

At an IAS Term of the Supreme Court of the State of New York, held in and for the County of Rensselaer, in the City of Troy, New York on the 9th day of August 2019

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

**JAY BURDICK, CONNIE PLOUFFE, EDWARD PLOUFFE,
FRANK SEYMOUR, SUZANNE SEYMOUR, AND EMILY MARPE,
as parent and natural guardian of E.B., an infant, and
G.Y., and infant, JACQUELINE MONETTE, WILLIAM SHARPE,
EDWARD PERROTTI-SOUSIS, MARK DENUÉ, and
MEGAN DUNN, individually, and on behalf of all similarly situated,**

Plaintiffs,

DECISION AND ORDER
Index No. 253835

- against -

TONOGA, INC. (d/b/a TACONIC),

Defendant.

APPEARANCES: FARACI LANGE, LLP
WEITZ & LUXENBERG, PC
Co-Lead Class Counsel

GREENBERG TRAURIG, LLP
HOLLINGSWORTH, LLP
Attorneys for the Defendant

McGRATH, PATRICK J., JSC

This case stems from the contamination of groundwater in the Town of Petersburg, New York with perfluorooctanoic acid (hereinafter "PFOA").

In the Second Amended Complaint, Plaintiffs allege that Defendant was responsible for this contamination, which came from its manufacturing facility operated in Petersburg. Taconic's primary business is the manufacture of Polytetrafluoroethylene (PTFE) coated products. PTFE is the

generic name for Teflon. Taconic purchased PTFE that contained PFOA for use as a raw material in manufacturing its products. PFOA is a water, oil and grease repellent used in carpeting, fabric and other products. The accumulation of PFOA, a man made chemical, in the body has been associated in the medical and scientific literature with increased incidence of cancerous and non-cancerous conditions in humans and animals. Plaintiffs allege that Taconic released PFOA into the environment via a vapor released from the facility's smokestacks, which condensed and coagulated into fine particulate matter, which was transported by wind and out into the air and into the soil. These particles also dissolved into rainwater percolating through the soil allowing PFOA to be transported to the groundwater, which caused contamination of the aquifer beneath the Taconic facility, and that PFOA released into the air settled into the ground, causing soil contamination. Plaintiff claims that discovery is likely to reveal other ways in which solutions containing PFOA were improperly discharged into the environment. The complaint alleges that in 2005, defendant installed a carbon filtration system on the wells at its plant, and sent a letter to the Department of Environmental Conservation stating that it had detected PFOA in groundwater. Because of this contamination, Plaintiffs claim that the drinking water became non-potable, causing loss of property value and other damages. Additionally, that the past consumption of contaminated water has caused PFOA to accumulate in Plaintiffs' blood serum and bodies.

Plaintiffs allege heightened blood concentration of PFOA, but no current manifestation of disease or symptoms related to PFOA exposure.

The complaint asserts causes of action sounding in negligence and strict liability related to property, negligence and strict liability related to PFOA ingestion, private nuisance and trespass. Plaintiffs also seek injunctive relief.

This Court has certified four (4) classes. Three of those classes allege harms related to property damage and nuisance stemming from contamination of class members' property and drinking water with PFOA. The fourth class seeks the establishment of a class-wide medical monitoring program to provide medical surveillance to class members exposed to PFOA via the municipal water supply or contaminated wells within a seven mile radius of defendant's facility.

Defendant now moves for summary judgement on all causes of action. Plaintiffs oppose the motion and defendant has submitted a Reply.

Procedural History

This Court has previously issued decisions denying defendant's pre-answer motion to dismiss (dated April 14, 2017), granting Class Certification (dated July 3, 2018) and denying the majority of defendant's five "Frye" motions (all dated November 15, 2019). The procedural history and factual background of the case is set forth in those Decisions, which are incorporated herein by reference, and will be repeated only where necessary. Additionally, both parties rely on expert affidavits and arguments submitted in connection with the aforementioned *Frye* motions. The Court provided a detailed recitation of the substance of those expert affidavits, respectively, in its

November 15, 2019 decisions, which will also only be repeated where necessary.

