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

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2-18-mn-2873-RMG This Document Relates to: *City of Camden, et al. v. 3M Company,* Case No. 2:23-cv-03147-RMG

STATES' AND SOVEREIGNS' OMNIBUS OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, FOR CERTIFICATION OF SETTLEMENT CLASS AND FOR PERMISSION TO DISSEMINATE CLASS NOTICE

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I. INTRODUCTION

The States of Arizona, California, Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, and Wisconsin, as well as the District of Columbia, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico (collectively, the "Sovereigns"), by and through their respective Attorneys General and/or their respective counsel, respectfully oppose the Plaintiffs' Motion for Preliminary Approval of Class Settlement, for Certification of Settlement Class and for Permission to Disseminate Class Notice ("Motion") (ECF No. 3370 [hereinafter cited as "Mot."]) seeking preliminary approval of a proposed class action settlement between Defendant 3M Company and public water suppliers ("Settlement"). The Sovereigns have concurrently moved to intervene in this action.

Either individually or in various groups, the Sovereigns have engaged in good-faith efforts to resolve several serious concerns with the Settlement over the past ten days, including multiple meet and confers with counsel for 3M and the plaintiff-movants ("Movants") and providing proposed revisions to the Settlement Agreement to 3M and the Movants. Unfortunately, while the parties have made limited progress on some items, due in part to the short amount of time available to negotiate solutions to these significant issues, the Sovereigns have been unable to resolve their concerns about the Settlement as proposed in the Motion.

The Sovereigns do not take this step of opposing a preliminary approval motion lightly. The Sovereigns understand the great importance of this matter, the complexity of the issues the Settlement seeks to resolve, and the many months of nearly nonstop work spent crafting it, including the time of a highly skilled court-appointed mediator. However, the Sovereigns did not have the opportunity to participate in that process and, instead, have had only three weeks to review the Settlement and make major decisions about how it may impact their rights. The Sovereigns

concluded in that shortened review that the Settlement has severe flaws that run counter to their interests directly (inasmuch as the Settlement Agreement could be read to impact their claims) and indirectly by foisting responsibility for filling the gap between monies awarded to the class members and the actual cost to design, build, operate, and maintain effective PFAS treatment systems back onto the public. As detailed in this Opposition and the Sovereigns' concurrently filed motion to intervene, those flaws threaten to shift 3M's obligations onto state taxpayers and impinge upon the Sovereigns' claims against 3M for the harms it has caused the Sovereigns and their people.

Judicial scrutiny is especially important because this is a uniquely consequential settlement that would directly affect the rights of thousands of water suppliers across the United States—and indirectly affect the Sovereigns and all taxpayers—impacting the drinking water supplies of thousands if not millions of citizens, with profound effects on public health and the environment. Such a proposal demands a searching and thorough review. The Motion should be denied, or at a minimum, the terms of the Settlement Agreement should be modified, for the following reasons.

First, the Settlement contains a perpetual, uncapped, and overbroad indemnity clause that could shift billions of dollars of 3M's liability onto class members and, ultimately, the Sovereigns' taxpayers. Indeed, the value of the Settlement in the aggregate, and to each individual proposed class member, is incapable of even rough calculation in light of the uncapped indemnity obligations that potential class members (and, ultimately, the taxpayers) are required to assume under the terms of the Settlement Agreement. *Second*, the Settlement's ambiguous and overbroad release provisions may provide 3M a basis to argue that some of the Sovereigns' claims for the remediation or treatment of PFAS are released or precluded by the Settlement. The Settlement Agreement must unambiguously state that the Sovereigns' claims are not impacted, regardless

whether a Sovereign operates water systems and regardless whether state agencies that may own or administer public water systems within the class definition opt out of the Settlement. *Third*, preliminary approval of the Settlement may be accompanied by an antisuit injunction[1] that should not stay cases brought by various Sovereigns pending in state and federal courts that seek a broad array of public costs and damages outside the ambit of the proposed class action. *Fourth*, the Settlement does not give putative class members reasonable time to evaluate their claims (including determining their respective fair shares through the model Proposed Class Counsel advised the Court at the last status conference would be available for such purpose), evaluate their indemnity obligations, decide whether to opt out, or submit their claims forms—all of which impairs the rights of public water suppliers across the country and ultimately would impact the issues identified herein.

For these reasons, and as more fully set forth below, the Sovereigns respectfully request the Court deny the Motion, or at a minimum, the terms of the Settlement Agreement should be modified to address the Sovereigns' concerns stated herein.

II. ARGUMENT

A. Applicable Legal Standard

The Motion and its supporting materials suggest that the Court plays a limited and perfunctory role when addressing a motion for preliminary approval of a proposed class settlement. But the Court here plays a far greater role, particularly considering the gravity and complexity of the proposed Settlement. Indeed, the Court "acts as a *fiduciary* for the class," *In re: Lumber*

[1] This was discussed by the Court at the July 14, 2023 hearing and is sought in the settlement proposed by the DuPont entities. Any such antisuit injunction should be narrowly tailored in an effort to avoid impacting the claims of the Sovereigns that are proceeding both inside the AFFF MDL and outside the AFFF MDL in a variety of state and federal courts dealing with PFAS contamination from sources other than AFFF.

Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., 952 F.3d 471, 483 (4th Cir. 2020) (emphasis added), and must protect unnamed class members from "unjust or unfair settlements affecting their rights," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "The primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during the settlement negotiations." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *1988 Tr. for Allen Child. Dated 8/8/88 v. Banner Life Ins. Co.*, 28 F.4th 513, 521 (4th Cir. 2022) ("The district court must protect the class's interests from parties and counsel overeager to settle (who may deny absent class members relief that they would otherwise receive) and frivolous objectors (who may impede or delay valuable compensation to others).").

