LABAUVE v. OLIN CORPORATION AND ARCH CHEMICALS

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ORDER

This matter is before the Court on plaintiffs' Motion for ClassCertification (doc. 119). The Motion has been exhaustivelylitigated, as the parties have submitted more than 200 pages ofbriefs and over 800 exhibits in support of their respectivepositions. The parties also presented live testimony and argumentin a two-day class certification hearing spanning April 6 and 7,2005. The Motion is now ripe for disposition. At this time,plaintiffs' Motion in Limine (doc. 168) to exclude defendants'evidence and argument regarding their statute of limitationsdefense will also be taken under consideration.

I. Background.

A. Factual Overview.

1. Olin's Operations in McIntosh.

This putative class action arises from the operations ofdefendants Olin Corporation and Arch Chemicals, Inc., formerlyknown as Olin Specialty Chemicals (collectively, "Olin") inMcIntosh, Alabama, which is located in Washington Countyapproximately 40 miles north of Mobile. From 1952 through 1982,Olin operated a mercury cell chlor-alkali facility on a 2,200acre site just west of a bend in the Tombigbee River, just southof a plant operated by Ciba-Geigy Corporation,[1] and justnorth and east of residential and other privately owned property.

Olin's McIntosh facility utilized 256 mercury cells, eachcontaining 4,000 pounds of mercury, as catalysts in themanufacturing process for chlorine and caustic soda. (Exh. P-11,at 53-54.) In simplified terms, the process worked as follows:Olin would dissolve salt from McIntosh's natural salt domes inwater, forming a brine. Subjecting the brine to an electrolyticprocess would separate out chlorine and caustic soda, with alayer of mercury flowing over a steel plate to prevent the highlyreactive end products from recombining. (Id. at 81-83.) Intheory, this process would culminate in the mercury beingrecovered from the end products and returned to the productionprocess, in a continuous recycle loop, akin to motor oil in anautomobile. No mercury was to be consumed in Olin's productionprocess; however, Olin documentation reflects that, particularlyduring the 1960s and 1970s, there was a substantial, ongoing lossof mercury at the McIntosh site through both known and unknownavenues (including, for example, spills, leaks, contaminatedwaste products and end products, vapors escaping through vents inmercury cell houses, and the like), at times exceeding 100

poundsof mercury per day. (Exhs. P-86, P-247, P-73, P-70.) In 1982,Olin shut down its McIntosh mercury cell chlor-alkali facility,switching to a different production process that does not utilizemercury.[2] In 1983, the Environmental Protection Agencydesignated Olin's McIntosh location a Superfund site. Since thattime, the Olin facility has been subjected to federally mandatedremediation studies and cleanup requirements under supervision offederal and state regulators. There is no dispute that the Olin site was and is contaminated with mercury, but there isconsiderable debate as to whether and to what extent thatcontamination migrated offsite. (E.g., Exh. P-2, at 57, 64,70-71; Exh. P-4, at 191-92; Exh. P-9, at 110-11, 121, 129-30;Exh. P-12, at 169.)[3]

2. Alleged Mercury Contamination in McIntosh.

Scientific evidence demonstrates that mercury is a toxicsubstance that does not degrade in the environment and isbioaccumulative. Exposure to mercury in sufficiently largeconcentrations may cause a variety of maladies in humans andanimals, including injury to vital organs, neurological damage,and even death. This substance, which is naturally occurring, hasan airborne and waterborne state, and may be found in soils,sediments, surface water, ground water, and in fish tissues.Mercury may be dispersed through wind, rain, water and dust,among other potential pathways.

The named class representatives in this action are Carrie JeanLaBauve, Daisy Mae Pressley, Lee Edward Jordan and Janice ReedLofton.[4] All four class representatives live in thevicinity of Olin's McIntosh facility and are seeking recovery foralleged property damage on the theory that mercury contaminationoriginating from Olin has diminished the value of their property.Plaintiff Jordan is also a commercial fisherman and seeks torecover for lost fishing opportunities based on allegedcontamination of the Olin Basin and Tombigbee River.[5] According to plaintiffs, mercury from the Olin site hascontaminated the surrounding community through several pathways.Plaintiffs utilize federal standards and Olin data to estimatethat air vents in the roofs of the mercury cell-houses allowed inexcess of 1300 grams of mercury vapor to escape into theatmosphere each day during the chlor-alkali plant's 30 years ofoperation.[6] Using a scientific air dispersion modelingtechnique and making certain assumptions regarding emissionamounts, type of deposition (i.e., wet vs. dry), and speciationrate (i.e., relative proportions of elemental and reactivemercury), plaintiffs' air modeling expert, Dr. Erno Sajo, hasestimated surface depositions of reactive gaseous mercury in aradius of 20 to 25 kilometers from the Olin plant during a15-year period spanning 1957 through 1971. When converted fromg/m^2 to parts per billion, Dr. Sajo's results show a small (1-2km) ring of concentrations exceeding 600 ppb, a 5-7 km ring ofconcentrations exceeding 60 ppb, and a 20-25 km ring exceeding 6ppb. (Hearing Transcript ("Tr."), at 468-69.)[7] This 20-25km ring encircles and defines the proposed air subclass.

In addition to airborne deposition, plaintiffs contend thatmercury has migrated beyond the boundaries of Olin property and into the community via surfacewater and groundwater flows. Plaintiffs point to evidence thatfrom 1952 to 1974, Olin utilized the Olin Basin (a lake on Olinproperty and connected to the Tombigbee River by a channel) as adumping area for wastewater

and effluents, including mercury.Contamination in the Basin allegedly spread to the TombigbeeRiver by means of the channel enabling hydraulic communicationbetween the two bodies of water, as well as the River's annual"flood stage," through which Basin and River waters arecommingled. From 1974 to 1982, plaintiffs assert, Olin'swastewater ditch that had been releasing manufacturing byproductsinto the Basin was redirected away from the Basin, such that itspath flowed directly into the channel, and from the channel intothe River. (Exh. P-2, at 268; Exh. P-10, at 46.) Aside from theRiver and Basin, plaintiffs maintain that Olin materials weretransported offsite via numerous waterborne routes. For example,plaintiffs pointed to underground culverts and drainage ditchesextending outward from Olin property to the south, under roadsand into the community; piles of waste products, runoff fromwhich traveled to beaver ponds and drained under roadways andinto Bilbo Creek; and groundwater plumes radiating south and eastof Olin's property into the McIntosh community.

Much attention has been devoted to "aggregate," a rock- orcement-like industrial waste material known by a host of monikerssuch as "well sands," "brine sands," "cementitious material," oreven "competent pedon." Evidence reflects that this "aggregate"was actually sands pumped from Olin's brine wells in the 1950sand 1960s, before being moved offsite at a much later date. (Exh.P-12, at 69-70, 77-78, 201.) Dozens of truckloads of thisaggregate were transported from Olin property (including a sawmill where the aggregate was apparently excavated during theconstruction process for a highway overpass) and deposited inseveral discrete locations in and around the McIntosh communityat various times.[8] For example, aggregate was used as aroad surface on at least portions of a 1.5-mile roadway, Allen Barnes Road (otherwiseknown as Salt Road), and as a "fill-in" material in several otherlocations, including the property of Dillard Covington and anarea near the McIntosh water tank.[9] Analysis of samplesof this aggregate revealed high concentrations of mercury, manytimes greater than the reference or background values for mercuryin the relevant community. The mercury in that cementitiousmaterial originated at Olin. (Exh. P-12, at 119.) Plaintiffs'expert civil engineer, Marco Kaltofen, opined that the aggregatewas an industrial waste product emanating from Olin, andtestified that it was a soft material that is degrading in theenvironment because of vehicle friction and weathering caused bywind and rain, all of which release mercury. (Exh. P-16, at 188,202, 206-07.)[10] According to Kaltofen, mercurycontamination in the aggregate is seeping into the environment inat least three respects: (1) vehicles traveling on Allen BarnesRoad kick up mercury-laden dust, which then migrates in the wind;(2) crystalline particles of aggregate may be transported bysurface waters to other locations during wet seasons; and (3)mercury in aggregate may have a volatile component with a vaporpressure, such that it may vaporize and be transported by air toother locations.[11] B. Procedural Posture.

1. The Complaint.

On August 25, 2003, plaintiffs filed their Class ActionComplaint and Jury Demand (doc. 1), initiating this lawsuitagainst Olin. In its present incarnation (as Plaintiffs' ThirdAmended Complaint (doc. 68)), the Complaint alleges state-lawcauses of action against defendants for negligence, absoluteliability,

strict liability, trespass, nuisance, conspiracy,intentional misrepresentation, negligent misrepresentation, fraudand fraudulent concealment, equitable and constructive fraud, andpunitive/exemplary damages.[12] From March 2004 throughFebruary 2005, the parties conducted bifurcated discovery,limited (in theory at least) to class certification issues.Roughly 33 depositions were taken, and many thousands of pages ofdocuments were exchanged.

On February 11, 2005, at the conclusion of class certificationdiscovery, plaintiffs filed their Motion for Class Certification(doc. 119) pursuant to Rule 23, Fed.R.Civ.P. Plaintiffs arerequesting certification of two different classes, a propertyclass (designated as Class A) and a fish class (designated asClass B). Plaintiffs contend that they are seeking three forms ofremedies, to-wit: (i) compensatory damages for diminution inproperty value; (ii) unjust enrichment arising from Olin'ssubstantial cost savings by using plaintiffs' property "as itsdumping ground for chemicals in lieu of properly disposing of" same; and (iii) punitive damages.(Plaintiffs' Brief, at 50-51.)[13]

2. The Proposed Classes.[14]

Class A (the "Property Class") would consist of all propertyowners within a 20 to 25 kilometer radius of Olin's McIntoshfacility, and would include (with limited exceptions) "[a]llindividuals or entities who owned residential, commercial, oragricultural real property, as of the date of certification ofthe class in this matter, in the geographic area surrounding theOlin McIntosh, Alabama facilities within the zone ofcontamination resulting from the release of hazardous substances"by Olin. (Plaintiffs' Brief (doc. 119), at 4.) As contemplated byplaintiffs, Class A would be subdivided into three subclasses: anair subclass, a surface water subclass, and a groundwatersubclass. The air subclass would apparently include all Class Amembers whose property was within the zone of contamination forair deposition of mercury by Olin, as estimated in Dr. Sajo's airdispersion model. The isopleths of that air dispersion modeldefine the contours of the 20-25 km ring around the Olin plantwhich plaintiffs would use to delineate membership in Class A. Asfor the surface water subclass, it would include all Class Amembers whose property was subject to contamination by surfacewater runoff from Olin. Plaintiffs offer no precise definition,geographic or otherwise, for the surface water subclass, butrepresent to the Court that "[t]he area of the surface watersubclass is subsumed within the boundaries of the air subclass." (Id. at 7.)[15]Finally, a groundwater subclass would apparently encompass allowners of property subject to groundwater contamination.Plaintiffs acknowledge that they lack sufficient information todocument the extent of offsite groundwater contamination or todefine the groundwater subclass, but urge the Court toconditionally certify such a subclass "subject to furtherdefinition and refinement" at a later date, and "likely" lyingwithin the boundaries of the air subclass. (Id. at 8-9.)

As a separate class, plaintiffs seek certification of Class B(the "Fish Class"), which they define as consisting of "allcommercial, recreational, or subsistence fishermen who, as of thedate of certification of this class in this matter, fished in thenatural basin known as the Olin Basin or in the Tombigbee Riverwithin the geographic boundaries of Class A." (Id. at 9.)

3. The Class Certification Hearing.

The Motion for Class Certification was briefed extensively,with plaintiffs offering 155 pages of briefing in support oftheir motion, and defendants submitting a 48-page memorandum inopposition. Moreover, the parties ultimately designated andmarked over 800 exhibits for the class certification hearing(including more than 600 by defendants, and 200+ byplaintiffs).[16] A class certification hearing wasconducted on April 6 and 7, at which time the Court heard lengthyopening statements from each side, and received testimony from five witnesses (all of themexperts), three on behalf of plaintiffs and two on behalf ofdefendants.

In the wake of the hearing, it was evident that the parties hadclogged the record with innumerable unnecessary materials thatwere irrelevant, redundant or of peripheral significance toissues implicated by the Motion. Of course, the parties may not,by the simple expedient of dumping an undifferentiated mass ofevidentiary material into the record, shift to the Court theburden of identifying evidence supporting their respectivepositions.[17] Likewise, "[t]here is no burden upon thedistrict court to distill every potential argument that could bemade based upon the materials before it." Resolution Trust Corp.v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995). For thatreason, the Court directed the parties, with the aid of theofficial hearing transcript, to designate specific exhibits andspecific portions of deposition transcripts they wished to beconsidered, so as to eliminate extraneous materials from theirenormous evidentiary submissions. The parties having undertakenat least superficial efforts to comply, the Motion is nowproperly before the Court for disposition.[18] II. Legal Standard for Class Certification.

Plaintiffs' Motion for Class Certification is governed by thestandards set forth in Rule 23, Fed.R.Civ.P. See Valley Drug Co.v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1187 (11thCir. 2003) (explaining that Rule 23 furnishes the "legal roadmap"which courts must follow in assessing propriety of classcertification). "For a district court to certify a class action,the named plaintiffs must have standing, and the putative classmust meet each of the requirements specified in Federal Rule ofCivil Procedure 23(a), as well as at least one of therequirements set forth in Rule 23(b)." Klay v. Humana, Inc.,382 F.3d 1241, 1250 (11th Cir. 2004); Valley Drug,350 F.3d at 1188 ("Failure to establish any one of [the Rule 23(a)]factors and at least one of the alternative requirements of Rule23(b) precludes class certification"). It is well establishedthat "[t]he burden of proof to establish the propriety of classcertification rests with the advocate of the class." ValleyDrug, 350 F.3d at 1187; see also London v. Wal-Mart Stores,Inc., 340 F.3d 1246, 1253 (11th Cir. 2003). A districtcourt's ruling on a class certification motion will be reviewed on appealfor abuse of discretion. See Cooper v. Southern Co.,390 F.3d 695, 711 (11th Cir. 2004) ("Questions concerning classcertification are left to the sound discretion of the districtcourt."); Murray v. U.S. Bank Trust Nat'l Ass'n, 365 F.3d 1284,1288 (11th Cir. 2004); Hines v. Widnall, 334 F.3d 1253,1255 (11th Cir. 2003) (district court decision on classcertification will not be disturbed as long as it remains withinRule 23 parameters, even if appeals court would have resolvedissues differently).[19]

The Rule 23(a) requirements are as follows: (i) numerosity,such that "the class is so numerous that joinder of all membersis impracticable"; (ii) commonality, such that "there arequestions of law or fact common to the class"; (iii) typicality,such that representative plaintiffs' claims are typical of thoseof the class; and (iv) adequacy, such that the representativeplaintiffs "will fairly and adequately protect the interests ofthe class." Rule 23(a), Fed.R.Civ.P.; Prado-Steiman v. Bush,221 F.3d 1266, 1278 (11th Cir. 2000) (describing numerosity,commonality, typicality and adequacy elements). The purpose ofRule 23(a) is to ensure that the bond between classrepresentatives and other class members is sufficiently strong towarrant lashing the fortunes of all class members to the namedrepresentatives. See Cooper, 390 F.3d at 713; see also Wrightv. Circuit City Stores, Inc., 201 F.R.D. 526, 535 (N.D. Ala.2001) (explaining that Rule 23(a) "acts as a lens through whichthe court looks to ensure that the interests and claims of therepresentative plaintiff match those of the putative class"). Aclass action "may only be certified if the trial court issatisfied, after a rigorous analysis, that the prerequisites ofRule 23(a) have been satisfied." General Telephone Co. ofSouthwest v. Falcon, 457 U.S. 147, 161, 102 S.Ct. 2364,72 L.Ed.2d 740 (1982); see also Agan v. Katzman & Korr, P.A.,222 F.R.D. 692, 696 (S.D. Fla. 2004) (similar); Rhodes v. CrackerBarrel Old Country Store, Inc., 213 F.R.D. 619, 671 (N.D. Ga.2003) (rather than accepting plaintiffs' evidence and argument atface value, Rule 23 requires district court to perform a rigorousanalysis).[20]

Even if the Rule 23(a) prerequisites are satisfied, classcertification is permissible only if plaintiffs also satisfy oneor more prongs of Rule 23(b). Here, plaintiffs invoke Rule23(b)(3), which requires findings that common questions of law orfact predominate over questions affecting only individualmembers, and that a class action is superior to other methods forfair and efficient adjudication of the controversy.

