Case Nos. 12-16396 and 12-16397
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSEPH ADINOLFE, et al.,
Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, d/b/a PRATT & WHITNEY,
Appellee

Appeal No. 12-16396
District Court Case No. 9:10-cv-80840-KLR

MAGALY PINARES and MARCOS PINARES,
Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, d/b/a PRATT & WHITNEY,
Appellee.

Appeal No. 12-16397
District Court Case No. 9:10-cv-80883-KLR

Appeal from the United States District Court
for the Southern District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

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Adinolfe, Joseph, Plaintiff-Appellant

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Alexis, Regnier, Plaintiff-Appellant

Alfonso, Margarita, Plaintiff-Appellant

Alty, Fruid, Plaintiff-Appellant

Alty, Ketley, Plaintiff-Appellant

Alvarez, Horacio, Plaintiff-Appellant

Antoine, Stepha, Plaintiff-Appellant

Arias, Gregory, Plaintiff-Appellant

Arias, Jannette, Plaintiff-Appellant

Baggs, Douglas, Plaintiff-Appellant

Baggs, Michelle, Plaintiff-Appellant

Bahl, William, Plaintiff-Appellant

Bald, Elizabeth, Plaintiff-Appellant

Bald, Michael, Plaintiff-Appellant

Barry, Nicola, Plaintiff-Appellant

Bianchi, Monica, Plaintiff-Appellant

Blackman, Clyde, Plaintiff-Appellant

Blackman, Shelia, Plaintiff-Appellant

Borges, Alicia, Plaintiff-Appellant

Boucugnani, Oscar, Plaintiff-Appellant

Bowers, Gerry Lynn, Plaintiff-Appellant

Brito, Anelis, Plaintiff-Appellant

Brito, Pedro, Plaintiff-Appellant

Campbell, Gary, Plaintiff-Appellant

Cardona, Elizabeth, Plaintiff-Appellant

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Case, William, Plaintiff-Appellant

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Cassion, Marie, Plaintiff-Appellant

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Castillo, William, Plaintiff-Appellant

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Chery, Sylvaince, Plaintiff-Appellant

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Chin, Sean, Plaintiff-Appellant

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Fiztsimmons, Tom, Plaintiff-Appellant

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Hart, Brad, Plaintiff-Appellant

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Hung, Dang, Plaintiff-Appellant

Hurley, Honorable Daniel T.K., United States District Judge for the Southern District of Florida

IAE International Aero Engines AG, Joint Venture between Japanese Aero Engine Corporation, MTU Aero Engine GmbH and Defendant-Appellee

International Aero Engines, Joint Venture Partner of Defendant-Appellee

Jabouin, Antoine, Plaintiff-Appellant

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Korland, Ursula, Plaintiff-Appellant

Kropp, Daisy, Plaintiff-Appellant

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Murrell, Fareeda, Plaintiff-Appellant

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See, Kenneth, Plaintiff-Appellant

See, Shirley, Plaintiff-Appellant

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Sirosky Aircraft Corporation, Sister Company of Defendant-Appellee

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Sorrell, Celestino, Plaintiff-Appellant

Spencer, Bridgette, Plaintiff-Appellant

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St. Omer, Joseph, Plaintiff-Appellant

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Toussaint, Marie, Plaintiff-Appellant

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Turene, Rosemene, Plaintiff-Appellant

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UTC Fire & Security Corporation, Subsidiary of Defendant-Appellee

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UTC Power Corporation, Subsidiary of Defendant-Appellee

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Van Dang, Malee, Plaintiff-Appellant

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Villante, Liliana, Plaintiff-Appellant

Villante, Steven C., Plaintiff-Appellant

Villari, Maria, Plaintiff-Appellant

Vitunac, Honorable Ann E., Magistrate to the United States Court for Southern District of Florida

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Vogel, Jessie, Plaintiff-Appellant

Wade, Loreen S., Plaintiff-Appellant

Watkins, Georgia, Plaintiff-Appellant

Williams, Robert, Plaintiff-Appellant

Willis, Brian, Plaintiff-Appellant

Willis, Nikki, Plaintiff-Appellant

Winkelman, Debra, Plaintiff-Appellant

Wood, Raymond, Plaintiff-Appellant

Wyman, Michael, Plaintiff-Appellant

Wyman, Patricia, Plaintiff-Appellant

Yohn, Ernest, Plaintiff-Appellant

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Zydel Darlene, Plaintiff-Appellant

By: _____
Bryan Scott Gowdy

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument because the issues raised herein concern novel questions of Florida law that should be certified to the Supreme Court of Florida.

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STATEMENT OF JURISDICTION

The district court had removal and diversity question jurisdiction under 28 U.S.C. §§ 1332(a)(d), 1441(b). This Court has jurisdiction under 28 U.S.C. § 1291 because Appellant appeals a final order of a federal district court.

STATEMENT OF THE ISSUES

I. WHETHER THE PLAINTIFFS CLAIMING THAT THEIR PROPERTIES WERE CONTAMINATED SUFFICIENTLY PLED, UNDER FEDERAL PLEADING LAW AND FLORIDA SUBSTANTIVE LAW, THAT DEFENDANT CONTAMINATED THEIR PROPERTIES.

II. WHETHER THE PLAINTIFFS WHO DID NOT CLAIM THEIR PROPERTIES WERE CONTAMINATED SUFFICIENTLY PLED A CAUSE OF ACTION UNDER FLORIDA LAW.

INTRODUCTION

Defendant wrongfully discharged contaminants onto Defendant's property, including into the groundwater underlying Defendant's property. Defendant disputes that its wrongful discharge has legally harmed Plaintiffs. Plaintiffs all own residential properties in the same neighborhood, named the Acreage, that is in the vicinity of, but not immediately adjacent to, Defendant's industrial property.

Some Plaintiffs claim that the contaminants discharged by Defendant have already migrated to, and contaminated, their properties in the Acreage and the underlying groundwater (the "Contamination Plaintiffs"). The properties of other Plaintiffs and their underlying groundwater, however, have not yet been contaminated. These latter Plaintiffs nonetheless claim that they have been legally harmed as a result of Defendant's wrongful discharge because of their properties' proximity to contaminated properties in the same neighborhood, as well as because of the strong likelihood that their properties will become contaminated in the future

(the "Proximity Plaintiffs"). Both the Contamination and Proximity Plaintiffs travel under a Florida statutory cause of action (Fla. Stat. § 376.313) and three Florida common law causes of action (nuisance, negligence, and strict liability).

The district court erred in dismissing the Contamination Plaintiffs' claims. *Infra* Argument I, at 33-46. It incorrectly relied on its own subjective "common sense." The Contamination Plaintiffs showed – based on scientific evidence that contradicted the district court's subjective "common sense" – that their claims were plausible. They showed it was plausible to prove: (a) contamination of their properties even if the contamination levels may have satisfied regulatory standards; (b) contamination of their properties by scientific sampling methods rather than by testing each individual parcel of property; and (c) Defendant was the most likely source of the contamination of the properties even if there were other possible alternative sources. The district court's findings to the contrary violated federal pleading law, *infra* Argument I.B, at 38-46, and its strict reliance on regulatory standards violated Florida substantive law, *infra* Argument I.A., at 33-38.

The district court also erred in dismissing the Proximity Plaintiffs' claims. *Infra* Argument II, at 46-57. The district court failed to comprehend that the non-static nature of groundwater contamination causes cognizable harm to property owners whose properties are not actually contaminated but are located near the contamination and who reasonably anticipate their properties will become

contaminated. The Proximity Plaintiffs' claims also should be certified to the Supreme Court of Florida in light of the lack of any controlling precedent from that court. In reaching its conclusions, the district court relied heavily and mistakenly on a distinguishable decision of a Florida intermediate appellate court. The Supreme Court of Florida would hold that actual contamination of Plaintiffs' property is not required to recover for the diminution in property value caused by Defendant's wrongful discharge of contaminants.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

This appeal arises from two diversity cases, based on Florida substantive law, that have been consolidated on appeal: *Adinolfe et al. v. United Technologies Corporation*, Case No. 9:10-cv-80840-KLR, and *Pinares et al. v. United Technologies Corporation*, Case No. 9:10-cv-80883-KLR. Both cases concern allegations that Defendant wrongfully discharged contaminants that harmed Plaintiffs, all of whom own residential real properties in the Acreage neighborhood. (*Adinolfe* Doc. 102, ¶¶ 230, 270, at 41, 51; *Pinares* Doc. 70, ¶¶ 2, 29, at 1, 10.) The *Adinolfe* action has 384 individual plaintiffs and is also a putative class action with three sub-classes. (*Adinolfe* Doc. 102, ¶ 251, at 49.) The *Adinolfe* plaintiffs do not claim any personal injuries or wrongful deaths, but instead claim only damages to their real properties. (*Id.)* On the other hand, the

two *Pinares* plaintiffs, a married couple, do claim personal injuries; specifically, they claim that Defendant's wrongful discharge of contaminants has caused Mrs. Pinares to develop renal carcinoma and Mr. Pinares to suffer loss of consortium damages. (*Pinares* Doc. 70, ¶ 29, 53, at 10, 18.) Other than these claims for personal injuries, the claims of Mr. and Mrs. Pinares are largely identical to the claims of the Contamination Plaintiffs in the *Adinolfe* action. (*Compare Adinolfe* Doc. 102, *with Pinares* Doc. 70.)

Plaintiffs filed three iterations of their complaints, which were largely identical in both actions. (*Adinolfe* Docs. 12-1, 45, 102; *Pinares* Docs. 1-2, 25, 70.) The district court in three orders, which were largely identical in both actions, dismissed the original and amended complaints without prejudice and the second amended complaint with prejudice. (*Adinolfe* Docs. 39, 98, 122; *Pinares* Docs. 21, 67, 89.) The district court also held a hearing for both cases on Defendant's motions to dismiss the amended complaints. (*Adinolfe* Doc. 97; *Pinares* Doc. 66.) The district court's stated grounds for the dismissals in these orders and at the hearing are discussed *infra* in the statement of facts. *Infra* at 27-31.

Contemporaneous to the litigation over the sufficiency of the complaints, the district court entered – at Defendant's request – *Lone Pine* case management orders. (*Adinolfe* Docs. 40, 70, 77; *Pinares* Docs. 20, 42, 47.) *Lone Pine* orders have been employed by trial courts to require plaintiffs in toxic tort/pollution cases

to provide prima facie evidence of their claims before they are permitted to conduct pre-trial discovery. *See, e.g.*, *Ramirez v. E.I. Dupont De Nemours & Co.*, 809-CV-321-T-33TBM, 2010 WL 144866 (M.D. Fla. Jan. 8, 2010) (discussing such orders that originated with the case of *Lore v. Lone Pine Corp.*, No. L–33606–85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986)).