In addition, where—as here—the parties are seeking class certification (conditionally or otherwise) and preliminary approval of a settlement at the same time, the proposed settlement requires closer judicial scrutiny.[2] *See Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 482 (D.D.C. 2019) (internal quotations & citations omitted); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004).[3]

The U.S. Court of Appeals for the Fourth Circuit has set a multifactor standard to assess whether a class action settlement is "fair, reasonable, and adequate." *Lumber Liquidators*, 952 F.3d

[2] Here, the proposed Settlement arises from an atypical context. The litigation at issue had been proceeding only as an individual action, with the recent filing of a putative class action complaint to facilitate the Settlement. It does not appear that any prior proceedings focused on, or generated discovery or a factual record related to, whether the elements of Rule 23 can be met.

[3] "Further, because before a class is formally certified 'there is an even greater potential for a breach of fiduciary duty owed the class during settlement[,]' pre-certification settlements demand 'an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair.'" *Grady v. RCM Tech., Inc.*, No. 5:22-cv-00842 JLS-SHK, 2023 WL 3327093, at *3 (C.D. Cal. May 2, 2023) (denying preliminary approval) (quoting *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)).

at 484. When determining whether to approve a class action settlement, the court will first consider whether the process leading to the settlement was fair and then turn to whether the terms provided within the settlement are adequate. *See Jiffy Lube*, 927 F.2d at 158-59.

Although closer scrutiny is generally reserved for the final approval hearing, *see Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *7 (N.D. Cal. Apr. 29, 2011), review of a preliminary approval motion should be sufficient to demonstrate that the settlement terms do not suffer from obvious defects and that final approval is likely to be granted. This is, in part, because of the significant amount of time, money, and resources involved in sending out class notice and proceeding to a final approval hearing. *See, e.g.*, *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016) (recognizing the importance of the preliminary approval stage "given the amount of time, money, and resources involved in, for example, sending out . . . class notices"); *Macy v. GC Servs. Ltd. P'ship*, No. 3:15-cv-819-DJH-CHL, 2019 WL 6684522, at *1 (W.D. Ky. Dec. 6, 2019) ("The standard for preliminary approval was codified in 2018, with Rule 23 now providing for notice to the class upon the parties' showing that the court will likely be able to approve the proposed settlement under the final-approval standard contained in Rule 23(e)(2)."). *See* 4 NEWBERG ON CLASS ACTIONS § 13:10 (Supp. 2021) ("[S]ending notice to the class costs money and triggers the need for class members to consider the settlement, actions which are wasteful if the proposed settlement [is] obviously deficient from the outset.").

Of course, a court should not grant preliminary approval of a settlement that suffers from obvious deficiencies. Courts confronted with similarly complicated proposed settlements involving environmental contamination have found that overly broad releases and/or indemnification provisions are improper to include in a class action settlement, including (i) releases that "contain[] any language that seeks or suggests that the claims of persons or entities

who are not parties to th[e] case are barred," (ii) terms that attempt to provide the settling defendant more than "the release of the claims class members asserted or could have asserted in the operative complaint against defendant," or (iii) indemnification of a defendant for claims or actions asserted against a defendant by any person or persons who are not parties to the case settled. *City of Long Beach v. Monsanto*, No. 2:16-cv-03493, ECF No. 254 (C.D. Cal.) (attached as Ex. 1) (denying preliminary approval sua sponte due to obvious defects in the settlement) (citing *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action." (internal quotations omitted))).

B. The Settlement's Indemnity Clause Is Overbroad and Could Shift Billions in Liability from 3M to the Public

The indemnity provision included in Section 11.6.3 of the Settlement Agreement provides:

> By this Agreement, ***each Releasing Party hereby covenants and agrees to indemnify and hold each and every Released Party harmless of and from*** (i) any future or further exposure or payment arising out of, related to, or involving the Released Claims, including any litigation, Claim, or settlement which may hereafter be instituted, presented, or continued by or on behalf of the Releasing Parties, or by any person seeking contribution, indemnity, or subrogation in connection with such Released Claims, ***and (ii) any Claim arising out of, related to, or involving PFAS that has entered or may enter Drinking Water or any Releasing Party's Public Water System.*** The Releasing Parties agree to credit and satisfy that portion of the total damages, if any, which may have been caused by the Releasing Parties, as such may be determined in any litigation, Claim, or settlement which may hereafter be instituted, presented, or continued in connection with the Released Claims, including any Claim of negligence or strict liability of the Released Parties.

Settlement Agr. § 11.6.3 (emphasis added). The Sovereigns' objections to the indemnity provision contained in Section 11.6.3 are that (1) the indemnity participating public water providers are required to provide 3M is fatally overbroad because it provides indemnity for any "Claims"

"related to PFAS," including PFAS that "may enter" (but has not yet entered) drinking water; (2) the indemnity participating public water providers are required to provide 3M is not capped at the amount each class member receives, exposing class members to an unlimited financial obligation to 3M; (3) such an indemnity obligation by public entities is against public policy in most States; and (4) given the monumental risk that public water systems will assume should they not opt out, if the indemnity provision is included in the Settlement Agreement, it must be specifically disclosed in the notice.

1. Section 11.6.3 Is Fatally Broad As Written

Section 11.6.3 could expose class members to billions of dollars in liabilities to 3M, making the Settlement worth far less to class members. In fact, as written, any given class member's indemnity payments to 3M could easily exceed the money it receives through the Settlement.

