Case No. 09-15798-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NANCY SHER, JAMES R. ABEL, CAROL A. CALECA, LOUIS GIOCONDO, BETTY L. KEY, Individually and On Behalf of All Others Similarly Situated

Plaintiffs-Appellees,

v.

RAYTHEON COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:08-cv-889-T-33AEP

PRINCIPAL BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned agrees with the certificate of interested persons submitted by Appellant and certifies that the following additional persons and entities not included on Appellant's list as interested persons and entities:

Baker, Jennifer A., former plaintiff

Curry, Landis Vernon, III, trial counsel for Appellant

Fink, Joura, former plaintiff

Gowdy , Bryan S., appellate counsel for Appellee

Henry, David G., trial counsel for Appellee

Lazzara, Richard A., U.S. District Judge

Lydon, Virginia, former plaintiff

Mills Creed & Gowdy, P.A., appellate counsel for Appellee

Members of the class, as certified by the District Court (owners of certain real properties in St. Petersburg, Florida)

Nancy Sher Revocable Living Trust

Porcelli, Anthony E., U.S. Magistrate Judge

Swartout, John C., former plaintiff

Swartout, Linda C., former plaintiff

By: s/Bryan S. Gowdy
Bryan S. Gowdy

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument in this interlocutory appeal of a class certification order under Fed. R. Civ. P. 23(f). If the Court does decide to hold oral argument, Appellees request that it be held as soon as possible, as proceedings continue in the district court and this case is currently set for trial in March 2011.

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STATEMENT OF JURISDICTION

Appellee agrees with Appellant's statement of jurisdiction with one caveat. Although this Court granted Appellant permission to appeal under Fed. R. Civ. P. 23(f), this Court retains the unfettered discretion to dismiss the appeal if that permission was improvidently granted. *See Colbert v. Dymacol, Inc.*, 344 F.3d 334, 334 (3rd Cir. 2003) (en banc) (holding circuits courts may dismiss Rule 23(f) appeals because the permission to appeal was improvidently granted). Permission is improvidently granted if, among other reasons, the Rule 23(f) petition is inaccurate. *See id.* As argued below, Appellant's Rule 23(f) petition and its brief on the merits give the false impression that the district court did not resolve Appellant's challenges to Appellees' expert testimony when, in fact, it did. *See infra* Argument I.B.2, at 34-38. Therefore, this Court should hold that permission to appeal was improvidently granted and dismiss the appeal.

STATEMENT OF THE ISSUES (RESTATED)

1. Whether the district court failed to resolve Defendant's "challenges" to Plaintiffs' expert testimony and thus abused its discretion in certifying the class.

2. Whether the district court abused its discretion by not requiring Plaintiffs to submit a formal trial plan before certifying the class.

3. Whether, based on the evidence presented, the district court abused its discretion in certifying the class.

INTRODUCTION

This appeal hinges on a false premise – that the district court purportedly failed to resolve Defendant Raytheon's "challenges" to the expert testimony presented by Plaintiffs, the class representatives. In fact, the district court did resolve these "challenges" by making several express findings of fact. (Doc. 144, at 39-40.) Defendant fails to contest, or even mention, these factual findings anywhere in its brief. The most critical factual finding is that Plaintiffs "established" a "groundwater plume" and "a zone of impact." (Doc. 144, at 39.) This finding demonstrates that Plaintiffs can prove their claims on a class-wide basis – specifically, by a proof of a plume that impacts the properties of all class members. *Infra* Argument III.B.1, at 49-52. While Defendant may dispute the *contours* of Plaintiffs' groundwater plume, it cannot logically dispute that a groundwater plume is a *method* for proving injury to a class of properties. *Id.* It cannot dispute this because it has drawn its own plume to show contamination of a contiguous group of properties inside the class area. (*See* Ct. Ex. A.)

STATEMENT OF THE CASE

We set forth our own statement of the case because Defendant's statement is inaccurate, includes immaterial facts, and omits material facts. As class certification turns on whether the claims on the merits are susceptible to "common proof," *e.g., Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1359 (11th Cir.

2009), we summarize the common proof (*i.e.*, evidence and factual findings) relevant to the issues of: (i) liability and (ii) damages. *Infra* Parts I & II, at 3-19. Then, we discuss the relevant procedural history and the district court's class certification order. *Infra* Part III, at 19-23.

I. Evidence and factual findings relevant to liability issues

A. Evidence and factual findings relevant to injury and causation

1. Background

Defendant owns a facility (also referred to as the "site") at which various industrial activities have occurred over the years. (Doc. 144, at 2.) These industrial activities caused chemicals to leak into the soil and groundwater at the site. (Doc. 144, at 2; Doc. 120-4, at 2.). These chemicals are also referred to as "contaminants of concern," "COCs," or "contaminants." (Doc. 144, at 2.)

There is no genuine dispute that the leaking chemicals from Defendant's facility have caused a harmful groundwater plume of contaminants to form under the properties in the neighborhood surrounding the site. (Doc. 144, at 40.) Indeed, the district court's factual findings – uncontested on this appeal – were as follows:

- "[B]oth parties' groundwater experts, as well as the FDEP [Florida Department of Environmental Protection] and Defendant's environmental consultant, ARCADIS[,] have acknowledged that there is a groundwater plume filled with COCs lurking under the Azalea Neighborhood." (*Id.*; *see also* Doc. 139, at 138; Doc. 141, at 109-10, 175-77.)

- Any concerns that other sources may have caused the contamination were "mitigated" because Defendant, the only defendant, already had

acknowledged responsibility for the migration of contaminants from its facility and for the cleanup of some of the surrounding properties. (Doc. 144, at 40; Doc. 141, at 176, 183-84; Doc. 139, at 139-40.)

- The contaminants migrating from Defendant's facility have been identified and are known to cause to harm. (Doc. 144, at 40.) Indeed, the county appraiser already has determined that the facility and the surrounding properties have suffered a diminution in value due to the contamination plume. (*Id.*; *see also* Pls.' Ex. 131; Doc. 141, at 280-88.)

The core dispute in this case, as the district court recognized, is what are the exact contours and characteristics of the groundwater plume, not whether a groundwater plume exists in the first place. (Doc. 144, at 40; *see also* Doc. 139, at 138.) Plaintiffs have delineated a larger groundwater plume covering areas with contamination *at any level*. (Doc. 139, at 131,140, 262-63; Doc. 144, at 8-9, 40.) In contrast, Defendant has delineated a smaller groundwater plume limited to areas where contamination is at *a level above Florida's regulatory standards*. (Doc. 144, at 8-9, 40; Doc. 141, at 179; Doc. 139, at 139, 268; Doc. 89-3, at 8.)

A comparison of Plaintiffs' and Defendant's plumes may be seen on the pull-out map that follows this page.[1] Plaintiffs' plume is drawn in red, while Defendant's plume is drawn in purple. (Doc. 139, at 139; Ct. Ex. A.) This map was presented to the district court and discussed at the evidentiary hearing. (Doc. 139, at 138-39.)

[1] The map is not included with the electronically filed version of this brief.

Defendant's own consultant, Arcadis, drew the purple groundwater plume for the purpose of showing the FDEP the spatial extent of the contamination that Defendant is responsible for cleaning up. (Doc. 141, at 176, 183-84.) Thus, the purple plume was drawn on the assumption that groundwater is contaminated only if its level of contaminants is above Florida's regulatory standards, *i.e.* the level at which Florida regulations require remediation by Defendant. (Doc. 139, at 139.) On the other hand, Plaintiffs' groundwater expert, Dr. Bedient, drew the red groundwater plume for a related, but different, purpose. (Doc. 139, at 131-32, 262-63.) He drew it to show all properties impacted "at any level" by contaminants originating from Defendant's facility. (*Id.* at 131, 133, 140.) Defendant's testifying expert, Dr. Mercer, conceded that previously he too had drawn groundwater plumes at contamination levels below Florida's regulatory standards. (Doc. 141, at 182.)

The certified class includes all parcels that, in whole or in part, are within the boundaries of Dr. Bedient's red plume and thus are impacted by the plume. (Doc. 83, at 16; Doc. 83-15; Doc. 144, at 5, 44.) All the class representatives own parcels within Dr. Bedient's red plume, and three of the five class representatives own parcels within Arcadis' purple plume. (Doc. 139, at 140; Ct. Ex. A.)

2. Dr. Bedient's testimony on plumes, impact, and causation

By definition, a groundwater plume delineates an area where, at some point in time, contamination either has flowed through or by, or will flow by, the properties in the area. (Doc. 139, at 264.) The scientific process of delineating a groundwater plume is not a process of simply "connect[ing] the dots" on a map where contamination has been detected. (*Id.* at 175-76, 178.) For instance, in drawing his red plume, Dr. Bedient did not include some properties where contamination had been detected. (*Id.* at 171.) "Drawing around" data points is an accepted scientific practice, as demonstrated by peer-reviewed journals and a textbook published by Defendant's testifying expert, Dr. Mercer. (*Id.* at 177-82.)

In accordance with these accepted scientific principles, Dr. Bedient testified that it was common to have "non-detects" on individual properties within any type of plume, including his red plume and Arcadis' purple plume. (*Id.* at 142-43, 149.) For example, only fourteen properties within Arcadis' plume showed detection levels above Florida's regulatory standards. (Doc. 139, at 145-46.) But, Dr. Bedient opined, it would have been "preposterous" to suggest that only fourteen properties within Arcadis' plume were contaminated. (*Id*.) In fact, Dr. Bedient noted that Defendant, in its reports to the FDEP, never suggested that it would not cleanup the "non-detect" properties within Arcadis' plume. (*Id.* at 143-44.) And just as the presence of non-detects on individual properties in Arcadis' plume did

not indicate that those properties were uncontaminated, the same was true for properties in Dr. Bedient's plume. (*Id.* at 149-50, 151-52.) This is so, Dr. Bedient testified, because groundwater continues to move across property lines. (*Id.* at 144, 153.)