The upshot of the district court's *Lone Pine* order was that the Plaintiffs submitted to the district court voluminous evidence, including test results and sworn statements by experts, to support the allegations made in the complaints.[1] (*Adinolfe* Docs. 46, 47, 71, 72, 79, 131; *Pinares* Docs. 26, 43, 44, 48, 51, 98.) Defendant argued that the district court should consider some of these expert materials when considering the sufficiency of Plaintiffs' complaints. (*E.g.*, *Adinolfe* Doc. 53, at 9-11 & n.5; *Pinares*, Doc. 29, at 8-11 & n.5.) Some of these experts materials are contained on a CD enclosed on the back inside cover of this brief. Accordingly, the ensuing statement of facts, though drawn from Plaintiffs' operative complaints (the second amended complaints), also discusses the actual evidence submitted to the district court – at Defendant's request – that supported the allegations in the complaints.

[1] Plaintiffs' voluminous evidence has been gathered without any discovery. If allowed to conduct discovery, Plaintiffs expect to uncover more supporting evidence from Defendant.

Statement of the Facts

A. Allegations and evidence that Defendant contaminated the Acreage and the Contamination Plaintiffs' Properties and likely will contaminate the Proximity Plaintiffs' Properties.

Allegations

The Contamination Plaintiffs alleged that Defendant already had contaminated their properties in the Acreage.[2] In contrast, the Proximity Plaintiffs alleged that their properties in the Acreage were not yet contaminated, but, they further alleged, Defendant would contaminate their properties as groundwater contaminated by Defendant continued to move and be drawn southward toward their properties.[3] The Proximity Plaintiffs alleged that their allegations of likely future contamination were based on science and "a reasonable degree of hydrologic and geologic probability and certainty." *See supra* note 2; (*Adinolfe* Doc. 102, ¶ 254, at 50.)

These preliminary allegations of property contamination, or likely property contamination in the future, were supported by the following factual allegations:

Factual allegations about Defendant's operations on its nearby industrial property

[2] (*Adinolfe* Doc. 102, ¶¶ 1-4, 6-12, 14-15, 17, 19-21, 23-36, 39-48, 50-53, 55-58, 60, 62-64, 66, 72-75, 77-84, 86-99, 101-103, 105-107, 109-110, 112-117, 119-134, 137-139, 143-145, 147-148, 150-151, 153, 155, 157-163, 165-180, 182-188, 191-198, 200-201, 203-206, 208-212, 214-217, 219-221, 223-224, 226-229, at 1-41; *Pinares* Doc. 70, ¶¶ 1, 20, at 1, 7.)

[3] (*Adinolfe* Doc. 102, ¶¶, 5, 13, 16, 18, 22, 37-38, 49, 54, 59, 61, 65, 67-71, 76, 85, 100, 104, 108, 111, 118, 135-136, 140-142, 146, 149, 152, 154, 156, 164, 181, 189-190, 199, 202, 207, 213, 218, 222, 225, at 1-41.)

- Defendant owned and operated an industrial facility on property located close to the Acreage's northern edge.[4] The area between the southern border of Defendant's property and the Acreage's northern border was an undeveloped wildlife management area. (*Adinolfe* Doc. 102, ¶ 231, at 42; *Pinares* Doc. 70, ¶ 4, at 1-2.)
- Since the 1950's, Defendant has engaged in manufacturing operations on its property, including the design, manufacturing, testing, and rebuilding of aviation and rocket engines and the operation of engine test stands. (*Adinolfe* Doc. 102, ¶ 232, at 42; *Pinares* Doc. 70, ¶ 5, at 2.)
- On its property, Defendant used and generated "significant quantities of toxins, contaminants, carcinogens and other hazardous wastes," including "1,4-dioxane, oil, sodium cyanide, thorium-dispersed nickel, construction debris, solvents, solvent sludges, asbestos, fuels, paints, pesticide and herbicide residue, benzonitrite, mercury, commercial and laboratory chemicals, and acidic and alkaline wastewater." (*Adinolfe* Doc. 102, ¶ 233, at 42; *Pinares* Doc. 70, ¶ 6, at 2.) Defendant spilled, dumped, released, buried, and intentionally discharged these toxic wastes and chemicals in or onto its property, its property's surface and ground water,

[4] Though not alleged in the complaint, the specific distance between Defendant's property and the Acreage is approximately five to six miles. (*Adinolfe* Doc. 131-1, at 2.)

and the adjacent wildlife area. (*Adinolfe* Doc. 102, ¶ 233-35, at 42-43; *Pinares* Doc. 70, ¶¶ 6-8, at 2-3.) The toxic wastes and chemicals were collected in percolation ponds, or were buried, stored, or incinerated, on the property. (*Adinolfe* Doc. 102, ¶ 233, at 42; *Pinares* Doc. 70, ¶ 6, at 2.)

- In the late 1980's, Defendant's property was evaluated for designation as a "Top Ten Superfund" site, but the federal EPA discontinued its evaluation at Defendant's request because of remediation efforts. The remediation efforts, however, "were belated and did not eliminate the injurious concentrations of CCOCs from the groundwater that flowed from [Defendant's] property to The Acreage." These remediation efforts did not include "measures to halt the movement of contaminated groundwater" into the Acreage. (*Adinolfe* Doc. 102, ¶ 244, at 46-47; *Pinares* Doc. 70, ¶ 17, at 6.)
- A 1988 report of the Florida Department of Health stated that Defendant's property was "a potential public concern because of the risk to human health caused by the possibility of exposure to hazardous substances via CCOCs in [the] groundwater and air." (*Adinolfe* Doc. 102, ¶ 244, at 46-47; *Pinares* Doc. 70, ¶ 17, at 6.)

- As of November 2008, the Florida Department of Environmental Protection ("FDEP") found twenty-four contaminants in the soil and water on Defendant's property. Chemicals or contaminants of concern ("CCOCs") confirmed by testing to be present in high concentrations in the groundwater in and around Defendant's property included: chloroform, bromodichloromethane, polychlorinated biphenyls ("PCB's"), 1,4-dioxane, trichloroethane, 1,1,1 trichoroethane (methyl chloroform), trichloroethylene ("TCE"), tetrachloroethylene (perchloroethylene), trichloroethene, tetrachloroethane, chloroethane, 1,1-dichloroethane, dichloromethane, dichloroethylene (vinyl chloride), carbon tetrachloride, methylene chlorides, and heavy metals. Testing performed for Defendant has confirmed that these CCOCs are present in high concentration in the groundwater under and around its property. (*Adinolfe* Doc. 102, ¶¶ 234-35, at 42-43; *Pinares* Doc. 70, ¶¶ 7-8, at 2-3.)

Factual allegations that Defendant contaminated the Acreage and the Contamination Plaintiffs' Properties and likely will contaminate the Proximity Plaintiffs' properties

- The toxic wastes and chemicals generated by Defendant's operations escaped from Defendant's property due to Defendant's failure to take adequate or reasonable measures. (*Adinolfe* Doc. 102, ¶¶ 233, 237, at 42, 44; *Pinares* Doc. 70, ¶¶ 6, 10, at 2, 4.) The CCOCs generated by

Defendant migrated from its property "into and under The Acreage" by way of "[g]roundwater movement, surface water movement, seepage, percolation pond flooding, canal flooding, and wind." (*Adinolfe* Doc. 102, ¶ 235, at 43; *Pinares* Doc. 70, ¶ 8, at 3.)

- Hydrologic studies showed that: (i) Defendant's property, the wildlife area, and the Acreage are underlain by, and share the same permeable and porous underground formations or aquifer; (ii) groundwater generally has moved from the north to the south into and under the Acreage; (iii) groundwater has drawn from beneath the wildlife area and Defendant's property to the Acreage as a result of the thousands of wells in the Acreage drawing water; (iv) one surface canal that drained Defendant's property has flowed through and off Defendant's property in a southerly direction; (v) because groundwater in the contaminated aquifer flows to the south, the groundwater underlying the Acreage has been contaminated by the CCOCs discharged by Defendant on its property and into the wildlife area; and (vi) these CCOCs continue to migrate beyond the boundaries of Defendant's property and the wildlife area into the Acreage and to contaminate the shared aquifer and groundwater of the Acreage. (*Adinolfe* Doc. 102, ¶ 236, at 43-44; *Pinares* Doc. 70, ¶ 9, at 3-4.)

- Plaintiffs' experts drilled test wells in the Acreage to determine the presence and identity of the CCOCs in the groundwater there. The tests revealed bromodichloromethane, methylene chloride, and chloroform in the Acreage's groundwater underlying and shared by Plaintiffs' properties and the properties of other Acreage residents. Plaintiffs' hydrologists and toxicologists confirmed that the types of CCOCs and their byproducts and derivatives known to have been discharged by Defendant at its site and the adjacent wildlife area travelled to and physically invaded the Acreage. (*Adinolfe* Doc. 102, ¶ 238, at 44; *Pinares* Doc. 70, ¶ 11, at 4.)
- Groundwater contaminated by the toxic CCOCs discharged by Defendant continues to move south through the aquifer underlying the Acreage and will continue to contaminate the shared water of the Acreage. (*Adinolfe* Doc. 102, ¶ 238, at 44; *Pinares* Doc. 70, ¶ 11, at 4.)
- Defendant's facility to the north of the Acreage is the only potential source of the CCOCs "as it is the only large industrial complex in the area that handles toxic CCOCs." (*Adinolfe* Doc. 102, ¶ 240, at 45; *Pinares* Doc. 70, ¶ 13, at 4-5.)
- Groundwater contamination, science teaches, is not static. "A property that has contaminated groundwater one day may not have contaminated

> groundwater the next day. Conversely, a property that does not have contaminated groundwater one day may have contaminated groundwater the next day." (*Adinolfe* Doc. 102, ¶ 253, at 50.)

Evidence

Plaintiffs alleged in their complaints that they had "previously submitted materials to the [district court] showing, based on expert opinions, which areas of the Acreage currently have contaminated groundwater." (*Adinolfe* Doc. 102, ¶ 255, at 50.) Plaintiffs were referring to the *Lone Pine* responses that they had filed, upon Defendant's request and per the court's orders, identifying the specific evidence supporting their allegations of contamination. (*Adinolfe* Docs. 46, 47, 71, 72, 79; *Pinares* Docs. 26, 43, 44, 48, 51.) Plaintiffs and Defendant specifically referred the court to this evidence when arguing the sufficiency of Plaintiffs' complaints. (*Adinolfe* Docs. 10, 53, 53-1, 55, 97, 114; *Pinares* Docs. 8, 29, 33, 66, 82.) Indeed, Defendant attached one expert's report (Dr. Bedient) to a motion to dismiss and argued extensively based on this report. (*Adinolfe* Docs. 53, at 9-11; 53-1; *Pinares* Doc. 29, at 8-11.) At the hearing, it was clear from the district court's comments that it had reviewed some of the submitted evidence. (*Adinolfe* Doc. 97, at 20, 27; *Pinares*; Doc. 66, at 20, 27.)