In performing the Rule 23 analysis, the Court may not inquireinto the merits of plaintiffs' claims at this preliminary stage.See, e.g., Cooper, 390 F.3d at 712 (repeating well-wornadmonition that Rule 23 does not confer upon a court authority toconduct preliminary merits inquiry in making class certificationdetermination); Morrison v. Booth, 763 F.2d 1366, 1371(11th Cir. 1985) (concurring with district court's assessmentthat it "could not conduct a preliminary inquiry into the meritsof a suit in order to determine whether it may be maintained as aclass action").[21] Nonetheless, in conducting therequisite "rigorous analysis," the district court may look beyondthe allegations of the Complaint to consider the parties'supplementary evidentiary submissions, which in this case amountsto hundreds of exhibits and two days of live testimony. SeeWright, 201 F.R.D. at 534 ("In determining whether to certify aclass, a court may consider both the allegations of the complaintand the supplemental evidentiary submissions of the parties.").

Moreover, the Court recognizes that this is a highly expertwitness-intensive case, as all five witnesses called to testifyduring the class certification hearing were experts. The Courthas previously ruled in this case that a full-blown Daubert investigation ispremature at the class certification stage. See Drayton v.Western Auto Supply Co., 2002 WL 32508918, *6 n. 13 (11thCir. Mar. 11, 2002) (finding that court need not "perform aDaubert inquiry of scientific evidence at this

early stage of aclass action proceeding," but may instead "address this issue asthis case progresses"); In re Visa Check/MasterMoney AntitrustLitigation, 280 F.3d 124, 132 n. 4 (2nd Cir. 2001) (noting that"a motion to strike expert evidence pursuant to Daubert . . .involves an inquiry distinct from that for evaluating expertevidence in support of a motion for class certification," andthat Daubert motions are typically not made until summaryjudgment or trial). Thus, in reviewing proffered expert testimonyfor class certification purposes, the Court's examination isconfined to ensuring "that the basis of the expert opinion is notso flawed that it would be inadmissible as a matter of law."Visa Check, 280 F.3d at 135 (only question is whether expertevidence is sufficient to demonstrate common questions of factwarranting certification of proposed class, not whether suchevidence will ultimately be persuasive); see also In rePolypropylene Carpet Antitrust Litigation, 996 F. Supp. 18, 26(N.D. Ga. 1997) (during class certification proceedings, judicialinquiry is limited to determining whether expert testimonycomports with basic scientific principles, has any probativevalue, and primarily uses evidence common to all class members).If that threshold is satisfied, then all proffered experttestimony will be weighed and considered at the Rule 23stage.[22] Under no circumstances may a district court"weigh conflicting expert evidence or engage in `statisticaldueling' of experts" for Rule 23 purposes. Visa Check,280 F.3d at 135. The parties' expert witness evidence will be evaluated inrecognition of these bedrock principles.

III. Standing of Named Plaintiffs to Represent the PutativeClass as to Class A.

"[I]t is well-settled that prior to the certification of aclass, and technically speaking before undertaking any formaltypicality or commonality review, the district court mustdetermine that at least one named class representative has Article III standing to raiseeach class subclaim." Prado-Steiman, 221 F.3d at 1279. Simplyput, a plaintiff cannot represent a class unless he first showsthat he has standing to raise the claims of the class he seeks torepresent. See Murray, 365 F.3d at 1288 n. 7. "[A]ny analysisof class certification must begin with the issue of standing."Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987);see also Hines, 334 F.3d at 1256. In Prado-Steiman,221 F.3d at 1280, for instance, the appellate court vacated classcertification and remanded with instructions that the lower courtdetermine whether at least one named representative of each classor subclass had standing for each proffered claim.[23] Twoparticular elements of standing are of vital importance in thecase at bar, to-wit: (i) whether the named plaintiffs havesustained an injury in fact; and (ii) whether their claims aretimely.

A. Injury-in-Fact Requirement.

1. Legal Standard.

In order to have standing, a plaintiff "must have suffered ininjury in fact — an invasion of a legally protected interestwhich is (a) concrete and particularized, and (b) actual orimminent, not conjectural or hypothetical." London v. Wal-MartStores, Inc., 340 F.3d 1246, 1251 (11th Cir. 2003) (quotingLujan v. Defenders of Wildlife, 504 U.S. 555, 560,112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); see also Lewis v.

Casey,518 U.S. 343, 349, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (applyingprinciples of standing to explain that "[i]t is the role ofcourts to provide relief to claimants, in individual or classactions, who have suffered, or will imminently suffer, actualharm"); Church v. City of Huntsville, 30 F.3d 1332, 1340(11th Cir. 1994) (class lacks standing unless at least onenamed plaintiff is in real and immediate danger of beingpersonally injured by challenged practice); Lynch v. Baxley, 744 F.2d 1452, 1456 (11th Cir. 1984) (observingthat if a named plaintiff does not show that he has sustained oris immediately in danger of sustaining a real, direct injury thatis not conjectural or hypothetical, then he may not seek reliefon behalf of the class); Drayton, 2002 WL 32508918, at *2(indicating that standing requires plaintiffs to establish thatthey were injured, and that at least one named plaintiff musthave personally suffered injuries giving rise to each claim);see generally Parker v. Scrap Metal Processors, Inc.,386 F.3d 993, 1003 (11th Cir. 2004) (defining injury in fact as "aharm suffered by the plaintiff that is concrete and actual orimminent, not conjectural or hypothetical").

2. Plaintiffs' Mercury Testing.

As discussed previously, Carrie Jean LaBauve, Daisy MaePressley, Lee Edward Jordan and Janice Reed Lofton are the namedplaintiffs in this action. Each of them owns property near Olin'sfacility in McIntosh, in proximity ranging from less than 1 mile(in the case of plaintiff Pressley) to approximately 12 milesaway (in the case of plaintiff Jordan). (See Exh. D-528; D-533;D-536; D-542; D-545).[24] Following the filing of thislawsuit in August 2003, plaintiffs retained a civil engineer,Marco Kaltofen, to collect samples of soils, dust, sediment, air,water, fish tissues, aggregate, other biological materials(i.e., pine needles), and polyurethane foam in and aroundMcIntosh for mercury testing. (Tr., at 222-23.) Kaltofencollected samples from the McIntosh area at six differentintervals, between December 2003 and August 2004. (See Exh.D-432.)[25] A number of these samples were taken on or nearplaintiffs' property.

In interpreting the test results for these samples, plaintiffs'and defendants' experts agreed that it is necessary to place themin context by comparing them to background, or reference, mercuryvalues. (Tr., at 219-20, 360-62.)[26] A background value is the"natural level" or "the level of constituent of concern absentany kind of contamination or other industrial source." (Exh.P-16, at 62.) The Kaltofen report assigned a background mercuryvalue for soils in the McIntosh area of approximately 60-80 partsper billion ("ppb"). (See Exh. D-432, at 9; Tr., at 210-11,231-32, 286.)[27] Thus, observed mercury concentrations of80 ppb or less may not reasonably be attributed to wrongdoing byOlin; rather, a given soil sample may only yield an inference ofOlin-related contamination to the extent that it exceeds thatthreshold. Stated differently, Kaltofen's background level of60-80 ppb is intended to capture general natural and humanactivities (other than Olin) in the McIntosh area, and Olincontamination may be inferred only in soil mercury readingsexceeding 60-80 ppb. (Tr., at 210-11, 218-19.)[28] Although plaintiffs took scores of samples, they only took onefrom plaintiff Lofton's property, located on John Johnston Roadroughly 1.5 miles west of the Olin plant. (D-522, D-533.) TheLofton sample, a dust sample taken from her refrigeratorcoils,[29] came back with a reading of "non-detect,"meaning that the mercury concentration in that dust was below 40ppb, the minimum

detection level for the particular protocolutilized by the testing laboratory retained by plaintiffs. (Exh.D-432, at 5; Exh. D-533.)[30] Thus, the lone sample takenfrom the Lofton property reveals no detected mercury at all,implying that whatever minuscule amounts of mercury may have beenin that sample were present at levels well within expectedbackground concentration. The level of mercury found at theLofton property falling short of plaintiffs' expert's backgroundvalue, there is no evidence that the Lofton property is presentlycontaminated by mercury emanating from the Olin facility.

Similarly, there is no evidence that the property of plaintiffsLaBauve or Jordan is presently contaminated by Olin mercury.Plaintiff LaBauve owns two pieces of property in and aroundMcIntosh, including a tract on Topton Road, approximately 1.1miles northwest of the Olin facility, and a parcel on JohnJohnston Road, approximately 3.2 miles west of the Olin facility.(Exh. D-522; D-542; D-545.) Kaltofen tested the well water andsoil on the LaBauve property on John Johnston Road, but all samples came back with "non-detect" readings. (Tr.,at 229-30.)[31] There is no evidence that plaintiffsperformed testing of any kind at LaBauve's Topton Road property,and defendants' evidence is that no such tests occurred. (SeeExh. D-544 ("No samples at LaBauve Topton Property").)[32]Likewise, there is no evidence that plaintiffs ever performed anymercury testing in or near plaintiff Jordan's property.[33]

With regard to plaintiff Pressley, however, plaintiffs' testingdata did reveal an above-background concentration of mercury. A dust sample from the refrigeratorcoils of Pressley's home, located on Pressley Road approximately0.9 miles south of the Olin plant, had a mercury concentration of170 ppb, or approximately double the background value. (Exh.D-536; D-537; D-538; D-432, at 5.) No other testing was performedat Pressley's residence.

3. Plaintiffs LaBauve, Jordan and Lofton Have Not Suffered anInjury in Fact, and Therefore Lack Standing.

As demonstrated by the foregoing discussion, plaintiffs havecome forward with no evidence that the properties of plaintiffsLaBauve, Jordan and Lofton are presently contaminated withmercury. There has been no showing that levels of mercury at anyof these locations exceed background levels for McIntosh andsouthern Alabama, generally. Plaintiffs do not contend andcertainly have not offered evidence that plaintiffs LaBauve,Jordan and Lofton are experiencing elevated levels of mercury attheir properties today.[34]

Nonetheless, plaintiffs insist that LaBauve, Jordan and Loftonpossess standing as to the Class A claims because theirproperties lie within the "zone of contamination" as reflected byDr. Sajo's air dispersion model. Plaintiffs reason that Dr.Sajo's model shows that mercury was "deposited upon all of theproperties within an approximate 25 km radius from the Olin plantfrom 1952 to 1982. All of the properties of the named Plaintiffsare within this confirmed zone of contamination." (Reply Brief,at 10 (emphasis omitted).)[35] The Court accepts for Rule23 purposes that Dr. Sajo's model is a scientifically valid tool for estimating the pattern and quantity of airbornemercury deposition from

the Olin facility in the McIntosh areaduring the time frame of January 1957 through December 1971, the15-year interval that he purported to model. (Exh. P-46) However,to accept that Dr. Sajo's model is a valid means of estimatingwhere and how much mercury fell 35-50 years ago is not to saythat plaintiffs LaBauve, Jordan and Lofton have an injury in facttoday. Dr. Sajo readily conceded that he made no attempt to modelor account for human activities or any activity other than normalatmospheric processes. (Tr., at 120, 132.) Moreover, he made nopretense of suggesting that the model specifies with exactitudethe amount of mercury actually deposited on a particular site; tothe contrary, Dr. Sajo explained that predicted uncertaintiesfrom his model could result in mercury deposition at a particularlocation (or at all locations) that departs from the model'sestimates by a factor of five. (Id. at 99-107.)

Thus, even accepting Dr. Sajo's model as valid and correct, wewould expect to see enormous disparities between forecastconcentrations and observed mercury readings at particular siteswithin the purported "zone of contamination" for two reasons.First, the model's high uncertainty rates mean that certain sitespredicted to receive substantial mercury deposition mightactually have received negligible mercury deposition during thetime period studied.[36] Second, human activities inintervening decades may have disturbed the mercury deposits, drastically changing thecomposition of the soil at certain locations, and potentiallyalleviating any mercury contamination that might have existed atparticular sites during the 1957-1971 period modeled by Dr. Sajo.Simply put, Dr. Sajo's model does not warrant a conclusion thatplaintiffs' properties were substantially contaminated by Olinmercury via air deposition 35-50 years ago, much less that thoseproperties are actually contaminated by mercury from that pathwaytoday. This finding necessarily implies the legal conclusion thatDr. Sajo's model, without more, fails to prove the requisite"injury in fact" for plaintiffs LaBauve, Jordan, and Lofton.

Aside from Dr. Sajo's model, plaintiffs attempt to show injuryin fact by alleging that they are in imminent danger of seriousharm through the mercury released by Olin from 1952 through 1982.(Reply Brief, at 10-12.) Plaintiffs offer extensive evidence thatOlin lost thousands of pounds of mercury through vapor, leaks,spills, and various other avenues during that time period.Certainly, that mercury had to go somewhere. Plaintiffs' evidence— which the Court accepts for Rule 23 purposes — shows thatmercury found its way into the community through at least fourpathways. First, it is reasonable to infer from Dr. Sajo'stestimony that at least a portion of Olin's mercury vaporized,was transported by air, dispersed offsite and deposited in thesurrounding community. Second, plaintiffs' evidence regardingmercury-laced aggregate transported from Olin property intoMcIntosh and used to pave a road and provide excavation fill atvarious discrete locations shows that Olin mercury has enteredthe McIntosh community through that mechanism. Third, evidence ofelevated mercury concentrations in drainage ditches on publicproperty adjacent to Olin property suggests that surface runoffhas transported Olin mercury into the McIntosh community in thatmanner. Fourth, plaintiffs have shown elevated concentrations ofmercury in groundwater at the Olin facility at certain times,suggesting that underground aquifers may have transported some ofthat mercury offsite.