Standard on a Motion for Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Clare's Hosp., 82 NY2d 738, 739 (1993); Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. Winegrad v. New York Univ. Med. Ctr., *supra*; Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). In the context of a summary judgment motion, "[t]he totality of the evidence should be viewed in a light most favorable to the nonmoving party and [the Court] should accord it the benefit of every reasonable inference." Gadani v Dormitory Auth. of State of N.Y., 43 AD3d 1218, 1219 (3d Dept. 2007); *see also* Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 37 (2004); Czarnecki v Welch, 13 AD3d 952 (3d Dept 2004). Failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad v. NYU Med. Center, *supra*.

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact. CPLR 3212(b). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Co., 68 NY2d 714, 717(1986); Zuckerman v. City of New York, *supra*; Bombardier Capital v Reserve Capital Corp., 295 AD2d 793, 794 (3d Dept 2002). A party in opposition to a motion for summary judgment "must assemble and lay bare affirmative proof to establish that the matters alleged are real and capable of being established upon a trial." Izzo v. Lynn, 271 AD2d 801, 802 (3d Dept. 2000).

"Evidence, not speculation or supposition, is needed to demonstrate a triable issue." Vogel v Dunn, 276 AD2d 977, 979 (3d Dept 2000). Yet, in so doing, the Court need not "ferret out speculative issues to get the case to the jury." Andre v Pomeroy, 35 NY2d 361, 364 (1974). Nor may the Court assess credibility when conflicting versions are presented "unless it clearly appears that the issues are not genuine but feigned." Rifenburgh v Wilczek, 294 AD2d 653, 655 (3d Dept 2002) *quoting* Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 (1968).

Injunctive Relief

Plaintiffs seek the following injunctive relief:

"[A]n injunction to require preventative measures to limit the damage to class members'

health and property values, the cleanup and mitigation of harm to class members' homes and personal property to the extent possible, including remediation of the aquifer upon which plaintiffs and class members depend for their drinking water, and an order requiring Defendant Taconic to institute remedial measures sufficient to permanently prevent PFOA or PFOS from contaminating class members' drinking water and/or properties and requiring Defendant Taconic to fund a medical monitoring and surveillance program for all persons injured by PFOA/PFOS accumulation in their bodies. Plaintiffs seek injunctive relief for mitigation and remediation only to the extent such injunctive relief is not duplicative of or contrary to remediation and mitigation measures put in place by State and Federal regulatory agencies through Consent Orders or other means.”

Defendant argues that this cause of action should be dismissed pursuant to the doctrine of primary jurisdiction, which "enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, especially where the agency's specialized experience and technical expertise is involved." Sullivan v. Keyspan Corp., 2014 WL 4078634, at **67-68 (Sup. Ct. Suff. Cnty. Aug. 7, 2014), rev'd on other grounds Sullivan v. Keyspan Corp., 155 A.D.3d 804 (2d Dept. 2017); see also Massaro v Jaina Network Sys., Inc., 106 AD3d 701 (2d Dept. 2013). Defendant contends that state agencies such as the New York State Department of Environmental Conservation, the New York State Department of Health, and the Rensselaer County Department of Health are exercising their jurisdiction and technical expertise to investigate the area, determine what remedial measures are necessary, and conduct that remediation. Defendant also notes that plaintiffs offer no expert to testify that any additional remediation is necessary or that current efforts are inadequate.

In opposition, plaintiffs state that the second amended complaint does not seek any injunctive relief that is being provided by state or federal agencies. But even if the request for injunctive relief were not limited, plaintiffs argue that defendant's characterization of primary jurisdiction is overbroad. Plaintiffs cite In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig. ("MTBE I"), 175 F. Supp. 2d 593, 616 (SDNY 2001) and In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig. ("MTBE II"), 476 F. Supp. 2d 275, 276 (SDNY 2007), wherein the court analyzed the four-part test for application of primary jurisdiction under Second Circuit law in connection with a petroleum release and resulting contamination, and determined that application of the doctrine was inappropriate because plaintiffs were not seeking remediation of the spills themselves, but rather remediation of the contamination in their wells and other injunctive relief to protect against future MTBE intrusion of their wells. The Court held,

“[W]here there is ample room for injunctive relief beyond [the DEC's] efforts, a court need not defer to the administrative process. Here the DEC's remedial measures may not go far enough and there remains ample room for this Court's involvement. While the DEC plays a significant role in crafting an overall response to a petroleum release and the resulting contamination, the DEC's activities are largely focused on abatement and remediation of the spill source and surrounding areas-rather than remediation of plaintiffs' wells or protecting those wells from future contamination.” MTBE II, 475 F. Supp. 2d at 281-82 (citations

omitted).