The indemnity of Section 11.6.3(ii) plainly states: Class members must indemnify 3M from and against "***any future*** or further exposure or payment arising out of, ***related to***, or involving the Released Claims" and "***any Claim***[4] ***arising out of, related to, or involving PFAS that has entered***

[4] "Claim" is defined broadly:

> "Claim" means any past, present, or future claim—including counterclaims, cross-claims, actions, rights, remedies, causes of action, liabilities, suits, proceedings, demands, damages, injuries, losses, payments, judgments, verdicts, debts, dues, sums of money, liens, costs and expenses (including attorneys' fees and costs), accounts, reckonings, bills, covenants, contracts, controversies, agreements, obligations, promises, requests, assessments, charges, disputes, performances, warranties, omissions, grievances, or monetary impositions of any sort, in each case in any forum and on any theory, whether legal, equitable, regulatory, administrative, or statutory; arising under federal, state, or local constitutional or common law, statute, regulation, guidance, ordinance, contract, or principles of equity; filed or unfiled; asserted or unasserted; fixed, contingent, or non-contingent; known or unknown; patent or latent; open or concealed; discovered or undiscovered; suspected or unsuspected; foreseen, foreseeable, unforeseen, or unforeseeable; matured or unmatured; manifested or not; accrued or unaccrued; ripened or unripened; perfected or unperfected; choate or inchoate; developed or

or may enter Drinking Water[5] ***or any Releasing Party's Public Water System***." Settlement Agr. § 11.6.3 (emphasis added).

As written, Section 11.6.3(ii) provides that settling class members pay for and indemnify 3M from "any Claim," which by definition includes any conceivable cause of action or request for relief, including Sovereigns' claims that 3M be required to remediate or restore PFAS from all waters of the State that "may enter" drinking water; Sovereigns' claims against 3M to recoup taxpayer costs for the treatment of PFAS in drinking water; any person's claims against 3M for future costs to treat PFAS that is in drinking water; community or class action claims for medical monitoring for those drinking 3M's PFAS; personal injury and wrongful death claims for those

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> undeveloped; liquidated or unliquidated; now recognized by law or that may be created or recognized in the future by statute, regulation, judicial decision, or in any other manner, including any of the foregoing for direct damages, indirect damages, compensatory damages, consequential damages, incidental damages, nominal damages, economic loss, punitive or exemplary damages, statutory and other multiple damages or penalties of any kind, or any other form of damages whatsoever; any request for declaratory, injunctive, or equitable relief, strict liability, joint and several liability, restitution, abatement, subrogation, contribution, indemnity, apportionment, disgorgement, reimbursement, attorneys' fees, expert fees, consultant fees, fines, penalties, expenses, costs, or any other legal, equitable, civil, administrative, or regulatory remedy whatsoever, whether direct, representative, derivative, class or individual in nature. It is the intention of this Agreement that the definition of "Claim" be as broad, expansive, and inclusive as possible.

Settlement Agr. § 2.10.

[5] "Drinking Water" is also defined broadly:

> "Drinking Water" means water provided for human consumption (including uses such as drinking, cooking, and bathing), consistent with the use of that term in the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-27. Solely for purposes of this Agreement, the term "Drinking Water" includes raw or untreated water that a Public Water System has drawn or collected from a Water Source so that the water may then (after any treatment) be provided for human consumption. It is the intention of this Agreement that the definition of "Drinking Water" be as broad, expansive, and inclusive as possible.

Settlement Agr. § 2.22.

drinking 3M's PFAS; property damage claims by fire departments, airports, Sovereigns, or industrial users for diminution in market value or to remediate source areas where AFFF containing 3M PFAS was applied and "may enter" drinking water; Sovereigns' claims for damages to the public's trust interests in their aquifers, surface waters, and other water resources that "may enter" drinking water; and any other "Claim . . . related to . . . PFAS that has entered or may enter Drinking Water."

The Sovereigns, who have the responsibility to protect the health and welfare of their citizens, have been assisting, and will be called upon to assist, the class members in addressing the gap between any monies awarded to them under the Settlement and the actual cost to design, build, operate, and maintain effective PFAS treatment systems. Because this provision, as written, would require each class member to indemnify 3M as to any such claim by a Sovereign, it would effectively paralyze the class members' ability to accept such funding, thereby leaving them without the full amount needed to protect their customers with effective PFAS treatment.

2. The Indemnity Obligations of Section 11.6.3 Are Unlimited

Under the terms of the Settlement Agreement, the broad indemnity obligations of each class member are unlimited, uncapped, and not even tied to the amount of money a class member might receive under the terms of the Settlement. Consequently, a class member could easily be required to pay more to 3M via its indemnity obligation than it received through the Settlement. For example, suppose a cancer cluster develops in a community because 3M's PFAS contaminated the public water system, and a victim wins a judgment against 3M. 3M could invoke this provision of the Settlement, as currently written, to seek full indemnification from the entity that owns the public water system, even if the amount indemnified far exceeds the system's award under the

Settlement. The results could well be ruinous for communities because many public water systems are owned by public entities.[6]

Because of the uncapped indemnity, the Settlement is worth far less to class members than its top-line value suggests. At best, the indemnity provision will create a massive, open-ended risk for thousands of public water suppliers across the United States. At worst, class members will be left much worse off under the Settlement, paying 3M for its own liabilities while retaining insufficient funds to address the drinking water pollution caused by 3M's PFAS. *See City of Long Beach v. Monsanto Co.*, No. CV 16-3493 FMO (ASx), 2020 WL 7060140, at *4 (C.D. Cal. Nov. 25, 2020) (finding an "overly broad" indemnification provision "concerning" and denying preliminary approval).