The studies and expert opinions brought to the attention of the district court, as alleged in the second amended complaints, included the following:

Dr. Bedient's expert opinion. Dr. Bedient holds a Ph.D. in environmental engineering sciences and has been a professor and faculty member at Rice University since 1975. (*Adinolfe* Doc. 131-1, at 1; *Pinares* Doc. 98-1, at 1.) He teaches courses in hydrology, floodplain analysis, and hydrologic modeling. (*Id.*) Dr. Bedient authored a 274-page report and a five-page supplemental sworn declaration. (*Adinolfe* Docs. 65-4, 131-1, 131-2; *Pinares* Docs. 39-4, 98-1, 98-2.) Included in his report was a map he created, Figure 10, that showed the geographical scope of the groundwater contamination plume in the Acreage. (*Adinolfe* Docs. 131-1, at 22; 106-2; *Pinares* Docs. 98-1, at 22; 74-2.) Another expert, Dr. John Kilpatrick (a real estate appraiser), superimposed Dr. Bedient's map over a map of the Acreage to identify the specific parcels that have been contaminated and that are not yet contaminated. (*Adinolfe* Doc. 65-3, at 2; *Pinares* Doc. 39-3, at 2.)

In his report, Dr. Bedient explained: (i) the history and nature of the contamination on Defendant's property, (ii) the hydrological characteristics of the surrounding area (including the Acreage); (iii) directional flow of groundwater in the area; and (iv) groundwater samples taken in the Acreage. (*Adinolfe* Doc. 131-1, at 1-11; *Pinares* Doc. 98-1, at 1-11.) Based on this explanation, he then made the following findings and opinions, including a finding that Defendant's property was the "likely source" of the contamination in the Acreage:

- Flow between Defendant's property and Acreage occurred with groundwater, overland surface water, and canal flow through the wildlife area.
- "The groundwater flow direction and the consistency of the chemicals found in the [Acreage] as compared to [Defendant's property] indicates [sic] chemical transport from [Defendant's] spills and plumes of contamination to the [Acreage's] affected area."
- "Groundwater samples . . . resulted in positive readings for chloroform, bromodichloromethane, chloromethane, and methylene chloride in [the Acreage] . . . These contaminants are consistent with contaminants found in quantity on [Defendant's property.]"
- The area of contamination in the Acreage was delineated in a map created by Dr. Bedient and located at Figure 10 of his report.
- "The area of contamination [was] consistent with both the contaminants found at [Defendant's property] and [the] directional flow of groundwater and surface water channels from [Defendant's property] to [Acreage]."
- "[T]here are substantial indicators showing transport of contaminants from [Defendant's property] to the [Acreage]. The general southeast groundwater flow direction in combination with canals and natural

pathways of overland surface water flow through the [wildlife area] make [Defendant's property] the likely source of contaminants found in the [Acreage]."

- "[Defendant's property] is the only industrial facility in the area and is directly northwest of the [Acreage]. The groundwater flow of southeast in the [Acreage] and the USGS analysis of overall conditions, when combined with the consistency of contaminants found, points to [Defendant's property] as being the source of contaminants found in the [Acreage]."
- "[C]ontaminants in the [Acreage] will continue to be transported in an average southeasterly direction over time."

(*Adinolfe* Doc. 131-1, at 9-11, 22; *Pinares* Doc. 98-1, at 9-11, 22.)

After Dr. Bedient submitted his report, Defendant's expert (Richard Cohen) submitted an affidavit that disputed points in Dr. Bedient's report. (*Adinolfe* Doc. 62-2; *Pinares* Doc. 36-2.) Defendant's expert asserted there were "35,000 potential THM release sources in The Acreage [that] . . . were much more likely to have contributed chloroform . . . to shallow groundwater in The Acreage than the release of the same chemicals at [Defendant's property]." (Doc. 62-2, ¶ 53, at 10.) In his sworn supplemental declaration, Dr. Bedient rebutted this alternative causation opinion as follows:

> The vast majority of these "potential sources" are located downgradient from the contaminated areas shown within The Acreage; therefore, they cannot be "potential sources" for groundwater contamination upgradient, i.e. north/northwest, where Bedient's plume is shown. Also, [Defendant's expert] refers to "shallow groundwater", but the Bedient contaminants were found in deeper groundwater. If THM contamination in groundwater underlying The Acreage were due to widespread sources in the community itself, the Plaintiffs would have detected similar levels of THM contamination throughout that groundwater aquifer. Instead, the Plaintiffs' independent testing found a plume of THM contamination that is only located on the north end of The Acreage closest to [Defendant's] facility which was known to have discharged significant quantities of THM pollutants into the very same aquifer.

(*Adinolfe* Doc. 65-4, ¶ 4, at 2; *Pinares* Doc. 39-4, ¶ 4, at 2.) Similarly, Dr. Wylie, Plaintiffs' toxicologist, agreed with Dr. Bedient's rebuttal of Defendant's alternative causation theory and opined in his own sworn declaration: "If THM contamination in groundwater underlying The Acreage were due to widespread sources originating in the community itself, the plaintiffs would have detected similar levels of THM contamination throughout the community's groundwater." (*Adinolfe* Doc. 65-4, ¶ 4, at 2; *Pinares* Doc. 39-4, ¶ 4, at 2.)

Mr. James Miller's expert opinion. In its orders of dismissal, the district court expressed a belief that the Contamination Plaintiffs had to actually test each of their properties to determine whether each individual property was, in fact, contaminated. (*Adinolfe* Doc. 122, at 4.) Defendant expressed a similar belief in its motions to dismiss. (*Adinolfe* Doc. 105, at 4.)

But in response to Defendant's motions (*Adinolfe* Doc. 105), Plaintiffs directed the district court's attention to the sworn expert scientific opinion of Mr. James Miller, a hydrologic engineer, that directly refuted these beliefs and that unequivocally asserted that testing on each property was not required to determine which properties were contaminated. (*Adinolfe* Doc. 114, at 4-5.) Specifically, Mr. Miller attested:

> 5. Hydrologic science does not require drilling on every parcel potentially affected by a groundwater contamination plume in order to determine the spatial geometry of the plume. We know, for example, that a contaminant plume originated on and has migrated off the property of [Defendant]. We also reasonably know, as Dr. Bedient concluded, . . . that the plume has reached and underlies significant portions of the Acreage.
>
> 6. Using this information, in conjunction with groundwater flow and transport computer programs and algorithms, particle tracking and contaminant concentration analysis, analytical and numerical models, and other geostatistical techniques, it is possible, as Dr. Philip Bedient has done to draw a map of isopleths or contamination contour lines that locate, with significant accuracy, the presence of groundwater contamination, by varying density, within the Acreage. By imposing Dr. Bedient's map over a same-scale street map of the Acreage, it will be easy to determine whether a particular plaintiff's property lies inside or outside a given isopleth or contamination contour.

(*Adinolfe* Doc. 65-5, ¶¶ 5-6, at 3; *Pinares* Doc. 39-5, ¶¶ 5-6, at 3.) Mr. Miller also attested that it is "unscientific and inconsistent with modern hydrological and geostatistical practice . . . to test every discrete parcel of land in an area affected by groundwater contamination." (*Adinolfe* Doc. 65-5, ¶ 7, at 4; *Pinares* Doc. 39-5, ¶ 7, at 4.) Extrapolative techniques, Mr. Miller attested, do "not appreciably increase

predictive error over a test regime that samples all properties on a site." (*Adinolfe* Doc. 65-5, ¶ 7, at 4; *Pinares* Doc. 39-5, ¶ 7, at 4.)

B. Allegations and evidence that Defendant's contamination of the Acreage had harmed or could harm the health of Plaintiffs.

Allegations

Plaintiffs alleged that they and other Acreage residents depended on the groundwater for "drinking, bathing, cooking and all other domestic uses." (*Adinolfe* Doc. 102, ¶ 247, at 47-48; *Pinares* Doc. 70, ¶ 21, at 8.) They alleged that the contaminants in the Acreage's groundwater were "genotoxic." (*Adinolfe* Doc. 102, ¶ 269, at 54; *Pinares* Doc. 70, ¶ 35, at 12.) The term "genotoxic" means "[d]amaging to DNA and thereby capable of causing mutations or cancer." Am. Heritage Med. Dictionary for Health Consumers (Rev. 2d ed. 2007). Plaintiffs further alleged that these contaminants do not require "any specific concentration or amount of absorption for them individually or in combination to cause clear cell renal carcinoma and other disease in humans and animals." (*Adinolfe* Doc. 102, ¶ 269, at 54-55; *Pinares* Doc. 70, ¶ 35, at 12.)

Plaintiffs identified by name three persons residing in the Acreage, including Mrs. Pinares, who were exposed to the contaminated groundwater and who, as a result, developed clear cell renal carcinomas. (*Adinolfe* Doc. 102, ¶ 269, at 54-55; *Pinares* Doc. 70, ¶ 37, at 12.) The local health department, Plaintiffs alleged, designated the Acreage a "cancer cluster." (*Adinolfe* Doc. 102, ¶ 239, at 45;

Pinares Doc. 70, ¶ 19, at 7.) Plaintiffs also alleged reports of children residing in the Acreage developing brain tumors and the high incidence of cancer developing in animals in the Acreage. (*Adinolfe* Doc. 102, ¶¶ 239-40, 269, at 45, 55; *Pinares* Doc. 70, ¶¶ 12-13, at 4-5.)

In their individual action separate from the other Plaintiffs, Mr. and Mrs. Pinares alleged that they had their well water tested and that it was contaminated with specific genotoxic contaminants (bromodichloromethane, methylene chloride, and chloroform).[5] (*Pinares* Doc. 70, ¶ 28, at 9-10.) Mr. and Mrs. Pinares alleged that they used their well water since May 2001 for drinking, cooking, showering, and all other daily activities. (*Id.*) They had no access to municipal water but depended on groundwater accessed through a well. (*Id.*) Mrs. Pinares alleged that these contaminants and their byproducts caused her to develop clear cell renal carcinoma that had metastasized. (*Id.*) This occurred, she alleged, because of exposure and absorption of the contaminants through ingestion, inhalation, and dermal absorption. (*Id.* ¶ 29, at 10.) The renal carcinoma, she alleged, had required surgical removal of her left kidney and over a third of her proximal femur and joint in her hip, necessitating an artificial replacement. (*Id.*) Mr. Pinares, as

[5] The level tested for bromodichloromethane was 0.84 (*Pinares* Doc. 98-4, at 15), which exceeded what even Defendant claimed was an acceptable level (0.6). (*Pinares* Doc. 74, at 4.)

the husband of Mrs. Pinares, alleged loss of consortium damages. (*Id.* ¶¶ 52-54, at 18, 19.)

Evidence

These allegations were supported by the following expert opinions that were brought to the attention of the district court (*Adinolfe* Doc. 55, at 7-8 & n.2; Doc. 97, at 20, 23; *Pinares* Doc. 33, at 7-8 & n.2; Doc. 66, at 20, 23):

Dr. Wylie's expert opinion. Dr. Wylie, Plaintiffs' toxicologist, opined that his "scientific conclusions" based on a review of the available evidence were:

> [T]oxic and carcinogenic contaminants are present in the Acreage groundwater in sufficient concentrations to cause illness in humans; and . . . sufficient human exposures to these contaminants occurred daily and over a sufficiently long period – via daily ingestion, skin absorption, and inhalation through the 12 pathways characterized in Table 1 of the Wylie Report – to be responsible for induction of renal carcinoma in Magaly Pinares and Paul Read. The exposure-induced carcinomas in Mrs. Pinares and Mr. Read necessitated the surgical removal of their cancerous kidneys, and Mr. Read subsequently died from his illness.
>
> . . . In my professional opinion, the chemical exposures that have been traceable to the [Defendant's] facility environmental contamination continue to cause health risks to the residents of The Acreage and will continue to have lingering environmental contamination adverse health effects to the residents of this community.