Mercury having reached the community through these pathways,plaintiffs argue, all property in the "zone of contamination"faces imminent and substantial endangerment of mercurycontamination. Mercury does not degrade in the environment.Furthermore, atmospheric, natural and human forces may mobilizemercury, causing secondary movement of mercury after it isinitially deposited. (Tr., at 164-65.).[37] To make this point, plaintiffs repeatedlyreturn to the graphic example of heavy trucks rolling over theaggregate-paved Allen Barnes Road, dislodging and disseminatingpurportedly toxic clouds of high-mercury dust which may radiateout into adjacent areas. (Tr., at 179-80.)

Thus, plaintiffs' theory that all plaintiffs face a presentthreat of imminent harm of mercury contamination to theirproperties ultimately rests on the following syllogism: (i)mercury from Olin is presently dispersed within the McIntoshcommunity; (ii) mercury does not break down in nature, and mayexperience secondary movement; and (iii) therefore, everyonewithin the McIntosh community faces a present threat of imminentharm of mercury contamination to their properties, even if theirproperty has no mercury today. The principal defect with thislogic is that it is hypothetical and conjectural. Plaintiffs haveposited no evidence that the properties of LaBauve, Jordan andLofton face a real, actual, imminent risk of mercurycontamination. There has been no showing that secondary movementhas caused, or is capable of causing, radical shifts in observedmercury levels at particular sites in McIntosh from one day tothe next, from one month to the next, or even from one year tothe next. In other words, plaintiffs have not quantified (or evenattempted to quantify) this secondary movement effect to showthat it poses any legitimate threat to overall mercuryconcentrations at particular locations.[38] Plaintiffs haveoffered no test results showing that mercury readings may be lowon a given site at one time, but may later spike to significantlyhigher levels, because of previously-deposited mercurytransported by air, wind and rain to new locations. Hence, thereis no reason to believe that any secondary movement of mercury is large enough tomatter, in terms of measured mercury concentrations atplaintiffs' properties.

Finally, plaintiffs argue that mercury-contaminated aggregatefrom the Olin site gives rise to continuing airborne mercury, asvehicular traffic on Allen Barnes Road yields mercury-laced dustthat wafts into the surrounding environs. However, there is noevidence as to how far that dust might reasonably be expected totravel or in what concentration.[39] None of plaintiffsLaBauve, Jordan or Lofton own property on or immediately adjacentto Allen Barnes Road, so it is unclear how their property wouldbe affected by activities occurring there. Further, plaintiffs'testing data does not disclose inordinately high mercuryconcentrations in the immediate vicinity of LaBauve's, Jordan'sand Lofton's property. As such, it certainly does not appear thatany of them lie directly in the path of a steadily advancingswath of mercury contamination.

Considered collectively, plaintiffs' evidence shows that it iswithin the realm of conceivable possibility that the propertyowned by plaintiffs LaBauve, Jordan and Lofton may be subject tofuture mercury contamination as a result of secondary movement ofmercury released by the Olin plant several decades ago. However,plaintiffs have not shown that those plaintiffs' properties areactually injured at this time, or that any future harm to them isimminent or immediate. There is neither

evidence nor anyparticular reason to believe that these properties are aligned inthe crosshairs of future mercury contamination. Rather, theproperty damage of which these plaintiffs complain is exactly thekind of conjectural or hypothetical injury that courts routinelydeem insufficient to satisfy the injury-in-fact requirement or to confer standing.[40] The Class A claimsof plaintiffs LaBauve, Jordan and Lofton reduce to allegationsthat their properties might be contaminated with mercury atsome time in the future. But mere apprehension of speculativefuture injury is simply not sufficient to satisfy the Article IIIinjury-in-fact requirement. Accordingly, the Court finds thatplaintiffs LaBauve, Jordan and Lofton lack standing to bringclaims on behalf of the class relating to alleged property damagefrom Olin mercury contamination.[41]

4. For Rule 23 Purposes, Plaintiff Pressley Has Suffered anInjury in Fact.

Plaintiff Daisy Mae Pressley is situated differently from herfellow named plaintiffs with regard to the injury-in-factrequirement. Testing at Pressley's property disclosed a sample ofhousehold dust that registered 170 ppb of mercury, orapproximately double the expected background level. (Tr., at231.) At the Rule 23 hearing, plaintiffs' expert Kaltofentestified that toxic effects of mercury contamination, includingreproductive consequences, beginning to take hold at the 170 ppbthreshold. (Id. at 291; Exh. P-212.)[42] Plaintiffs haveproffered no evidence that a mercury concentration of 170 ppb (or twice the background level) on a given property'srefrigerator coils, without more, diminishes the value of suchproperty. For that reason, it is debatable whether plaintiffPressley has sustained an "injury in fact" sufficient to conferupon her standing to bring class claims against Olin for propertydamage. Nonetheless, the Court finds that Pressley has adequatelyshown an injury in fact, inasmuch as: (i) a dust sample takenfrom her residence reveals mercury concentrations well in excessof background levels; and (ii) common sense dictates that aproperty's value will decline if it is contaminated withpollutants in concentrations that may cause adverse human healtheffects. For that reason, the Court concludes that Pressley hasmade a sufficient showing of an actual, real injury to satisfythe "injury-in-fact" element of the standingrequirement.[43]

Of course, an injury in fact is not the only requirement forestablishing standing. The Court therefore proceeds to addresswhether Pressley can satisfy the other elements of standing,including specifically the timeliness prerequisite.

B. Timeliness Requirement.

The law is clear that "[t]o have standing to represent a class,the named plaintiffs' claims must be timely filed." City ofHialeah, Fla. v. Rojas, 311 F.3d 1096, 1101 (11th Cir. 2002)(citations omitted); see also Franze v. Equitable Assurance,296 F.3d 1250, 1254 (11th Cir. 2002) (explaining thatplaintiff cannot represent class if his claims are time-barred);Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1347 (11thCir. 2001) ("a class representative whose claim is time-barredcannot assert the claim on behalf of the class"). Accordingly, itis appropriate, and indeed necessary, to consider whether a named plaintiff has timely brought her claims inassessing the propriety of class certification. Before

assessingwhether plaintiff Pressley's claims are timely, however, theCourt must first weigh plaintiffs' Motion in Limine to ExcludeEvidence Regarding Defense of Statute of Limitation (doc.163).[44]

1. Timeliness Inquiry is Proper and Appropriate at Rule 23Stage.

Plaintiffs' Motion in Limine is animated by the contention thatstatute of limitations is a merits issue, consideration of whichis premature at the class certification stage. (Plaintiffs' Brief(doc. 163), at 1-2.) However, this objection offers nosatisfactory rebuttal to the bedrock legal principle in thisCircuit that class certification requires a court to considerstanding, which does not exist if a plaintiff's claims areuntimely. See Murray v. U.S. Bank Trust Nat'l Ass'n,365 F.3d 1284, 1289 n. 7 (11th Cir. 2004) (indicating that "anyanalysis of class certification must begin with the issue ofstanding"); Hialeah, 311 F.3d at 1101 (class action plaintifflacks standing if his claims were not timely filed). In short,the Court is obligated to make determinations about standing atthis time, and cannot do so without considering the timeliness ofplaintiffs' claims.

Notwithstanding this fact, plaintiffs' Motion in Limineadvances several other supporting arguments, to-wit: (i)plaintiffs cannot fully and fairly litigate the statute oflimitations issue because discovery conducted to date has beenconfined to class certification issues; (ii) the relevantlimitations period should be tolled, and defendants should beestopped from raising the limitations defense, because defendantshave concealed facts pertinent to plaintiffs' claims bycontinuing to deny that the Olin plant has caused significantoffsite mercury contamination; and (iii) plaintiffs' claims aretimely under the doctrine of continuous tort because defendants "arecontinuously every day releasing hazardous pollutants into theenvironment." (Plaintiffs' Brief (doc. 163), at 2-9.)

In the Court's view, none of plaintiffs' identified concernswarrant exclusion of all evidence and argument relating tolimitations issues from the class certification calculus. Withrespect to the discovery question, review of discovery effortsshows that both sides have taken discovery far exceeding thereasonable parameters of Rule 23 issues. More importantly, it isunclear why plaintiffs would require discovery from defendants toestablish when plaintiff Pressley knew or should have known thatOlin had contaminated her property. The best source of thatinformation would appear to be Pressley herself. Besides,plaintiffs absolutely could have directed discovery at defendantsrelating to standing (including the timeliness of the namedplaintiffs' claims) because standing is fundamentally a classcertification issue.[45] Likewise, plaintiffs' argumentsfor equitable tolling/estoppel and continuous torts do notsupport their Motion in Limine. Rather than being arguments forexcluding the limitations issue from Rule 23 proceedings, thesecontentions are simply grounds for resolving that issue inplaintiffs' favor.

For all of the foregoing reasons, the Court is of the opinionthat it is not only appropriate, but also necessary, to considerthe timeliness of plaintiff Pressley's claims in order todetermine whether at least one plaintiff in this action hasstanding to bring claims on behalf of the class. See Franze,296 F.3d at 1255 (reversing class certification order where namedplaintiffs' claims were untimely, such

that they lacked standingto assert claims on behalf of the class). Plaintiffs' Motion inLimine to Exclude Limitations Evidence (doc. 163) is thereforedenied, at least insofar as it would preclude the Court from determining whether plaintiff Pressley has standing torepresent the class.[46]

2. Analysis of Timeliness of Plaintiff Pressley's Claims.

As indicated supra, plaintiff Pressley has made a sufficientshowing of an injury in fact based on mercury test results fromher home. To establish standing to bring her claims in thisaction, however, she must also show that her claims are timely.Pressley cannot do so.

a. Relevant Legal Standards.

Plaintiffs' Third Amended Complaint purports to assert a hostof state-law causes of action. The claims for negligence,absolute liability, strict liability, nuisance, conspiracy,intentional representation, fraud and fraudulent concealment, andequitable and constructive fraud are all subject to a two-yearlimitations period under Alabama law. See Ala. Code §6-2-38(l) (setting catch-all two-year limitations period fornon-enumerated claims for injury to person or rights of another);Saxton v. ACF Industries, Inc., 239 F.3d 1209, 1212 (11thCir. 2001) ("Under Alabama law, the statute of limitations forgeneral tort claims is two years."); Thompson v. Vaughn,592 So.2d 585, 587 (Ala. 1992) (explaining that plaintiffs'negligence and fraud claims were barred by two-year statute oflimitations). By contrast, the claims for trespass and punitivedamages (construed as a claim for wanton trespass) are subject toa six-year limitations period under Alabama law. See Ala. Code§ 6-2-34(2) (explaining that "[a]ctions for any trespass to realor personal property" are subject to six-year limitation period);Motisi v. Alabama Gas Corp., 485 So.2d 1157, 1158 (Ala. 1986)("Trespass actions are barred after six years.").[47] Having identified the applicable limitations periods, the Courtmust next determine when those periods began to run in plaintiffPressley's case. With respect to the fraud claims, Alabama hasadopted a discovery rule, such that the two-year limitationsperiod commences "when the plaintiff was privy to facts whichwould provoke inquiry in the mind of a person of reasonableprudence, and which, if followed up, would have led to thediscovery of the fraud." Auto-Owners Ins. Co. v. Abston,822 So.2d 1187, 1195 (Ala. 2001) (citation omitted) (rejectingstandard of "actual knowledge" for computing limitations period).

In accordance with the Court's prior rulings in this action,the timeliness of plaintiff Pressley's remaining claims must beassessed by reference to federal law, given the preemptive effectof the federal Comprehensive Environmental Response, Compensationand Liability Act, as amended, 42 U.S.C. §§ 9601 et seq.("CERCLA"). In particular, CERCLA provides that: "In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement

date in lieu of the date specified in such State statute."42 U.S.C. § 9658(a)(1) (emphasis added). The "federally requiredcommencement date" ("FRCD") is defined as "the date the plaintiffknew (or reasonably should have known) that the personal injuryor property damages . . . were caused or contributed to by thehazardous substance or pollutant or contaminant concerned."42 U.S.C. § 9658(b)(4) (emphasis added); see also ReichholdChemicals, Inc. v. Textron, Inc., 888 F. Supp. 1116, 1126 (N.D.Fla. 1995) (trigger for FRCD is when plaintiff became aware of contamination, and it is not necessary thatplaintiff know identity of specific pollutant(s) involved).

Thus, the critical legal inquiry for purposes of establishingwhen the limitations period began to run for plaintiff Pressleyis when she "reasonably should have known" that her property hadbeen damaged by industrial contamination from the Olin site.Defendants have developed considerable evidence on this point.

b. Equitable Estoppel.

As an initial matter, plaintiffs argue that equitableconsiderations prevent this Court from ever reaching the questionof whether plaintiff Pressley's claims are timely. As the Courtunderstands it, plaintiffs maintain that defendants are equitablyestopped from invoking the "disingenuous" statute of limitationsdefense because of their persistent denials (both in public andin this litigation) that plaintiffs' claims have merit or thatOlin contamination has spread offsite. (See Plaintiffs' Brief,at 23 n. 15, 44, 50 n. 32; Reply Brief, at 16-21.) Plaintiffsexpress indignation that defendants "still state thatcontamination beyond the plant boundaries does not exist," andsuggest that if defendants are denying liability even to thisday, then plaintiffs could not possibly have known anything abouttheir claims until plaintiffs' counsel completed their initialtesting on February 2, 2004. (See Plaintiffs' Brief, at 23 n.15, 50 n. 32; Reply Brief, at 15-16.) In support of theirargument, plaintiffs rely heavily on several depositions whichOlin representatives denied that the plant had contaminated thecommunity. (Reply Brief, at 18.) (Excerpts of several of thesedepositions were presented in video form via a DVD as Exhibit Bto plaintiffs' post-hearing submissions.) For example, in a Rule30(b)(6) deposition, Olin representative Toni Odom testified thatshe did not believe there was any hazardous waste offsite andthat she was unaware of any reason why McIntosh residents shouldbe concerned about health effects or property contamination fromthe Olin site. (Exh. P-24, at 27, 30-35, 376-78.) Similarly,Olin's former plant manager, Joseph Rytlewski, testified in hisdeposition that he did not know of any offsite contamination orany reason for community residents to fear adverse health effectsor property value diminution from Olin activities. (Exh. P-28, at78-81.)