3. The Indemnity Obligations Are Against Public Policy

The Court also should consider a public entity's inability to provide indemnities to third parties prior to preliminary entry of the proposed Settlement. A subdivision of a State cannot issue an unlimited obligation under federal law or under the law of most States. The United States explicitly prohibits federal agencies from guaranteeing funds they do not have, as that effectively commits the government to make payments at some time in the future and coerces Congress into

[6] This concern is not hypothetical. For instance, a Washington state jury recently found against Monsanto and awarded $185 million to three teachers who had been exposed in the classroom to toxic substances manufactured by Monsanto. *See Monsanto Told to Pay Teachers $185M over Chemical Exposure*, ASSOCIATED PRESS (July 28, 2021), *located at* https://perma.cc/W8TJ-X49M (last visited July 22, 2023). If Monsanto had an unlimited indemnity right against that school district like the one that is in 3M's proposed Settlement against public water providers, the jury award would have boomeranged back against the school district and depleted the public coffers. The same is true for potential class members here. Any sizable indemnity would, at minimum, consume a substantial portion of the funds a water supplier receives through this Settlement. Such an outcome would impair class members' ability to remediate the PFAS pollution this Settlement is intended to redress.

making an appropriation to cover the commitment. *See* Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, & 1517. Such coercion violates the Appropriations Clause of the Constitution[7] by usurping Congress's exclusive appropriations authority. Federal courts have long upheld the rule that the Anti-Deficiency Act generally prohibits open-ended indemnification clauses in government contracts. *See E.I. du Pont de Nemours & Co. v. United States*, 365 F.3d 1367, 1374 (Fed. Cir. 2004); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 22-23 (1987) (holding that, unless authorized by law, contracts that provide for indeterminate liability violate the Anti-Deficiency Act).

States have similarly acknowledged that "the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government." *In re Deborah Heart & Lung Ctr. SFY 2009 Charity Care Subsidy Allocation*, 8 A.3d 250, 254 (N.J. Super. Ct. App. Div. 2010). Mirroring the Anti-Deficiency Act, most State constitutions contain provisions limiting a state entity's ability to incur debt.[8] Such debt limitations exist to "ensure that political subdivisions do

[7] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. CONST. art. 1, § 9, cl. 7.

[8] *See, e.g.*, ARIZ. CONST. art. IX, § 7; CAL. CONST. art. XVI, §§ 6, 17; COLO. CONST. art. V, § 34, art. XI, §§ 1-2; CONN. CONST. art. I, § 1; HAW. CONST. art. VII, § 4; ME. CONST. art. IX, § 14; MD. CONST. art. III, § 34; MASS. CONST. art. of amend., art. LXII, § 1; MINN. CONST. art. XI, §§ 2, 12; N.H. CONST. pt. 2, art. V; N.J. CONST. art. VIII, § 2, P 1, art. VIII, § 3, PP 2-3; N.M. CONST. art. IV, §§ 26, 31; N.Y. CONST. art. VIII, §§ 4, 10, art. X § 5; N.M.I. CONST. art. X, §§ 1, 6; PA. CONST. art. VIII, § 8; R.I. CONST. art. VI, §§ 11, 16; TENN. CONST. art. II, § 31; TEX. CONST. art. III, §§ 50, 52, art. VIII, § 3, art. XVI, § 6; VT. CONST. ch. II, § 27; WIS. CONST. art. XI, § 3; *see also* 31 U.S.C. § 1341(a)(1) (D.C.).

Some Sovereigns have also enacted statutory law. *See, e.g.*, TENN. CODE ANN. § 6-56-205 (no public utility can make "any appropriations in excess of estimated available funds, except to provide for an actual emergency."); N.M. STAT. ANN. § 6-6-11 ("[A]ny indebtedness for any current year which is not paid and cannot be paid . . . is void."); HAW. REV. STAT. § 55 (absent law to the contrary, no "debt [shall] be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof[.]"); 1 N. MAR. I. CODE § 7401 ("No expenditure of Commonwealth funds shall be made unless the funds are appropriated in currently

not become overburdened by obligation, and seek[] to impose the burden of that repayment upon those who create obligations, not upon future generations." 15 MCQUILLIN MUN. CORP. § 41:3 (3d ed.). Allowing water providers that are state entities to issue an unlimited obligation would violate constitutional appropriation and debt-limitation provisions designed to promote the common good and welfare. Further, without authorization,[9] many of the non-state public water systems cannot agree to the financial terms of the Settlement, rendering the indemnity clause void.[10]

Moreover, the indemnity clause contained in the Settlement Agreement could impair the Sovereigns' claims against 3M. The Sovereigns' claims seek, inter alia, compensatory damages and other relief for injuries to drinking water resources including surface water and groundwater in each State. *See generally* Compl., ECF No. 1-1, *People ex rel. Bonta v. 3M*, No. 2:23-cv-01531-

effective annual appropriation acts . . . . No Commonwealth official may make an obligation or contract for the expenditure of unappropriated Commonwealth funds, unless provided by law or approved in advance by joint resolution of the legislature.").

[9] Appropriations by public entities are typically subject to review, whether by the legislature, the general public, the entity's board, or a public utility commission. *By vote*: MASS. GEN. LAWS ch. 44, § 2 ("[C]ities, towns and districts shall incur debts only in the manner of voting and within the limitations as to amount and time of payment prescribed in this chapter[.]"). *By legislature*: N.J. STAT. ANN. § 40A:4-1 (a municipality's budgetary powers are "subject to the dominion of the Legislature" and Department of Community Affairs ordered to "take such action as the director deems necessary" to ensure the proper implementation of local budgets); TENN. CODE ANN. § 7-82-701 (Tennessee Board of Utility Regulation is charged with "determin[ing] and ensur[ing] the financial integrity of those utility systems . . . includ[ing] the water, wastewater, or natural gas systems of a county, metropolitan government, or incorporated town or city[.]").