(*Adinolfe* Doc. 65-6, ¶ 7, at 3; *Pinares* Doc. 39-6, ¶ 7, at 3.) Dr. Wylie further opined that "environmentally-induced cancers of [two Acreage residents,] Mrs. Pinares and Mr. Read[, were] a direct result of long-term multiple exposures to

multiple toxins and carcinogenic chemicals released into the environment and that are presented in the Acreage's well water, notably trihalomenthanes (THMs) such as chloroform." (*Adinolfe* Doc. 65-6, ¶ 2, at 2; *Pinares* Doc. 39-6, ¶ 2, at 2.)

Dr. Wylie noted that the cancer rate for Defendant's employees, who drank well water from the same aquifer as the Acreage residents, was significantly higher than the cancer rate for the general public. (*Adinolfe* Doc. 131-4, ¶ 3, at 3; *Pinares* Doc. 98-4, ¶ 3, at 3.) Dr. Wylie also opined that public agencies had significantly under-calculated the risk to Acreage residents of developing cancer from exposure to contaminated well water. (*Adinolfe* Doc. 131-4, ¶¶ 4-6, at 3-4; *Pinares* Doc. 98-4, ¶¶ 4-6, at 3-4.) Dr. Wylie confirmed, however, that Plaintiffs' allegations of a cancer cluster in the Acreage were supported by the local health department's statistical data, not simply by news media reports. (*Adinolfe* Doc. 65-6, ¶ 21, at 7; *Pinares* Doc. 39-6, ¶ 21, at 7.) Dr. Wylie also explained how, if Defendant had alerted Plaintiffs and other Acreage residents earlier of the health risks posed by its contamination, Plaintiffs and other residents could have taken protective measures to mitigate the risk. (*Adinolfe* Doc. 131-4, ¶ 9, at 4; *Pinares* Doc. 98-4, ¶ 9, at 4.)

Dr. Wylie refuted any belief that governmental regulatory standards sufficiently protected human health. (*Adinolfe* Doc. 131-4, ¶ 8, at 4, 17; *Pinares* Doc. 98-4, ¶ 8, at 4, 17.) He opined that "exposure to any amount [of genotoxic carcinogens] is assumed to involve a risk of cancer without a threshold." (*Adinolfe*

Doc. 131-4, at 11; *Pinares* Doc. 98-4, at 11.) He further opined that Florida's drinking water standards were not "health-based standards," but instead were "set only on 'organoleptic criteria (i.e., taste, order, or color).'" (*Adinolfe* Doc. 131-4, at 17; *Pinares* Doc. 98-4, at 17 (quoting FLDEP and EPA reference).) In Dr. Wylie's opinion, Florida's groundwater clean target levels (GCTLs) under-protected against cancer risks to human health.[6] (*Adinolfe* Doc. 131-4, ¶ 8, at 4; *Pinares* Doc. 98-4, ¶ 8, at 4.) Dr. Wylie also refuted Defendant's and the trial court's comparison of contamination found in the Acreage's groundwater to the purportedly typical contamination levels found in municipal water. (*Adinolfe* Doc. 65-6, ¶ 10, at 4; *Pinares* Doc. 65-6, ¶ 10, at 4.) Specifically, Dr. Wylie noted that the Acreage's potable water came from groundwater wells, not municipal water that was chlorinated. (*Adinolfe* Doc. 65-6, ¶ 11, at 4; *Pinares* Doc. 65-6, ¶ 11, at 4.)

Dr. Danoff's expert opinion. Dr. Danoff was a Yale-trained, board-certified urologist. (*Adinolfe* Doc. 131-5, at 2; *Pinares* Doc. 98-5, at 2.) He largely agreed with Dr. Wylie's findings and opinions. (*Adinolfe* Docs. 131-5, 71-3; *Pinares*

[6] Dr. Wyle also explained the deficiencies in in the federal EPA standards. The EPA has two drinking water standards: (1) the non-enforceable Maximum Contaminant Level Goal (MCLG) standard that is designed to avoid any adverse health effects; and (2) the actual enforceable Maximum Contaminant Level (MCL) standard that are set based on a cost-benefit analysis. The latter MCL standards, Dr. Wylie opined, did "not fully protect people from developing cancer as a result of contaminants at or below the legal (MCL) threshold concentrations." (*Adinolfe* Doc. 131-4, at 17; *Pinares* Doc. 98-4, at 17.)

Docs. 98-5, 43-3.) He noted that the type of kidney cancer from which two Acreage residents, Mrs. Pinares and Mr. Read, suffered was an "uncommon condition," consisting of less than 2-3% of all cancers diagnosed in the United States. (*Adinolfe* Doc. 131-5, at 2; *Pinares* Doc. 98-5, at 2.) He also attributed the kidney cancer of a third Acreage resident (Nancy Moral) to be "the same type of renal carcinoma with clear cell morphology" that afflicted the two other residents. (*Adinolfe* Doc. 71-3, ¶ 2, at 2; *Pinares* Doc. 43-3, ¶ 2, at 2.)

Dr. Danoff opined that "the occurrence of [three] very similar cases of renal carcinoma in [three] unrelated people living in the same community is suggestive of a shared environmental exposure to a carcinogen active in the human kidney." (*Adinolfe* Doc. 71-3, ¶ 3, at 2; *Pinares* Doc. 43-3, ¶ 3, at 2; *see also Adinolfe* Doc. 131-5, at 3; *Pinares* Doc. 98-5, at 3.) Dr. Danoff further opined that a "cancer cluster" related to renal carcinomas existed in the Acreage and that the kidney cancers of three Acreage residents (Mrs. Pinares, Mr. Read, and Mrs. Moral) were "caused by long-term exposure to the THM carcinogens [that] are known to cause kidney tumors." (*Adinolfe* Doc. 71-3, ¶ 4, at 2; *Pinares* Doc. 43-3, ¶ 4, at 2.) He opined that "the cancer rate (including kidney cancer) in The Acreage community will increase in the coming years as more residents there begin manifesting cancers from the genetic damage that has already occurred due to past exposures to . . .

[THMs] that have contaminated their groundwater." (*Adinolfe* Doc. 71-3, ¶ 1, at 2; *Pinares* Doc. 43-3, ¶ 1, at 2.)

C. Allegations and evidence that Defendant's contamination of the Acreage diminished Plaintiffs' property values and caused them to lose the full use and enjoyment of their properties.

Allegations

Both the Contamination and Proximity Plaintiffs alleged that Defendant's discharge of contaminants into the Acreage's groundwater diminished the values of all properties within the Acreage and resulted in the loss of the full use and enjoyment of their properties. (*Adinolfe* Doc. 102, ¶ 248, at 48; *Pinares* Doc. 70, ¶ 21, at 7.) Specifically, Plaintiffs alleged that, because of the contamination in the Acreage, they: (i) were unable to use their wells, which was their only source of potable water; (ii) feared illnesses that could be caused by exposure to the contaminants; (iii) feared bodily contact with the Acreage's water; (iv) limited their water-related activities; (v) had to purchase and use bottled water and install water purifications systems; and (vi) were unable to realize the full economic value of their property either by sale, rental, or use as security for obtaining a loan. (*Adinolfe* Doc. 102, ¶ 288, at 60; *Pinares* Doc. 70, ¶ 49, at 17.)

Plaintiffs alleged that local media coverage of contamination of the Acreage was widespread, naming several specific examples of local media reports. (*Adinolfe* Doc. 102, ¶¶ 241-43, 246, at 45-47; *Pinares* Doc. 70, ¶ 19, at 7.) They

also alleged that a local realtor association had advised its members how they should disclose to potential buyers and lessees of properties in the Acreage about the potential "cancer cluster." (*Adinolfe* Doc. 102, ¶ 245, at 47; *Pinares* Doc. 70, ¶ 18, at 6-7.) Specifically, the realtor association advised its members to use the term "Acreage Health concern" rather than "Cancer Cluster." (*Id*.) Another large realtor, Coldwell Banker, prepared a disclosure form that was similar to the advice given by the realtor association. (*Id.*) The Federal Housing Administration warned appraisers that a state-declared cancer cluster may be harming home values in the Acreage. (*Adinolfe* Doc. 102, ¶ 246, at 47; *Pinares* Doc. 70, ¶ 19, at 7.)

Evidence

Dr. Kilpatrick's expert opinion. Dr. John Kilpatrick was an expert with a wide variety of credentials, experience, and education in finance, appraising, and real estate. (*Adinolfe* Doc. 71-5; *Pinares* Doc. 43-5.) Pursuant to the district court's *Lone Pine* orders, Dr. Kilpatrick submitted, under oath, a 100-page report and two other declarations. (*Adinolfe* Docs. 65-3, 70, 71-1 131-3; *Pinares* Docs. 39-3, 42, 43-1, 98-3.) In his report, Dr. Kilpatrick determined the diminution in value of residential properties in the Acreage resulting from the Acreage's designation as a cancer cluster, the environmental and health concerns in the Acreage, and Defendant's contamination of the Acreage. (*Adinolfe* Doc. 131-3, at 23; *Pinares* Doc. 98-3, at 23.)

Dr. Kilpatrick relied on the "standard appraisal method of subtracting the value of the property as impaired from the value of the property as if unimpaired." (*Adinolfe* Doc. 131-3, at 23; *Pinares* Doc. 98-3, at 23.) The impairment to the properties was the Acreage's designation as a "cancer cluster."[7] (*Adinolfe* Doc. 131-3, at 23; *Pinares* Doc. 98-3, at 23.) Dr. Kilpatrick opined that all properties in the Acreage, even non-contaminated properties, suffered a diminution in value resulting from the Acreage's designation as a cancer cluster and Defendant's contamination of the Acreage:

> Properties may not have tested positive for contamination, but because of the cancer cluster designation and the stigmatization of The Acreage caused by the emergence of [Defendant's] chemical spills and groundwater contamination becoming prominent, these properties suffer from a loss of marketability. These homes are considered to be stigmatized.

(*Adinolfe* Doc. 131-3, at 23; *Pinares* Doc. 98-3, at 23.)

In reaching his expert opinions, Dr. Kilpatrick relied on facts alleged in the second amended complaint, including: the media reports about the contamination of Acreage, its designation as a cancer cluster, and the health concerns; the local health department's designation of the Acreage as a cancer cluster; and the actions

[7] However, Dr. Kilpatrick opined that whether or not the Acreage was officially designated a cancer cluster was not critical. (*Adinolfe* Doc. 131-3, at 15; *Pinares* Doc. 98-3, at 15.) The Acreage, Dr. Kilpatrick opined, was "stigmatized by the general knowledge and the public health concerns that emerged with the dissemination of knowledge regarding [Defendant's] chemical spills and upgradient groundwater contamination." (*Adinolfe* Doc. 131-3, at 15; *Pinares* Doc. 98-3, at 15.)

taken by realtors and the federal government to disclose the public health concerns to potential buyers of the Acreage's residential properties. (*Adinolfe* Doc. 131-3, at 12-15; *Pinares* Doc. 98-3, at 12-15.) Dr. Kilpatrick noted that "several empirical studies" have "indicate[d] that proximity (physical closeness) to environmental contamination and the spread of information about the contamination play key roles in determining the nature and degree of the impact of environmental stigma on the market."[8] Dr. Kilpatrick also opined that a property may suffer "stigma" damages even in the absence of actual adverse health effects. (*Adinolfe* Doc. 131-3, at 45; *Pinares* Doc. 98-3, at 45.)