Plaintiffs are willing to limit their claims for injunctive relief to those, like the plaintiffs' claims in the MTBE cases, that concern remediation of their private wells. Plaintiffs note that while the state is currently paying to maintain the granular activated carbon ("GAC") filters on those wells, there is no guarantee that the state will continue this upkeep into the future. PFOA contamination, in contrast, is not going away. If the state stops maintaining the GAC filters, it will fall to Plaintiffs to pick up the slack. Further, Plaintiffs plead for injunctive relief to fund a medical monitoring program. No state or federal agency is providing a medical monitoring program and there is no indication that a state or federal agency will do so.

As noted by the Court in MTBE II, *supra*,

"Under the doctrine of primary jurisdiction ... a court's deference to an agency guarantees that courts and agencies with concurrent jurisdiction over a matter do not work at cross-purposes. Courts apply this doctrine in the narrow scope of circumstances where enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* at 278 (internal citations and quotations omitted).

As there are no administrative agencies taking any action to administer or regulate a medical monitoring program, the doctrine is inapplicable. The Court also agrees that plaintiffs' private wells are not the focus of administrative abatement and remediation, which has thus far focused on the spill source and surrounding areas. If limited as outlined herein, the motion to dismiss this cause of action is denied.

Strict Liability

Defendant contends that Plaintiffs have not met their burden to prove that Taconic engaged in an abnormally dangerous activity. Relying on the affidavits and materials submitted in support of the motion to exclude Dr. Savitz, Defendant claims there is no evidence that any level of PFOA exposure poses any risk of harm, and that without such evidence of causation, plaintiffs' claims must fail. Defendant also notes that Plaintiffs' evidence supports only the contention that they have suffered asymptomatic harm from PFOA accumulation in their bodies, and that the Court of Appeals has rejected such asymptomatic injury claims as a basis for a cause of action for medical monitoring damages. See Caronia v. Phillip Morris USA, Inc., 22 NY3d 439 (2013). Even if the law supported the position that mere accumulation of PFOA in the blood is a physical injury resulting from exposure, defendant argues that there is no support for the conclusion that persons are injured if they have a PFOA blood level at or above 1.86 µg/L.

Relying on the affidavits and materials submitted in support of the motion to exclude Dr. Zabel, defendant claims that there is no evidence that plaintiffs' property values have decreased because of any alleged PFOA on their property. Additionally, that the levels of contaminants on

many plaintiffs' properties are below state and federal advisories and there are no relevant maximum contaminant level (MCL) for PFOA.

Defendant also argues that its use of PTFE with trace amounts of PFOA was common in the coating industry and that its use and disposal of PTFE/PFOA was not inappropriate to the place where it occurred. Specifically, that Taconic is located in a rural location, away from densely populated areas, and that placing a manufacturing facility in such a location is "entirely appropriate." Further, that there were at least three manufacturers using PTFE near Taconic, including the Warren Wire Co. in Pownal, Vermont, the St. Gobain Facility in Hoosick Falls, New York, and the former Chem Fab/St. Gobain facility in Bennington, Vermont. Defendant provides the affidavit of Karen Toth, Environmental Manager at Taconic, to establish that at all times, Taconic acted in accordance with government regulations and permits and industry guidance regarding the handling and disposal of PFOA-containing materials.

Defendant also provides the affidavit of Dr. Stanley Feenstra, its expert in hydrogeology, who opines that the actions taken by Taconic up to 2006 in response to the detection of PFOA in its on-site and off-site wells were in accordance with the standard of care at the time given: the low concentrations of PFOA in the wells of its off-site properties; the GAC treatment systems added to its water supplies; the decline in concentrations observed in its on-site production wells; and, still developing knowledge regarding PFOA in groundwater and concentration levels of regulatory concern.