[10] A public entity's agreement to indemnify or hold harmless a private corporation is an unauthorized incurrence of debt and is therefore void. *See T & N. O. R.R. v. Galveston Cnty.*, 169 S.W.2d 713, 715 (Tex. Comm'n App. 1943); *Santa Fe Water & Light Co. v. Santa Fe Cnty.*, 224 P. 402, 405 (N.M. 1924); *Naranjo v. Cnty. of Rio Arriba, State of N.M.*, 862 F. Supp. 328, 332 (D.N.M. 1994) (holding that a lease with provisions so restrictive that a county did not have option of receding without involving any financial liability was unenforceable); *City-Cnty. Solid Waste Control Bd. v. Cap. City Leasing, Inc.*, 813 S.W.2d 705, 707 (Tex. App.—Austin 1991, writ denied) (holding that a contract that violates constitutional provisions prohibiting city or county from incurring "debt" is void, and the governmental unit involved need not pay any related obligation).

RMG (D.S.C.).[11] The Settlement Agreement's overbroad indemnity clause might be interpreted to give 3M the right to sue and seek a credit against or indemnification from public water suppliers to satisfy any judgment the Sovereigns may obtain against 3M. In simple terms, the indemnity provisions may leave everyone else—the Sovereigns, state agencies, and public water suppliers—responsible for cleaning up 3M's mess.

4. The Notice Is Insufficient

At a minimum, the Movants' proposed long-form and short-form notices are incomplete as written because they do not disclose the Settlement's indemnity clause. Courts frequently reject as inadequate notices that fail to call potential class members' attention to key provisions that could affect whether they decide to participate in a settlement. *See, e.g.*, *Daniels v. Aéropostale W., Inc.*, No. C 12–05755 WHA, 2014 WL 2215708, at *6-7 (N.D. Cal. May 29, 2014) (denying preliminary approval of class settlement where the proposed notice "would not plainly lay out the salient points" and "[b]uried" key terms regarding the amount of recovery deep in notice and exhibits). Potential class members must be informed that, by participating in the Settlement, they could confer a broad, perpetual, and uncapped indemnity right on 3M. The proposed notices fail to provide such required information and should be rejected.

C. The Settlement's Overbroad Release Prejudices Sovereigns

The Settlement's release provisions, as written, could prejudice the Sovereigns. The definition of "Releasing Parties," as currently written, includes the following language:

> [A]nyone acting on behalf of or in concert with a Class Member or its Public Water System (excluding states) to prevent PFAS from entering a Class Member's Public Water System or to seek recovery for alleged harm to the Class Member's Public Water System (including recovery of any funds that have already been expended to

[11] *See* Part II.A in concurrently filed Sovereigns' Mem. in Support of Mot. to Intervene (describing the Sovereigns' pending or potential lawsuits).

> remove PFAS from the Class Member's Public Water System, none of which shall implicate the rights of any state or the federal government)[.]

Settlement Agr. § 2.60. This appears to carve out "states"—an undefined term that should be defined to include sovereign territories of the United States—from the universe of "Releasing Parties." But the phrase "none of which shall ***implicate*** the rights of any state or the federal government" is ambiguous. In conjunction with the release language discussed immediately below, it leaves open the possibility that 3M could argue certain of the Sovereigns' claims are released through the Settlement.

Additionally, the apparent exclusion of "states" from the definition of "Releasing Parties" is in tension with other provisions in the Settlement Agreement that are ambiguous as to the scope of claims that would be released and could be argued to include some of the Sovereigns' claims. For example, the broad release in Section 11.1.1 of the Settlement Agreement extends to "(i) any Claim that may have arisen or may arise at any time in the future out of, relates to, or involves PFAS that has entered or ***may reasonably be expected*** to enter Drinking Water or any Releasing Party's Public Water System." Settlement Agr. § 11.1.1 (emphasis added). "Drinking Water" is defined to only include water "that a Public Water System has drawn or collected from a Water Source," *id.* § 2.22, and "Water Source" is defined as "a groundwater well, a surface-water intake, or any other intake point from which a Public Water System draws or collects water . . . ," *id.* § 2.80. Because the Section 11.1.1 release extends to claims arising out of or relating to PFAS that "***may be reasonably expected to enter*** Drinking Water," it could be argued that the release extends upstream of the water source (groundwater wells and surface water intakes) and the public water system itself, into aquifers and surface water bodies that the Sovereigns typically hold in trust for their citizens and which are the subject of remediation and other claims properly brought by the Sovereigns.

Further, a number of Sovereigns have sued or may sue 3M in their *parens patriae* capacities on behalf of their citizens and/or subdivisions for damages to public drinking water. *See, e.g.*, *State v. Exxon Mobil Corp.*, 126 A.3d 266, 290 (N.H. 2015) (upholding judgment for state awarding damages for, inter alia, costs of monitoring and treating public water systems and holding that the "State was the proper party to bring suit against the MTBE defendants, because it has a quasi-sovereign interest in protecting the health and well-being, both physical and economic, of its residents with respect to the statewide water supply" (internal quotations omitted)); *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 470 (D. Md. 2019) ("The State brings this suit for the widespread contamination of its waters. This is an injury that is properly redressed in *parens patriae*."). The language of the release provisions is overbroad, such that 3M may rely on them to argue that certain of the Sovereigns' public trust and *parens patriae* claims against it are released or precluded if even one of a Sovereign's political subdivisions (a county, a municipality, or a special district such as a water district) or water providers participates in the Settlement. That result would in turn detrimentally impact or forestall the Sovereigns' efforts to clean up the vast PFAS contamination caused by 3M. The Court should not approve a Settlement containing such language. *See City of Long Beach*, 2020 WL 7060140, at *3 ("[T]he court cannot approve any release that contains any language that seeks or suggests that the claims of persons or entities who are not parties to this case are barred."). *Cf. Taylor v. W. Marine Prods., Inc.*, No. C 13–04916 WHA, 2014 WL 4683926, at *13 (N.D. Cal. Sept. 19, 2014) ("Counsel must remember that any class settlement must be limited to the issues certified for class treatment and may not release claims of absent class members not certified.").