D. The district court's orders and its reasoning for dismissal.

The district court stated the following five grounds for dismissing Plaintiffs' second amended complaints:

1. Contamination must exceed regulatory standards. The Contamination Plaintiffs had no cause of action because they failed to allege any THM contamination that exceeded "regulatory safe drinking water

[8] (*Adinolfe* Doc. 131-3, at 35; *Pinares* Doc. 98-3, at 35; *see also Adinolfe* Doc. 131-3, at 36; *Pinares* Doc. 98-3, at 36 (discussing study that found "off-site contamination causes many issues similar to on-site contamination"); *Adinolfe* Doc. 131-3, at 40; *Pinares* Doc. 98-3, at 40 (discussing study that found estimated 8% loss in value of properties within five-mile radius of an area of contamination concern); *Adinolfe* Doc. 131-3, at 45; *Pinares* Doc. 98-3, at 45 (discussing study on impact of "stigma" on residential market value and noting that contamination diminishes the value of not only the contaminated areas but also non-contaminated nearby areas).)

standard." (*Adinolfe* Doc. 97, at 13-14, 16-19, 45; Doc. 122, at 4; *Pinares* Doc. 66, at 13-14, 16-19, 45; Doc. 89, at 3.)

2. Plaintiffs failed to test each of their individual properties for contamination and instead relied on test wells located in the Acreage. (*Adinolfe* Doc. 39 at 5; Doc. 122, at 4; *Pinares* Doc. 21, at 5; Doc. 89, at 4.)

3. Insufficient allegations of causation. Plaintiffs did not sufficiently allege that Defendant had caused the contamination in the Acreage. (*Adinolfe* Doc. 39, at 4-6; Doc. 98, at 2-3; Doc. 122, at 5-6; *Pinares* Doc. 21, at 4-6; Doc. 67, at 2-3; Doc. 89, at 5.) Granted, as the district court acknowledged, Plaintiffs' experts had "confirm[ed]" that the "types of CCOCs . . . known to have been spilled at [Defendant's] site have traveled to and physically invaded The Acreage," were present in the Acreage groundwater, and had contaminated the groundwater shared by Plaintiffs and other residents. But, according to the district court, "any chemical in the Acreage could have come from a different source than [Defendant's site]" (*Adinolfe* Doc. 98, at 6-7; Doc. 122, at 6; *Pinares* Doc. 67, at 6-7; Doc. 89, at 5); for example, the district court opined, the contamination "could be a normal byproduct of water chlorination or could have come from fill used to raise Acreage

properties." (*Adinolfe* Doc. 98 at 7; Doc. 122, at 3; *Pinares* Doc. 67, at 7; Doc. 89, at 3.)

4. Different and contradictory allegations of causation. Plaintiffs had "different and contradictory theories" of how the CCOCs travelled from Defendant's site to the Acreage: groundwater movement, seepage, percolation, pond flooding, canal flooding, and wind. (*Adinolfe* Doc. 122, at 6; *Pinares* Doc. 89, at 5.)

5. No cause of action based on proximity to, or future, contamination. The Proximity Plaintiffs had no cause of action because their properties, currently, were not actually contaminated. (*Adinolfe* Doc. 122, at 4-5; *Pinares* Doc. 89, at 3-4.) Absent actual contamination, Plaintiffs could not seek "stigma damages" stemming from media stories and public concerns. (*Adinolfe* Doc. 39, at 7-8; Doc. 98 at 2-3, 7-8; Doc. 122, at 7; *Pinares* Doc. 21, at 7-8; Doc. 67, at 5; Doc. 89, at 6.) The district court suggested to Plaintiffs that they sue "the local media, the law firms and the community activists who have made public statements about the various theories behind the cancer cluster." (*Adinolfe* Doc. 39, at 8; *Pinares* Doc. 21, at 8.) The district court based its holding on the decision of a Florida intermediate

appellate court, *St. Joe Co. v. Leslie*, 912 So. 2d 21, 25 (Fla. Dist. Ct. App. 2005). (*Adinolfe* Doc. 98, at 2-3; *Pinares* Doc. 67, at 2, 7.)

At the hearing on the motions to dismiss the amended complaint, the district court stated that it would not "be looking at the any of the expert testimony" provided under the court's prior *Lone Pine* orders.[9] (*Adinolfe* Doc. 97, at 5, 16; *Pinares* Doc. 66, at 5, 16.) But, then in the very next sentence, the district court stated it had looked at the expert testimony and acknowledged that there was a "division of opinion between the experts." (*Adinolfe* Doc. 97, at 5; *Pinares* Doc. 66, at 5.) During the argument at the hearing, counsel and the district court often discussed the *Lone Pine* expert testimony. (*See generally Adinolfe* Doc. 97; *Pinares* Doc. 66.) For example, the district court remarked that "the testing of all of . . . the wells [was] clean." (*Adinolfe* Doc. 97, at 12; *Pinares* Doc. 66, at 12.) The district court also discounted the expert testimony of Dr. Danoff as being "beyond his field of expertise." (*Adinolfe* Doc. 97, at 20; *Pinares* Doc. 66, at 20.) The district court further inquired of counsel whether, based upon the tests taken and Dr. Bedient's report, "any chemicals . . . exceed[ed] the safety level." (*Adinolfe* Doc. 97, at 27; *Pinares* Doc. 66, at 27.)

[9] Counsel for Plaintiffs agreed that Plaintiffs' experts "d[id]n't need to be analyzed on the motion to dismiss," but then stated that, if the court was going to analyze the expert opinions (as it clearly was based on its comments at the hearing), then it should read Dr. Bedient's explanation of the hydrological flow in the Acreage. (*Adinolfe* Doc. 97, at 23; *Pinares* Doc. 66, at 23.)

Finally, at the hearing, the district court suggested that it may be appropriate for this Court to certify to the Supreme Court of Florida the question of whether Plaintiffs could recover "stigma damages" – that is, the diminution in Plaintiffs' property values caused by Defendant's contamination and the publicity of that contamination – even if Plaintiffs' own properties were not actually contaminated. (*Adinolfe* Doc. 97, at 36-37, 47; *Pinares* Doc. 66, at 36-37, 47; *see also Adinolfe* Doc. 97, at 38-39; *Pinares* Doc. 66, at 38-39 (discussing stigma damages).)

Standard of Review

This Court reviews *de novo* the district court's orders granting Defendant's motions to dismiss. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007).

SUMMARY OF ARGUMENT

Each of the five grounds for the district court's orders of dismissal was error under federal pleading law, Florida substantive law, or both. *See supra* at 27-30.

The district court did not cite any authority to support ground (a) – its holding that contamination must exceed regulatory standards to be actionable and harmful to human health. Florida law is to the contrary. Compliance with statutory or regulatory standards does not preclude a jury from finding a defendant negligent or otherwise liable. Nevertheless, this Court should certify a question to the Supreme Court of Florida, as the issue is determinative and there is no

controlling authority from that court in the context of an environmental contamination case.

The district court's rulings also contradicted federal pleading law and the *Iqbal*/*Twombley* plausibility standard. The district judge impermissibly relied on his own subjective common sense. The complaint's allegations and the objective scientific and expert evidence contradicted the judge's subjective beliefs.

In particular, the district judge's ground (a) – his subjective belief that harmful contamination exists only if the contamination levels exceed regulatory standards – was contradicted by the complaint's allegations and expert opinions stating that contamination levels below regulatory standards still harmed human health. Likewise, the district judge's ground (b) – his subjective belief that each Plaintiff could prove contamination on her own individual property only by testing it – was contradicted by the complaint's allegations and the expert opinions that Plaintiffs could prove which properties were contaminated without testing each property. Equally misplaced was the district judge's ground (c) regarding causation; the complaint alleged that, notwithstanding the potentially alternative sources cited by the district judge, Defendant was the most likely source of the contamination, and Plaintiffs' experts confirmed this. The district court's final violation of federal pleading law was its ground (d) ruling (faulting Plaintiffs for alleging purportedly inconsistent theories of causation); Plaintiffs' alternative

theories were not inconsistent with another, and even if they were, *Iqbal* and *Twombly* did not abolish the rule that parties may plead inconsistent, alternative theories.

Lastly, the district court erroneously construed Florida law on a novel question concerning the Proximity Plaintiffs. The district court incorrectly relied on *dicta* from a Florida intermediate appellate court. The Supreme Court of Florida would permit the Proximity Plaintiffs to recover "stigma damages" for the diminution in value caused by Defendant's nearby contamination. This Court should certify a question to the supreme court.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Contamination Plaintiffs sufficiently pled, under Florida substantive law and federal pleading law, that Defendant contaminated their properties and inflicted personal injuries on the Pinares Plaintiffs.

A. The district court's holding – that contamination levels must exceeded regulatory standards – is contrary to Florida law, and this Court should certify a question to the Supreme Court of Florida.

The Contamination Plaintiffs alleged that the contaminants on their properties were "genotoxic." (*Adinolfe* Doc. 102, ¶ 269, at 54.) Plaintiffs alleged factual information and provided evidence to support this allegation. *See supra* at 18-24. Nevertheless, the district court ruled, these allegations were insufficient because, the court opined, the contamination level had to "exceed the regulatory safe drinking water standard." (*Adinolfe* Doc. 122, at 4.) The district court did not

cite any authority, from Florida or elsewhere, to support its ruling. (*Adinolfe* Doc. 122.) Indeed, Florida law is contrary to the district court's ruling.[10]

Under Florida law, "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable person would take additional precautions." Restatement (Second) of Torts § 288C (1965); *accord Dorsey v. Honda Motor Co.*, 655 F.2d 656 (5th Cir. Unit B Sept. 1981), *modified on other grounds*, 670 F.2d 21 (5th Cir. Unit B Mar. 1982) (construing Florida law);[11] *Fla. Power & Light Co. v. Glazer*, 671 So. 2d 211, 214 (Fla. Dist. Ct. App. 1996); *Beck v. Ritchie*, 678 So. 2d 502, 503 (Fla. Dist. Ct. App. 1996); *see also Westland Skating Ctr., Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959, 964 (Fla. 1989) (holding that "while one's compliance with a statute or an ordinance may amount to evidence of reasonableness, such compliance is not tantamount to reasonableness as a matter of law").

As one Florida appellate court has explained:

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[10] *See infra* Argument II, at 47-48 (noting this Court must construe Florida law as the Supreme Court of Florida would do so).

[11] This Court is bound by *Dorsey*, as it was decided before September 30, 1981 by the Former Fifth Circuit's Unit B. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981); *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982). This Court must follow *Dorsey*'s interpretation of Florida law unless, subsequent to *Dorsey*, Florida courts in their decisions have cast doubt on *Dorsey*. *See World Harvest Church, Inc. v. Guideone Mut. Ins. Co.*, 586 F.3d 950, 957 (11th Cir. 2009). In fact, as demonstrated by the citations in the text, Florida courts have confirmed, not cast doubt, on *Dorsey*'s interpretation of Florida law.