Dr. Feenstra opines that the actions taken by Taconic since 2006 were timely, appropriate and effective given the concentrations of PFOA in those off-site wells since 2016, and the Lifetime Health Advisory issued by the EPA in May 2016. Further, that the actions taken by Taconic related to PFOA over time were consistent with the historical knowledge and standard practice for disposal of these materials, and the historical development of knowledge related to groundwater contamination by these materials and other chemical materials.

Finally, defendant argues that its value outweighs plaintiffs' speculative harms. Specifically, that Taconic is a significant employer in Petersburg and its surrounding counties, employing over 230 people in Petersburg, a town with a population of approximately 1500. Further, that Taconic produces valuable products that are used in food processing, packaging, the aerospace industry, the automotive industry, PVC welding, lamination, screen printing, textile drying/curing, and communications systems.

Plaintiffs argue that the question of whether an activity is ultrahazardous should be left to the fact-finder, and is not a question of law for the courts. In the alternative, that Taconic's "decades-long use of the carcinogenic, man-made chemical APFO in close proximity to residential housing constitutes an ultrahazardous activity."

Plaintiffs contend that the evidence in the record is more than sufficient, especially when viewed in the light most favorable to Plaintiffs, that coating fiberglass fabric in close proximity to

a number of residential homes and a public water system posed a high degree of risk of harm to land and people.

Dr. Savitz, plaintiffs' epidemiology expert, has expressed to a reasonable degree of scientific certainty that there is a probable causal link between PFOA exposure and six human diseases and conditions: kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, hypercholesterolemia and pregnancy induced hypertension (preeclampsia).

Dr. Cheremisinoff, plaintiffs' standard of care expert, has provided a critical assessment of the air pollution and waste stream pollution management practices of the defendant. He opines that when Taconic used PTFE dispersions containing APFO, it knew or should have known that once this ingredient is released to the environment it does not biodegrade, based on the chemical suppliers' Material Safety Data Sheets (MSDS) released as early as 1989, which report that the products they sold were toxic and "required special handling." Dr. Cheremisinoff opines that Taconic failed to effectively clean the air stream which left its stacks, and that defendant should have used "[a] more efficient pollution control", such as a "venturi scrubber" or an even better control such as an RTO or combination of both. Dr. Cheremisinoff provides a list of other actions Taconic could have taken to reduce emissions, including the performance of a Pollution Prevention audit to determine points of releases of fugitive emissions, and then eliminate these either through source reduction or replacing its processing aids with less toxic materials; conduct a review of the adequacy of its in-house training programs and strengthen these to ensure that its operators were adequately trained to control oven temperatures and to accurately monitor stack opacity; assign engineers the tasks of assessing whether it had adequate oven controls that could maintain precise operating temperatures over narrow operating ranges and whether its thermocouple sensors were accurate and reliable as well as placed these on a preventive maintenance program to ensure that they did not fail; and perform a Pollution Prevention assessment focusing on waste minimization which not only more likely than not have helped to reduce fugitive air emissions, but improved wastewater management practices.

In terms of wastewater, Dr. Cheremisinoff states that prior to the time that Taconic installed an evaporator, all of the wastewater was released into the septic system and leach fields into the groundwater and outfalls. He states that even after this evaporator unit was installed, groundwater was able to seep into the underground storage holding the wastewater prior to its being pumped in the evaporator, meaning wastewater was also seeping out into the ground. By 2000, the evaporator was no longer being used and wastewater was being stored on site in aboveground storage tanks and then sent off site for disposal. Dr. Cheremisinoff states that defendant did not carefully consider open pathways of exposure to drinking water sources, despite the fact that its MSDS state that the preferred options for disposal are to separate solids from liquid by precipitation and decanting or filtering and then disposing of dry solids in a landfill that is permitted, licensed or registered by a state to manage industrial solid waste and/or to discharge liquid filtrate to a wastewater treatment system, and/or to incinerate.