Dr. Bedient opined, with a reasonable degree of scientific certainty, that every property within his red plume had been impacted by contaminants from Defendant's site. (*Id*. at 185, 188-89, 264.) He drew the lines for his red plume to the locations where, in his scientific judgment, the level of the contaminants reached zero. (*Id.* at 184-85.) This judgment was based on "cone zero points" that he had identified, the general directional flow of the groundwater, and his own expertise. (*Id*. at 183-85.) Some of Dr. Bedient's red plume lines were 500 feet from the "last hit" (*i.e.*, the outer point at which contaminants were detected). (*Id.* at 184-85.) Dr. Bedient conceded that his use of the term "buffer zone" to refer to this 500-foot area was a "poor choice of words," as the area was not a buffer beyond the impact zone but rather a buffer from the last hit. (*Id.*)

On the issue of causation and alternative sources for the contamination, Dr. Bedient testified that the contaminants were all man-made and that, absent a lab error in testing, the only potential source for the contaminants was Defendant's facility. (*Id.* at 185-87, 258-59.) This opinion comported with a report by Arcadis. (Doc. 83-2, at 15-16; Doc. 89-3, at 7.)

3. Dr. Mercer's testimony on plumes

Defendant's testifying expert, Dr. Mercer, relied entirely on Arcadis' plume and did not draw his own plume. (Doc. 141, at 176-77.) According to Dr. Mercer, Arcadis' plume depicted the spatial extent of the contamination to be remediated. (*Id.* at 176, 183-84.) During remediation, some properties that currently are "clean" would, in Dr. Mercer's opinion, possibly have contaminated water flowing under them. (*Id.* at 184-85.) Dr. Mercer agreed that Arcadis delineated its plume, more or less, based on Florida's groundwater cleanup target levels (GCTLs).[2] (*Id.* at 179.) And, he conceded, in other jurisdictions, groundwater plumes were delineated at contamination levels below Florida's groundwater cleanup target levels. (Doc. 141, at 182.)

Dr. Mercer also conceded that the delineation of plumes in Florida is not based on a one-time sampling of irrigation wells. (Doc. 141, at 173.) Indeed, Arcadis' plume included properties where there had been "non-detect" tests of irrigation wells. (*Id.* at 178-79.) Dr. Mercer acknowledged that, in his professional experience, owners of all properties within a plume were notified that their property was in a contaminated area. (*Id.* at 181-82.) Indeed, Plaintiffs introduced an exhibit showing that the FDEP requires such notice to owners of all properties in a contamination plume drawn by a licensed professional, regardless

[2] Dr. Mercer believed that Arcadis' plume was a "little below" Florida's groundwater cleanup target levels. (Doc. 141, at 179.)

of whether or not those properties have been confirmed to be contaminated by laboratory data. (Pls.' Ex. 107, at FDEPWEB 112974.)

4. Defendant's challenges to Dr. Bedient's testimony

In the district court, Defendant challenged the weight to be given to (but not the admissibility of) Dr. Bedient's opinions and testimony in two ways: (i) its cross-examination of Dr. Bedient, and (ii) the testimony of its own groundwater expert, Dr. Mercer.

a. Defendant's challenges on cross examination to Dr. Bedient's testimony

When cross examining Dr. Bedient, Defendant's counsel challenged Dr. Bedient's experience (Doc. 139, at 206) and his opinions on the contours and characteristics of the groundwater plume (Doc. 139, at 213-29). Counsel compared the contours of Dr. Bedient's red plume to a facial profile of actor Jimmy Durante (now deceased), and he questioned the reliability of the "edges" of the red plume that appeared to be the "nose," "chin," "back of the jaw," and "puffed hair." (*Id.* at 213-18.) To demonstrate his disagreement with Dr. Bedient's red plume, Defendant's counsel drew a line that "chopped off" the "nose" and "chin." (*Id.* at 267; *see also* Def.'s Ex. 299, at 40) Counsel repeatedly attacked the reliability of Dr. Bedient's 200-to-500 foot "buffer zone" at the edge of his red plume and the methodology for drawing that zone. (Doc. 139, at 214-15, 223-29.) The map enclosed with this brief demonstrates that the "nose" and "chin"

are the areas of greatest divergence between Dr. Bedient's red plume and Arcadis' purple plume. (Ct. Ex. A; *see also* Def.'s Ex. 299, at 40.)

In addition, Defendant's counsel challenged Dr. Bedient's opinions by eliciting misleading cross-examination testimony from Dr. Bedient, upon which it relies in its brief. (Def.'s Br. 34-35.) Specifically, Defendant's counsel conveyed the misleading impression that Dr. Bedient was of the opinion that there were "dozens and dozens" of uncontaminated properties scattered throughout his red plume and that determining whether any particular property was contaminated would have to be done an individual basis. (*Id. citing* Doc. 144, at 238, 240-41.) Counsel conveyed this misleading impression by eliciting testimony that "there [were] *monitoring wells* scattered around throughout the impacted area for which there [has been] no detection of contamination."[3] (Doc. 139, at 240 (emphasis added).)

But this misleading impression was clarified during Dr. Bedient's re-direct testimony. (Doc. 139, at 264.) Specifically, Dr. Bedient testified:

> [A]ll of the sampling that's gone on at this site . . . with all of the irrigation wells with a single sample, perhaps a non-detect or a detect, but certainly sites where you are getting non-detects from a single

[3] As it did in the district court, Defendant in its reply may point to other parts of Dr. Bedient's cross-examination testimony that, when read out of context, make it appear that he was testifying that *properties*, not *wells*, were uncontaminated. (Doc. 137, at 10 n.2.) Given the standard of review, however, it is improper for Defendant, as the Appellant, to rely on Dr. Bedient's ambiguous cross-examination testimony rather than his clarified re-direct testimony. *See infra* at 23.

> one-inch or two-inch probe on the facility does not at all indicate that that site is uncontaminated.

(*Id*.) Dr. Bedient re-affirmed that the *plume boundaries* – not the single samples of detects or non-detects – were determinative of which properties were impacted by Defendant's contaminants and which were not. (*Id*.)

Equally misleading is the impression conveyed in Defendant's brief that Dr. Bedient testified that his impact area could not be "independently reproduced from the data." (Def.'s Br. 35; *see* Doc. 139, at 218-19.) In fact, Dr. Bedient testified that drawing plume lines was such a complex process that if "two hydrologists [were put] in the same room with the same set of data and ask[ed] . . . to draw a line or an impact zone," they "would probably get two slightly different answers." (Doc. 139, at 263-64; *see also* Doc. 139, at 218.) Finally, Defendant's brief also suggests that Dr. Bedient's drawing of the red plume "by hand and by eye" was unreliable (Def.'s Br. 35), but even Defendant's own expert, Dr. Mercer, in his pre-hearing written report attested that "[c]ontouring may be performed *by hand* or using computer software." (Doc. 93-2, at 19 (emphasis added).)

b. Dr. Mercer's challenges to Dr. Bedient's testimony

At the evidentiary hearing and in his written report, Dr. Mercer rendered three opinions,[4] one of which challenged Dr. Bedient's testimony on the red plume and his methodology for drawing it. (Doc. 144, at 9-10; Doc. 93-3, at 1-8; Doc. 141, at 121-54.) Dr. Mercer opined that the problem with Dr. Bedient's methodology was that he did not do what Arcadis had done in drawing its FDEP-approved plume. (*Id.* at 152.) According to Dr. Mercer, Dr. Bedient should not have included the "chin" and the "nose" in his red plume. (*Id.* at 121-22.) Dr. Mercer opined that the "chin" and the "nose," as well as the "forehead" and the "jaw," had many uncontaminated properties. (*Id.* at 121-23, 151-52.)

Dr. Mercer further opined that Dr. Bedient had improperly used trace contamination detections to expand the impacted area beyond Arcadis' plume. (*Id.* at 123-126, 144-45, 149-51; Doc. 144, at 9-10) Dr. Mercer also criticized: (i) Dr. Bedient's "buffer zone" as "arbitrary" and not capable of replication; (ii) Dr. Bedient's inclusion of three outliers in the plume; and (iii) Dr. Bedient's "oversimplified" analysis, which may have caused him to miss other outliers and to encompass data points better explained by other sources. (Doc. 144, at 9-10; Doc.

[4] Dr. Mercer rendered two other opinions: (i) each property in the class was unique as to the types and concentrations of chemicals contaminating the property; and (ii) each property had to be tested individually to determine the particular chemicals and concentrations. (Doc. 141, at 71-72.) Defendant apparently deemed these opinions not relevant to its appeal, as it failed to mention them in its statement of the facts (Def. Br. 5-13). *See* Fed. R. App. P. 28(a)(7).

139, at 124, 134-45, 150-51; Def.'s Ex. 299, at 44-48; Doc. 93-3, at 5.) Moreover, Dr. Mercer opined that Dr. Bedient's methodology for contouring did not comply with Dr. Mercer's textbook or any applicable professional standards. (Doc. 141, at 128-32, 153-54; Doc. 144, at 9.)