> "While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 36, at 233 (5th ed. 1984) (footnote omitted); *see also* Restatement (Second) of Torts § 288C (1965). This court, citing the restatement, has stated, "while proof of compliance with a statute is evidence of due care, it is not conclusive on the issue . . . ." *Nicosia v. Otis Elevator Co.*, 548 So. 2d 854, 856 (Fla. 3d DCA 1989); *see also Atlantic Coast Line R. Co. v. Wallace*, 61 Fla. 93, 54 So. 893, 894 (Fla. 1911) (stating that compliance with statutes and regulations is not determinative of negligence issue where circumstances may require additional precautions).

Fla. Power & Light Co., 671 So. 2d at 214. In this case, if the jury agrees with Defendant and finds that Defendant's contamination of Plaintiffs' properties complies with regulatory standards, that finding "does not necessarily preclude a finding that [Defendant] was negligent in failing to take additional precautions." *Id.* For example, the jury could believe Plaintiffs' expert, Dr. Wylie, who has opined that compliance with FLDEP standards is "insufficient to protect people from cancer risks from cariogenic chemicals." (*Adinolfe* Doc. 131-4, ¶ 8, at 4.)

The rationale of the foregoing authorities should also apply to Plaintiffs' other common law claims (nuisance and strict liability). The rule that regulatory compliance does not excuse tort liability has been firmly rooted in the common law for over a hundred years. *See* Paul Dueffert, Note, *The Role of Regulatory*

Compliance in Tort Actions, 26 Harv. J. on Legis. 175, 175 & n.1, 180-91, 193-214 (1989). It has been applied to a wide variety of common law torts.[12]

Nor is there anything in Chapter 376 or section 376.313 that supports the district court's requirement that Plaintiffs plead violations of regulatory standards for their statutory claims. Section 376.313 creates a cause of action "for all damages resulting from a discharge or other condition of pollution covered by [sections] 376.30-376.317." The terms "discharge" and "pollution" used in section 376.313 are broadly defined and not limited to violations of regulatory standards. Fla. Stat. § 376.301(12) & (37). Section 376.313 severely limits the available defenses, and compliance with regulatory standards is not listed as a defense. *See* Fla. Stat. §§ 376.308, 376.313(3) (2010).

The Supreme Court of Florida has cited favorably the Restatement (Second) of Torts § 288C, which states that compliance with administrative regulations does not preclude tort liability. *See Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1204 (Fla. 1997). The supreme court also has stated, over one hundred years ago in

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[12] *See, e.g., Porter v. Saddlebrook Resorts, Inc.*, 596 So. 2d 472, 474 (Fla. Dist. Ct. App. 1992) (holding in nuisance action that trial court improperly instructed the jury that the reasonableness of defendant's use of its land turned solely on whether it complied with an ordinance); W. Page Keeton et al., *Prosser and Keeton on Torts* § 88B, at 632 (5th ed. 1984) (noting that most courts hold that a defendant's compliance with a zoning ordinance does not preclude a plaintiff from asserting a private nuisance claim); *id.*§ 79, at 567 (noting that later courts have tended to avoid concluding that a defendant is not strictly liable simply because its conduct was authorized by statute).

another context, that the "determination of whether there was negligence does not depend solely upon a compliance with the requirements of statutes, ordinances, or other lawful governmental regulations." *Atlantic Coast*, 54 So. at 894. Courts outside of Florida have held the plaintiffs may prosecute claims of environmental contamination even when contamination levels do not exceed regulatory standards.[13] But the Supreme Court of Florida has not squarely addressed whether the instant causes of action, when pled in the context of a groundwater contamination case, require the plaintiff to plead contamination exceeding regulatory standards.[14] In light of this lack of controlling precedent from the supreme court and because this issue is determinative, this Court should certify the question stated *infra* at 57-58.

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[13] *See Mejdreck v. Lockformer Co.*, No. 01 C 6107, 2002 WL 1838141, at *5 (N.D. Ill. Aug. 12, 2002) (determining plaintiffs could adequately prosecute allegations of environmental contamination even though regulatory authorities had determined the level of contamination did not threaten their health), *aff'd by Medrech v. Met-Coil Sys. Corp.*, 319 F. 3d 910 (7th Cir. 2003); *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 478 (S.D. Ohio 2004) (permitting plaintiffs to prosecute environmental class action on behalf of neighborhood residents even though state regulators had determined the neighborhood's drinking water was safe).

[14] A Florida intermediate appellate court arguably cited the lack of contamination exceeding regulatory standards as one of several grounds for denying class certification. *See St. Joe*, 912 So. 2d at 25. To the extent that *St. Joe* can be read to support the district court's holding, it should not be followed by this Court because it is contrary to the decisions of the Supreme Court of Florida, this Court, and other Florida courts cited in the text. *See infra* Argument II, at 47-48 (explaining this Court must construe Florida law as the Supreme Court of Florida would).

B. The Contamination Plaintiffs sufficiently pled plausible claims under federal pleading law.

In addition to erroneously applying Florida substantive law, the district court misapplied federal pleading law. We first discuss federal pleading law in light of the recent landmark decisions in *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). *Infra* Argument I.B.1, at 38-42. We then discuss the specific errors committed by the district court. *Infra* Argument I.B.2, at 42-46.

1. The *Iqbal*/*Twombly* "plausibility" assessment should be an objective standard under which a judge's "common sense and judicial experience" are informed by expert evidence.

The "plausibility" standard under *Twombly* and *Iqbal* does not "require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Speaker v. U.S. Dept. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1380 (11th Cir. 2010). A court is not required to accept the truth of legal conclusions, conclusory statements, "threadbare recitals" of the elements of a case of action, or mere "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949-50. But when the complaint has well-pleaded factual allegations, a court must assume their truth and then "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679, 129 S. Ct. at 1950. Plaintiffs must show claims that are more than merely "conceivable" or

"speculative," but they need not show that their claims are "probable." *See Speaker*, 623 F.3d at 1380 (quoting *Twombly*, 550 U.S. at 570, 555-56, 127 S. Ct. at 1974, 1964-65)). In other words, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. at 1965).

Determining whether a complaint states a plausible claim is "a context-specific task" that requires a court "to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679, 129 S. Ct. at 1950. The Court in *Iqbal* and *Twombly*, however, gave almost no guidance on what it meant by "judicial experience" and "common sense." *See, e.g.*, Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 Vill. L. Rev. 857, 875 (2012). The factors of "judicial experience" and "common sense" may require resorting to information and evidence submitted by the plaintiff. Indeed, this Court has suggested that, in light of *Iqbal* and *Twombly*, a plaintiff may need to present evidence.[15] The U.S. Supreme Court in *Twombly* itself relied on an expert opinion when it quoted a non-

[15] *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (holding that a plaintiff has an "obligation under *Twombly* to indicate that he could provide evidence" demonstrating the plausibility of his claim); *id.* at 1346 (Ryskamp, J. dissenting) (criticizing the *Jacobs* majority for "go[ing] too far" in requiring the plaintiff to provide "actual evidence" and "demonstrable empirical evidence" at the pleadings stage).

legal, factual statement from a treatise as a basis for its holding.[16] Commentators also have recognized that a trial judge's "common sense" and "judicial experience" in assessing plausibility should include consideration of additional information and evidence, including expert opinions.[17]

Consideration of extrinsic evidence, especially expert opinions, to inform the judge's "common sense" and "judicial experience" allows the plausibility standard to be an objective standard, rather than a subjective standard based on a judge's own individual common sense and experience. *See* Brown, *supra*, 44 Creighton L. Rev. at 181-82 (discussing how consideration of statistical or expert materials as part of the plausibility assessment reduces subjectivity). Judge Ryskamp (the district judge in this case), when sitting on this Court, correctly condemned any

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[16] *See Twombly*, 550 U.S. at 569, 127 S. Ct. at 1973 (quoting Areeda & Hovenkamp, *Antitrust Law*, ¶ 307d, at 155 (Supp. 2006) as support for the Court's apparent "common sense" belief about how business firms operate in the marketplace); *see also* Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After Twombly and Iqbal*, 44 Creighton L. Rev. 141, 169-70 (2010) (discussing *Twombly*'s reliance on this expert opinion).

[17] *See* Charles Alan Wright *et al.*, 5 *Federal Practice and Procedure* § 1216 (describing the factors of common sense and judicial experience as "extra-pleading" factors and noting that *Iqbal* and *Twombly* "have invited judges to look beyond the four corners of the complaint . . . whenever they assess a complaint's plausibility"). Henry S. Noyes, *supra*, 56 Vill. L. Rev. at 878 (suggesting that a "district court drawing on judicial experience in deciding a motion to dismiss must consider information and evidence beyond that alleged in the complaint . . . when deciding whether a claim is plausible"); Brown, *supra*, 44 Creighton L. Rev. at 171-72 (suggesting a method of "correlation plausibility" under which judges consider expert reports and studies to inform their "judicial experience").

interpretation of *Iqbal* and *Twombly* that made it a subjective, rather than objective, standard. *See Jacobs*, 626 F. 3d at 1346 (Ryskamp, J., dissenting) ("When plausibility is based on a judge's common sense and experience, different judges will have different opinions as to what is plausible, resulting in a totally subjective standard for determining the sufficiency of a complaint.").

Granted, not every case will warrant judicial consideration of evidence to assess the plausibility of a pleading. For example, in an auto accident case, a judge will have a reliable level of individual experience to assess a complaint's plausibility without resorting to extrinsic evidence. *See* Brown, *supra*, 44 Creighton L. Rev. at 184.

But this case – a toxic tort case premised on science and specialized knowledge – is particularly appropriate for a judge to consider information and evidence to ensure an objective plausibility assessment. A typical judge's own subjective "common sense" and "judicial experience" in matters of science and specialized knowledge is limited and may be misguided without the aid of expert information and evidence. How is a district judge, based on his own common sense and experience, to know whether particular contaminants at particular levels are potentially harmful to human health? How is he to know the nature, scope, and extent by which particular contaminants may migrate via groundwater from one property to another? The district judge here erred because, though he

acknowledged the expert evidence before him, he largely disregarded that evidence in favor of his own, contradictory subjective sense of what was plausible, as we argue next.

2. The district court's plausibility holdings were improperly based on the court's subjective views and contradicted by the complaints' allegations and the scientific evidence, or the holdings otherwise violated federal pleading law.

Ground (a): The district court erroneously held that the contamination levels had to exceed regulatory standards to be harmful**.**

As previously discussed, the district violated Florida law when it held that Plaintiffs could not state a cause of action unless they alleged contamination exceeding regulatory standards. *See supra* Argument I.A, at 33-38; (*Adinolfe* Doc. 97, at 13-14, 16-19, 45; Doc. 122, at 4.) This holding also violated federal pleading law because the district judge incorrectly assumed, based on his own subjective views, that contamination levels complying with regulatory standards were not harmful to human health.