Certain activities, due to their abnormally dangerous nature, give rise to strict liability. *See*

Doundoulakis v Town of Hempstead, 42 NY2d 440, 448 (1977); Searle v Suburban Propane Div. of Quantum Chem. Corp., 263 AD2d 335, 339 (3d Dept. 2000); Mikula v Duliba, 94 AD2d 503, 507 (4th Dept. 1983). Whether something is an ultrahazardous activity is determined by the consideration of a number of factors suggested by in the Restatement of Torts Second § 520 including: (a) existence of a high degree of risk of harm to the person, land or chattels of others (b) likelihood that the harm that will result from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) the extent to which its value to the community is outweighed by its attributes. Doundoulakis v. Town of Hempstead, *supra*; Searle v. Suburban Propane Div. of Quantum Chemical Corp., 263 AD2d 335, 339-40 (3d Dept. 2000); Hilltop Nyack Corp. v. TRMI Holdings, Inc., 264 AD2d 503, 505 (2d Dept. 1999).

The determination of whether an activity is abnormally dangerous is one for the court to make and involves the consideration of all of the above cited factors, none of which is dispositive. Mayore Estates, LLC v. Port Auth. of NY and N.J., 2003 U.S. Dist. LEXIS 17013 (SDNY 2007); Doundoulakis v Town of Hempstead, *supra*, at 448; Restatement (Second) of Torts § 520.

Notably, where the evidence supports a finding that the dangers associated with the activity in question can be eliminated or diminished with the exercise of reasonable care, dismissal is appropriate, since an activity which can be safely performed generally will not be deemed to be ultrahazardous. DeFoe Corp. v. Semi-Alloys, Inc., 156 AD2d 634 (2d Dept. 1989); *see generally* National R.R. Passenger Corp. v. New York City Housing Authority, 819 F. Supp. 1271, 1279 (SDNY 1993).

Viewing the evidence in a light most favorable to the plaintiffs and according them the benefit of every reasonable inference, the first two factors are satisfied. Plaintiffs have alleged that the contaminants discharged by defendant have been linked to cancers, pregnancy related conditions and other health issues. The fifth factor is arguably met here as well. Defendant's smoke stacks and coating activities emitted PFOA into the air and water supply of a residential community in close proximity to defendant's facility. With respect to the sixth factor concerning, the value of the jobs and products created by the defendant would not necessarily outweigh the health risks associated with exposure to PFOA, as alleged by plaintiffs' experts.

However, the third factor—"inability to eliminate the risk by exercise of reasonable care"—is not satisfied here. The aforementioned test does not require that the danger be eliminated. Restatement § 520, comment "h" states as follows:

"[m]ost ordinary activities can be made entirely safe by the taking of all reasonable precautions [T]here is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place where it is carried on It is not necessary, for the factor stated in Clause (c) to apply, that the risk be one that no conceivable precautions or care could eliminate. What is referred to here is the unavoidable risk remaining in the activity, even though the actor has taken all reasonable precautions in advance and has exercised all reasonable

care in his operation, so that he is not negligent. The utility of his conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.”

In this case, Dr. Cheremisinoff’s affidavit establishes that the dangers presented by defendant’s coating methods could have been significantly diminished if more care and better safety procedures had been exercised. Having weighed each of these factors, the Court concludes, upon this record, that the defendant’s use of APFO in close proximity to residential housing does not itself constitute an abnormally dangerous activity, and therefore, this cause of action is dismissed.

Negligence

Under long-established principles of common law, a plaintiff asserting a negligence claim under New York law must allege “(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” Lerner v. Fleet Bank, N.A., 459 F.3d 273, 286 (2d Cir. 2006) (internal quotation marks omitted). In general, the “duty” in question is a duty to exercise reasonable care; in other words, to avoid acting in a way that will give rise to a foreseeable, but avoidable, risk of harm to others. See Korean Air Lines Co. v. McLean, 118 F.Supp.3d 471, 486 (EDNY 2015).

Defendant contends that it did not owe a duty of care not to discharge or emit waste water with trace amounts of PFOA. Defendant notes that at all times, its waste water disposal was in compliance with all regulations and permits, as well as all industry standards and guidance. Further, that plaintiff has failed to establish that class members had a reasonable expectation that any care was owed. Finally, that a duty of care should not be imposed on defendant concerning materials that were not known or even suspected of being hazardous.