Both common sense and applicable law confirm that thesecircumstances fall well short of supporting a viable equitable estoppel argument. Essentially,plaintiffs maintain that defendants should be barred frominvoking the statute of limitations because they have denied andcontinue to deny liability. If this were the test for equitableestoppel, then few plaintiffs would ever be subject to meaningfullimitations constraints, as it is the rare defendant who does notdeny wrongdoing prior to and during class action litigation,especially where millions of dollars may be at stake. In anyevent,

plaintiffs fail to identify a single authority in which adefendant's mere denial of liability prior to and duringlitigation is a valid basis for applying equitableestoppel.[48] Examination of case law interpreting andapplying equitable estoppel, both at the federal level and underAlabama law, establishes that much more than a mere denial ofliability is needed. See Village of Milford v. K-H HoldingCorp., 390 F.3d 926, 932 (6th Cir. 2004) ("To toll thelimitations period because a prospective defendant denies itsliability . . . would circumvent the purpose of the statute oflimitations."); Page v. Hale, 472 So.2d 634, 636 (Ala. 1985)("In general, conduct which is sufficient to give rise to anestoppel against the pleading of a statute of limitations mustamount to an affirmative inducement to the plaintiff to delaybringing the action.").[49] Indeed, in a case arising underfederal law, the Eleventh Circuit explained that, "[t]osuccessfully invoke the doctrine, the late arriving plaintiffmust show that she was misled by defendant or its agents so that[s]he delayed suit because of (a) an affirmative statement thatthe statutory period to bring the action was longer than itactually was, or (b) promises to make a better settlement of the claim if plaintiff did not bring suit or (c)comparable representations and conduct." Keefe v. Bahama CruiseLine, Inc., 867 F.2d 1318, 1323-24 (11th Cir. 1989). No suchallegations have surfaced here. As such, the Court rejectsplaintiffs' attempt to sidestep the limitations issue altogethervia equitable estoppel predicated on a theory that defendantshave consistently denied wrongdoing.

c. Continuous Tort.

In the alternative, plaintiffs insist that the statute oflimitations defense has no valid application here because "all ofDefendants' activities are continuous and Plaintiffs' claimsshould fall under the ambit of the continuous tort doctrine."(Reply Brief, at 16.) Curiously, despite their voluminousbriefing regarding the limitations issue (spanning dozens ofpages in the aggregate), neither side devotes more than passingattention to whether plaintiffs' claims may be rendered timelyunder a continuous tort theory. Plaintiffs' argument on thispoint is confined to a conclusory statement "that Defendants arecontinuously every day releasing hazardous pollutants into theenvironment and surrounding community, continuously defraudingthe community, and continuously conspiring to manipulate data topresent to government agencies." (Id. at 16.) No authoritiesare offered to describe or apply the continuous tort doctrine. Noevidence is presented to support these accusations of ongoingreleases of mercury by Olin today (aside from the NPDES permit).Apparently, plaintiffs invoke continuous tort doctrine as anafterthought. Although the cursory manner in which it was raisedwould justify summary rejection of the continuous tort claim, theCourt will consider it on the merits.

"When a tort is deemed continuous, the limitations period runsfrom the last date the plaintiff was exposed to damages." Hayniev. Howmedica Osteonics Corp., 137 F. Supp.2d 1292, 1294 (S.D.Ala. 2000). In Moon v. Harco Drugs, Inc., 435 So.2d 218 (Ala.1983), the Alabama Supreme Court explained that a continuous tortoccurs when a defendant engages in "repeated tortious conductwhich has repeatedly and continuously injured a plaintiff." Id.at 220. Where a continuous tort exists, the result is analogousto continuing trespass, such that "the repeated actions of thedefendants combined to create a single cause of action in tort."Id. at 221. The ultimate effect of a continuous tort is toextend

the statute of limitations by compressing a protractedcourse of conduct into a single cause of action. Id.; see also Reichert v. City of Mobile,776 So.2d 761, 766 (Ala. 2000) (continuous torts toll the running ofthe statutory limitations period). However, Alabama courts haveclarified that the "continuous tort" doctrine is not available ininstances where a single act is followed by multipleconsequences, but rather requires "repetitive acts or ongoingwrongdoing." Payton v. Monsanto Co., 801 So.2d 829, 835 & n. 2(Ala. 2001).

To the extent that the continuing wrongdoing claimed byplaintiffs consists of either secondary migration of Olinpollutants in the community or defendants' failure to takeappropriate offsite remedial measures to correct existingcontamination, such allegations do not support application of thecontinuous tort doctrine. Indeed, a defendant's failure to cleanup contamination that predates the limitations period, or themigration of such "old" contamination from one location toanother, does not constitute a continuous tort, as a matter oflaw. See Milford, 390 F.3d at 933 (further migration ofpollutants released before the statutory period, without furtheracts by the defendant, does not constitute an additional tort ora continuing trespass); Achee v. Port Drum Co.,197 F. Supp.2d 723, 735-36 (E.D. Tex. 2002) (continuous tort doctrine wasinapplicable because alleged tortious conduct ceased when plantwas closed and, although plaintiffs claimed continuing wrongbecause defendant failed to clean up area, the refusal to modifyor reverse prior wrongful conduct is not a continuing tort).

Plaintiffs maintain that the continuing wrongful activityconsists of ongoing release of hazardous pollutants from the Olinsite into the community, as well as ongoing fraudulent activitiesby Olin towards the community and regulators. However, there hasbeen no evidence that defendants are presently releasingappreciable quantities of mercury or other hazardous substancesoffsite in a manner that might contaminate plaintiff Pressley'sproperty.[50] As for plaintiffs' allegations of ongoingfraud, viewed in the light most favorable to plaintiffs, the evidence shows thatdefendants have misrepresented the nature and extent ofcontamination to the community and to the news media, up throughand including the present day.[51] Be that as it may,however, any such continuing fraudulent activities would notpresent plaintiff Pressley with a viable continuous tort argumentbecause (as will be discussed below) she became aware ofdefendants' alleged wrongdoing many years ago. At least withrespect to Pressley, there can be no continuing fraud because shenecessarily stopped believing and relying on defendants'representations when she took an outspoken stand that Olin hadcontaminated her property. Thus, with respect to plaintiffPressley, allegations of continuing tort through ongoingfraudulent conduct cannot succeed. The alleged fraud was completeas to Pressley when she stopped relying on defendants'representations and reassurances. That date may be ascertainedthrough examination of Pressley's own conduct and testimony, andany fraudulent activities by defendants thereafter cannot bolsterPressley's fraud claims because she could not reasonably haverelied on defendants' representations.

In short, Pressley may not evade the limitations defense byrelying on the continuous tort doctrine.[52] The applicable limitations periods must beapplied to Pressley's claims to ascertain whether she

hasstanding, with the critical issue being when she knew or shouldhave known of the injury of which she now complains.

d. Facts Relating to Plaintiff Pressley's Knowledge.

In or about the mid 1990s, Pressley became the secretary of theEnvironmental Justice Task Force (the "Task Force" or the"Southern Organizing Committee"), which she described as acommunity group that conducted meetings because of concerns aboutpollution by Olin and Ciba in their community, including the areasouth of Olin where Pressley resides. (Exhibit D-331, at 60-62.)Pressley began attending Task Force meetings at least as early as1996 or 1997. (Id. at 105-06.) This Task Force discussedconcerns regarding pollution in the area, and met withrepresentatives of Olin and Ciba in an effort to redress thosegrievances. (Id. at 67.) The Task Force printed up its ownletterhead bearing the legend "Southern Organizing Committee ForEconomic and Social Justice, McIntosh Chapter," and plainlyidentifying Pressley as the group's secretary in the upper righthand corner, along with the organization's other officers.(Exhibit D-337.) Pressley was one of several "main individuals"at the Task Force during the 1998 time frame. (Exh. D-331, at79.)

In November 1998, the Task Force sent a memorandum to Olin andCiba on its letterhead stating, in relevant part, as follows: "The McIntosh Community and Chemical Company employees request the relocation of McIntosh High School and approximately 300 families located in the contaminated areas. The suggested location should be at least 5 miles from plant site."(Exhibit D-337.) The letter went on to request compensation forplant workers who had been injured by exposure to chemicals, aswell as for "any community member, who has been in contact,whether direct or indirect, and has suffered from leaks or aircontamination." (Id.) The requested area of relocation includedproperties south of the Olin facility and encompassed Pressley'shome, where she has lived for the last 40 years. (Exhibit D-331,at 23-24, 76.) At the time that letter was sent, Pressley"believed" that Olin operations had contaminated the areas fromwhich relocation was requested, including her home. (Id. at76-77.)[53] Pressley testified that she was affiliated withthe organization in 1998 because of these beliefs, stating that"[i]f I didn't believe it, I wouldn't have been with theorganization." (Id. at 92.)

Within weeks after the November 1998 letter, the Task Forceheld a meeting with Olin's then-plant manager, Mr. Rytlewski, atthe Olin guest house. (Id. at 78-81.) Pressley attended thismeeting. (Id. at 78.) Pressley recalls that during the meeting,the Task Force's president, George Curtis, reiterated thecommunity's requests for relocation of 300 families and McIntoshHigh School, and for compensation for community members who hadbeen in contact with pollutants through leaks and aircontamination. (Id. at 81-82.) Pressley's recollection is thatwhen Olin's representative denied the contamination and indicatedthat nothing was wrong, Curtis responded that, "if you aren'tgoing to consider what we are saying, we'll just leave," afterwhich the Task Force representatives (including Pressley) didjust that. (Id. at 84.)

Following the November 1998 meeting with Olin, the SouthernOrganizing Committee conducted a

community meeting in early December, which wasattended by more than 100 people. (Id. at 86-87.) The nextweek, Pressley and other community members attended a multi-daytraining workshop in Baton Rouge, Louisiana, for the purpose ofreceiving training about the community's rights and what stepscould be taken "about doing something that was a concern for thepeople." (Id. at 88.)[54]

Pressley's deposition depicts in stark, unambiguous terms thatthe battle lines had been drawn between Olin and the Task Forceby no later than 1998, and that she had actively represented thecitizens of McIntosh in shaping the community's emergent disputewith Olin.

e. Relevant FRCD for Pressley.

The obvious question for assessing the timeliness of plaintiffPressley's claims is when the limitations periodcommenced.[55] That issue turns on her FRCD, or when sheknew or reasonably should have known that her property had been damaged by mercurycontamination. See 42 U.S.C. § 9658(b)(4). As reflected by thestatutory language, the "reasonably should have known"requirement is an "objective standard for accrual" based not onwhat a plaintiff actually knew, but what she reasonably shouldhave known. See Freier v. Westinghouse Elec. Corp.,303 F.3d 176, 198 (2d Cir. 2002) (FRCD applies "if there was sufficientinformation that a plaintiff reasonably should have known thecause of the injury earlier than he actually knew"). Thisstandard requires less than actual knowledge, but more than "meresuspicion, whatever its reasonableness." Id. at 205-06; seealso O'Connor v. Boeing North American, Inc., 311 F.3d 1139,1148 (9th Cir. 2002) ("the federal standard requires more thansuspicion alone").

In applying the FRCD's "reasonably should have known" standard,courts apply a two-pronged test. First, they assess "whether areasonable person in Plaintiffs' situation would have beenexpected to inquire about the cause of his or her injury."O'Connor, 311 F.3d at 1150. If the plaintiff was on inquirynotice, then courts consider whether such inquiry "would havedisclosed the nature and cause of plaintiff's injury so as to puthim on notice of his claim," and charge plaintiff with knowledgeof facts that would have been discovered through that process.Id. The law is clear that the "reasonably should have known"test under FRCD "does not permit a party to await certainty."Village of Milford v. K-H Holding Corp., 390 F.3d 926, 932(6th Cir. 2004) (when plaintiff knew that defendant hadreleased chemicals and that chemicals were present in plaintiff'swater supply, it knew or should have known of its cause ofaction). A key point in applying the FRCD rule is that aplaintiff "must be diligent in discovering the critical facts. Asa result, a plaintiff who did not actually know that his rightswere violated will be barred from bringing his claim after therunning of the statute of limitations, if he should have known inthe exercise of due diligence." Bibeau v. Pacific NorthwestResearch Foundation Inc., 188 F.3d 1105, 1108 (9th Cir. 1999).

Plaintiffs claim that the appropriate FRCD is February 2, 2004,the date their counsel received test results relating to theMcIntosh area. (Reply Brief, at 15.) The Court has previouslyexpressed incredulity toward the legitimacy of that date, whichpostdates the filing of plaintiffs' Complaint by

six months. Inneither their filings nor the class certification hearing haveplaintiffs done anything to alleviate that skepticism. Forplaintiffs to assert that, as a matter of law, they neither knewnor reasonably should have known the factual bases for theirclaims until six months after they filed a detailed 30-page,12-count lawsuit is absurd. Although they have been affordedseveral opportunities to justify their reasoning, plaintiffs haveidentified no authority in support of the proposition that a FRCDfor specific wrongdoing delineated in a complaint may not occuruntil many months after the filing of that complaint. Clearly,then, the February 2, 2004 date is of no legal significance incomputing plaintiff Pressley's FRCD, as she manifestly had orshould have had knowledge of her injuries and of defendants'alleged wrongdoing on August 25, 2003, the date when she suedOlin.

To determine the appropriate FRCD for Pressley, the Court looksto facts specific to her. Evidence adduced during class discoveryrevealed that Pressley began attending community meetingsregarding Olin/Ciba environmental contamination in 1996 or 1997.By the fall of 1998, Pressley had become secretary for theSouthern Organizing Committee, and actively participated in thatorganization's negotiations with Olin. Specifically, Pressley'sname appears with a short list of other Task Force officers onthe letterhead of a memorandum dated November 16, 1998, in whichthe Southern Organizing Committee demanded that Olin relocate 300families (including Pressley's) "located in the contaminatedareas," as well as the high school, at least five miles away fromthe plant because of alleged offsite contamination. That samememorandum requested compensation for community members who mighthave been exposed to such contamination.[56] The recordfurther shows that in October 1998, Pressley activelyparticipated in efforts to secure legal counsel for the communitywith regard to Olin/Ciba contamination. Within weeks after theTask Force sent the November 1998 letter, Pressley attended ameeting at which Olin denied wrongdoing, prompting Pressley andother members of her organization to walk out because they felt theirdemands were not being seriously considered. Pressley thenattended a multi-day, out-of-town training seminar regardingsteps that could be taken to protect the community's rights.

In light of this evidence, the Court fixes the FRCD forplaintiff Pressley at November 16, 1998, the date on which sheand other members of the community demanded in writing that Cibaand Olin relocate their families from "contaminated areas" to alocation at least five miles away.[57] This evidenceunequivocally establishes that on that date, Pressley believedthat her property was contaminated, believed that thecontamination was sufficiently serious to require relocation, andbelieved that Ciba and Olin were responsible, and that thesebeliefs were sufficiently solidified by that time that sheinitiated concerted action against Olin on the community'sbehalf. Equally importantly, the record shows that by November1998, plaintiff utterly dismissed Olin's representations that thecommunity was safe, to the point that she and other members ofher organization walked out of a meeting when Olin's plantmanager made such statements.[58] At this time, Pressleywas actively seeking legal counsel and attending trainingseminars to explore available options. Plainly, then, by November1998, Pressley was squarely on inquiry notice that her propertywas contaminated and that Olin was the culprit.[59] Therefore, she is charged, as of November 1998, with whateverknowledge a reasonable inquiry might bring, includingspecifically the knowledge

of offsite mercury contamination inand around her property. That Pressley opted not to engage insuch an inquiry until her lawyers conducted testing on her behalfin early 2004 does not excuse her from being charged much earlierwith the knowledge that such inquiry would reasonably haveobtained, had it been done in a reasonably promptmanner.[60]

Defendants argue that the FRCD for Pressley should date back toat least 1995 because by that time it was public knowledge thatthe Olin site was a Superfund property, various McIntoshcommunity organizations had begun holding town meetings aboutcontamination issues, the EPA was holding meetings, and there wasnewspaper coverage of alleged contamination. (Opposition Brief,at 19-20.) But Pressley testified that she did not beginattending Task Force meetings until 1996 or 1997. There is noevidence that her involvement in that organization becameelevated until 1998, or that she ever disbelieved Olin'srepresentations of non-contamination before late 1998. Indeed,defendants fail to provide any evidence that Pressley evenbelieved that her property was contaminated as of 1995, as her deposition testimony addressed her beliefs as of November1998.[61] With respect to media accounts of contamination,the unrebutted testimony is that Pressley does not read theWashington County News with any frequency. (Exh. P-27, at85.)[62] Accordingly, defendants have failed to produce anyevidence that might justify an FRCD for Pressley dating back to1995.

f. Plaintiff Pressley's Trespass and Wantonness Claims areTimely.