D. Any Antisuit Injunction Should Be Carefully Tailored to Exclude Sovereign Cases That Are Currently Pending Outside This MDL

While the proposed order accompanying the Settlement does not include an antisuit injunction, the Court observed during the July 14, 2023 Status Conference that it may issue such an injunction as set forth in the proposed order granting the separately pending motion for preliminary approval concerning the water providers' potential settlement with certain DuPont entities. *See* Ex. 2 (July 14, 2023 Status Conf. Tr.) at 19:16-22:9. The Court inquired whether any party would object to the imposition of such an injunction. *See id.* at 22:5-16.

Considering that several Sovereigns already have concurrent litigation pending in state and federal courts (some of which are at a very advanced stage) and others may bring such suits,[12] if the Court determines that an injunction is appropriate, the language of the injunction should be carefully tailored so as not to prejudice these lawsuits. The Court should not enjoin any Sovereign from litigating its non-AFFF cases or AFFF claims not related to water systems and, in particular, should not enjoin Sovereigns from proceeding with litigation in the public interest in their own state courts.[13]

The active non-AFFF litigation that the Sovereigns have pending involves claims for damages to state resources and interests well beyond the public water systems' claims at issue in the proposed Settlement. The lawsuits pending in certain Sovereigns' respective state courts seek recovery for PFAS contamination (from non-AFFF sources) in not only public water systems but also groundwater, private wells, soils, sediments, other natural resources, landfills, cleanup sites, farms and other biosolids application sites, construction sites, and wastewater treatment systems.

[12] *See* Part II.A in concurrently filed Sovereigns' Mem. in Support of Mot. to Intervene (describing the Sovereigns' pending or potential lawsuits).

[13] Certain Sovereigns intend to address this issue more fully in a concurrent filing.

Arguably, an injunction of the kind proposed by the DuPont entities could result in the immediate stay of these cases, which would impose an enormous burden on the Sovereigns, without resolving any legitimate threat to the Settlement pending in this Court. Accordingly, any potential injunction should be narrowly tailored and not stay the Sovereigns' actions in other courts.

E. The Proposed Class Notice Is Insufficient

Finally, a settlement of this historic size and breadth requires more robust notice disclosures apprising class members of the method for estimating each individual class member's settlement value—including the value of the indemnity or offset mechanisms—and more time for consideration by potential class members. Absent such information and a meaningful opportunity to consider it, the class settlement approval process will result in severe prejudice not only to the Sovereigns and other interested parties, but also and more significantly, to the class members themselves.

First, neither the Settlement Agreement nor the class notice materials attached thereto provide class members with adequate information regarding the determination of settlement value for each individual class member or guidance on how to obtain that information.[14] Proposed Class Counsel has advised that the Settlement Agreement utilizes a complex formula for allocating the settlement value among thousands of class members. However, no one has yet seen or had access to the proposed complex formula, and the final amount any individual class member will receive may not be determinable until after the opt-out deadline. In other words, the proposed Settlement may require public water systems to decide whether to broadly release their claims against 3M, and assume a broad indemnity of and credit against 3M's responsibilities, without any idea what consideration they may receive in return.

[14] Counsel for the State of Colorado raised this concern with counsel for 3M on July 22, 2023. As of the time of filing of this Opposition, no resolution had been reached.

During the July Status Conference and through separate communications with counsel for public water systems with claims in this MDL, Proposed Class Counsel represented that an allocation model has been designed that can provide an estimated recovery amount for any individual class member. *See* Ex. 2 (July 14, 2023 Status Conf. Tr.) at 6:2-8:22. However, the notice materials do not mention this model. All class members should be made aware of the model and its availability. Furthermore, while Proposed Class Counsel has advised that this model will be made available, no representation has been made as to *when* it will become available. Such information should also be provided in the notice. *See id.* at 5:21-6:1 (THE COURT: "[T]hey've got to be able to tell their clients roughly what they're going to get. I understand it may not be down to the penny, but they need to have an idea because they can't really evaluate is this in their client's interest.").

Second, the Settlement contemplates that opt outs and objections would be due 60 days after the mailing of the class notice. *See* Settlement Agr. §§ 8.4, 8.5. Opt-out periods "should afford class members a reasonable time in which to exercise their option." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.321 (2004). Although a 60-day opt-out period may be adequate for a class action settlement involving individual plaintiffs, it is unreasonable for a settlement involving complicated, diverse, and often public entities like public water suppliers. To consider a complex and consequential settlement like this one, a public water supplier may need time to retain counsel, solicit public input as required by the laws and rules that govern them, seek advice from federal and state authorities, advise decision makers, and obtain necessary board and other approvals. A 60-day opt-out period does not account for the realities of public administration, threatening to

prejudice class members that would otherwise opt out if provided adequate time.[15] A more reasonable opt-out period would be 120 days.

Third, combining the two above points, the opt-out and objection period—whether the Court determines it should be 60 days, 120 days, or any other time period—should not begin to run until the promised model for estimating individual class member recovery amounts is made available to all class members.

III. CONCLUSION

For the foregoing reasons, the Court should deny the Motion, or at a minimum, the terms of the Settlement Agreement should be modified to address the concerns addressed herein. The Sovereigns also request any other relief to which they are justly entitled.

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Respectfully submitted,

STATE OF ARIZONA
KRISTIN K. MAYES
Arizona Attorney General
State of Arizona
/s/ Curtis Cox
Curtis Cox
Assistant Attorney General
2005 N. Central Avenue
Phoenix, Arizona 85004
Telephone: (602) 542-7781
Environmental@azag.gov

[15] Certain public water suppliers raised similar concerns to this Court and similarly requested an enlargement of the class notice period to 120 days. *See* ECF No. 3414 (Letter from Counsel for City of Airway Heights, City of Moses Lake, and Lakewood Water District).