In 532 Madison Avenue Gourmet Foods, Inc. v. Findlandia Center, Inc., 96 NY2d 280, 290 (2001) the Court of Appeals explained that “[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them,” but concluded that the expansion of this duty to protect additional shopkeepers who lost profits due to road closures—shopkeepers whose properties were not themselves reached by the collapse—would unreasonably expand the scope of negligence. Id. at 750 N.E.2d at 1102-03. The Court further described how to assess a tortfeasor’s duty:

“The existence and scope of a tortfeasor’s duty is, of course, a legal question for the courts, which fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.”

Id. at 288, quoting Hamilton v. Beretta U.S.A. Corp., 96 NY2d 222 (2001). Such a duty “do[es] not rise from mere foreseeability of the harm,” (Hamilton v. Beretta U.S.A. Corp., *supra* at 235, citing Pulka v. Edelman, 40 NY2d 781 (1976)), but instead comes from an analysis “of the wrongfulness

of a defendant's action or inaction" combined with "an examination of an injured person's reasonable expectation of the care owed." Palka v. Servicemaster Mgmt. Servs. Corp., 83 NY2d 579 (1994), citing Turcotte v. Fell, 68 NY2d 432 (1986)). "At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss." 532 Madison, *supra* at 289.

In Baker v. Saint-Gobain Performance Plastics Corp., 232 F. Supp. 3d 233 (NDNY 2017), a case that also involves PFOA contamination in Hoosick Falls, the Court concluded in that "this policy determination must include a duty not to pollute a plaintiff's drinking water. Society has a reasonable expectation that manufacturers avoid contaminating the surrounding environment, an expectation that extends to the pollution of an area's water supply." *Id.* at 245 (collecting cases). "It is sensible public policy to require that manufacturers avoid polluting the drinking water of the surrounding community, and nothing in 532 Madison prevents a person whose water supply was contaminated by such conduct from recovering in tort, even if she seeks economic damages." *Id.* at 245-46.

The Court agrees with plaintiffs that the Court of Appeals has made clear that "[a] landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them." 532 Madison Avenue Gourmet Foods, Inc. v. Findlandia Center, Inc., 96 NY2d 280, 290 (2001). Several other New York cases have held that contamination of drinking water by the activities on a neighboring property is actionable, recognizing the duty restated in 532 Madison. See Murphy v. Both, 84 AD3d 761, 761-63 (2d Dept. 2011) (defendant may be liable in negligence where he causes chemicals to leak into groundwater that migrate onto plaintiffs' property and contaminate their drinking water); *see also* In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 119 (2d Cir. 2013); Ivory v. International Business Machines, 116 AD3d 121, 130 (3d Dept. 2014); Fetter v. DeCamp, 195 AD2d 771, 772-73 (3d Dept. 1993) (defendant may be liable in negligence where improperly functioning septic system caused fecal contamination to migrate into neighboring properties' drinking water); Flick v. Town of Steuben, 199 AD2d 970, 970 (4th Dept. 1993) (defendant may be liable in negligence when improperly stored salt allowed to dissolve in soil and migrate to neighbor's drinking water). This Court has also recognized that defendant had a duty to refrain from contaminating neighboring properties when it denied Taconic's motion to dismiss.

Additionally, plaintiffs have provided evidence from which a jury could reasonably conclude that Defendant knew or should have known about PFOA's potential risks but failed to take reasonable precautions to prevent injury to Plaintiffs. As alleged in the Cheremisinoff Affidavit, Defendant's MSDS informed it that PTFE dispersions contained a toxic chemical (APFO) that should not be discharged to the environment. Further, that at least by 1997, Defendant knew that APFO contained in PTFE dispersions was a toxic substance and that emissions of such chemical "should be controlled as low as possible." Plaintiff has provided proof that defendant was advised numerous times in 2002 of concerns about APFO escaping into the environment through air emissions by suppliers of the PTFE dispersions it utilized, including DuPont and ICI, and was offered assistance by these suppliers in conducting testing and utilizing technology to control the APFO emissions. By 2003, plaintiff alleges that defendant became aware of the drinking water contamination with PFOA that had occurred as a result of air emissions of APFO from DuPont's