On the heels of that labyrinthine timeliness analysis, spawnedby dozens of pages of briefing by both sides, the anticlimacticconclusion is that certain of plaintiff Pressley's claims aretimely, while others are not. All of her causes of action thatare subject to a two-year limitations period (including state-lawclaims for negligence, absolute liability, strict liability,nuisance, conspiracy, intentional representation, fraud andfraudulent concealment, and equitable and constructive fraud) aretime-barred. As both federal and state discovery rules weretriggered by November 16, 1998, Pressley was obliged to file suiton these claims by no later than November 16, 2000; however, shetarried for more than two and a half years after that deadline.As such, these claims are plainly untimely, and Pressley lacksstanding to pursue them on behalf of a class.

A different result inures to Pressley's claims of trespass andwantonness/punitive damages. As indicated supra, those claimsare subject to a six-year limitations period, such that Pressleywas obligated to file suit on those theories by no later thanNovember 16, 2004. The Complaint satisfies this filing deadlinewith more than a year to spare; therefore, the Court finds thatPressley does have standing (both from a timeliness standpointand an injury-in-fact standpoint) to prosecute state-law claims of trespass and wanton trespass on behalf of a class ofsimilarly-situated plaintiffs.[63]

IV. Class Definition of Class A.

A. Legal Standard for Definability of Class.

Although not an express Rule 23 requirement, it is imperativethat Class A (and its various subclasses) be definable in areasonable manner. "In order for a party to represent a class,`the class sought to be represented must be adequately definedand clearly ascertainable.'" Adair v. Johnston, 221 F.R.D. 573,577 (M.D. Ala. 2004) (quoting DeBremaecker v. Short,433 F.2d 733, 734 (5th Cir. 1970)); see also Gustafson v. PolkCounty, Wis. 226 F.R.D. 601, 607 (W.D. Wis. 2005) (impliedrequirement for class certification is that definition ofproposed class must be precise, objective and presentlyascertainable); Mike v. Safeco Ins. Co. of America,223 F.R.D. 50, 52-53 (D. Conn. 2004) (class certification improper unlessclass is sufficiently definite to render it administrativelyfeasible for court to determine membership of particularindividuals without mini-hearings).[64]

In determining whether a class is adequately defined, courtsconsider whether the proposed definition "specif[ies] aparticular group that was harmed during a particular time frame,in a particular location, in a particular way" and "facilitat[es]a court's ability to ascertain its membership in some objective manner." Bentley v. Honeywell Intern., Inc.,223 F.R.D. 471, 477 (S.D. Ohio 2004). Courts have declined to certifya class where the proposed definition would not enableidentification of class members short of individualizedfact-finding. See Crosby v. Social Sec. Admin. of U.S.,796 F.2d 576, 580 (1st Cir. 1986); Noble v. 93 University PlaceCorp., 224 F.R.D. 330, 338 (S.D.N.Y. 2004) (class definition isrejected if mini-hearing on merits of each plaintiff's case willbe necessary to ascertain their class membership). Simply put,"[a] court should deny class certification where the classdefinitions are overly broad, amorphous, and vague, or where thenumber of individualized determinations required to determineclass membership becomes too administratively difficult." Perezv. Metabolife Intern., Inc., 218 F.R.D. 262, 269 (S.D. Fla.2003). Where, as here, plaintiffs subdivide a class into multiplesubclasses, each subclass must separately satisfy classcertification requirements, including the definabilityprerequisite. See Morris v. Wachovia Securities, Inc.,223 F.R.D. 284, 291 (E.D. Va. 2004) ("The class action requirementsmust also be separately proven as to any proposed subclass.");Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 696 (S.D. Fla.2004) ("Each proposed subclass must independently satisfy classaction criteria.").

B. Application to Class A and Associated Subclasses.

As mentioned supra, Class A is a Property Class that would bedivided into subclasses defined by the pathway of pollution.Hence, plaintiffs would have the Court certify an air subclass, asurface water subclass, and a groundwater subclass, each of whichwould be comprised of persons whose property was exposed tocontamination by Olin through the specified environmentalpathway. Of the three subclasses, only the air subclass isdefined through objective criteria. Plaintiffs have utilized anair dispersion model to identify a "zone of contamination"extending approximately 20-25 kilometers around the Olin plant,representing the geographic area in which significant airbornemercury contamination could reasonably be expected to have beendeposited by Olin's operations from 1957 to 1971. There can be noreasonable dispute that the Class A air subclass is readilydefined through the singular criterion of property ownershipwithin the isopleth charted by Dr. Sajo. Clearly, then, the air subclass has been adequately defined and is readilyascertainable.[65]

The surface water and groundwater subclasses rest on a vastlydifferent definitional footing than the air subclass. Plaintiffscharacterize the former as encompassing "nearby properties"contaminated by surface water runoff from the Olin facility,including "owners of property south of the plant and those owningproperty along and near Bilbo Island and Bilbo Creek."(Plaintiffs' Brief, at 6-7.) However, plaintiffs proffer noobjective means of designating a property as "nearby" theselandmarks for purposes of defining the surface water subclass,much less for determining whether such "nearby properties" havein fact been contaminated by surface water runoff from Olin.Plaintiffs do not draw the boundaries of the surface watersubclass on a map, whether using isopleths or identifyingparticular corridors of surface water runoff. Indeed, short ofengaging in exhaustive property-by-property testing proceduresfor Olin surface water runoff and contamination, plaintiffs donot offer (and the Court does not perceive) any method fordetermining whether a particular property owner lies within thescope of the surface water subclass.[66] It would thus beinordinately difficult, from an administrative standpoint, for the Court to identify the members of the surface water subclass.

The shortcomings are even more pronounced with respect to thegroundwater subclass. Although plaintiffs assert thatcontaminants have migrated offsite from the Olin facility viagroundwater, they acknowledge that they do not know the scope ofthe groundwater subclass because they do not know the extent ofthe offsite groundwater contamination. (Plaintiffs' Brief, at8.)[67] Nevertheless, they urge the Court to certify thegroundwater subclass conditionally, "subject to furtherdefinition and refinement" at an unspecified future date viaunspecified future mechanisms. (Id.) Plaintiffs speculate thatit is "likely" that the groundwater subclass will be subsumedwithin the geographic boundaries of the air subclass. (Id. at8-9.) Such contentions are rife with inadequacies. Plaintiffs'groundwater expert, Dr. Phillip Bedient, testified that there isno way to determine the geographic scope of the alleged offsitegroundwater contamination given the data inadequacies.[68]Moreover, not a single one of plaintiffs' water samples takenoffsite tested at above background levels for mercury. (Exh.P-12, at 322; Tr., at 238-42, 333-36.) Testing of monitoringwells near the southern edge of Olin's property reflects no significant levels of mercury contamination in the groundwaterleaving Olin since 1991. (Exh. P-12, at 322-23; Tr., at 239-40,387-89.) In acknowledging these facts, the Court is not makingany value judgment as to the merits of plaintiffs' groundwatercontamination claims.[69] Rather, the point is thatplaintiffs do not presently have any data that might enable themto delineate the scope of a groundwater class, and have notoffered any indication that any such data might reasonably becomeavailable in the future.[70] It appears that thegroundwater class could be defined only by speculation as towhether the groundwater was contaminated and where it might havetraveled.

Rather than tracing the boundaries of the surface water andgroundwater subclasses in a meaningful way, plaintiffs explainwith a sleight of hand that these subclasses will be brought intofocus at some unspecified future date through some unspecifiedmechanism. At that time, plaintiffs urge, the Court can revisit,modify or rescind the certification decision if necessary.(Plaintiffs' Brief, at 6-9; Reply Brief, at 47-48.) The Courtcannot endorse this sort of presumptuous "shoot first, askquestions later" approach to class certification. Plaintiffs areeffectively asking this Court to accept on faith that they

willformulate a meaningful, appropriate, reasonable definition oftheir surface water and groundwater subclasses during the meritsphase. But this action is already 27 months old, and plaintiffshave been unable thus far to sculpt the perimeter of these twosubclasses despite the focus of the proceedings to date on class certification issues. They offer noreason to believe that they will be able to do so between now andtrial. Accordingly, the Court cannot and will not certifyamorphous, ill-defined subclasses based on mere speculation thatplaintiffs might someday formulate meaningful definitions forthose subclasses, predicated on objective criteria that will notnecessitate extensive individualized fact-finding andmini-hearings to determine each prospective class member's statusvis a vis the class.

For all of the foregoing reasons, it is the opinion of theundersigned that the air subclass of Class A is properly defined,but that the surface water and groundwater subclasses are not.Because the surface water and groundwater subclasses flunk thedefinability requirement, plaintiffs' bid for class certificationmust be rejected as to those two subclasses.

V. Rule 23(a) Considerations as to Class A.

Having concluded that at least one named plaintiff has standingto pursue at least trespass and wanton trespass claims on behalfof Class A, and that at least the air subclass has been properlydefined, the Court now turns to the Rule 23(a) factors. For thesake of completeness, the Court will apply Rule 23(a) to thetrespass and wanton trespass causes of action of plaintiffPressley, and alternatively to all claims of all plaintiffsrelating to Class A, irrespective of the standing defectsidentified above.[71] Where appropriate, the Court willalso assess whether the surface water and groundwater subclassescould have satisfied Rule 23 elements, assuming they had beenproperly defined.

A. Numerosity.

The numerosity requirement obliges plaintiffs to show that "theclass is so numerous that joinder of all members isimpracticable." Rule 23(a)(1), Fed.R.Civ.P. No rigid numericalthreshold must be met. See Bacon v. Honda of America Mfg.,Inc., 370 F.3d 565, 570 (6th Cir. 2004) ("There is noautomatic cut-off point at which the number of plaintiffs makesjoinder impractical, thereby making a class-action suit the only viable alternative."); Silva-Arriagav. Texas Exp., Inc., 222 F.R.D. 684, 688 (M.D. Fla. 2004)(explaining that no specific number of class members is requiredto show impracticability of joinder for Rule 23(a)(1) purposes).Nonetheless, the sheer number of potential class members maywarrant a conclusion that Rule 23(a)(1) is satisfied. SeeBacon, 370 F.3d at 570 (if there are more than several hundredclass members, that fact favors numerosity). Numerosity isgenerally presumed when a proposed class exceeds 40 members. SeeCox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553(11th Cir. 1986); Serventi v. Bucks Technical High School,225 F.R.D. 159, 165 (E.D. Pa. 2004) ("generally if the namedplaintiff demonstrates that the potential number of plaintiffsexceeds 40, the first prong of Rule 23(a) has been met");Dujanovic v. MortgageAmerica, Inc.,

185 F.R.D. 660, 666 (N.D.Ala. 1999) ("As a general rule, classes of more than 40 membersare deemed to satisfy the numerosity requirement."). Otherconsiderations for Rule 23(a)(1) purposes include geographicdiversity of class members, judicial economy, and the ease ofidentifying and locating class members. See Jones v. Roy,202 F.R.D. 658, 665-66 (M.D. Ala. 2001) (collecting cases).

Here, the air subclass proposed by plaintiffs includes allproperty owners within a clearly demarcated "zone ofcontamination" as delineated by Dr. Sajo's air dispersion model.Plaintiffs do not quantify the number of property owners withinthat 20 to 25 kilometer zone surrounding the Olin plant; however,it is reasonable to assume that these prospective class membersnumber at least well into the hundreds. On its face, thisformulation of the air subclass would appear to satisfy Rule23(a)(1), inasmuch as joinder of so many prospective plaintiffswould almost certainly be rendered impracticable by their sheernumbers.

Nonetheless, even in the face of plaintiffs' compelling showingthat the air subclass will be hundreds of persons strong,defendants stubbornly refuse to concede the numerositypoint.[72] In particular, defendants assert that the numerosity requirement isnot satisfied because the air subclass is dependent on Dr. Sajo'sflawed models, which the Court should disregard. (OppositionBrief, at 31.) As the Court has explained supra, however, it isinappropriate to subject Dr. Sajo's research and testimony to arigorous Daubert-style inquisition here, and Dr. Sajo's work isnot so demonstrably faulty as to be inadmissible as a matter oflaw. See generally O'Connor v. Boeing North American, Inc.,184 F.R.D. 311, 321 n. 7 (C.D. Cal. 1998) (at class certificationstage, "inquiry into the admissibility of Plaintiffs' proposedexpert testimony as set forth in Daubert would beinappropriate"); In re Polypropylene Carpet Antitrust Litig.,996 F. Supp. 18, 25-26 (N.D. Ga. 1997) (similar). Accordingly,the Court accepts Dr. Sajo's "zone of contamination" asidentifying the air subclass, and the magnitude of that "zone" isplainly sufficient to render impracticable the joinder of themany hundreds of property owners encompassed within that "zone."Rule 23(a)(1) is satisfied.[73] The same is not true of the groundwater and surface watersubclasses. Plaintiffs have made no showing from which anyreasonable conclusion could be drawn as to the number of propertyowners afflicted by alleged surface water and groundwatercontamination emanating from the Olin plant. Monitoring well datareveals that there has been no contaminated groundwater leavingthe southern boundary of the McIntosh site for well over adecade, and plaintiffs' testing yielded only two samples ofsurface water that show appreciable mercury contamination (one orboth of which may be on Olin property or public waterways, not onclass members' property).[74] Thus, there is no indicationin the record that any sizeable numbers of property owners haveor may have experienced property devaluation by virtue of surfacewater or groundwater contamination because of Olin's activities.There is no reason to believe that joinder of any individuals whohave sustained such harms would be impracticable; therefore, evenif the surface water and groundwater subclasses were properlydefined, they fail to satisfy the numerosity requirement setforth in Rule 23(a)(1).[75] B. Commonality/Typicality.