THE PEOPLE OF THE STATE OF CALIFORNIA
ROB BONTA
Attorney General of California
EDWARD H. OCHOA (SBN 144842)
Senior Assistant Attorney General
JEREMY M. BROWN (SBN 269159)
Supervising Deputy Attorney General
NICHOLAS G. CAMPINS (SBN 238022)
BRENDAN J. HUGHES (SBN 333690)
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612
Telephone: (510) 879-0801
Fax: (510) 622-2270
Email: Nicholas.Campins@doj.ca.gov
/s/ Nicholas G. Campins
NICHOLAS G. CAMPINS
Deputy Attorney General
Attorneys for the People of the State of California, ex rel. Rob Bonta, Attorney General of California

STATE OF COLORADO
PHILIP J. WEISER
ATTORNEY GENERAL
/s/ Heather Kelly
PHILIP J. WEISER, Attorney General
LESLIE EATON
HEATHER KELLY
CARRIE NOTEBOOM
First Assistant Attorneys General
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Telephone: (720) 508-6000
FAX: (720) 508-6040
*Counsel of Record

STATE OF CONNECTICUT
WILLIAM TONG
Attorney General
/s/ Matthew I. Levine
Matthew I. Levine
Deputy Associate Attorney General
Christopher Kelly
Assistant Attorney General
165 Capitol Avenue
Hartford, CT 06106
Telephone: 860-808-5052
Email: Matthew.Levine@ct.gov
Christopher.Kelly@ct.gov

DISTRICT OF COLUMBIA
BRIAN L. SCHWALB
Attorney General for the District of Columbia
JENNIFER C. JONES
Deputy Attorney General
Public Advocacy Division
ARGATONIA D. WEATHERINGTON
Chief, Social Justice Section
/s/ Wesley Rosenfeld
WESLEY ROSENFELD
Assistant Attorney General
LAUREN CULLUM
Special Assistant Attorney General
Office of the Attorney General for the District of Columbia
400 Sixth Street NW, 10th Floor
Washington, D.C. 20001
Tel: 202.368.2569
wesley.rosenfeld1@dc.gov
lauren.cullum@dc.gov

EDELSON PC
/s/ Jimmy Rock
JIMMY ROCK
1255 Union St NE, 7th Floor
Washington, D.C. 20002
Tel: 202.270.4777
jrock@edelson.com

STATE OF HAWAII
ANNE E. LOPEZ
Attorney General
/s/ Wade H. Hargrove III
WADE H. HARGROVE, III
Deputy Attorney General
465 S. King Street, #200
Honolulu, Hawaii 96813
(808) 587-3050
Wade.H.Hargrove@hawaii.gov

STATE OF MAINE
AARON M. FREY
ATTORNEY GENERAL
/s/ Matthew F. Pawa
Matthew F. Pawa
Benjamin A. Krass
Seeger Weiss LLP
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550
MPawa@seegerweiss.com
BKrass@seegerweiss.com

Scott Boak
Robert Martin
Assistant Attorneys General
6 State House Station
Augusta, Maine 04333
(207) 626-8566
(207) 626-8897
Scott.Boak@maine.gov
Robert.Martin@maine.gov

Kyle J. McGee
Viola Vetter
Jason H. Wilson
Grant & Eisenhofer, P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7000
kmcgee@gelaw.com
vvetter@gelaw.com
jwilson@gelaw.com

STATE OF MARYLAND
ANTHONY G. BROWN
Attorney General of Maryland
/s/ Patricia V. Tipon
PATRICIA V. TIPON
Attorney No. 0806170244
JULIE KUSPA
Attorney No. 0912160009
MATTHEW ZIMMERMAN
Attorney No. 8005010219
Assistant Attorneys General
Office of the Attorney General
1800 Washington Boulevard, Suite 6048
Baltimore, Maryland 21230
patricia.tipon@maryland.gov
matthew.zimmerman@maryland.gov
julie.kuspa@maryland.gov
(410) 537-3061
(410) 537-3943 (facsimile)

ADAM D. SNYDER
Attorney No. 9706250439
Assistant Attorney General
Office of the Attorney General
301 West Preston Street, Suite 1101
Baltimore, Maryland 21201
adam.snyder1@maryland.gov
(410) 767-1409

COMMONWEALTH OF MASSACHUSETTS
ANDREA JOY CAMPBELL
Attorney General
/s/ Nancy E. Harper
NANCY E. HARPER
Assistant Attorney General and Chief, Environmental Protection Division
I. ANDREW GOLDBERG
LOUIS DUNDIN
JILLIAN RILEY
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 727-2200
(617) 727-9665 (facsimile)
betsy.harper@mass.gov
andy.goldberg@mass.gov
louis.dundin@mass.gov
jillian.riley@mass.gov
Attorneys for Plaintiff Commonwealth of Massachusetts

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
/s/ Peter N. Surdo
Special Assistant Attorney General
Office of the Minnesota Attorney General
445 Minnesota Street
Suite 1400
St. Paul, Minnesota 55101
peter.surdo@ag.state.mn.us
Phone: (651) 757-1061

STATE OF NEW HAMPSHIRE
By its attorney,
JOHN M. FORMELLA,
ATTORNEY GENERAL
/s/ Christopher G. Aslin
Christopher G. Aslin, NH Bar #18285
Senior Assistant Attorney General
Environmental Protection Bureau
NEW HAMPSHIRE DEPT. OF JUSTICE
33 Capitol Street
Concord, NH 03301
Tel: (603) 271-3650
christopher.g.aslin@doj.nh.gov

STATE OF NEW JERSEY
MATTHEW J. PLATKIN
Attorney General
/s/ Gwen Farley
GWEN FARLEY
Deputy Attorney General
Division of Law
Environmental Enforcement &
Environmental Justice Section
Hughes Justice Complex
25 Market Street, 7th Floor
P.O. Box 093
Trenton, NJ 08625-0093
Telephone: (609) 376-2740
Gwen.Farley@law.njoag.gov