5. The district court's rejection of Defendant's challenges to Dr. Bedient's opinions

The district court rejected Defendant's challenges to Dr. Bedient's opinions. (*See* Doc. 144, at 9-10, 36-37 n.14, 39.) Specifically, in its class certification order, the district court detailed Defendant's challenges, with record citations, and said it was "cognizant" of them. (*Id.* at 9-10, 36-37 n.14, 39.) Nonetheless, the district court found, "Through the Property Map, Dr. Bedient established the geographic contours of the groundwater plume and using peer-reviewed science and relevant data he defined a zone of impact and identified the scope of the class." (*Id.* at 39.) The district court also rejected Defendant's challenge to Dr. Bedient's experience by finding that Dr. Bedient's scholarly credentials were "impeccable." (*Id.*) In rejecting Defendant's challenges, the district court made several other findings that have been previously discussed – for example, that all persons involved (Defendant, Arcadis, FDEP, etc.) have agreed that Defendant's facility has caused a groundwater plume of contaminants to form under the neighborhood surrounding the facility. *Supra* Part I.A.1, at 3-4.

B. Evidence and factual findings relevant to Defendant's common course of conduct and notice to the class

The gist of Plaintiffs' complaint is that Defendant and its predecessor delayed in remediating the contamination plume on its site, though it has long known about the contamination. (Doc. 2, at 1-3; Doc. 83, at 3.) As a result of this delay, Plaintiffs claim that the plume has migrated off site and is impacting the surrounding neighborhood. (Doc. 2, at 1-3; Doc. 83, at 3; Ct. Ex. A.) Defendant's predecessor knew about the chemicals causing groundwater contamination as early as 1991 and subsequently entered a consent order with the FDEP to cleanup the site. (Doc. 144, at 3.) Defendant was aware of the contamination when it purchased the site in the mid-1990's and became bound by the consent order. (*Id.*)

Importantly, however, only recently did it become publically known that the contamination plume was traveling far off Defendant's site and encroaching deeply into the surrounding neighborhood.[5] As of the 2006-2007 time frame, the contours of the groundwater plume – as delineated by Defendant and its consultant, Arcadis, and submitted to the FDEP – were limited to Defendant's site or just barely off site. (Doc. 139, at 162-63; Doc. 141, at 65; Pls.' Ex. 146, at RAYWEB 02783, Figure 7; Pls.' Ex. 50.) Indeed, Defendant and Arcadis claimed in a recent report

[5] Of course, Defendant, as the owner of the facility, has known more than the general public about the contamination caused by the facility's operations. Therefore, Plaintiffs have alleged, and still allege, that, by its inaction for many years, "Defendant[] . . . knowingly or recklessly created a plume of contamination." (Am. Compl., Doc. 2, at 2.)

to the FDEP that only in 2006 and early 2007 did they begin to fully understand the nature and extent of the groundwater contamination. (Site Assessment Report Addendum ("SARA"), § 2.6, at 16-17 & Figures 2-10 to 2-14 (Aug. 29, 2008) (located at Def.'s Ex. 306).) They admitted that previously they had failed to "fully delineate[]" the contaminants of concern. (*Id*.)

In the spring of 2007, however, Defendant and Arcadis commenced an assessment to collect additional data. (*Id.* § 2.6, at 16 (Def.'s Ex. 306).) In February 2008, Defendant and Arcadis submitted a status report concerning the assessment to FDEP, and draft and final reports were submitted to FDEP in May and August of 2008. (*Id.* § 2.3.2, at 9 (Def.'s Ex. 306).) The data contained in these reports delineated for the first time a much larger plume, extending far off Defendant's site and deeply encroaching into the surrounding neighborhood. (*See* Doc. 89-3, at 10; Doc. 139, at 162-63; SARA § 6.3, at 68, Figures 4-16 to 4-18 (Def.'s Ex. 306).) In March 2008, a newspaper published a story about contamination migrating via groundwater from Defendant's site into the surrounding neighborhood. (Doc. 144, at 4; Doc. 83-16, at 2.) Plaintiffs have defined the class to be the property owners as of the date of the newspaper story because, before then, they could not have known of the impact on their properties. (Doc. 144, at 4.)

On the issue of notice to the class, Defendant's brief is misleading. Defendant points to the 1995 publication notice of the FDEP consent order, and it claims to have "notified a substantial portion of property owners within the . . . 'impacted area' of the problem in the 1990's." (Def.'s Br. 29.) But "the problem in the 1990's" was largely limited to Defendant's own site, as the plume (delineated by Defendant and its consultant) did not expand deeply into the surrounding neighborhood until sometime after 2006. *Supra* at 14-15. As of 2006, the Stone's Throw Condominiums and the Brandywine Apartments, both immediately adjacent to the Defendant's site, were the only off-site properties included in any delineated plume. (Pls.' Ex. 146, at RAYWEB 02783, Figure 7; *see also* Doc. 141, at 62-63, 65; Doc. 139, at 162-63; Pls.' Ex. 50; SARA, § 2.6, at 16-17 (Def.'s Ex. 306).)

Defendant's evidence, if any, of pre-2008 notice to class members has been limited to the one owner of Brandywine and the 350 owners of the Stone's Throw Condominiums, which means that there is absolutely no evidence that the vast majority (seventy-five percent) of the class ever received pre-2008 notice. (Doc. 139, at 84-86; Def.'s Exs. 261, 264, 269; Def.'s Br. 29-30.) The issue of whether notice was given to the owners of the Stone's Throw Condominiums depends

primarily on whether any notice to the condominium association equates to notice to each individual owner.[6] (*See* Doc. 141, at 63-64; Def.'s Exs. 264, 269.)

II. Evidence and factual findings relevant to damages

In the district court, Defendant challenged the weight to be given to (but not the admissibility of) the opinions and testimony of Plaintiffs' appraisal expert, Dr. Kilpatrick. It did so by cross-examining Dr. Kilpatrick and presenting the testimony of its own appraisal expert (Dr. Jackson). (Doc. 140, at 114-52; Doc. 141, at 5-59, 66, 196-249, 288-90.) Defendant's brief repeats some of these same challenges, all of which essentially contend that Dr. Kilpatrick's mass appraisal method is not feasible and that each property in the class will have to be appraised individually to determine damages. (Def.'s Br. 9-12, 42-45.) The district court listed many of these same challenges in its class certification order. (Doc. 144, at 12-13.)

The district court, however, expressly rejected Defendant's challenges with the following factual finding: "Dr. Kilpatrick's scholarly credentials are . . . sound. [He] provided Plaintiffs with a viable model for calculating property damages on a class-wide basis." (Doc. 144, at 39.) This finding is not mentioned or contested in Defendant's brief.

[6] To be clear, we do not concede that any member of the class, including the owners of the Stone's Throw Condominiums, received notice that would make their claims time-barred. And there is no evidence that any notice given to the association was ever conveyed to the individual owners.

The district court supported its finding by noting two facts in particular (Doc. 144, at 40), neither of which Defendant mentions or contests in its brief. First, "the Pinellas County Property Appraiser already uses a mass-appraisal method to determine property values in St. Petersburg, Florida – where [Defendant's site] and the Azalea Neighborhood [*i.e.*, the class area] are located." (*Id.*) Second, "the Pinellas County Property Appraiser has already performed an analysis of the 'Azalea Area' which determined that the properties have suffered a diminution in value based on the presence of the contaminated plume." (*Id.*) These facts were supported by a letter from the Property Appraiser that was introduced into evidence and that "included an analysis of the property values in the 'Azalea Area' that used the mass-appraisal method and a map prepared by ARCADIS" showing the purple plume. (*Id.* at 13; *see also* Pls.' Ex. 131; Doc. 141, at 280-88.)

In addition, the district court found that Defendant in 2005 submitted a form to the Property Appraiser stating that "contamination affects offsite residential properties creating the opportunity for negative community relations and legal liability." (Doc. 144, at 4; Doc. 139, at 51-53.) Finally, as an alternative holding, the district court noted that, even if the damages issues would require individualized inquiries, the law in this Circuit is settled that individual issues on

damages generally do not defeat class certification. (Doc. 144, at 39 *citing Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1261 (11th Cir. 2003).)

III. Procedural History and the Class Certification Order

At a status conference in July 2009, Plaintiffs' counsel expressed a concern that the upcoming evidentiary hearing on class certification would become a "miniature *Daubert* hearing," which, in his view, was "not appropriate at this stage of the litigation."[7] (Doc. 108, at 25-26 (referring to *Daubert*, 509 U.S. at 579, 113 S. Ct. at 2786).) The district court agreed, stating that "a good judge should be able to make certain that it doesn't turn into a *Daubert* hearing" and that the court would "make certain that [didn't] happen." (*Id.* at 26.) Defendant's counsel did not object or express any disagreement. (*Id.* at 25-31.)

During the two months between the status conference and the evidentiary hearing, Defendant filed nothing of record arguing that the district court should conduct a *Daubert* inquiry at the class certification stage. (Docket.) It filed no motion to exclude any expert testimony based on *Daubert* or Fed. R. Evid. 702. (*Id.*) During the evidentiary hearing, it raised no objection based on *Daubert* or Fed. R. Evid. 702. (Docs. 139-141.)

At the three-day evidentiary hearing, the district court heard or received testimony from the aforementioned experts, the three class representatives, and two

[7] The same view has been expressed by this Court in an unpublished opinion and other district courts in this Circuit. *Infra* Argument I.A, at 27-28.

of Defendant's employees. (Doc. 144, at 14-15; Doc. 139, at 3; Doc. 140, at 3; Doc. 141, at 3, 291.) The court received into evidence approximately sixty exhibits (Doc. 139, at 4; Doc. 141, at 4, 295-308), many of which were voluminous, scientific materials (*see, e.g.*, Def.'s Ex. 251 (691 pages)). The court was engaged at the hearing, asking numerous questions of witnesses and counsel.[8]

Seven days after the evidentiary hearing, the court entered a forty-four page order granting Plaintiffs' motion for class certification. (Doc. 144.) The focus of Defendant's appeal is on following three sentences in the order, which largely comport with the unobjected-to statements that the district court made at the July 2009 status conference:

> As a threshold matter, the Court finds it is not necessary at this stage of the litigation to declare a proverbial winner in the parties' war of the battling experts or dueling statistics and chemical concentrations. . . . This type of determination would require the Court to weigh the evidence presented and engage in a *Daubert* style critique of the proffered experts [sic] qualifications, which would be inappropriate.