The Federal Rules of Civil Procedure authorize classcertification only where "there are questions of law or factcommon to the class" (the "commonality" requirement) and "theclaims or defenses of the

representative parties are typical ofthe claims or defenses of the class" (the "typicality"requirement). Rule 23(a)(2), (3). The Eleventh Circuit has opinedthat these requirements, while distinct, are interrelated andoverlapping, inasmuch as "[b]oth requirements focus on whether asufficient nexus exists" between the claims of classrepresentatives and those of other class members to warrant classcertification. Cooper v. Southern Co, 390 F.3d 695, 713(11th Cir. 2004) (quoting Prado-Steiman v. Bush,221 F.3d 1266, 1278 (11th Cir. 2000)); see also General Telephone Co.of Southwest v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364,72 L.Ed.2d 740 (1982) ("The commonality and typicalityrequirements of Rule 23(a) tend to merge."); Prado-Steiman,221 F.3d at 1278-79 ("the commonality and typicality requirements ofRule 23(a) overlap").[76] The critical function of thetypicality/commonality inquiry is to verify that namedplaintiffs' incentives are aligned with those of absent classmembers to ensure that the latter's interests are properlyserved. See Prado-Steiman, 221 F.3d at 1279. The Court willconsider the commonality and typicality requirements separately,but recognizes that the distinctions between them may be blurry.

1. Commonality Requirement.

Rule 23(a)(2)'s commonality prerequisite contemplates that "aclass action must involve issues that are susceptible toclass-wide proof." Cooper, 390 F.3d at 714 (citation omitted)."A court cannot simply presume that the commonality requirementhas been satisfied; the plaintiff bears the burden of proof onthis issue." Nelson v. U.S. Steel Corp., 709 F.2d 675, 679-80(11th Cir. 1983) (at class certification stage, plaintiff isobligated to show, in at least a preliminary fashion, commonality between her claims and those of putative class). To meet thisburden, "[i]t is not necessary that all of the questions raisedby arguments are identical; it is sufficient if a single commonissue is shared by the class." Weiss v. La Suisse, SocieteD'Assurances Sur La Vie, 226 F.R.D. 446, 449 (S.D.N.Y. 2005);see also Amone v. Aveiro, 226 F.R.D. 677, 684 (D. Haw. 2005)("Commonality is established by the existence of shared legalissues with divergent factual predicates or a common core ofsalient facts coupled with disparate legal remedies within theclass.") (citation omitted).

The commonality requirement is not a stringent threshold anddoes not impose an unwieldy burden on plaintiffs. See Dujanovicv. MortgageAmerica, Inc., 185 F.R.D. 660, 667 (N.D. Ala. 1999)(characterizing Rule 23(a)(2) burden as "not high"); Georgine v.Amchem Products, Inc., 83 F.3d 610, 627 (3rd Cir. 1996)(recognizing "very low threshold for commonality"). In fact, as ageneral rule, all that is necessary to satisfy Rule 23(a)(2) isan allegation of a standardized, uniform course of conduct bydefendants affecting plaintiffs. See, e.g., Bentley v. HoneywellIntern., Inc., 223 F.R.D. 471, 481 (S.D. Ohio 2004) ("whendefendants' conduct towards the proposed class is alleged to beuniform, the commonality requirement is met."); Agan v. Katzman& Korr, P.A., 222 F.R.D. 692, 697 (S.D. Fla. 2004) ("Thecommonality element is generally satisfied when a plaintiffalleges that defendants have engaged in a standardized course ofconduct that affects all class members."). Plaintiffs need onlyshow a "common nucleus of operative facts" to satisfy Rule23(a)(2). Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 581(N.D. Ill. 2005); In re Currency Conversion Fee AntitrustLitigation, 224 F.R.D. 555, 562 (S.D.N.Y. 2004) ("thecommonality requirement does not require that each class memberhave

identical claims as long as at least one common question offact or law is evident"); Bentley, 223 F.R.D. at 479 (observingthat factual dissimilarities among class members' claims do not,in and of themselves, warrant denial of class certification oncommonality grounds).

In briefing Rule 23(a)(2), both parties have obscured theapplicable legal standard.[77] The touchstone of a commonality analysis is not whether any issueswill require individualized proof, as defendants attempt to show.Likewise, the commonality requirement does not hinge on theoutcome of a balancing test to whether any common issues do or donot predominate over their individual counterparts, as plaintiffswould argue. Rather, as shown by the legion authorities above,the critical question for commonality purposes is whether commoncore issues of fact are present. They unquestionably are. TheClass A plaintiffs allege that Olin engaged in a unitary,singular course of conduct against them by emitting mercury vaporinto the air, which was then deposited on their properties bywind or rain, and subsequently engaging in deceptive conduct toconceal their polluting activities and the offsite impact ofsame. The Court does not doubt that numerous issues in thislitigation will require individualized proof. Nonetheless, theexistence of a core nucleus of common factual issues (e.g., didOlin contamination travel offsite, and if so, what contaminantswere released, when and how were they released, and did Olinmislead the community as to those contaminants) is sufficient tosatisfy the commonality requirements, irrespective ofcountervailing individual issues. It being beyond serious disputethat this litigation involves at least certain issues that aresusceptible to class-wide proof, Rule 23(a)(2) is satisfied,regardless of whether other issues require individualproof.[78]

2. Typicality Requirement.

To comport with Rule 23(a)(3), plaintiffs must show that "theclaims or defenses of the representative parties are typical ofthe claims or defenses of the class." Id. Simply put, classrepresentatives "must possess the same interest and suffer thesame injury as the class members in order to be typical under Rule 23(a)(3)." Cooper,390 F.3d at 713 (citation omitted). The key to this inquiry is whether classrepresentatives' claims are similar to those of putative classmembers. See Hines v. Widnall, 334 F.3d 1253, 1257 (11thCir. 2003). In other words, the typicality requirement turns onwhether the claims of class representatives are "reasonablyco-extensive" with those of other plaintiffs, in terms of classrepresentatives' individual circumstances and the legal theoriesupon which they proceed. Tanne v. Autobytel, Inc.,226 F.R.D. 659, 667 (C.D. Cal. 2005). Rule 23(a)(3) is satisfied if theplaintiffs show that the same practice or course of conduct bydefendants affected both the named class representatives and theabsent class members, and that the class representatives' claimsare based on the same legal theories as those of their classmember counterparts. See Kornberg v. Carnival Cruise Lines,Inc., 741 F.2d 1332, 1337 (11th Cir. 1984) (opining thattypicality is satisfied if claims of class representatives andother class members arise from same events and are based on samelegal theory); Weiss, 226 F.R.D. at 450 ("The typicalityrequirement of Rule 23(a)(3) is satisfied if the claims of thenamed plaintiffs arise from the same practice or course ofconduct that gives rise to the claims of the proposed classmembers."); Agan, 222 F.R.D. at 698 ("If parties seeking classcertification can

establish that the same unlawful conduct wasdirected at or affected both the class representatives and theclass itself, then the typicality requirement is usually metirrespective of varying fact patterns which underlie theindividual claims."); Noble v. 93 University Place Corp.,224 F.R.D. 330, 338 (S.D.N.Y. 2004) ("A class representative's claimsare "typical" under Rule 23(a)(3), where each class member'sclaims arise from the same course of events and each class membermakes similar legal arguments to prove defendants' liability.");Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 542-43(N.D. Ala. 2001) (noting that Rule 23(a)(3) requires only thatclass representatives' claims arise from same broad course ofconduct and be based on same legal theory as those of otherplaintiffs).

Here, the named plaintiffs' claims are clearly based on thesame course of conduct and rely on similar, if not identical,legal arguments as those of other class members. All plaintiffscontend that defendants engaged in a pattern of environmentalcontamination through air, surface water, and groundwaterpathways over a period of many years. All plaintiffs propound thesame or similar legal theories in support of their claims. On this record, there isplainly a sufficient nexus between the claims of the classrepresentatives and those of the class members at large tosatisfy the typicality requirement.[79]

Under any reasonable application of Rule 23(a)(3), it is clearthat the incentives of the named plaintiffs are aligned withthose of the absent class members in such a manner as to ensurethat they will fully and fairly represent the interests of otherclass members. In other words, the claims of the named plaintiffsand the other class members, at least as to Class A, areinterrelated and are predicated on the same legal theories andthe same alleged wrongdoing by defendants, notwithstanding thepotential for significant factual differences in each plaintiff'sclaims.[80] Nothing further is required to provetypicality.

C. Adequacy.

The fourth Rule 23(a) factor requires a showing that "therepresentative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4),Fed.R.Civ.P.[81] The adequacy element is intended toascertain whether a representative plaintiff will sufficientlysafeguard the interests of other class members. See Valley DrugCo. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181, 1189(11th Cir. 2003). As one district court succinctly put it,"[t]he named plaintiff's adequacy to represent the putative classis established where the said plaintiff 1) has common interestswith the unnamed class members, 2) will vigorously prosecute theinterests of the class through qualified counsel, and 3) has noantagonistic interests with the interests of the class." In reConsolidated Non-Filing Ins. Fee Litigation, 195 F.R.D. 684, 691(M.D. Ala. 2000); see also Valley Drug, 350 F.3d at 1189(explaining that Rule 23(a)(4) precludes class certificationwhere economic interests and objectives of named plaintiffsdiffer significantly from those of unnamed classmembers).[82] "Antagonistic interests" means a fundamentalconflict, including circumstances where certain plaintiffs claimto have been harmed by conduct that benefitted other classmembers. See Valley Drug, 350 F.3d at 1189.

Upon careful review of the record, the Court has no difficultyconcluding that Rule 23(a)(4) is satisfied. After all, thecommonality of the named plaintiffs' interests with those ofother class members has already been established supra, andthere is no reason to believe that the named plaintiffs will notvigorously prosecute class interests or that the namedplaintiffs' interests are somehow at loggerheads with those of the rest of the class. Plaintiffs have shown to theCourt's satisfaction that they are adequate to represent theinterests of the class.[83]

VI. Rule 23(b) Requirement as to Class A.

Assuming that plaintiffs can successfully traverse all four ofthe Rule 23(a) hurdles with respect to proposed Class A (or someportion of same), their quest for class certification wouldnonetheless fail absent satisfaction of one prong of Rule 23(b).Here, plaintiffs invoke Rule 23(b)(3), which requires a showingthat common questions predominate over individual questions andthat the class action mechanism is superior to other methods forfair and efficient adjudication of the dispute.[84] Thepredominance and superiority requirements are properly viewed assupplementary to those of Rule 23(a). See Cooper,390 F.3d at 722.[85] A. Predominance Requirement.

1. Legal Standard.

With respect to predominance, the rule provides that classcertification is proper pursuant to Rule 23(b)(3) only where"questions of law or fact common to the members of the classpredominate over any questions affecting only individualmembers." Id. As the Advisory Committee noted, "[i]t is onlywhere this predominance exists that economies can be achieved bymeans of the class-action device." Rule 23(b)(3), Advisory Notesto 1966 Amendment. Although superficially similar, the Rule23(b)(3) predominance requirement is "far more demanding" thanthe Rule 23(a) commonality requirement. Cooper,390 F.3d at 722; see also Jackson v. Motel 6 Multipurpose, Inc.,130 F.3d 999, 1005 (11th Cir. 1997) ("The predominance inquiry . . .is far more demanding than Rule 23(a)'s commonalityrequirement."); Noble, 224 F.R.D. at 339 (similar); O'Connorv. Boeing North American, Inc., 184 F.R.D. 311, 339 (C.D. Cal.1998) ("For the proponent to satisfy the predominance inquiry, itis not enough to establish that common questions of law or factmerely exist, as it is under Rule 23(a)(2)'s commonalityrequirement."). The predominance requirement is manifestly notsatisfied if, as a practical matter, resolution of common issueswill "break[] down into an unmanageable variety of individuallegal and factual issues." Cooper, 390 F.3d at 722 (quotingAndrews v. American Tel. & Tel. Co., 95 F.3d 1014, 1023(11th Cir. 1996)). Thus, the Eleventh Circuit has declaredthat Rule 23(b)(3) cannot be satisfied when it appears that mostof plaintiffs' claims will stand or fall depending onindividual-specific factual issues. See Cooper,390 F.3d at 722.

Last year, the Eleventh Circuit issued a definitive opinion onthe meaning and application of the predominance requirement inKlay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004). Thatruling is highly instructive here. The Klay court reasoned that"[w]here, after adjudication of the classwide issues, plaintiffsmust still introduce a great deal of individualized proof orargue a number of

individualized legal points to establish mostor all of the elements of their individual claims, such claimsare not suitable for class certification under Rule 23(b)(3)."Id. at 1255. An alternative formulation of the predominance criterion is whether addition of more plaintiffsto the class would require presentation of significant amounts ofnew evidence. Id. If the answer to that question isaffirmative, then it is likely that individual issues predominateover their common counterparts. Id.

Applying this standard, the Klay panel held that the districtcourt abused its discretion in certifying a class under Rule23(b)(3) as to certain state-law claims because the case involvedplaintiffs who suffered "varying types of injury . . . throughdifferent causal mechanisms, thereby creating many separateissues," with "[n]o single proximate cause [that] applies equallyto each potential class member and each defendant."382 F.3d at 1265 (citations omitted). Klay involved civil RICO andstate-law claims arising from allegations that the defendants(health care entities responsible for reimbursing physicians inHMOs) had allegedly programmed computers to underpay plaintiffs(a putative class of physicians) on those reimbursements. Thefundamental problem in Klay was that the classwide proof showedonly that defendants had sometimes programmed computers todefraud doctors out of reimbursement funds, through a variety oftechniques, but did not show that any particular doctor had beencheated on any particular occasion, or by how much. Id. at1266-67. Thus, even if plaintiffs could prove that defendantsconspired against them and sometimes underpaid or delayedpayments improperly, each plaintiff would still have to proveindependently, by facts specific to him, that his payments hadbeen improperly reduced or delayed. Id. at 1268. Klaycontrasted this scenario with several actions in which theEleventh Circuit upheld class certification where the evidencewas that defendants had harmed each putative plaintiff in exactlythe same way, albeit not in the same exact dollar amount.Id.[86] In light of these concerns, the Eleventh Circuitheld that "even though the plaintiffs' breach of contract claims involve some relatively simple commonissues of law and possibly some common issues of fact,individualized issues of fact predominate." Klay,382 F.3d at 1267.[87]

2. Application of Rule 23(b)(3) Standard to Plaintiffs'Claims.

A helpful starting point in conducting the Rule 23(b)(3)weighing of common and individualized issues is to outlineexactly which factual and legal issues are common to the class,and which are plaintiff-specific. Undoubtedly, this case featuresa nucleus of common factual issues relating to defendants'conduct. Whether Olin released mercury, whether such mercurymigrated offsite, where the mercury traveled when it left Olinproperty, the pathway(s) through which it was transported, andthe time period of the alleged mercury contamination are allcommon questions of fact. Similarly, classwide determinations canlikely be made as to whether defendants made fraudulentmisrepresentations or wrongfully concealed information regardingthe existence and scope of contamination, based on common factualfindings regarding what defendants said, when they said it, andwhat they knew or reasonably should have known at the time theymade such statements. The Court expects that the proof for theseissues relating to Olin's course of conduct will be consistentacross all plaintiffs.

However, numerous other fundamental issues will demandindividual-specific resolution. Whether a plaintiff's property iscontaminated, the source(s) of such contamination, the extent ofsuch contamination, the cause and timing of harm, and theresulting damage (measured in diminution of property value) areall questions that will require plaintiff-by-plaintiff scrutiny.Likewise, the plaintiffs' awareness of and reliance on allegedlyfraudulent statements and reassurances by Olin must necessarily be resolved on an individualized basis. Furthermore, inasmuch asdefendants have interposed a limitations defense, individualizedinquiry will be needed to ascertain when each plaintiff knew orshould have known of the alleged contamination.