STATE OF NEW MEXICO
RAÚL TORREZ
ATTORNEY GENERAL
/s/ William Grantham
William Grantham
Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501
wgrantham@nmag.gov
Phone: (505) 717-3520

STATE OF NEW YORK
LETITIA JAMES
ATTORNEY GENERAL
/s/ Muhammad Umair Khan
Muhammad Umair Khan
Senior Advisor & Special Counsel
Umair.Khan@ag.ny.gov
Philip Bein
Mihir Desai
Assistant Attorneys General
Philip.Bein@ag.ny.gov
Mihir.Desai@ag.ny.gov
Office of the New York Attorney General
28 Liberty St.
New York, NY 10005
(212) 416-6685

OFFICE OF THE ATTORNEY GENERAL
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
/s/ Keisha Blaise
Keisha Blaise
Assistant Attorney General
keisha_blaise@cnmioag.org
Hon. Juan A. Sablan Memorial Bid., Fl. 2
Caller Box 10007, Capitol Hill
Saipan, MP 96950
Telephone: (670) 237-7500

STATE OF OHIO
ATTORNEY GENERAL DAVE YOST
/s/ Kyle J. McGee
Kyle J. McGee
Viola Vetter
Jason Wilson
Grant & Eisenhofer P.A.
123 Justison Street
Wilmington, Delaware 19801
Tel.: (302) 622-7000
kmcgee@gelaw.com
vvetter@gelaw.com
jwilson@gelaw.com
Attorneys for State of Ohio

COMMONWEALTH OF PENNSYLVANIA
MICHELLE A. HENRY
ATTORNEY GENERAL
/s/ James A. Donahue, III
James A. Donahue, III
First Deputy Attorney General
Pennsylvania Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
717-787-3391
jdonahue@attorneygeneral.gov

FOR THE COMMONWEALTH OF PUERTO RICO
DOMINGO EMANUELLI HERNÁNDEZ
SECRETARY OF JUSTICE
DEPARTMENT OF JUSTICE OF PUERTO RICO
/s/ Guarionex Díaz Martínez
GUARIONEX DÍAZ MARTÍNEZ
Assistant Secretary
Department of Justice
PO Box 9020192
San Juan, PR 00902-0192
Tel. 787.721.2900
gdiaz@justicia.pr.gov

EDELSON PC
/s/ Jimmy Rock
JIMMY ROCK
1255 Union St NE, 7th Floor
Washington, D.C. 20002
Tel: 202.270.4777
jrock@edelson.com

STATE OF RHODE ISLAND,
PETER F. NERONHA
ATTORNEY GENERAL
By Its Attorneys,
/s/ Alison Hoffman
ADI GOLDSTEIN (Bar No. 6701)
MIRIAM WEIZENBAUM (Bar No. 5182)
SARAH W. RICE (Bar No. 10588)
ALISON HOFFMAN (Bar No. 9811)
DEPARTMENT OF THE ATTORNEY GENERAL
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400
agoldstein@riag.gov
mweizenbaum@riag.gov
srice@riag.gov
ahoffman@riag.gov

STATE OF TENNESSEE
JONATHAN SKRMETTI (BPR No. 31551)
ATTORNEY GENERAL AND REPORTER
/s/ Sohnia Hong
Sohnia W. Hong (BPR No. 17415)
Deputy Attorney General
Amanda E. Callihan (BPR No. 035960)
Senior Assistant Attorney General
Office of the Tennessee Attorney General
Environmental Division
P.O. Box 20207
Nashville, Tennessee 32707
Sohnia.Hong@ag.tn.gov
Amanda.Callihan@ag.tn.gov

STATE OF TEXAS
ANGELA COLMENERO
PROVISIONAL ATTORNEY GENERAL
/s/ Katie B. Hobson
KATIE B. HOBSON
Assistant Attorney General
State Bar No. 24082680
BRITTANY WRIGHT
Assistant Attorney General
State Bar No. 24130011
KELLIE E. BILLINGS-RAY
Deputy Chief
State Bar No. 24042447
Environmental Protection Division
P. O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Katie.Hobson@oag.texas.gov
Brittany.Wright@oag.texas.gov
Kellie.Billings-Ray@oag.texas.gov

STATE OF VERMONT
CHARITY R. CLARK
ATTORNEY GENERAL
/s/ Laura B. Murphy
Laura B. Murphy
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3186
laura.murphy@vermont.gov

Matthew F. Pawa
Benjamin A. Krass
Seeger Weiss LLP
1280 Centre Street, Suite 230
Newton Centre, MA 02459
(617) 641-9550
MPawa@seegerweiss.com
BKrass@seegerweiss.com

Kyle J. McGee
Viola Vetter
Jason H. Wilson
Grant & Eisenhofer, P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7000
kmcgee@gelaw.com
vvetter@gelaw.com
jwilson@gelaw.com

STATE OF WISCONSIN
JOSHUA L. KAUL
Attorney General of Wisconsin
/s/ Bradley J. Motl
BRADLEY J. MOTL
Assistant Attorney General
State Bar #1074743
SARAH C. GEERS
Assistant Attorney General
State Bar #1066948
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-0505 (Motl)
(608) 266-3067 (Geers)
(608) 267-2778 (Fax)
motlbj@doj.state.wi.us
geerssc@doj.state.wi.us

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and a copy thereof was served via the CM/ECF system upon all counsel of record.

/s/ William J. Jackson
William J. Jackson
Tex. Bar No. 784325
KELLEY DRYE & WARREN LLP
515 Post Oak Blvd. Suite 900
Houston, Texas 77027
Telephone: (713) 355-5000
Facsimile: (713) 355-5001
BJackson@KelleyDrye.com