[8] (*See, e.g.*, Doc. 139, at 135 (questioning witness as to definition of "hits" on contamination map); Doc. 139, at 183 (asking witness about the principles of groundwater flow); Doc. 139, at 190 (asking witness about time spent as an expert versus time spent as a teacher); Doc. 139, at 280 (clarifying that witness's decrease in property value is "above and beyond" the current market trend); Doc. 140, at 12-13 (asking witness to clarify the location of property); Doc. 141, at 204 (questioning the Pinellas County property appraisal valuation method); Doc. 141, at 212 (questioning the devaluation percentages of the homes based on their respective value); Doc. 141, at 230-31 (questioning expert on mass analysis technique and class formation when both homes and condominiums are present); Doc. 141, at 311 (questioning the difference in damages and injuries of each property owner); Doc. 141, at 314, 318 (asking counsel to focus on predominance analysis under Rule 23(b) and why a class is certifiable).)

> At this stage of the litigation, therefore, an inquiry into the admissibility of Plaintiffs' proposed expert testimony as set forth in *Daubert* would be inappropriate, because such an analysis delves too far into the merits of Plaintiffs' case.

(Doc. 144, at 38-39.) Despite the foregoing language, the district court, in fact, did make several factual findings in which it weighed the evidence and rejected Defendant's evidentiary challenges, as we already have mentioned above. *Supra* at 3-4, 13-14; (*e.g.*, Doc. 144, at 39-40.)

In its class certification order, the district court also listed the four factors specified under the "superiority" prong of Fed. R. Civ. P. 23(b)(3). (Doc. 144, at 41.) It then made the following findings related to those factors: (i) the "exorbitant costs" for prosecuting the class members' claims "would preclude or effectively bar most individual plaintiffs from coming to court;" (ii) only one of the more than one thousand class members had filed an individual action;[9] (iii) based on the testimony of the named plaintiffs, the class members did not have "any particular interest in individually controlling their own litigation;" and (iv) the problems related to judicial management of multiple individual actions would be far greater than any problems related to management of the class action. (Doc. 144, at 41-43.)

[9] The individual action is *Galligan v. Raytheon Co.*, Case No. 8:08-cv-02427, (M.D. Fla.).

The district court's class certification order also addressed Defendant's contention based on *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) that, absent a trial plan submitted by Plaintiffs, the court should not certify a class. (Doc. 144, at 43.) The court rejected this contention, noting that it was "not strong enough" and that, unlike *Vega*, a trial was not imminent (*id*.), as it set for March 2011 (Doc. 79, at 1). In conclusion, the trial court certified the class of red-plume property owners as proposed by Plaintiffs, but noted that its decision to certify was not "immutable." (Doc. 144, at 44.)

Defendant then petitioned this Court under Fed. R. Civ. P. 23(f) to review the class certification order. Its petition raised one single issue, which is essentially the same as Issue No. 1 in Defendant's merits brief: "Whether the district court erred by certifying a class based on the named plaintiffs' proffered expert testimony *without ever addressing* the [D]efendant's challenge to that testimony." (Def.'s Rule 23(f) Pet. in Case No. 09-90028-H ("Def.'s Pet."), at 3; *see also* Def.'s Br. 4.) Now in its merits brief, Defendant has listed two issues (Issues No. 2 and 3) that were not contained in the question presented in its Rule 23(f) petition. (Def. Br. 4). Nevertheless, Defendant, in its petition did argue briefly some of the arguments that can also be found under Issues No. 2 and 3 of its merits brief. (*compare id.* at 27-46 *with* Def.'s Pet. 16-19.)

STANDARD OF REVIEW

Defendant correctly states that the standard of review is abuse of discretion. (Def.'s Br. 13-14.) However, two additional points bear mentioning. First, though normally a district court's factual findings are reviewed for clear error, *e.g.*, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir. 2004), in this case this Court may not disturb or overturn the district court's factual findings because Defendant has failed to challenge them on appeal (or even mention them in its brief), *see, e.g.*, *SunAm. Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (holding that a party waives any argument that a factual finding is erroneous when it does not "explicitly" argue that the factual finding is clearly erroneous). Second, "[i]t is irrelevant whether this Court would have granted certification;" the district court's decision may not be disturbed as long as its reasoning is within the parameters of Fed. R. Civ. P. 23. *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1189 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

Class certification is appropriate when a plaintiff, by proving his or her claims, can essentially prove the claims of the entire class. In this case, Plaintiffs' "common proof" is a groundwater plume. A plume – not individual data points – is what scientists use to determine the geographical area impacted by man's contamination of groundwater. Proof of Plaintiffs' red groundwater plume will establish injury not only to Plaintiffs' individual properties, but also injury to the other class members' properties within the red plume.

Defendant disputes the contours of the red plume because it is larger than the purple plume that Defendant submitted to the FDEP. But that dispute is not a basis to defeat class certification. To the contrary, the purple plume, like the red plume, demonstrates that Plaintiffs' claims can be proved by common proof and tried on a class-wide basis. Because Defendant cannot repudiate its own purple plume, it cannot logically assail the reasonableness of the district court's decision to certify a class based on Plaintiffs' red plume.

Defendant instead relies on red herrings to undermine Plaintiffs' certified class. Defendant first argues that the district court failed to resolve its "challenges" to Plaintiffs' expert testimony. This argument unduly focuses on three sentences in the district court's forty-four page order. These three sentences, for the most part, hold that *Daubert* does not apply at the class certification stage. At no time did

Defendant ever argue to the district court that this holding was mistaken. Accordingly, Defendant's argument on appeal is waived.

Nor can Defendant's argument be reconciled with a fair reading of the district court's entire order. In that order, the district court conducted a rigorous analysis, weighed the competing expert testimony, made factual findings, accepted Plaintiffs' expert testimony, and rejected Defendant's expert testimony to the extent necessary to determine class certification. Defendant fails to contest (or even mention) the district court's multiple factual findings on liability and damages. Thus, Defendant is bound by these findings that are fatal to its appeal.

Defendant next argues that, absent exceptional circumstances, the district court could not certify a class unless Plaintiffs submitted a formal trial plan. This issue is outside the question presented in Defendant's Rule 23(f) petition and thus should not be considered. In any event, Defendant's new proposed rule requiring submission of a trial plan should be rejected because: (i) this Court may not amend Rule 23; (ii) this Court's decision in *Vega*, a rather distinguishable case, did not impose any such rule; and (iii) such a rule would be imprudent as it would eviscerate the discretion accorded district courts.

Defendant's final issue, challenging the sufficiency of the evidence for class certification, is also outside the question presented in the Rule 23(f) petition and thus should not be considered. If it is considered, the evidence is sufficient to

show that Plaintiffs' claims can be tried on a class-wide basis. Liability and injury can be proved by a plume. Damages can be proved by a mass appraisal method, something the county appraiser already has used to calculate the diminished value of properties in the purple plume. The statute-of-limitations defenses, if any, apply to a distinct subset of the class and that alone does not defeat certification. Plaintiffs' claims for unjust enrichment and private nuisance are susceptible to class treatment. Finally, the alleged "conflict of interest" is belied by the district court's uncontested factual findings, and any dissatisfied class members can opt out.

ARGUMENT AND CITATIONS OF AUTHORITY

I. DEFENDANT FAILED TO PRESERVE ANY CHALLENGE TO THE ADMISSIBILITY OF PLAINTIFFS' EXPERT TESTIMONY, AND THE DISTRICT COURT PROPERLY WEIGHED THE EVIDENCE.

Defendant faults the district court for failing to "address" or "resolve" Defendant's "challenge" to Plaintiffs' expert testimony. (*E.g.*, Appellant's Br. 18, 23, 25.) Defendant, however, does not clearly articulate whether this challenge was to the *admissibility* or its *weight* of the evidence. A challenge to the admissibility of expert testimony is not the same as a challenge to the weight given to that testimony. *See, e.g., Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1343-46 (11th Cir. 2003) (explaining differences between challenges to admissibility and weight of expert testimony). Simply put, "where expert

testimony is based on well-established science, the courts generally have concluded that reliability problems go to weight, not admissibility." 29 Charles Alan Wright and Victor James Gold, *Federal Practice and Procedure* § 6266, at n.2 (1st ed. 2009).

In the district court, Defendant failed to challenge the admissibility of Plaintiffs' expert testimony, and thus that issue is not preserved for review. *Infra* Argument I.A, at 27-29. Insofar as Defendant challenges how the district court weighed the testimony, that challenge is without merit because the district court properly weighed the parties' expert testimony. *Infra* Argument I.B., at 29-38.

A. Defendant failed to preserve any challenge to the admissibility of Plaintiffs' expert testimony.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence and by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993) and its progeny. The courts, however, have varied in how they apply *Daubert* at the class certification stage. *See* 1 Joseph M. McLaughin, *McLaughlin on Class Actions* § 3:14, at n.12 (6th ed. Dec. 2009); 1 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, *Newberg on Class Actions* § 3.1, nn.37-43 (4th ed. Nov. 2009).