Washington Works plant. Defendant declined an invitation to join an effort to quantify the amount of APFO being emitted by PTFE processors performing similar manufacturing operations. Dr. Shin's affidavit alleges that defendant subsequently received the report of this study, showing a large percentage of the APFO (9-54%) contained in the PTFE dispersions was being released to the atmosphere and still failed to take any actions to test its emissions, reduce its emissions, implement best available control technology, or notify the community of the tons of APFO that had been released from the facility since the 1960s. Therefore, the Court finds that questions of fact exist concerning the extent of defendant's knowledge, and whether it adequately addressed those concerns, which in turn, raises factual issues concerning whether defendant breached its duty of care.

Defendant also contends that plaintiffs have failed to prove that they suffered any cognizable injury, arguing that the Court of Appeals has rejected asymptomatic injury claims as a basis for a cause of action for medical monitoring damages. *See generally Caronia*, 22 NY3d 439. Defendant next argues that even if the law supported the position that mere accumulation of PFOA in the blood is a physical injury resulting from exposure, it cannot support a finding of physical injury for all persons having a blood level above 1.86 µg/L.

This Court previously addressed these arguments in its decision denying defendant's motion to dismiss, finding that "*Caronia* did not upend the definition of injury espoused by *Abusio* and seemingly championed in its own text... Instead, the *Caronia* court quoted *Abusio's* language that accumulation coupled with a rational fear of contracting disease was an injury sufficient to receive medical monitoring damages, and noted the Appellate Divisions' use of 'the test enunciated in *Abusio*' as further support for its decision... Thus, while *Caronia* does not expressly define physical injury, its adoption of *Abusio's* reasoning strongly indicates that this definition at least includes the accumulation-based injury described in that case." *Baker v. Saint-Gobain Performance Plastics Corp.*, 232 F. Supp. 3d 233 (NDNY 2017). This Court made similar rulings in its decision granting class certification.

Next, defendant contend that plaintiffs have failed to prove any decrease in value of their properties due to PFOA. Plaintiffs' expert Jeffrey Zabel, Ph.D. has provided an opinion that property values in the contaminated area have decreased by 20% based upon his hedonic valuation analysis. The Court finds that plaintiff has raised questions of fact that must be resolved by a jury on this issue.

Next, defendant notes that this Court has recognized plaintiffs' negligence claims based on property damage are also based on the contamination of their drinking water, and the loss of a potable water supply, but argues that plaintiffs have failed to establish that they have in fact suffered a loss of potable water. Defendant argues that plaintiffs have offered no expert opinion to support any claim for remediation of their water supplies and that remediation efforts are already underway. Defendants note that the Town Water system has been installed and cleared for use, and POETs for qualified private wells have been installed and are undergoing continuous maintenance. Additionally, the Taconic site remediation is currently underway. Defendants contend there is no evidence of any economic losses due to property damage and that plaintiffs' property damage claims should be dismissed.

It is undisputed that plaintiffs were deprived of potable water for a definitive period of time until filtrations systems were provided and that they are now reliant on mitigation systems that are not effective if power is lost or if they malfunction. Moreover, Dr. Shin has opined PFOA is present in the soil of the property damage class members' properties, and Dr. Siegel has opined that this PFOA will remain "for the foreseeable future." The Court finds that questions of fact therefore remain as to the economic losses due to property damage.

Next, defendant argues that the bodily invasion class includes many current or former Taconic employees who assert claims based on their exposures to PFOA within the workplace. Specifically, any person who worked or currently works at Taconic, has a PFOA blood level about 1.86 µg/L, and was exposed to water while onsite at the facility are current class members. In this case, the class definition for the PFOA Invasion Injury Class requires two things: (1) a blood PFOA level at or above 1.86 ug/L, and (2) proof that the person consumed water from a source contaminated with PFOA within seven miles of the Taconic facility. The class definition requires both consumption of water contaminated with PFOA from a residence within the class zone and an elevated PFOA blood level. Even if a class member was a current or former employee of Taconic employed before 2003, the consumption of contaminated water in his or her home is not "within the scope of their employment" and thus, would not prohibit them from pursuing a civil claim against defendant based upon this exposure. Additionally, neither the affidavit of Ms. Ramasco nor any other information provided by Defendant allows the Court to assess whether the people employed by Taconic that reside in Petersburg meet the two class requirements. Essentially, defendant is asking for summary judgment on an affirmative defense against unknown individuals who are not, and may never be, before the Court. The Court finds that defendant has failed to meet its threshold burden on this issue.

