v. West Paces Hotel Grp., LLC*, No. 9:09-2466-MBS, 2011 WL 1049195, at *18 (D.S.C. Mar. 18, 2011) (internal quotation marks omitted). "The plaintiffs need not be able to identify every class member at the time of certification, but if class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate." *Adair*, 764 F.3d at 358 (internal quotations omitted).

Here, the putative class is defined as, "All Persons who currently reside or formerly resided in or currently own or formerly owned, (i) a property with a Private Well Drinking Water Source; (ii) within the Class Area; (iii) for at least one (1) year during the Class Period." (Dkt. No. 1987-1 at 11.) The Class Area is "the land within the area bounded by the north by University Drive, in the south by Heath Lane, in the west by Roosevelt Road and in the east by Bay of Green Bay, all in the Town of Peshtigo, Wisconsin[.]" *Id*. at 5. The Class Period is "the time between January 1, 1965 and December 31, 2020." *Id*. With these objective criteria, the "practical issue of identifying class members" is not "overly problematic" such that "administrative burdens of certification may outweigh the efficiencies expected in a class action." *Cuming v. South Carolina Lottery Comm'n*, No. 3:05-cv-03608-MBS, 2008 WL 906705, at *1 (D.S.C. Mar. 31, 2008). As a result, the class members are readily identifiable and the implicated threshold requirement to proceed under Rule 23 is satisfied.

B. Rule 23(a) is Satisfied.

1. Numerosity

First, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No specified number is needed to maintain a class action." *Brady v. Thurston Motor Lines,* 726 F.2d 136, 145 (4th Cir. 1984). Instead, "the determination rests on the court's

practical judgment in light of the particular facts of the case." *Lott v. Westinghouse Savannah River Co.,* 200 F.R.D. 539, 550 (D.S.C. 2000); *accord Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n,* 446 U.S. 318, 330 (1980) ("The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.") "[P]racticability of joinder depends on many factors, including, for example, the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *Baltimore v. Laborers' Int'l Union of N. Am.,* 67 F.3d 293, 1995 WL 578084 at *1 (4th Cir. 1995). This proposed class consists of approximately 300 households inside the Class Area, each of approximately three to four residents. (Dkt. No. 1087 at 14.) Joinder of this quantity and category of parties is impracticable. *See, e.g. Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) ("Where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable."). Numerosity is therefore satisfied.

2. Commonality

The Court next considers whether there are common questions of "law or fact" among the class members. The class members' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350 (2011). "Although the rule speaks in terms of common questions, what matters to class certification [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Adair,* 764 F.3d at 360 (internal quotation marks omitted) (emphasis in original). "A single common question will suffice,

but it must be of such a nature that its determination will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. (internal citations and quotation marks omitted). Here, the putative class members allege that they each lived within the Class Area during the Class Period and were each exposed to PFAS that contaminated their water wells as a result of AFFF use at the AFTC. These common allegations raise common answers likely relevant to resolving the claims, therefore satisfying the commonality requirement.

3. Typicality

Next, typicality demands that "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Lienhart v. Dryvit Sys., Inc.,* 255 F.3d 138, 146 (4th Cir. 2001) (internal quotation marks omitted). Typicality exists "if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Parker v. Asbestos Processing, LLC,* No. 0:11–CV–01800–JFA, 2015 WL 127930, at *7 (D.S.C. Jan. 8, 2015). Potential individual damages calculations do not destroy typicality because "Rule 23 explicitly envisions class actions with [ ] individualized damage determinations." *Gunnells*, 348 F.3d at 428. Here, the proposed class representatives' claims arise from the same alleged exposure to the same chemicals in the same geographical area during same time period, as do the putative members' claims. Typicality is therefore satisfied.