This Court has rejected the argument that a *Daubert* inquiry is required at the class certification stage, but it has done so only in an unpublished, non-binding decision. *Drayton v. W. Auto Supply Co.*, No. 01-10415, 2002 WL 32508918, at

*6 n.13 (March 11, 2002); *see also* 11th Cir. R. 36-2 (stating that unpublished opinions are not binding precedent). The district courts of this Circuit have relied on this non-binding precedent in declining to decide *Daubert* motions at the class certification stage. *See In re Netbank, Inc., Secs. Litig.*, 259 F.R.D. 656, 670 n.8 (N.D. Ga. 2009); *LaBauve v. Olin*, 231 F.R.D. 632, 644 (S.D. Ala. 2005); *see also In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 26 (N.D. Ga. 1997) (holding the same before *Drayton*). In contrast, other courts have applied *Daubert* more robustly at the class certification stage. *See* 1 McLaughin, *supra* § 3:14, at nn.10-14, 16-19, 23-28, 30, 50 (comparing the different ways that courts have applied *Daubert* at the class certification stage). *But see* 1 Rubenstein, Conte, and Newberg, *supra* § 3.1, at n.43 (listing courts that apply a more limited *Daubert* inquiry at the class certification stage).

The instant case, however, does not provide a vehicle for this Court to resolve whether it should adhere to its non-binding precedent or instead should change course and require, like some courts, a more robust *Daubert* inquiry at the class certification stage. This is so because Defendant did not preserve the issue for review. Defendant's counsel never objected when the district court stated, at a status conference two months before the evidentiary hearing, that *Daubert* did not apply at the class certification stage. (Doc. 108, at 25-31.) At no time (before, during, of after the status conference or at the evidentiary hearing) did Defendant

argue that *Daubert* applied at the class certification stage or move to exclude, or otherwise object to, any of Plaintiffs' expert testimony as inadmissible under Rule 702 or *Daubert*. Moreover, Defendant never argued to the district court any of the multiple principles and considerations involved in a *Daubert* inquiry. *See, e.g.*, *Quiet Tech.*, 326 F.3d at 1340-42 (explaining the principles and considerations for a *Daubert* inquiry). Accordingly, Defendant's "challenge" to Plaintiffs' expert testimony was not preserved with respect to the admissibility of that testimony under Rule 702 and *Daubert*. *See, e.g., Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1292 (11th Cir. 2003) (holding arguments not presented to the district court are waived).

B. The district court properly weighed the expert testimony.

Defendant's first argument on appeal and the question presented in its Rule 23(f) petition rest on the false premise that the district court failed to weigh the parties' competing expert testimony. This false premise is built entirely on three sentences within the district court's forty-four page order. *Supra* at 20-21 (quoting the three sentences); (Doc. 144, at 38-39). These three sentences, for the most part, address the appropriateness of a full *Daubert* inquiry at the class certification stage and thus, for the most part, are immaterial to this appeal because Defendant failed to preserve any argument based on *Daubert*. *See supra* Argument I.A, at 27-29.

Looking only at preserved arguments, the district court made only two statements that plausibly can serve as a basis for Defendant's appeal: (1) it was not necessary to declare a "proverbial winner" in the battle of the experts (Doc. 144, at 38); and (2) it would be "inappropriate" to "weigh the evidence presented" and to engage in a *Daubert* inquiry because "such an analysis [would] delve[] too far into the merits of Plaintiffs' case" (*id.* at 39). Both statements are intermixed with the unobjected-to, *Daubert* statements. (Doc. 144, at 38-39.)

Read properly and with the appropriate deference, the district court's statements were correct on the law because, at the class certification stage, a district court may weigh competing expert testimony only to the extent necessary to determine whether a case can be tried on a class-wide basis and not for the sole purpose of determining the merits. *Infra* Argument I.B.1, at 30-34. And the district court here complied with this law because, in fact, it weighed the parties' competing expert testimony and resolved Defendant's challenges to Plaintiffs' expert testimony to the extent necessary to determine whether class certification was appropriate. *Infra* Argument I.B.2, at 34-38.

1. At the class certification stage, a district court may weigh competing expert testimony only to the extent necessary to determine whether a case can be tried on a class-wide basis.

The issue of whether a plaintiff's action should be certified as a class action is related to, yet distinct from, the issue of whether a plaintiff's action is

meritorious. As stated in Defendant's principal case, a plaintiff's burden when seeking class certification is not to prove the elements of her claim; rather, her burden is to demonstrate that her claim "is capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d 305, 311-12 (3d Cir. 2008). To satisfy this burden, it is true that there may be some "overlap between a class certification requirement and the merits of a claim." *Id.* at 316. Hence, the "rigorous analysis" required for class certification may also require a district court to make a "preliminary inquiry into the merits." *Id.* at 317 (internal quotations omitted). And, as Defendant notes (Def.'s Br. 23-24), weighing conflicting expert testimony at this preliminary inquiry is "permissible" and "may be integral to the rigorous analysis." *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d at 323.

But the weighing of expert testimony (or any evidence) at the class certification stage is "[not] necessary in every case or unlimited in scope." *Id.* at 324. "In its sound discretion, a district court may find it unnecessary to consider certain expert opinions with respect to a certification requirement," even though it may not decline to resolve a factual dispute relevant to class certification merely because that dispute "overlap[s]" with the merits. *Id.* And a district court is accorded "considerable discretion" to limit the scope of its inquiry at the class certification stage to ensure that the class certification hearing does not turn into "a

protracted mini-trial of substantial portions of the underlying litigation." *Id.* (quoting *In re IPO Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)).

In exercising its discretion, a district court may resolve only those factual disputes that necessarily must be resolved to determine whether a plaintiff's claims are susceptible to being tried on a class-wide basis. *See id.*; *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1190 (11th Cir. 2009) (holding a district court "should not determine the merits of the plaintiffs' claims at the class certification stage," but instead only "should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied" (internal quotations omitted)); *In re IPO Secs. Litig.*, 471 F.3d at 41 (holding that, in making class certification determinations, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."). Furthermore, the ultimate fact-finder on the merits may repudiate the findings made by a district judge at the class certification stage, even if the ultimate fact-finder is the same district judge who certified the class. *IPO Secs. Litig.*, 471 F.3d at 41. Simply put, any factual findings made at the class certification stage "do not bind the ultimate fact-finder at the merits stage." *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d at 324.

In this case, the district court's purportedly objectionable statements in its order are consistent with the aforementioned legal principles, which are taken from

the very cases on which Defendant relies. For instance, the district court's first statement – that "it [was] not necessary at [the class certification] stage . . . to declare a proverbial winner in the parties' war of the battling experts" (Doc. 144, at 38) – comports with the principle that "it [is] unnecessary to consider certain expert opinion[s] with respect to a certification requirement" and with the principle that the factual findings at class certification "do not bind the ultimate fact-finder at the merits stage." *In re Hydrogen Peroxide Antitrust Lit.*, 552 F.3d at 324. The district court's second statement – indicating that it would be "inappropriate" to "weigh the evidence presented" and to engage in a *Daubert* inquiry because "such an analysis [would] delve[] too far into the merits of Plaintiffs' case" (Doc. 144, at 38) – comports with the principle that "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement." *IPO Secs. Litig.*, 471 F.3d at 41.

Defendant, however, misconstrues the district court's statements and unfairly reads them out of context. To the extent the district court's statements might incorrectly suggest that the court did not weigh the evidence (which it clearly did, *see infra* Argument I.B.2, at 34-38), the statements were merely an inadvertent use of less-than-perfect language, which is not grounds for a reversal. *See Manning v. Sch. Bd. of Hillsborough County*, 244 F.3d 927, 943 (11th Cir. 2001) ("We would not permit an inadvertent use of language by a district court to constitute reversible error."). More importantly, however, the district court did

not, as Defendant suggests, "simply accept[] the testimony of plaintiffs' experts at face value." (*Contra* Defs.' Br. 18.) Nor did the district court "declin[e] to resolve Raytheon's challenge to that testimony." (*Contra id.*) To the contrary, as argued immediately below, the district court properly weighed the competing testimony and resolved Defendant's challenges to Plaintiffs' expert testimony to the extent necessary to decide the issue of class certification.

2. The district court properly weighed the parties' competing expert testimony and resolved Defendant's challenges to the extent necessary to determine whether to certify the class.

Defendant's brief fails to discuss those portions of the district court's order in which the court, in fact, did weigh the parties' competing expert testimony and resolve Defendant's challenges to the extent necessary to determine whether class certification was appropriate. Indeed, the district court made several express factual findings relevant to class certification that overlapped with the merits. (Doc. 144, at 39-40). Because Defendant failed to explicitly challenge, or even mention, these findings in its brief, any argument that these findings were erroneous is deemed waived and abandoned. *SunAm. Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996); *Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1578 (11th Cir. 1988).

First, the district court made the following factual findings related to the issue of whether Defendant's liability was susceptible to common proof:

- The scholarly credentials of Plaintiffs' groundwater expert, Dr. Bedient, were "impeccable." (Doc. 144, at 39.)

- "Through the Property Map, Dr. Bedient established the geographic contours of the groundwater plume and using peer-reviewed science and relevant data he defined a zone of impact and identified the scope of the class." (*Id.*)

- Defendant had acknowledged that the contaminants of concern had migrated from its facility. (Doc. 144, at 40.)

- Defendant had acknowledged that it was responsible for the cleanup of the Raytheon site and some surrounding properties, and thus, unlike other cases, the issue of causation did not preclude class certification. (*Id.*)

- The contaminants of concern at issue in this case had been identified and were known to cause harm. (*Id*.)

- "[B]oth parties' groundwater experts, as well as the FDEP and Defendant's environmental consultant, ARCADIS[,] have acknowledged that there is a groundwater plume filled with [contaminants of concern] lurking under the Azalea Neighborhood." (*Id.*)

Most critical was this last finding by the district court – that *both* parties' experts agreed that there is a groundwater plume under the class area. (*Id*.) As explained below, this finding is fatal to Defendant's opposition to class certification. *Infra* Argument III.B.1, at 49-52. The parties' agreement that a plume can be identified – despite their disagreement on its exact contours and characteristics – demonstrates that Plaintiffs' claims are susceptible to common proof that can be tried on a class-wide basis. *Infra id*.