In balancing these competing considerations, the Court looks tothe Klay standard of whether, after adjudication of classwideissues, plaintiffs would still need to introduce extensiveindividualized proof or argue substantial individualized legalpoints to establish most of the elements of their claims. Thisquestion is answered in the affirmative.

Three examples will illustrate the point. First, under Alabamalaw a plaintiff cannot prevail on an indirect trespass claim forrelease of foreign polluting matter onto his property unless heproves the following elements: "1) an invasion affecting aninterest in the exclusive possession of his property; 2) anintentional doing of the act which results in the invasion; 3)reasonable foreseeability that the act done could result in aninvasion of plaintiff's possessory interest; and 4) substantialdamage to the res." Russell Corp. v. Sullivan, 790 So.2d 940,947 (Ala. 2001) (citation omitted); see also Snyder v. HowardPlumbing and Heating Co., 792 So.2d 425, 428 (Ala.Civ.App.2000). Even if plaintiffs proved all the common issues showing ahistory of releases of toxic materials by Olin, each plaintiffwould still have to make an individual showing of the first andfourth elements (and perhaps also the third, depending on theplaintiff's proximity to Olin), requiring substantialindividualized proof and legal argument. Second, plaintiffs'nuisance claims require proof of (1) activities that worked hurt,inconvenience, or damage to the complaining party, (2) breach ofa legal duty owed, (3) causal relation between the conduct oractivity complained of and the hurt, inconvenience, or damagesued for, and (4) damages. See Tipler v. McKenzie Tank Lines,547 So.2d 438, 440 (Ala. 1989). The classwide proof may establishthe second of those nuisance elements, but considerableindividualized showings would be necessary as to each of theother three nuisance elements.

Third, plaintiffs' fraud claims generally require a showingthat defendants made a false representation concerning a materialfact, that defendants knew the statement was false or made it inreckless disregard for its truth or falsity, that the plaintiffreasonably relied upon such statement, and that the plaintiff wasdamaged by virtue of such reliance. See, e.g., Reynolds MetalsCo. v. Hill, 825 So.2d 100, 105 (Ala. 2002). Classwide evidence may establish thatdefendants made certain misrepresentations regarding offsitecontamination; however, different plaintiffs will almostcertainly have become aware of different representations atdifferent times (if ever),[88] and will have reacteddifferently to such awareness. As such, plaintiffs' fraud-relatedclaims will inevitably become mired in individual-specificinquiries about which representations by defendants were heard byeach plaintiff, whether and how each plaintiff relied on suchrepresentations, whether such reliance was

reasonable given otherinformation that may have been known by or reasonably availableto that plaintiff, and whether and how that plaintiff was damagedby virtue of any such reasonable reliance. Thus, the bulk of theproof regarding plaintiffs' fraud claims will be individualizedin nature.[89] 3. Application of Rule 23(b)(3) to Limitations Defense.

The primacy of individual-specific proof considerations isfurther magnified under the lens of defendants' statute oflimitations defense. There can be no reasonable debate thatdifferent plaintiffs became aware, or should have become aware,of the existence of their claims at different times.[90]Thus, the FRCD will need to be fixed separately for eachplaintiff based on a plethora of factors such as (a) whether andwhen he observed anything out of the ordinary on or near hisproperty that might reasonably have led him to believe it wasbeing contaminated by mercury from Olin; (b) whether and when heparticipated in any community organizations relating to Olin andCiba contamination; (c) whether and when he was aware of anyrepresentations by Olin relating to the level of offsitecontamination and, if so, whether and how he relied upon them;(d) whether and when he or any organization of which he was amember requested relief from Olin for alleged contamination; (e)whether and when he became aware of any news reports regardingalleged contamination emanating from the Olin site; (f) whetherand when he sought out legal counsel to pursue potentialcontamination-related claims against Olin; (g) whether and whenhe first believed that Olin was contaminating his property; (h)whether and when he believed Olin's allegedly fraudulentrepresentations regarding offsite contamination; and (i) whetherand when he stopped believing such representations.[91] The Court has already pored over extensive record evidence anddevoted extensive analysis to evaluating the statute oflimitations defense as it pertains to plaintiff Pressley. Seesupra, at Section III.B.2.d.-f. To gauge the applicable FRCD foreach individual plaintiff, the Court would undoubtedly have toengage in a similarly detailed analysis tailored to each person'sunique circumstances.[92] Given that community agitationagainst Olin's alleged contaminating activities dates back to atleast the early 1990s, it is probable that certain putative classmembers may have FRCDs predating six years before the filing ofthe Complaint, rendering all of their claims time barred. It islikewise probable that certain class members had no knowledge,and no reason to know, of alleged contamination to theirproperties until the Complaint was filed on their behalf inAugust 2003, such that all of their claims are timely. It is alsovirtually certain that other plaintiffs will be situatedsimilarly to Pressley, with the 2-year limitations claims beingtime-barred while the 6-year limitations claims are timely. Onlyafter painstaking factfinding on a plaintiff-by-plaintiff basiswill each plaintiff's status vis a vis the statute of limitationsdefense be ascertainable.[93] Courts have found thatdisparate, individualized assessment of the statute of limitations issue itself may cause individual considerations topredominate for purposes of a Rule 23(b)(3) inquiry. SeeO'Connor v. Boeing North American, Inc., 197 F.R.D. 404, 414(C.D. Cal. 2000) ("Based on the individualized, fact-intensivenature of the necessary inquiry in this case, the statute oflimitations issues preclude a finding that common issuespredominate over individual issues."); Corley v. Entergy Corp.,220 F.R.D. 478, 487-88 (E.D. Tex. 2004) (reasoning thatlimitations issues defeat predominance because issues of whetherindividual landowners' claims are timely and whether equitabletolling applies are not amenable to class treatment).

4. Application of Rule 23(b)(3) to Damages Issues.

In this case, defendants devote considerable effort to arguingthat damages calculations will necessarily be performed on anindividualized basis. The mere fact of individualized damagescomputations does not defeat predominance. See, e.g., AllapattahServices, Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11thCir. 2003) ("Numerous courts have recognized that the presence ofindividualized damages issues does not prevent a finding that thecommon issues in the case predominate."); Sterling v. VelsicolChemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) ("Nomatter how individualized the issue of damages may be, theseissues may be reserved for individual treatment with the questionof liability tried as a class action."); De La Fuente v.Stokely-Van Camp, Inc., 713 F.2d 225, 233 (7th Cir. 1983)("It is very common for Rule 23(b)(3) class actions to involvediffering damage awards for different class members."); Morrisv. Wachovia Securities, Inc., 223 F.R.D. 284, 299 (E.D. Va.2004) ("differences in damages among the potential class membersdo not generally defeat predominance if liability is common tothe class"). The Klay decision casts light on this issue, asthe Eleventh Circuit explained that "where damages can becomputed according to some formula, statistical analysis, orother easy or essentially mechanical methods, the fact thatdamages must be calculated on an individual basis is noimpediment to class certification." Klay, 382 F.3d at 1259-60(footnotes omitted). However, where there are significantindividualized questions regarding liability, Klay counselsthat the need for individualized assessments of damages maywarrant denial of Rule 23(b)(3) certification. Id. at 1260.

Here the plaintiffs' damages expert, Dr. Robert Simons (who didnot testify at the class certification hearing), has not yetperformed any analysis of the diminution in value of theplaintiffs' property.[94] Indeed, Dr. Simons testified thathis work has been confined to reviewing literature and that hehas not studied the diminution in property value for theseplaintiffs. (Exh. P-31, at 60-61.) He has performed neithersurveys nor analysis in an effort to quantify plaintiffs'damages. (Id. at 115-16.) Dr. Simons indicated that he will beable to utilize one or more of a laundry list of real estateanalytical techniques to quantify the reduction in propertyvalues; however, he has not applied those methodologies to classmembers' properties to date, and was vague as to his intentionsfor doing so. (Exh. P-48, at 3-4.) Despite the paucity ofanalysis, Dr. Simons' report optimistically concludes in the mostconclusory of terms that plaintiffs' property values "can bemodeled and calculated on a class-wide basis through a common,formulaic methodology as to all the property owners in theproposed class." (Id. at 13.)

Review of the record reveals that Dr. Simons' rosy, conclusoryprognostications of a "common, formulaic methodology" obscurenumerous conceptual and practical obstacles almost certain tonegate straightforward use of an across-the-board formula. Dr.Simons is on record as agreeing that the analysis will be more complex than a simple formula, and that hehas not performed sufficient research in this case to knowwhether application of these generically described methodologiescan succeed. As to certain properties within the "zone ofcontamination," Dr. Simons acknowledged that no formulaic methodis available, and that he will have to perform property-specificappraisals. (Exh.

P-31, at 61-62.) He also conceded that, inidentifying benchmark "before and after" market conditions, hisefforts could be complicated by the need for inclusion ofmultiple dates, but that he has not determined what any of thosepotential dates might be as yet. (Id. at 127-28, 132-33.) Dr.Simons agreed that different information could have becomeavailable to the market regarding the contaminated oruncontaminated state of the properties in particular regions atdifferent times, but that he does not know when those marketeffects occurred because he has not performed the analysis.(Id. at 149-50.) When pressed for specifics in certain aspectsof the analysis, Dr. Simons commented that he would not knowuntil the merits stage. (Id. at 173.) At one point, he candidlyacknowledged, "I haven't done anything in this case yet." (Id.at 307.) Even under his own veiled methodology, Dr. Simonsconcedes that separate analyses would have to be performed forrental and industrial properties, including potentiallyindividual-specific appraisals. (Id. at 186, 188-89.) Separateanalyses would also have to be performed for crop lands andtimber lands within the geographic boundaries of the class.(Id. at 193-94.) When asked how he would distinguish betweendiminution in property value resulting from contamination causedby Olin and diminution in property value resulting fromcontamination caused by other sources, Dr. Simons had noeffective response except to reinterpret the question as relatingto the possibility of dividing a "pot of money" at the"settlement stage." (Id. at 217-18.)[95]

Any rational examination of the multitudinous factors that mayimpact each plaintiff's damages award must conclude that damages in this case are not amenable tocomputation by an easy or essentially mechanical method. Rather,those calculations will be fraught with peril, and will hinge onproperty-specific determinations of (a) whether the property isindustrial, residential, commercial, agricultural, public, etc.in nature; (b) whether the property is contaminated;[96](c) the extent of its contamination; (d) the pathway(s) ofexposure; (e) the genesis and duration of its contamination; (f)where on the property the contamination is located;[97] and(g) the portion of that contamination attributable toOlin.[98] Clearly, then, individualized inquiry into damages issuesappears inevitable.[99] To be sure, the necessity forindividualized damage determinations is not sufficient, in and ofitself, to warrant a finding that classwide issues do notpredominate over individual issues. Nonetheless, as the EleventhCircuit has recognized, "[i]t is primarily where there aresignificant individualized questions going to liability that theneed for individualized assessments of damages is enough topreclude 23(b)(3) certification." Klay, 382 F.3d at 1260. Thatis precisely the situation here, inasmuch as both liability anddamages determinations are chock full of individual-specific inquiries.Thus, the need for individualized damages calculations, whencombined with the numerous liability and limitations issuesrequiring plaintiff-by-plaintiff scrutiny, counsels stronglyagainst class certification pursuant to Rule 23(b)(3).

5. Conclusion.

Without question, there is a certain core nucleus of commonfacts in this case, encompassing such issues as whether Olinreleased mercury, when it released mercury, where the mercurywent, and what efforts Olin made to notify the community orconceal such releases. Adjudication of such common factual issueswould establish background facts, but little else.[100]Proof of the classwide facts would

neither establish defendants'liability to any class member nor fix the level of damagesawarded to any plaintiff. The common facts would not establish asingle plaintiff's entitlement to recover on any theory ofliability, or even show that a single plaintiff is aggrieved.Even after the common proof was made, each plaintiff would stillhave to prove individually that his property is contaminated,that the contamination came from Olin, and that he was aware ofand relied on Olin's misrepresentations to his detriment. TheCourt would have to fix separate FRCDs for each plaintiff. Afterresolving the individual liability and timeliness issues, thedamages inquiry would be carried out at the individual level.Notwithstanding class status, the clear weight of the proof for agiven plaintiff's claims would be individual in nature. Thus,class certification would snarl, delay and complicate this actionbeyond all recognition, spawning inquiries into liability,causation, reliance, timeliness and damages that would require adjudication on a plaintiff-by-plaintiff basis. Far fromsaving time, class treatment of this action would result in anyefficiencies being washed away by torrents of paralyzingindividual determinations multiplied across hundreds of classmembers. Simply put, if litigated as a class action, this casewould break down into an unmanageable variety of individual legaland factual issues. Given the myriad sources of harm, types ofharm, and damages resulting from harm, individual issues dwarfwhatever common issues there may be, such that a vast array ofmini-trials would be required for each class member ifcertification were granted. Accordingly, it is the opinion of theundersigned that the predominance problem is fatal to plaintiffs'bid for class certification. Stated differently, the Court findsthat questions of law or fact common to members of the class donot predominate over any questions affecting only individualmembers, and that certification of a class under Rule 23(b)(3) istherefore inappropriate and unwarranted.