The district judge's subjective view was contradicted by the allegations in the second amended complaint and expert opinions. The contrary allegations and evidence are more fully stated above. *See supra*, at 18-24. To summarize, the Contamination Plaintiffs alleged that the contaminants on their properties were "genotoxic," (*Adinolfe* Doc. 102, ¶ 269, at 54), meaning they were "[d]amaging to DNA and thereby capable of causing mutations or cancer." Am. Heritage Med.

Dictionary for Health Consumers (Rev. 2d ed. 2007). Plaintiffs alleged that these contaminants do not require "any specific concentration or amount of absorption for them individually or in combination to cause clear cell renal carcinoma and other disease in humans and animals." (*Adinolfe* Doc. 102, ¶ 269, at 54-55.) They identified three persons, including Ms. Pinares, residing in the Acreage who were exposed to the contaminated groundwater and who, as a result, developed clear cell renal carcinomas. (*Pinares* Doc. 39-6, ¶ 3, at 2; Doc. 70, ¶ 35, at 12.)

These allegations were supported by the expert opinions of Drs. Wylie and Danoff. *See supra* at 21-24. In particular, Dr. Wylie opined that Florida's drinking water standards were not "health-based standards," but instead were "set only on 'organoleptic criteria (i.e., taste, order, or color).'" (*Adinolfe* Doc. 131-4, at 17; *Pinares* Doc. 98-4, at 17 (quoting from FLDEP reference).) He further opined that Florida's groundwater clean target levels (GCTLs) under-protected against cancer risks to human health. (*Adinolfe* Doc. 131-4, ¶ 8, at 4.)

Ground (b): The district court erroneously held that each Plaintiff could show contamination of his or her property only by actually testing groundwater on the property.

The district court faulted the Contamination Plaintiffs because they did not test each of their properties but instead drilled test wells in the Acreage that revealed contaminants in the Acreage's groundwater. (*Adinolfe* Doc. 122, at 4.) The district judge incorrectly assumed, based on his own subjective belief, that the

proper and only scientific method to prove actual groundwater contamination of a parcel of property is by testing that particular parcel of property. The district court's subjective view was contradicted by expert opinions referenced in the second amended complaint. (*Adinolfe* Doc. 102, ¶ 255, at 50-51.) Mr. Miller, a hydrologic engineer, attested that testing of each individual property is not required to prove which properties in the Acreage were contaminated. *See supra* at 16-18; (*Adinolfe* Doc. 65-5, ¶¶ 5-6, at 3.) Another expert, Dr. Bedient, created a map (Figure 10 of his report) and attested that the map represented "what parcels [in the Acreage] are contaminated based on the sampling performed." *See supra* at 13-17; (*Adinolfe* Doc. 65-4, ¶ 2, at 1.)

Ground (c): The district court erroneously relied on possible alternative sources of contamination to hold that Plaintiffs had not sufficiently pled that Defendant contaminated their properties, contrary to Plaintiffs' allegations and evidence that Defendant was the most likely source of contamination.

The district judge also justified its dismissal based on his subjective belief that the contaminants in the Acreage could have originated from sources other than Defendant's site and, in particular the court hypothesized, that the contamination could have been the result of water chlorination or fill. (*Adinolfe* Doc. 98, at 6-7; Doc. 122, at 3, 6.) This holding was contradicted by the complaints' allegations and the evidence before the court fully set forth above. *See supra* at 6-27. In summary, Plaintiffs alleged, based on hydrologic studies and other expert evidence: (i) the groundwater aquifer shared by the Acreage and Defendant's site

located to the north of the Acreage; (ii) the flow of this groundwater from the north (where Defendant's site was located) to the south (where the Acreage was located) and how this flow would have carried Defendant's contaminants; (iii) the testing of the groundwater under the Acreage that showed the same types of contaminants found on Defendant's site; and (iv) Defendant's facility to the north of the Acreage was the only potential source for the groundwater contamination as it was the only large industrial complex in the area that handled toxic contaminants. *See supra* at 6-12.

The evidence submitted to the district court, at Defendant's request, also contradicted the district judge's subjective beliefs about causation. For example, contrary to the district judge's speculation about potential alternative sources for the contamination, Dr. Bedient opined that there were "substantial indicators showing transport of contaminants" from Defendant's property to the Acreage. (*Adinolfe* Doc. 131-1, at 10.) These indicators included "the general southeast groundwater flow direction in combination with canals and natural pathways of overland surface water flow through the [wildlife area]." (*Adinolfe* Doc. 131-1, at 10.) These indicators, Dr. Bedient opined, made Defendant's property "the likely source of contaminants" found in the Acreage. (*Adinolfe* Doc. 131-1, at 10.) Dr. Bedient and Dr. Wylie both disagreed with the district judge's subjective belief

that other potential sources caused the contamination. (*Adinolfe* Doc. 65-4, ¶ 4, at 2; Doc. 65-6, at 4.)

Ground (d): The district court erroneously faulted Plaintiffs for pleading alternative, and purportedly inconsistent, theories of causation.

The district court dismissed the second amended complaint because it alleged purportedly "different and contradictory" pathways – groundwater, surface water, seepage, pond and canal flooding, and wind – by which the contaminants travelled from Defendant's property to the Acreage. (*Adinolfe* Doc. 102, ¶ 235, at 43.) As initial matter, these alternative allegations, though "different," were not "contradictory" to one another. (*Adinolfe* Doc. 102, ¶ 235, at 43.) Contaminants may travel by more than one pathway. More importantly, even if these allegations were "contradictory" (i.e. inconsistent) with one another, federal pleading law permits a plaintiff to plead inconsistent theories. *See, e.g.*, *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1352 (11th Cir. 2008) (holding that the "Federal Rules of Civil Procedure . . . allow plaintiffs to plead inconsistent theories" and citing Fed. R. Civ. P. 8(d)(3)). Nothing about *Twombly* or *Iqbal* altered a plaintiff's right to plead inconsistent theories under Federal Rule of Civil Procedure 8(d)(3).

II. The Proximity Plaintiffs sufficiently pled causes of actions under Florida law, but this Court should certify questions to the Supreme Court of Florida.

Courts in various jurisdictions are divided over the circumstances that permit a property owner to recover "stigma damages." Some courts permit a property owner to recover for diminution in property value caused by the defendant's nearby contamination and the resulting negative publicity even if the owner's property is not actually or physically contaminated.[18] On the other hand, some courts hold that physical or actual contamination of the owner's property is a prerequisite to recover the diminution in property value and "stigma damages" caused by the defendant's contamination and resulting negative publicity. *See, e.g.*, *AVX Corp. v. Horry Land Co.*, 686 F. Supp. 2d 621, 627 n.3 (D.S.C. 2010) (citing multiple cases). The district court, at the hearing below, acknowledged this split of authority nationally and the lack of any on-point authority in Florida. (*Adinolfe* Doc. 97, at 37.)

When sitting in diversity and deciding Florida law, this Court must follow the decisions of the Supreme Court of Florida. *E.g.*, *Flintkote Co. v. Dravo Corp.*,

[18] *See, e.g.*, *Lewis v. Gen. Elec. Co.*, 254 F. Supp. 2d 205, 218 (D. Mass. 2003) (permitting nuisance claims for diminution of property value without any physical contamination); *Scheg v. Agway*, 645 N.Y.S.2d 687, 688 (N.Y. App. Div. 1996) (permitting nuisance claim where plaintiffs alleged that "the value of their property was diminished as a result of its proximity to a [contaminated] landfill"); *Allen v. Uni-First Corp.*, 558 A.2d 961, 962-65 (Vt. 1988) (holding that the trial court erred when it prevented the jury from properly considering the plaintiffs' claims that their property values had decreased due to "widespread contamination and the resulting public perception that [their town] was an unsafe place in which to live"); *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So. 2d 375, 379 (La. Ct. App. 1984) (finding that damages resulting from the "stigma" attached to the mere existence of a landfill could be recovered).

678 F.2d 942, 945 (11th Cir. 1982). In the absence of a decision from the supreme court, this Court should follow the "decisions of [Florida's] intermediate appellate courts unless there is some persuasive indication that the [supreme court] would decide the issue otherwise." *Id.*

The district court opined that *St. Joe*, a decision of a Florida intermediate appellate court, was the most instructive Florida precedent on the question of whether the Proximity Plaintiffs – those who did not allege actual or physical contamination – could recover "stigma damages." (*Adinolfe* Doc. 98, at 7-8 (citing *St. Joe*, 912 So. 2d at 24-25).) The district court was wrong. *St. Joe* is materially distinguishable and should not control this Court's decision. *Infra* Argument II.A, at 48-50. Regardless, the Supreme Court of Florida would not adopt any of the dicta in *St. Joe* and instead would hold that the Proximity Plaintiffs were not required to show actual contamination of their properties to recover under Florida law. *Infra* Argument II.B, at 50-57.

A. The district court erroneously relied on the distinguishable *St. Joe* decision of a Florida intermediate appellate court.

In *St. Joe*, the appellate court reviewed the trial court's decision to certify a class of plaintiffs who were alleging primarily soil contamination caused by the defendant's direct dumping of mill waste on properties later sold to the plaintiffs. *St. Joe*, 912 So. 2d at 22. Though the issue in *St. Joe* was class certification, the court did address the underlying merits and indicate that proof of actual

contamination was required for an individual property owner to recover under various claims for "stigma" damages. *Id.* at 24-25 & n.1. *St. Joe*, however, should not control this Court's decision for three reasons.

First, *St. Joe* is materially distinguishable from the instant case. In *St. Joe*, the legal issue (class certification) was different than the legal issue here (the pleading's sufficiency). *See id.* at 24. Class certification was not permitted in *St. Joe* because, unlike this case, none of the named plaintiffs' properties were contaminated. *Id.* at 25. In contrast, here, many of the Plaintiffs' properties are contaminated. *See supra* note 2 & Argument I, at 43-44. Moreover, the contamination in *St. Joe* was primarily static (soil) contamination, unlike the primarily non-static (groundwater) contamination at issue here.[19] (*See Adinolfe* Doc. 102, ¶ 253, at 50.) Non-static contamination that is likely to migrate to nearby properties legally harms the owners of the nearby properties, not just the owners of the actually contaminated properties. *See supra* note 18.

Second, *St. Joe*'s statements on stigma damages and the merits of plaintiffs' claims were non-binding *dicta* because they were not essential to the court's decision. *See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dept. of Bus. Regulation of State*, 276 So. 2d 823, 826 (Fla. 1973) (holding that a

[19] *St. Joe* mentions allegations of water contamination. 912 So. 2d at 22-23. But the nature of contamination in this case is different from *St. Joe*. In *St. Joe*, there were no allegations of a shared aquifer or contamination by groundwater migrating from the defendant's industrial facility or from where the mill waste was dumped.

"statement of [a Florida intermediate appellate court]" that is "not essential to the decision of that court . . . is without force as precedent"). The *St. Joe* court stated that, even if stigma damages were available under Florida law, class certification was inappropriate. 912 So. 2d at 24-25. Class certification was the only issue before the *St. Joe* court. Once the court resolved that issue, any further statements on the underlying merits were dicta that were not essential to the court's decision.