Second, the district court made the following factual findings related to whether Plaintiffs' damages were susceptible to common proof:

- The scholarly credentials of Plaintiffs' damages expert, Dr. Kilpatrick, were "sound." (Doc. 144, at 39.)

- "Dr. Kilpatrick provided Plaintiffs with a viable model for calculating property damages on a class-wide basis." (*Id.*)

- The Pinellas County Property Appraiser already was using a mass-appraisal analysis to determine property values for the properties in the class area. (Doc. 144, at 40.)

- The Pinellas County Appraiser already has determined that Defendant's facility and the surrounding properties have suffered a diminution in value due to the contamination plume. (*Id.*)

These findings on damages – though not critical given that individual damages issues normally do not defeat class certification (*infra* at 53-54) – further buttress the district court's conclusion that Plaintiffs' claims were susceptible to common proof and to being tried on a class-wide basis.

Defendant omits these factual findings from its brief, making it seem as though the district court did not weigh any evidence or address any aspect of Defendant's challenges to Plaintiffs' expert testimony. (Def.'s Br. 11-13, 17-19.) This impression left by Defendant is false, and it is refuted by the district court's express factual findings stated immediately above. (*See* Doc. 144, at 39-40.)

Nor did the district court overlook Defendant's own expert testimony or its challenges to Plaintiffs' expert testimony. To the contrary, the district court in its

order detailed Defendant's "well-documented" challenges and stated that it was "cognizant" of them. (Doc. 144, at 36-37 n.14, 39.) The district court, by its findings, essentially rejected these "well-documented" challenges. (Doc. 144, at 39-40.) For example, the district court's finding on Dr. Bedient's testimony – that he "established the geographic contours of the groundwater plume" by "using peer-reviewed science and relevant data" (Doc. 144, at 39) – rejected Defendant's challenges to his testimony (Doc. 144, at 36-37 n.14), all of which essentially claimed that Dr. Bedient's testimony on the groundwater plume was unreliable. Thus, the district court, in fact, weighed the competing expert testimony and then resolved and rejected Defendant's challenges to Plaintiffs' expert testimony.

Finally, Defendant is wrong when it asserts that the district court "sidestep[ped]" the required rigorous analysis. (Def.'s Br. 26-27.) The district court's comment that "[c]lass certification is not an immuatable decision" (Doc. 144, at 44) accurately stated the law, something that Defendant concedes (Def. Br. 26). *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may altered or amended before final judgment."); *Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1566 (11th Cir. 1996) ("A district court may alter or amend its certification order anytime before its decision on the merits."). The district court did not adopt a "certify now, ask questions later" approach (Def.'s Br. 19), but instead it asked ample substantive questions of both

experts and counsel during the three-day evidentiary hearing. *See supra* at 20 n.8. And the court's forty-four page order, with specific factual findings and reasoned conclusions of law, was equally thorough and rigorous. (Doc. 144.)

C. Conclusion on Issue No. 1

The district court undertook a rigorous analysis, weighed the competing expert testimony, and then resolved and rejected Defendant's challenges to that testimony to the extent necessary to determine whether class certification was appropriate. In short, the district court did not abuse its discretion. Accordingly, this Court should affirm the decision to certify a class, or this Court should dismiss this Rule 23(f) appeal as having been improvidently granted. *See Colbert v. Dymacol, Inc.*, 344 F.3d 334, 334 (3d Cir. 2003) (en banc). Alternatively, if this Court decides Issue No. 1 in Defendant's favor, it should remand this case for the district court to conduct, in the first instance, the appropriate factual inquiry and analysis. *See Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358-59 (11th Cir. 2009) (explained in footnote below).[10]

[10] In *Williams*, the district court, in ruling on a class certification motion, "failed to conduct a rigorous analysis," failed to provide "any meaningful explanation," and "accepted the [plaintiffs'] expert testimony without examining it or explaining its affect on the predominance analysis." 568 F.3d at 1358-59. Defendant's argument under Issue No. 1 – though misplaced in this case – is similar to *Williams*. (*See, e.g.*, Def.'s Br. 18.) Thus, if this Court were to accept Defendant's argument on Issue No. 1, it should provide the same appellate remedy that it provided in *Williams* – a remand to the district court for it to "pragmatically assess," in the first instance, whether class certification was appropriate. 568 F.3d at 1359.

II. THE DISTRICT COURT'S FAILURE TO REQUIRE A FORMAL TRIAL PLAN – AN ISSUE OUTSIDE THE QUESTION PRESENTED – WAS NOT AN ABUSE OF DISCRETION.

A. This Court should not consider the trial-plan issue because it was not "fairly included" in the question presented in Defendant's Rule 23(f) petition.

This is a permissive appeal, *see* Fed. R. App. P. 5, not an appeal as a matter of right, *see* Fed. R. App. P. 3. The rule authorizing this permissive appeal is Rule 23(f) of the Federal Rules of Civil Procedure. Under Rule 23(f), this Court enjoys "unfettered discretion." Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments. This unfettered discretion is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.* In exercising its discretion, the Supreme Court declines to entertain any issue not "fairly included" in the question presented in the petition for certiorari. *E.g.*, *Wood v. Allen*, No. 08-9156, __ S. Ct. __, 2010 WL 173369 (Jan. 20, 2010) (citing Sup. Ct. R. 14.1); *see, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 140, 119 S. Ct. 493, 500 (1998) (holding that petitioners could not raise argument that was outside the question presented in their petition for certiorari).

This Court should adopt a discretionary practice for Rule 23(f) petitions that is similar to the Supreme Court's practice for petitions for certiorari. Rule 23(f) grants unfettered discretion to this Court to limit its caseload and to decide which class certification issues are sufficiently important and urgent enough to warrant an

interlocutory appeal. This Court should not allow litigants to bypass this unfettered discretion by "smuggling" into an appeal questions not presented in a Rule 23(f) petition. *Cf. Irvine v. California*, 347 U.S. 128, 129, 74 S. Ct. 381 (1954) (disapproving of the practice of "smuggling" into a case those questions not originally presented in the petition for certiorari). Ordinarily, for Rule 23(f) appeals, this Court should consider only those issues "fairly included" in the question presented.

Issue No. 2 in Defendant's merits brief concerns the requirement of a trial plan – specifically, whether the district court should have required Plaintiffs to submit a formal trial plan. (Def.'s Br. 4.) This trial-plan issue was not fairly included in the question presented in Defendant's Rule 23(f) petition. (*Compare* Def.'s Pet. 3 *with* Def.'s Br. 4.) The question presented was merely whether the district court erred by purportedly not addressing Defendant's challenge to Plaintiffs' expert testimony. (Def.'s Pet. 3.)

This question presented is different from the trial-plan issue raised in Defendant's merits brief. *See Wood*, 2010 WL 173369, at *8 (holding that an issue is not "fairly included" in a question presented if it is "different" from the question presented). Indeed, the question presented and the trial-plan issue have little, if any, relation to one another other than both concern the general topic of class certification. But even if they were related to one another, the trial-plan issue still

would not be fairly included in the question presented. *See id.* (quoting *Rice v. Collins*, 546 U.S. 333, 342, 126 S. Ct. 969 (2006)) (holding an issue is not "fairly included" in the question presented merely because it is "related" or "complementary to" the question presented). Finally, the mere discussion of the trial-plan issue by Defendant in its Rule 23(f) petition does not equate to the issue being "fairly included" in the question presented. *See id.* (citing *Izumi Seimitsu Kogyo Kabushiki v. U.S. Philips Corp.*, 510 U.S. 21, 31 n.5, 114 S. Ct. 425 (1993)) (holding an issue is not "fairly included" in the question presented merely because a petitioner discusses the issue in the text of its petition).

In summary, because Defendant failed to fairly include the trial-plan issue in its Rule 23(f) petition, this Court should decline to consider this issue.

B. Neither the plain language of Rule 23 nor this Court's decision in *Vega* required the submission of a formal trial plan before a class could be certified, and such a rule would be imprudent.

Defendant argues that this Court in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) established a new class certification rule not mentioned in Fed. R. Civ. P. 23. Specifically, Defendant proposes that, absent "exceptional circumstances," a formal trial plan must be submitted before a class may be certified. (Def.'s Br. 31-32.) Defendant's proposed rule is without merit because, if adopted, it would be: (1) an improper judicial amendment to Rule 23; (2) not supported by the distinguishable *Vega* decision; and (3) imprudent.

1. This Court may not amend Rule 23 to add a requirement of a pre-certification trial plan.

This Court is not empowered to add to Rule 23 a new requirement of a pre-certification trial plan. *See Miller v. Mackey Intern., Inc.*, 452 F.2d 424, 428 (5th Cir. 1971) (Wisdom, J.) (noting that "[t]his Court cannot . . . rewrite the Federal Rules of Civil Procedure and seriously undermine the class action device in order to avoid dubious harm to these defendants"). Rule 23 expressly lists six requirements to certify a class seeking money damages: (i) numerosity, (ii) commonality, (iii) typicality, (iv) adequacy, (v) predominance, and (vi) superiority. *See* Fed. R. Civ. P. 23(a) & (b)(3); *Vega*, 564 F.3d at 1265. Rule 23 also prescribes several other procedures for class certification. Fed. R. Civ. P. 23(c)–(h). Some of these procedures are mandatory, while others are discretionary. *See id.* Rule 23(d), in particular, gives the district court broad discretion to supervise and manage class action litigation. *See generally* 7B Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1791 (3d ed. 2009). Thus, under Rule 23(d), a district court *may* order putative class representatives to submit a trial plan in conjunction with their class certification motion.