A helpful analogy may be found in Georgine v. Amchem Products,Inc., 83 F.3d 610 (3rd Cir. 1996), a personal injury caseinvolving asbestos exposure. In determining that Rule 23(b)(3)predominance was not satisfied, the Georgine court noted that,although there were broadly common issues (i.e., whetherdefendants knew of the hazards of asbestos, whether they hadadequately tested, etc.), class members' claims varied widelybased on such variables as differential exposures for differentlengths of time, in different ways, and over different periods,as well as differences in the manifestations of harm (i.e.,some plaintiffs had suffered physical injury, other plaintiffshad not). The same is true here. Certainly, there are sharedfactual issues (i.e., did Olin release mercury, how much, overwhat period of time, through what pathways, etc.). But each classmember's claims may be expected to vary widely depending on suchfactors as whether their property is contaminated at all, theextent of contamination, the causation of such contamination,when each class member knew or should have known of thecontamination, and the extent to which each class member hassustained property damage. As in Georgine, these factualdifferences translate into significant legal differences,including causation, limitations, and damages. The Georginepanel astutely observed that "the individualized issues canbecome overwhelming in actions involving long-term mass torts(i.e., those which do not rise out of a single accident),"thereby rendering Rule 23(b)(3) certification problematic andinappropriate. 83 F.3d at 628.[101]

That said, the Court is well aware that case authority is notuniform in its method of application of

Rule 23(b)(3) to propertydamage cases involving alleged environmentalcontamination.[102] The Court further recognizes that somecourts have minimized the types of concerns articulated here asinsufficient to swing the predominance pendulum against classcertification. See, e.g., Olden v. LaFarge Corp., 383 F.3d 495,508-09 (6th Cir. 2004) (Rule 23(b)(3) standard satisfiedwhere common issues of emission of pollutants and causation of harmcould be determined on classwide basis, while damages issues wereleft for individuals); Mejdrech v. Met-Coil Systems Corp.,319 F.3d 910 (7th Cir. 2003) (individual questions as to whetherTCE contamination reached class members' property, harm sufferedby class members and the like held not to predominate overclasswide issues such as whether defendant leaked TCE in thefirst place). Unlike the circumstances present in the Olden andMejdrech lines of authority, wherein causation could bedetermined on a classwide basis, here causation turns on highlyindividual-specific determinations. Mercury may be emitted bymany sources, natural and manmade, in the McIntosh area. It couldcome from the local incinerator, from the nearby electric powerplants, from various household products, or from the earth'scrust. This fact will necessitate an individualized inquiry foreach and every plaintiff to ascertain (a) whether mercury is onhis property and, if so, how much; (b) where the mercury camefrom; and (c) the extent of damages. Plaintiffs have not offeredany means of reducing the causation question to one amenable toclasswide determination; therefore, the Olden/Mejdrechreasoning is inapplicable.[103]

B. Superiority Requirement.

The final prong of the Rule 23(b)(3) analysis requires afinding of whether "a class action is superior to other availablemethods for the fair and efficient adjudication of thecontroversy." Id. This criterion contemplates consideration of the "relative advantagesof a class action suit over whatever other forms of litigationmight be realistically available to the plaintiffs." Klay,382 F.3d at 1269.[104]

The Court's analysis of the superiority element ends almostbefore it begins. As the late Judge Vollmer explained,"superiority analysis is `intertwined' with predominanceanalysis; when there are no predominant common issues of law orfact, `class treatment would be either singularly inefficient . . .or unjust.'" Shelley v. AmSouth Bank, 2000 WL 1121778, *8(S.D. Ala. July 24, 2000) (quoting Jackson v. Motel 6Multipurpose, Inc., 130 F.3d 999, 1006 n. 12 (11th Cir.1997)); see also Klay, 382 F.3d at 1269 (observing thatpredominance analysis has "tremendous impact" on superiorityanalysis); Cooper, 390 F.3d at 723 (indicating that whereissues subject to individualized proof predominated, that findingrendered Rule 23(b)(3) class action procedure not superior forfair and efficient adjudication). Simply put, thenon-predomination of common issues over individual issues rendersthe class action vehicle distinctly ill-suited as a means ofadjudicating plaintiffs' claims. Because of the tremendous arrayof individualized determinations necessary for plaintiffs'claims, this case is unmanageable as a class action, as it wouldbecome mired in an endless procession of individual-specificmini-trials dwarfing the classwide issues compelling utilizationof the class action framework in the first place. The Courttherefore has no hesitation in concluding that this case failsRule 23(b)(3)'s superiority requirement. See Kirkman v. NorthCarolina R. Co., 220 F.R.D. 49, 54 (M.D.N.C. 2004) (given thevariety of potentially impacted commercial, rural, and urbanproperty, and given complexity of

issues of ownership, liability,and damages, "[a] class action is simply not the superior way tohandle this litigation").

VII. Rule 23 Analysis of Class B.

Having exhaustively addressed whether class certification isappropriate as to Class A, the Court now turns to Class B, theso-called "Fish Class." Plaintiffs would define the Fish Class asconsisting of "all commercial, recreational, or subsistencefishermen who, as of the date of certification of this class in this matter, fished in the areas of the naturalbasin known as the Olin Basin or in the Tombigbee River withinthe geographic boundaries of Class A." (Id. at 9.) In theseproceedings, the Fish Class has been no more than anafterthought. During the two-day class certification hearing,plaintiffs presented vanishingly little (if any) evidence orargument relating to the Fish Class. Moreover, discussion of theFish Class in the pleadings and briefs has been sporadic (asevidenced by plaintiffs' virtually complete omission of evidenceor argument relating to Class B in their 84-page principalbrief), and plaintiffs have undertaken little effort to explainwhy they believe class certification is warranted for the FishClass. Upon closer scrutiny, it becomes readily apparent thatClass B is ill-conceived and ill-described, a mere "tagalong"class that plaintiffs have expended minimal effort todevelop.[105] The Fish Class suffers from gapingconceptual, definitional, and evidentiary flaws that render itwholly inadequate to satisfy the prerequisites of standing anddefinability, as well as the Rule 23(a) and Rule 23(b) standards.As plaintiffs have not endeavored to present a cogent basis forcertifying Class B, the Court finds it unnecessary to devoteextensive treatment to its patent infirmities. Rather, a brief,illustrative discussion of a sampling of those defects willsuffice.

A. Plaintiff Jordan Lacks Standing to Pursue Claims on Behalfof Class B.

The lone named plaintiff who apparently purports to representthe interests of the Fish Class is Lee Edward Jordan, who isidentified in the Third Amended Complaint (doc. 68) as "afisherman who fishes in the Tombigbee River and/or itstributaries. Plaintiff ingested fish from the Tombigbee River.Lastly, Plaintiff earned income selling fish from the TombigbeeRiver. Upon information and belief, the Tombigbee River and/orits tributaries have been contaminated by materials from theDefendants' sites and Plaintiff Jordan's income has beenadversely affected by Defendants' actions and/or inactions."(Third Amended Complaint, ¶ 35.) Jordan is a commercial fishermanwho operates his own retail seafood business some 12 miles southof McIntosh. (Exh. P-14, at 8, 9.)

Plaintiff Jordan's standing problems are twofold. First,Jordan's claims are untimely. In his deposition, he testifiedthat it has been "common knowledge" since 1998 or 1999 that oneshould not eat fish caught in the Olin Basin because of mercurycontamination. (Exh. P-14, at 74-76.)[106] He furthertestified that, beginning in or about 1999, he began hearing fromhis customers that they did not want to purchase his fish if hecaught them from the Tombigbee River. (Id. at 76-77.) Clearly,Jordan was on notice of his claims against Olin for contaminatingthe waterways where he

earned his living by no later than 1999,or four years before the lawsuit was filed. As all of the Class Bclaims are subject to a two-year statute of limitations (therebeing no conceivable likelihood that the Fish Class couldinterpose trespass claims), Jordan's claims are clearly untimely.As such, he lacks standing to represent the class.

Second, and alternatively, Jordan is deprived of standingbecause there has been no showing that he has been detrimentallyaffected by Olin's alleged actions. It appears that Jordancontinues to fish on the Tombigbee River today, and to sell hiscatch to customers.[107] The record further establishes that there are alternative non-contaminated fishing areas withina reasonable distance of his Mt. Vernon home and business (12miles south of the Olin plant). (Exh. P-14, at 45-50.) The recordis silent as to whether his average daily fish catch is lowerthan it was before 1998 and 1999, whether his revenue from thesale of fish has declined, whether his profits have fallen andthe like.[108] Simply put, it would be logical for acommercial fisherman who learned that the Basin was contaminatedto pick another fishing spot, where presumably he could catch thesame volume of fish without worrying about Olin-induced mercurycontamination. Absent any suggestion that there are no reasonablealternative locations for Jordan to ply his trade, that he isunable to fish where he previously did, or that his business hasbeen damaged, he cannot show actual harm, and he has not incurredan injury in fact.[109] If anything, Jordan appears upsetthat he is not catching as many fish as he once did, and that heis forced to take multiple trips for his daily catch. (Exh. P-14,at 62.) But plaintiffs have neither argued nor offered proof thatOlin-produced mercury has reduced the quantity of fish in theTombigbee River.[110] Thus, the Court concludes that plaintiff Jordan lacks standingto represent the Fish Class because his claims are untimely andhe has failed to make any showing of an injury in fact. BecauseJordan is the only named class representative for Class B, hislack of standing is fatal to plaintiffs' efforts to certify ClassB.

B. Class B is Not Adequately Defined.

Even if Jordan possessed standing, the request for classcertification would fail nonetheless because Class B is so poorlydefined that its membership would be difficult, if notimpossible, to ascertain. The proposed class definition isinadequate in at least four respects. First, its geographic scopeis so amorphous that plaintiffs themselves lack fixed notions asto its reach. In their principal brief, plaintiffs define theclass as consisting of all fishermen who "fished in the naturalbasin known as the Olin Basin or in the Tombigbee River withinthe geographic boundaries of Class A." (Plaintiffs' Brief, at 9(emphasis added).) Presumably in support of this contention,plaintiffs offered affidavits of several putative class memberswho fish or did fish in the Basin. (Exhs. P-108, P-109, P1-10.)Upon being confronted with evidence that the Olin Basin isprivate property owned by Olin, plaintiffs abruptly changed theirtune, insisting that the Fish Class does not embrace fishermenwithin the Olin Basin, but is and always has consisted offishermen who "fished in the areas of the natural basin knownas the Olin Basin or in the Tombigbee River within the geographicboundaries of Class A." (Reply Brief, at 41 (emphasis added).)Given that plaintiffs themselves treat the geographic boundariesof Class B as shifting with the exigencies of the moment, theCourt cannot find that this class has been

adequatelydefined.[111] Second, the temporal scope of the Fish Class is even moreproblematic. According to plaintiffs, Class B embraces fishermen"who, as of the date of certification of the class in thismatter, fished" in the waterways of concern. (Plaintiffs' Brief,at 9.) The Court cannot tell what that means. Is Class B limitedto fishermen who actually fish in the River on the actual date ofentry of the Class Certification Order? Does it extend to coverall fishermen who fished in those waterways during the one-weekperiod before entry of the Class Certification Order? One month?One year? Does it include every fisherman who ever fished inthose waterways? Plaintiffs' hopelessly vague, ambiguousdefinition of Class B obstructs any reasonable answer to thosequestions.[112]

Third, the class definition does not purport to define what a"commercial," "recreational" or "subsistence" fisherman is. Theseterms are all subject to their own definitions, none of whichhave been provided. Thus, the Court cannot determine whetherplaintiffs intend for Class B to encompass each and every personwho has cast a fishing line into the River, or whether plaintiffsintend simply to incorporate certain categories of fishermen intoClass B. Nor is it reasonably possible with this amorphousterminology to ascertain the category in which a particularfisherman belongs. Presumably, the same person may fish for allthree of these purposes.

Fourth, the Court is of the opinion that, however plaintiffsmight attempt to repair these definitional defects, it would beadministratively burdensome to identify class members. Plaintiffswave away this issue, suggesting that members of this class canbe readily identified via licensing information or publication notice. (Reply Brief, at 48.) But licensinginformation may not pick up all fishermen. Even if it did, suchinformation may reveal little to no data about who was actuallyfishing in a particular section of the River on a particular dayor in a particular time interval. Plaintiffs furnish the Courtwith no inkling as to what information may be available vialicensing records. Similarly, publication notice may be bothoverinclusive and underinclusive in identifying class members, asnot all of them may read the paper and certain people may respondto publication notice even though they were not fishing in theparticular area of concern during the particular temporalinterval of concern. In the absence of public records or otherobjective criteria allowing for easy identification of classmembers, courts are leery of engaging in the sort of fishingexpedition proposed by plaintiffs. See, e.g., Perez v.Metabolife Intern., Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003)(rejecting class definition where individual mini-trials would beneeded just to determine class membership, given that passengerlists, employment records or public records could not be used toconfirm membership in proposed class).

For all of the foregoing reasons, it is the opinion of theundersigned that plaintiffs' proffered definition of Class B isoverly broad, amorphous, and vague, and would engendersubstantial administrative difficulties in making individualizeddeterminations required to ascertain the class status ofparticular putative class members.

C. Plaintiffs Have Failed to Show Numerosity or Typicality asto Class B.

Even if the preconditions of standing and definability weresatisfied, Class B would be unable to overcome at least two ofthe Rule 23(a) hurdles. On the subject of numerosity, the recorddivulges no clue as to how many class members might fall withinthe parameters of the Fish Class. The Court has no way of knowingwhether one, 10, 100, or 1,000 persons might be Class B members.In response to defendants' numerosity objection, plaintiffssimply state in conclusory terms that "Plaintiffs have shown thatthere are hundreds, if not thousands, of putative class membersthat fit the criteria of the class definitions." (Reply Brief, at49.) No such showing has been made as to the Fish Class, and theCourt is of the opinion that plaintiffs have failed to meet theirburden of showing that joinder of all members of Class B isimpracticable. The numerosity requirement has not been satisfied.

Likewise, the Court harbors substantial concerns to thetypicality of Jordan's claims. By his own admission, he is a commercial fisherman. From the limitedrecord before it, the Court has no basis for concluding that theinterests of a commercial fisherman are aligned with those of asubsistence or recreational fisherman, that each would beadvancing the same legal theories, or that each would be subjectto the same defenses. Because plaintiffs have neglected topresent evidence from which a finding of typicality couldreasonably be made, the Court concludes that they have notsatisfied their burden under Rule 23(a)(3) with respect to theFish Class.

D. Predominance is Lacking.

Finally, even if plaintiff Jordan had standing to bring claimson behalf of Class B, even if Class B were defined withsatisfactory precision, and even if the Rule 23(a) criteria weresatisfied, certification of the Fish Class would remain improperbecause plaintiffs have not shown that common issues predominateover individual issues. There is no indication in the record thatthe alleged contamination of the River by defendants has affecteddifferent categories of fishermen, or even fishermen in the samecategory, in the same way. By plaintiffs' own admission, at leastsome of those fishermen continue to fish in the very areas of theRiver that plaintiffs contend has been contaminated by Olin.Perhaps others do not. The impact of the alleged Olin-causedcontamination may be different in different fishing spotsfrequented by different fishermen. It may also differ dependingon the kinds of fish that different fishermen may catch. Somefishermen may be bass fishermen, others may be gar fishermen, andthe like, and the levels of contamination in those types of fishmay vary markedly. Certain fishermen may have been able tomitigate harm by simply fishing elsewhere, while others may not.Fishermen who fish in the Basin may have no actionable claim forrelief at all (if they are even Class B members, which cannot bedetermined using plaintiffs' inconsistent statements), given theevidence that the Basin is private property owned by Olin.Additionally, damages calculations would almost certainly beindividualized for all members of Class B.

There is no indication that plaintiffs have taken theseconsiderations into account, or that any classwide issuesregarding Olin allegedly dumping mercury contamination into theBasin and River are sufficiently extensive to predominate overthose individualized determinations. On this record,

the Courtcannot find that plaintiffs have satisfied Rule 23(b)(3) as tothe Fish Class, given the paucity of evidence that classwide issues predominate over theirindividualized counterparts.

In light of these myriad concerns regarding timeliness, injuryin fact, definability, numerosity, typicality and predominance,it is the opinion of this Court that Class B represents anamorphous, ill-defined, poorly considered attempt to implement a"tagalong" class, without regard to the exacting legalprerequisites for class status under Rule 23 and applicable law.Whatever plaintiffs' reasons might have been for appending suchan afterthought class, their showing has been wholly inadequateon many different yardsticks to sustain class certification forClass B. This is not a close question. Plaintiffs are notentitled to certification of Class B, as a matter of law.

VIII. Conclusion.

For all of the foregoing reasons, plaintiffs' Motion for ClassCertification (doc. 119) is due to be, and the same hereby is,denied. Plaintiffs' Motion in Limine to Exclude LimitationsEvidence (doc. 163) is denied.

DONE and ORDERED.