Third, though the *St. Joe* court did discuss Florida Statutes section 376.313, the court did not address whether actual contamination of a plaintiff's property was required for a cause of action under section 376.313. *Id.* at 24-25 & n.1. Instead, the court merely commented that there was no evidence that the contaminated samples taken by the plaintiffs were from the same area where the plaintiffs alleged the waste had been dumped or that the waste exceeded regulatory standards. *Id.* at 25. Thus, *St. Joe* is not precedent on the issue of whether an owner of a non-contaminated property in the vicinity of pollution may recover under section 376.313.

B. The Supreme Court of Florida would hold that actual contamination of Plaintiffs' property is not required for Plaintiffs to recover for the diminution in their property's value caused by Defendant's contamination plume.

As the *St. Joe* court conceded, its viewpoint about Florida law was not universally held. *Id.* at 24 n.1 (noting contrary view on Florida law in *Peters v. Amoco Oil Co.*, 57 F. Supp. 1268, 1286 (M.D. Ala. 1999)). The Supreme Court of

Florida would not follow any *dicta* or rationale in *St. Joe* when adjudicating the Proximity Plaintiffs' statutory claim (Florida Statutes Section 376.313) or their three common law claims (nuisance, negligence, and strict liability).

1. Fla. Stat. § 376.313

The Supreme Court of Florida would not require Plaintiffs to show actual contamination of their property to recover under Florida Statutes section 376.313 (2010).[20] *See Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010). In *Curd*, the supreme court allowed fishermen to recover purely economic damages under section 376.313 despite the fact that they did not own any property damaged by the defendant's pollution. 39 So. 3d at 1221. Chapter 376, the court noted, was "a far-reaching statutory scheme." *Id.*

Under section 376.313, a plaintiff's pleading and proof burdens are light. A plaintiff "'need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred.'" *Id.* at 1222 (quoting Fla. Stat. § 376.313(3) (2004)). "*Any* person" may recover "*all* damages resulting from a discharge or other condition of pollution." Fla. Stat. § 376.313(3) (2010) (emphasis added). A defendant is liable even for non-negligent discharges that it

[20] The applicable version of the statute for this case should be the 2010 version. However, the statute has not been amended in recent years, and therefore, the case law cited herein interpreting prior versions of the statute should apply.

did not cause. *Curd*, 39 So. 3d at 1221-22 (citing *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 24 (Fla. 2004)).

While section 376.313 imposes very light pleading and proof burdens on plaintiffs, defendants in contrast have almost no defenses available to them. The "*only* defenses" to a section 376.313 cause of action "shall be those specified in section 376.308." Fla. Stat. § 376.313(3) (2010) (emphasis added). Outside of certain discharges not applicable in this case, section 376.308 lists only the following defenses: acts of God, war, and government; and acts or omissions of third parties. Fla. Stat. § 376.308(2) (2010). Relying on section 376.308's language, the supreme court in *Curd* held that the defendant there could not raise the fishermen's lack of property ownership as a defense. 39 So. 3d at 1222. In a similar vein, the supreme court would hold that Defendant here cannot raise the Proximity Plaintiffs' lack of actual property contamination as a defense.

Justice Polston, in his *Curd* concurring opinion,[21] recognized the extraordinary breadth of a section 376.313 action. He noted that, under the applicable provisions, the statutory scheme provides for the recovery of "all damages" without any restriction. *Id.* at 1230 (Polston, J., concurring in part,

[21] Justice Polston concurred, based on different reasoning, with the *Curd* majority's conclusion that fishermen could recover their loss income under section 376.313. *Curd*, 39 So. 3d at 1229 (Polston, J., concurring in part, dissenting in part). He dissented from the *Curd* majority's conclusion that the fishermen had a common law negligence claim for purely economic losses. *Id.*

dissenting in part). Critically, Justice Polston further explained that "all damages" include "economic damages" (i.e., diminution in property values) and that such damages were not limited solely to fishermen:

> The plain meaning of "all damages" includes economic damages; and the Legislature has directed that section 376.313(3) be liberally construed. *See* § 376.315, Fla. Stat. (2004) . . . . Consequently, the statute provides commercial fishermen (*among others*) with a private cause of action.

Id. (emphasis added). The *Curd* majority neither rejected nor accepted Justice Polston's interpretation of the meaning of "all damages" in section 376.313(3). *See id.* at 1219-22 & nn.1-3 (majority opinion). In a subsequent case (such as this case), the supreme court would adopt the rationale of Justice Polston's concurring opinion. *Cf. Kokal v. State*, 492 So. 2d 1317, 1320 (Fla. 1986) (adopting a single justice's prior concurring opinion as the holding of the supreme court).

2. Common Law Nuisance

The Supreme Court of Florida would not require Plaintiffs to show actual contamination of their property to recover under a common law nuisance claim. The supreme court never has required proof of physical injury to property as a prerequisite for a nuisance action. In fact, the supreme court has allowed a nuisance action to proceed, in the absence of any physical injury to the land, when homeowners complained that the addition of a cemetery to their neighborhood "would substantially interfere with the comfort, repose and enjoyment of their

homes." *Jones v. Trawick*, 75 So. 2d 785, 788 (Fla. 1954). Furthermore, the supreme court has broadly defined nuisance to allow one property owner to restrain another property owner from doing "[a]nything which annoys or disturbs one in the free use, possession, or enjoyment of his property, or which renders its ordinary use or occupation physically uncomfortable." *Id.*

St. Joe's contrary dicta on Florida nuisance law rests on a shaky precedent. *St. Joe* relied exclusively on *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995), which interpreted Virginia law. *See* 912 So. 2d at 24-25 n.1. But the court that decided *Adams* later limited its holding when it allowed a Virginia nuisance claim to proceed in the absence of any physical impact to the property, provided that the defendant's interfering use was "physically perceptible" to the plaintiff. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1154 (4th Cir. 1996). In relying exclusively on *Adams*' interpretation of Virginia law as a basis for interpreting Florida nuisance law, the *St. Joe* court did not acknowledge the courts that have permitted nuisance claims by owners of properties that are merely in the vicinity of contaminated land. *See supra* note 18. The supreme court, after fully considering the decisions of these other courts, would interpret Florida law to permit such a nuisance claim.

3. Common Law Negligence and Strict Liability

The Supreme Court of Florida would not require Plaintiffs to show actual contamination of their property to recover under either a negligence or strict liability common law claim.

St. Joe contradicted supreme court precedent when it stated that a Florida negligence claim requires a plaintiff to prove "property damage." 912 So. 2d at 24 n.1 (citing *Stephenson v. Collins*, 210 So. 2d 733, 737-38 (Fla. Dist. Ct. App. 1968) (Rawls, J., dissenting); *Monroe v. Sarasota County Sch. Bd.*, 746 So. 2d 530 (Fla. Dist. Ct. App. 1999)). The supreme court has "abrogated the traditional tort requirement of personal or property damage." *Curd*, 39 So. 3d 1216, 1230-31 (Fla. 2010) (Polston, J., concurring in part, dissenting in part) (citing *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532, 543 (Fla. 2004)). Specifically, the supreme court has held that "actionable conduct that frustrates *economic interests* should not go uncompensated *solely because the harm is unaccompanied by any injury to a person or other property*." *Indem. Ins.*, 891 So. 2d at 543 (emphasis added); *see also Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, SC10-1022, 2013 WL 828003 (Fla. March 7, 2013) (abolishing the Florida economic loss rule in all contexts except in products liability cases).

The *St. Joe* court also was wrong when it stated the common law strict liability requires proof of "physical harm." *See St. Joe*, 912 So. 2d at 24-25 n.1 (citing *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d

510 (Fla. Dist. Ct. App. 1984)). Another court has expressly rejected the argument that physical damage is a prerequisite for a Florida strict liability claim:

> The Restatement provides for consideration of, inter alia, "[the] existence of a high degree of risk of some harm to the . . . land [and the] likelihood that the harm that results from it will be great." Restatement (Second) Torts § 520. The Restatement does not require physical contact or damage, and Defendants fail to provide any authority containing such requirement. Indeed, Defendants cite *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510 (Fla. Dist. Ct. App. 1984), as authority. *Great Lakes* states that strict liability will apply only if the ultrahazardous activity "poses some physical . . . *danger* to persons or property in the area, which danger must be of a certain magnitude and nature," *Id.* at 460 (emphasis added). *Great Lakes* does not require that the contact be present.

Peters, 57 F. Supp. 2d at 1286 (emphasis and omissions supplied). The supreme court would adopt the better reasoned view stated in the *Peters* case.

The supreme court's *Curd* decision is instructive on both the common law negligence and strict liability claims. *Curd* addressed whether fishermen could recover, under negligence and strict liability, for economic losses caused by the defendant's release of pollutants, even though the fishermen did not own any property damaged by the pollution. 39 So. 3d at 1222. The Court concluded the fishermen could recover purely economic losses. *See id.* at 1222-28.

Similarly, in this case, Plaintiffs should be allowed to recover economic losses for the diminution to their property value even if the Plaintiffs' properties were not contaminated. Granted, as the district noted (*Adinolfe* Doc. 39, at 7), the

plaintiffs in *Curd*, commercial fishermen, were found to have within the zone of risk a "special interest" not shared by the general public. *Curd*, 39 So. 3d at 1228. But the same can be said of Plaintiffs in this case. As owners of properties in the path of Defendant's contamination plume, Plaintiffs have a "special interest" within Defendant's zone of risk not shared by the general public.

In summary, the supreme court would conclude that the Plaintiffs whose properties were diminished in value by their proximity to Defendant's contamination plume, or by the strong likelihood of future contamination by the plume, could plead and prove negligence and strict liability claims even if their properties were not actually presently contaminated by the plume.

CONCLUSION

This Court should reverse the district court's orders of dismissal in *Adinolfe* and *Pinares*. This Court should conclude that the orders violate federal pleading law. This Court should further conclude that the orders violate Florida substantive law, or alternatively, this Court should certify the following questions to the Supreme Court of Florida pursuant to Florida Rule of Appellate Procedure 9.150:

I. Whether, under each of these causes of action – Fla. Stat. § 376.313 and common law nuisance, negligence, and strict liability – a plaintiff property owner must plead and prove levels of contamination that exceed regulatory standards.

II. Whether, under each of the causes of action stated in question I, a plaintiff must plead and prove actual or physical contamination of the plaintiff's property or instead may a plaintiff recover damages for the diminution in his property value caused by the property's proximity to contamination or the likelihood that the property will become contaminated in the future.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains 13,990 words (including words in footnotes) according to Microsoft Word 2010, the word-processing system used to prepare this brief.

Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY service by U.S. Mail a true and correct copy of the foregoing upon the following clerk of court this 20th day of March 2013:

John Ley, Clerk of Court
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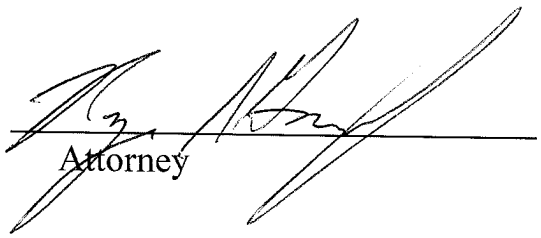

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