But nowhere does Rule 23 *mandate* that, absent exceptional circumstances, a trial plan must be submitted before a class may be certified. This omission stands in stark contrast to Fed. R. Civ. P. 16(b)(1). That rule mandates that, except for

certain circumstances, a scheduling order must be issued at a defined point in the litigation. Fed. R. Civ. P. 16(b)(1). The presence of such mandates under Rule 16(b)(1) and other rules, coupled with the absence of a mandate for pre-certification trial plans under Rule 23(d), demonstrates that the rules' drafters did not contemplate Defendant's proposed rule. In other words, the drafters did not intend that, absent exceptional circumstances, a trial plan always must be submitted before a class may be certified. Defendant's proposed rule is an improper attempt to obtain by judicial interpretation a result that may be obtained only by the process of amending the rules of civil procedure. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 1163 (1993) (holding that a requirement that claims against municipalities be pled with specificity violated the maxim of *expressio unius est exclusion alterius* and that such a requirement could be obtained only "by the process of amending the Federal Rules, and not by judicial interpretation").

2. *Vega* is distinguishable, and it does not support Defendant's proposed trial-plan rule.

This Court clearly stated in *Vega* that the submission of a formal trial plan was a mere recommendation to district courts and that it was not a prerequisite for certification under Rule 23. 564 F.3d at 1279 n.20. This clear statement in *Vega*, standing alone, should conclusively refute Defendant's proposed rule.

In any event, *Vega* is not comparable, at all, to this case. In *Vega*, this Court discussed the preference for a trial plan in the context of the district court's "superiority" analysis under Rule 23(b)(3) – an analysis that this Court criticized as being "extremely cursory," "conclusory," and "grossly insufficient." *Id.* at 1277-79 & n.20. The *Vega* district court did not address any of the four factors listed under Rule 23(b)(3)'s superiority prong, and instead it supported its finding of superiority by merely cross-referencing its reasons for finding the other Rule 23 requirements satisfied. *Id.* at 1278.

In contrast, the superiority analysis of the district court in this case was not cursory, conclusory, or insufficient. The analysis covered three full pages and thoroughly considered each of the four factors listed in Rule 23(b)(3). (Doc. 144, at 41-43.) The analysis rested on factual findings based on the testimony and evidence presented at the hearing below. (*Id.*) Those factual findings are summarized above. *Supra* at 22.

Vega also differs in that the district court in *Vega* had no evidentiary hearing and failed to give "any meaningful consideration" on how the case would be tried. 564 F.3d at 1263-64, 1278-79. By comparison, the district court here considered how the case would be tried by actually presiding over a three-day evidentiary hearing, a virtual mini-trial, in which it heard much of the same testimony and evidence that will be presented to the ultimate fact-finder at trial. (Docs. 139-41.)

And the district court summarized this evidence in its written order. (Doc. 144, at 2-15.) Thus, Defendant is wrong to argue that, without a trial plan, it is "entirely unclear how a class trial [in this case] would actually proceed in practice." (Def.'s Br. 32.) One must merely read the district court's order and the transcript of the evidentiary hearing to understand how the class trial of this matter will actually proceed in practice.

Another difference between *Vega* and this case is the timing of the class certification ruling. In *Vega*, the district court ruled on the class certification motion just *six days* before the case was scheduled to go to trial. 564 F.3d at 1263-64, 1279. Consequently, this Court recommended that district courts require putative class representatives to submit trial plans "as early as practicable." *Id.* at 1278-79 & n.20. In contrast, the district court here certified the class nearly *eighteen months* before the case was set to go to trial. (*Compare* Doc. 79, at 1 *with* Doc. 144.). Thus, as the district court here recognized in its order, one troubling aspect of *Vega* – a certification on the eve of trial without any plan for how the case would be tried – does not exist in this case. (Doc. 144, at 43.)

3. Defendant's proposed trial-plan rule is imprudent.

Adoption of Defendant's proposed rule – requiring a district court to "first review[] a trial plan" before certifying a class unless "exceptional circumstances" exist (Def.'s Br. 32) – would be imprudent. Such a rule would micromanage the

district courts and unnecessarily infringe on their discretion. The instant case demonstrates this point.

In contrast to the district court in *Vega*, the district court in this case has been engaged and proactive in managing the litigation below. (*See, e.g.*, Doc. 108, at 1-38 (expressing concern at a status conference that the case be timely completed and *sua sponte* suggesting the need for an evidentiary hearing on class certification).) The court was actively engaged at the three-day evidentiary hearing, as demonstrated by the court's numerous questions of counsel, witnesses, and experts. *See supra* at 20 n.8. And both at the hearing and in its order, the district court expressly deliberated over this Court's recommendation in *Vega* concerning the use of a trial plan, but it decided not to require a pre-certification trial plan. (Doc. 141, at 325-26; Doc. 144, at 43.) Even without a formal trial plan, the district court was still able to rigorously analyze the parties' claims and the evidence, weigh the evidence, and make the factual findings necessary for class certification. (Doc. 144.) Thus, in this case, requiring the submission of a formal trial plan would have added nothing of substance to the process employed by the district court.

Indeed, requiring the submission of a pre-certification trial plan would serve only to eviscerate the discretion accorded district courts under Rule 23. That discretion allows a district court to choose from a "range of choices." *E.g.*,

Anderson v. Cagle's, Inc., 488 F.3d 945, 953-54 (11th Cir. 2007). Moreover, this range of choices must be broad "[b]ecause class actions tend to be extremely complicated and protracted" and thus "their management and disposition frequently require the exercise of considerable judicial control and ingenuity." 7B Wright, Miller, and Kane, *supra* § 1791. Defendant's proposed rule would effectively mean that a district court has no choice and that it must order pre-certification trial plans, no matter how unnecessary and useless they may be, unless it can identify some "exceptional circumstances." And what these "exceptional circumstances" may be is a mystery because Defendant has failed to define them in its brief. (Def.'s Br. 32.)

C. Conclusion on Issue No. 2

This Court should not consider the trial-plan issue because it was not fairly included in Defendant's question presented. *Supra* Argument II.A, at 39-41. If this Court does consider this issue, it should reject Defendant's proposed trial-plan rule because it: (1) would be an improper judicial amendment to Rule 23, (2) is not supported by this Court's distinguishable *Vega* decision, and (3) is imprudent. *Supra* Argument II.B, at 41-47.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE THE EVIDENCE WAS SUFFICIENT TO SUPPORT CLASS CERTIFICATION (AN ISSUE OUTSIDE THE QUESTION PRESENTED).

A. This Court should not consider the sufficiency-of-the-evidence issue because it was not fairly included in the question presented and this Court normally would not grant review of this issue under Rule 23(f).

Defendant's Issue No. 3 asks, based on the particular facts of this case, whether there was sufficient evidence in the record to support the district court's class certification order. (Def.'s Br. 5.) In contrast, the question presented in the Rule 23(f) petition asked whether the district court erred by purportedly failing to address Defendant's challenge to Plaintiffs' expert testimony. (Def.'s Pet. 3; Def.'s Br. 4.) This Court should decline to consider Issue No. 3 because it is different from, and not "fairly included" in, the question presented in Defendant's Rule 23(f) petition. *See supra* Argument II.A, at 39-41 (arguing that this Court should not consider issues not "fairly included" in the Rule 23(f) petition).

This Court also should decline to decide Issue No. 3 because this Court normally is less inclined to grant Rule 23(f) review on an issue of "case-specific matters of fact and district court discretion," and instead is more inclined to limit its Rule 23(f) review to "important" and "unsettled" legal issues. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1275-76 (11th Cir. 2000). While the question presented may have satisfied these criteria, Issue No. 3 clearly does not. Issue No.

3 requires this Court to engage in the laborious process of examining and analyzing the extensive factual record to determine whether class certification is appropriate based on the particular facts of this case. Moreover, Issue No. 3 does not involve an unsettled or important legal issue.

In short, this Court should not consider Issue No. 3 because: (i) it was not fairly included in the question presented and (ii) this Court normally would not grant review of such an issue under Rule 23(f).

B. The district court did not abuse its discretion because the evidence was sufficient to support class certification.

1. Plaintiffs' claims of injury are susceptible to common proof, as demonstrated by Defendant's purple plume.

Plaintiffs can prove injury to their properties on a class-wide basis. Claims of contamination by a *groundwater plume* – as opposed to other types of contamination claims – are ordinarily susceptible to common proof and can be proved on a class-wide basis. Many cases confirm this proposition. *See, e.g.*, *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2002) (Posner, J.) (holding that class treatment was appropriate for claims by approximately one thousand owners of residential properties surrounding a factory that had leaked contaminants into the soil and groundwater beneath the properties); *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 475, 487-88 (S.D. Ohio 2004) (certifying class of property owners where the defendants' facilities spilled contaminants

causing a groundwater contamination plume to form under the owners' properties); *LeClercq v. Lockformer Co.*, No. 00 C 7164, 2001 WL 199840, at *8 (N.D. Ill. Feb. 28, 2001) (certifying class of property owners where the defendant's facility spilled contaminants into the ground causing, among other things, contaminated groundwater to migrate to the owners' properties); *see also Turner v. Murphy Oil USA, Inc..*, 234 F.R.D. 597, 601-02, 614-16 (E.D. La. 2006) (certifying class of property owners impacted by oil plume that formed after oil spill from the defendant's facility); (Doc. 83, at 13 n. 5 (listing other groundwater contamination cases)). The cases cited by Defendant are distinguishable and do not support its argument to the contrary.[11]

Defendant's opposition to class certification is belied by its own purple groundwater plume and the district court's factual findings, which are uncontested on this appeal. Specifically, the purple groundwater plume shows the contiguous geographic area that Defendant itself admits has been contaminated by its facility and that it is solely responsible for remediating (*i.e.*, cleaning up). (*See* Doc. 141, at 176, 183-84; Doc. 144, at 40.) And the county appraiser, using a mass appraisal method, has determined that this purple groundwater plume has caused a

[11] For example, one case concerned primarily soil contamination from the dumping of a variety of waste, not from leaking or spilled contaminants, and the plaintiffs merely alleged a "risk" that the groundwater would become contaminated. *See St. Joe Co. v. Leslie*, 912 So. 2d 21, 22-23 (Fla. Dist. Ct. App. 2005) (cited at Def.'s Br. 34, 37-38).

diminution in value to the properties in the area impacted by the plume. (*See* Doc. 144, at 40; Pls.' Ex. 131; Doc. 141, at 280-88.) The foregoing facts – found by the district court and not contested on this appeal – demonstrate injury on a class-wide basis because they show: (i) a groundwater plume of contaminants exists; (ii) Defendant is responsible for the plume and its contaminants; (iii) the plume impacts a contiguous group of properties; and (iv) this impact results in a diminution in value to the properties impacted by the plume.