4. Adequacy

To determine if the class representatives may "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), the Court engages "a two-pronged inquiry, requiring evaluation of: (1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether Plaintiffs' claims are sufficiently interrelated with and not

antagonistic to the class claims as to ensure fair and adequate representation" *Lott v. Westinghouse Savannah River Co.,* 200 F.R.D. 539, 561 (D.S.C. 2000). Regarding the first prong, class counsel for both plaintiffs and defendants have demonstrated sufficient qualification, experience and commitment to prosecuting such tort claims and defenses, including in the context of this multi-district litigation. Regarding the second prong, the causes of action brought in the complaint encompass the types of injuries provided for in the parties' First Amended Class Settlement and Release Agreement and, therefore, are interrelated to the class claims. Adequacy is, therefore, satisfied.

C. Rule 23(b)(3) is Satisfied.

As discussed in the Rule 23(a) context, there exist questions of law or fact common to class members that predominate over any questions affecting individual members and, as a result, class action is superior to other methods of adjudication. Here, all putative members contend that PFAS entered groundwater from AFFF use at the AFTC site and infiltrated their drinking water wells. There is also no indication that class members would have a strong interest in individual litigation. Similarly, there is a sufficient desirability to concentrate the litigation in the forum given its familiarity with the relevant issues as the transferee Court.

D. Rule 23(e) is Satisfied.

Rule 23(e) provides the procedures applicable to settlement of a class proposed to be certified for purposes of settlement. First, the "parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A). The parties have here submitted their First Amended Class Settlement and Release Agreement, enabling the Court to determine that notice to the proposed class is warranted. Next, the "court must direct notice in a reasonable manner to all class members who would be

bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). First, as discussed, the parties have demonstrated that the Court could likely certify the class. Second, Rule 23(e)(2) provides:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
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> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). The Court has reviewed the parties' First Amended Class Settlement and Release Agreement and finds that Rule 23(e)(2) is satisfied. For example, the proposed class counsel's extensive engagement and leadership in litigating this multi-district litigation and pursuing the instant proposed settlement indicate that they have adequately represented the class. There is similarly no indication that the proposed representatives have inadequately represented the members' interests. The Court is also aware of the parties' extensive arm's-length negotiations to draft and amend their agreement in light of the issues illuminated by the simultaneously prosecuted litigation. Moreover, a cash compensation from Defendants of $17,500,000 to the class members represents adequate relief—including in light of the costs of going to trial, the effectiveness of the proposed distribution, and the terms of proposed attorney's

fees—such that preliminary approval is warranted. Last, the proposed Agreement treats class members equitably in relation to one another in the context of settlement fund allocation and the claim submission process.

E. The Court Appoints Class Counsel Pursuant to Rule 23(g).

Rule 23(g) provides that when certifying a class, the Court must appoint class counsel and must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A), *see also* Fed. R. Civ. Pro. R. 23(c)(1)(B). Additionally, appointed counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). The parties move the Court to appoint David R. Cohen, Esq. as Settlement Administrator and Matt Garretson, Esq. as Class Notice Administrator. The Court has reviewed their qualifications and finds that their relevant experience, knowledge of the law and available resources supporting concluding that they will fairly and adequately represent the members' interests. (Dkt. Nos. 1087-2, 1087-3.)

F. The Court Approves the Proposed Notice and Notice Plan Pursuant to Rule 23(c).

Rule 23(c) provides that a class certified as a Rule 23(b)(3) type, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Court has reviewed the parties proposed Notice (Dkt. No. 1087-1 at 67-77) and finds that it "clearly and concisely state[s] in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v)

that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." *Id*. Counsel is therefore authorized to disseminate the Notice and Notice Plan.

IV. Conclusion

For the foregoing reasons, the joint motion for preliminary approval of the settlement agreement and certification of the settlement class (Dkt. No. 1087) is **GRANTED**. The Court **ADOPTS and APPROVES** the parties' Proposed Timeline. (Dkt. No. 1087-4.)

AND IT IS SO ORDERED.

s/ Richard Mark Gergel
Richard Mark Gergel
United States District Judge

January 25, 2021
Charleston, South Carolina