Indeed, Defendant's purple plume demonstrates that the genuine dispute in this case concerns the *size of the class*, not whether Plaintiffs' claims can be proved on a class-wide basis. Plaintiffs sought certification of a class based on a red plume that is larger than Defendant's purple plume. Defendant's purple plume includes only groundwater contamination above the FDEP's regulatory standards. *Supra* at 4. In contrast, Plaintiffs' red plume includes contaminants at any level. *Id.* Plaintiffs in this tort action may rely on a standard for contamination different from the standard applicable in the regulatory setting. *See In re MTBE Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 153-58 (S.D.N.Y. 2006).

Defendant's own presentation at the evidentiary hearing also demonstrated that the genuine dispute in this case concerns the size of the class, not whether Plaintiffs can prove their claims by common proof. In particular, Defendant vigorously attacked Dr. Bedient's decision to include in his red plume the areas of

the "nose," the "chin," the "forehead," etc. *Supra* at 9-13. These areas are outside of Defendant's purple plume, and they caused the red plume to be larger than the purple plume. (Ct. Ex. A.) Therefore, of course, Defendant disapproved of the inclusion these areas in the red plume, as the district court noted (Doc. 144, at 40 ("It [was] elementary that Plaintiffs would prefer a larger geographic footprint for the proposed class, while Defendant would prefer a smaller one.").)

The district court, however, decided to accept Plaintiffs' red plume and reject Defendant's purple plume. (Doc. 144, at 39 ("Through the Property Map, Dr. Bedient established the geographic contours of the groundwater plume and using peer-reviewed science and relevant data he defined a zone of impact and identified the scope of the class.")) But the district court did not shut the door completely on Defendant's purple plume, as it left open the possibility for Defendant at the merits stage to persuade the jury that only those class members within the purple plume have suffered a cognizable injury. (Doc. 144, at 40 ("There is, and should be, a spirited debate about the contours and characteristics of the groundwater plume and the geographic size of the proposed class.").) It was entirely proper for the district court to leave the door open for reevaluation later at the merits stage by the ultimate fact-finder. *See supra* Argument I.B.1, at 32 (explaining that a district court's factual findings at the class certification stage do not bind the ultimate fact-finder at the merits stage).

2. Defendant's arguments on damages omit critical factual findings and fail to show an abuse of discretion.

Defendant's argument on the damages issues is incomplete, as it fails to mention the district court's critical findings that the Pinellas County Property Appraiser, by way of a mass appraisal method, already has determined that the properties impacted by the purple plume have suffered a diminution in value. *Supra* at 18. This omission by Defendant means that it has waived any argument that these findings were clearly erroneous. *See, e.g., SunAm. Corp. v. Sun Life Assur. Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996).

Defendant also omitted from its brief, and thus waived any challenge to, the district court's finding that Plaintiffs' damages expert provided "a viable model for calculating property damages on a class-wide basis." (Doc. 144, at 39.) This finding demonstrates that the district court considered the damages issues to be relevant to class certification, not irrelevant as Defendant wrongly suggests in its brief (Def. Br. 41).

Defendant is equally wrong when it suggests that the district court "avoid[ed]" and "gloss[ed] over the individualized injury element of a claim by simply equating 'injury' with 'damages.'" (Def. Br. 37.) The district court did no such thing. It merely held, in the alternative, that even if the damages issues would require individualized inquiries, individual issues on damages generally do not defeat class certification. (Doc. 144, at 39-40 (*citing Allapattah Servs., Inc. v.*

Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003)).) Defendant concedes this statement of the law was correct. (Def. Br. 41.)

3. Class certification was not precluded because of the statute-of-limitations defense.

Defendant's suggestion that its statute-of-limitations defense should have precluded class certification (Def.'s Br. 29-30) rests on misleading factual assertions. Before the 2006-2007 time frame, Defendant itself had not delineated any plume that encroached on any off-site properties, except for the Stone's Throw Condominiums and the Brandywine Apartments, meaning that there is no possibility that seventy-five percent of the class could have received notice before the statute-of-limitations period, as this suit was filed in 2008. *See supra* at 14-17; (Doc. 1); (Def. Br. 29 (asserting five-year period for statute of limitations).)

Any issues specific to the owners at Stone's Throw and Brandywine do not defeat class certification. The predominance prong of Rule 23(b)(3) does not require that *all* issues be *identical* for *every* class member. As this Court has stated: "The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible." *Schroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1379 (11th Cir. 1984); *see also Smilow v. S.W. Bell Mobile Sys. Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) ("Rule 23(b)(3) requires merely that common issues

predominate, not that all issues be common to the class."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("Predominance under Rule 23(b)(3) cannot be reduced to a mechanical, single-issue test.") In other words, "[if] the addition of more plaintiffs [with individual issues] leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004). Accordingly, courts routinely permit classes to be certified even when there are statute-of-limitations defenses that apply to a subset of class members.[12]

In this case, the issue of the statute-of-limitations defense applies, if at all, to a defined subset of the class – the one owner of the Brandywine Apartments and the 350 owners of the Stone's Throw Condominiums. *Supra* at 16. And the 350 condominium owners share a common issue – whether any notice given to the condominium association can equate to notice to each individual owner. Therefore, the district court can easily manage this statute-of-limitations issue with the available procedural mechanisms without undermining either due process or

[12] *See, e.g.*, *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983) ("[E]ven if some of the class members were threatened with a potential statute of limitations defense, that problem would not necessarily defeat the availability of a class action suit."); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 924 (3rd Cir. 1992) (holding no abuse of discretion to certify a class even though there would have to be individual determinations on whether a subset of class members' claims were time-barred).

the efficiencies gained by class certification. *Cf. Smilow*, 323 F.3d at 39-40 (noting that a district court has "available adequate procedural mechanisms" for dealing with issues specific to a subset of the class).

4. Defendant's other arguments are without merit.

Defendant is wrong when it argues that unjust enrichment claims, based on Florida substantive law, are "categorically ineligible for class certification." (Def.'s Br. 31, 34 (*citing Vega*, 564 F.3d at 1274 *and Klay*, 382 F.3d at 1267).) *Vega* and *Klay* do not establish the *per se* categorical prohibition suggested by Defendant. Courts have, and may, certify class actions prosecuting unjust enrichment claims based on Florida substantive law. *See City of Tampa v. Addison*, 979 So. 2d 246, 249, 251, 256 (Fla. Dist. Ct. App. 2007) (affirming trial court's decision to certify a class on an unjust enrichment claim); *Arvida v. Council of Villages, Inc.*, 733 So. 2d 1026 (Fla. Dist. Ct. App. 1999) (reversing trial court for failing to certify a class on an unjust enrichment claim).

In a similar vein, Defendant wrongly suggests that claims for private nuisance are "inherently individualized" and not susceptible to class treatment. (Def.'s Br. 39-40.) But private nuisance claims are certifiable where the nature of the injuries and damages to the plaintiffs can be objectively measured. *See Olden v. LaFarge Corp.*, 383 F.3d 495, 498, 509-10 & n.5 (6th Cir. 2004) (affirming class certification of nuisance claim brought by homeowners alleging that

pollutants from a manufacturing plant caused damage to their properties because the nature of the homeowners' complaints were objective). Appraisal methods, like those employed by Plaintiffs' expert and the Pinellas County Appraiser, provide such an objective measurement. *Supra* at 17-18.

Finally, Defendant's conflict-of-interest argument has no evidentiary support. (Def.'s Br. 39.) Defendant's brief points to no evidence of even a single class member who has expressed dissatisfaction about being "lumped" into the class. (*Id.*) If any class member is dissatisfied, the solution is to allow that class member to exercise her right to opt-out of the class, not to deny certification for the approximately 1300 remaining class members who have not expressed any dissatisfaction. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998). Moreover, Defendant's argument rests on the mistaken premise that the class area consists of contaminated and *uncontaminated* properties. (Def.'s Br. 39.) In fact, all properties in the class area have been impacted by contaminants originating from Defendant's facility, as demonstrated by the district court's uncontested findings. (Doc. 144, at 39-40.)

C. Conclusion on Issue No. 3

This Court should not consider the sufficiency-of-the-evidence issue because it was not fairly included in Defendant's question presented and it is not the type of issue for which this Court normally grants review. *Supra* Argument III.A, at 48-

49. If this Court does consider this issue, it should conclude that the district court did not abuse it discretion because the evidence was sufficient to support class certification. *Supra* Argument III.B, at 49-57.

CONCLUSION

For the foregoing reasons, the district court's class certification order should be affirmed. Alternatively, if this Court determines that the district court did not conduct the appropriate factual inquiry and analysis, it should remand this case for the district court to conduct, in the first instance, the appropriate factual inquiry and analysis.

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 13,786 words (including words in footnotes) according to Microsoft Word 2003, the word-processing system used to prepare this brief.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. mail to the following on this 8th day of February, 2010:

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