Trespass

Defendant argues that plaintiffs have not proffered admissible or reliable evidence that Taconic intended any PFOA to intrude on their property or that Taconic had any reason to know that any PFOA would migrate from its facility to their land. Further, that plaintiffs have failed to provide the requisite evidence to support their claims of harm to their drinking water and property values. These legal arguments have already been rejected by this Court in its April 14, 2017 decision denying defendant's motion to dismiss. As noted in that decision,

"In Phillips v. Sun Oil Co., 307 NY 328, 331 (1954), the Court of Appeals held that 'while the trespasser, to be liable, *need not intend or expect the damaging consequence of his intrusion*, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness...To constitute such a trespass, the act done must be such as 'will to a substantial certainty result in the entry of the foreign matter' (Restatement, Torts, supra, § 158, comment h). Further, that '[t]he application of the above-stated rule, in the few pertinent New York cases, to damage claims arising from the underground movements of noxious fluids, produces this conclusion: that, even when the polluting material has been deliberately put onto, or into, defendant's land, he is not liable for his neighbor's damage therefrom, unless he (defendant) had good reason to know or

expect that subterranean and other conditions were such that there would be passage from defendant's to plaintiff's land.'" (Emphasis supplied).

The Court also finds that plaintiffs have raised issues of fact concerning the "harmfulness" of the PFOA contaminated water through their experts Alan Ducatman, M.D. and David Savitz, Ph.D., who both describe the toxicity of PFOA and the harms and risks it engenders, including carcinogenicity. These experts have stated that these dangers are well documented in the scientific literature and have been recognized by the U.S. EPA and multiple state governments including Vermont, New York and New Jersey (which have set "maximum contaminant levels" well below the concentrations found in the Petersburg Public Water System and private wells of class members), as well as suppliers of the PTFE dispersions used by Taconic.

With respect to property values, the requisite harm in a trespass claim is an interference with the plaintiff's "right to possession of real property." In re Methyl Tertiary Butyl Ether (MTBE) Prods Liab. Litig., 725 F. 3d 65, 119 (2d Cir. 2013). Permitting toxic or noxious contaminants to enter another's property constitutes such interference. Scribner v. Summers, 84 F.3d 554, 557-58 (2d Cir. 1996); *see also* Fitzgibbon v. City of Oswego, 2011 U.S. Dist. LEXIS 143772 (NDNY 2011). In this case, the Shin, Cheremisinoff, and Siegel affidavits allege that class members' property, including their soil, their wells and household fixtures receiving PFOA-containing groundwater have been invaded by contaminants negligently released by Taconic.

Next, defendant argues that plaintiffs fail to offer any evidence to support their assertion that all PFOA present in plaintiffs' bodies or in their wells is attributable to Taconic, however, no such showing is necessary. Under New York law, there can be more than one proximate cause of an injury and multiple parties can be held jointly liable based upon their contributions to the injury. *See* Argentina v. Emery World Wide Delivery Corp., 93 NY2d 554, 560 n.2 (1999) *citing* Foote v. Albany, 279 NY 416, 422 (1939). Thus, there is no requirement that Plaintiffs must prove that all of the contamination on their properties and in their drinking water came from Taconic. Moreover, the affidavits of Hyeong-Moo Shin, Ph.D. and Donald I. Siegel, Ph.D. allege, based upon the testing data and other evidence, that Taconic is the source of all of the contamination in the class area. As noted by the plaintiffs, defendant's expert Stephen Washburn only opined that there are "other" sources that "would have the potential to impact surface water and groundwater quality within the Little Hoosick [sic] Valley including areas within a 7-mile radius of the Taconic Facility," but he did not state that any of these other potential sources actually contributed to the contamination found. Nor did he exclude Taconic as a source of the contamination.

It is also undisputed that Taconic entered into a Consent Order with the New York State Department of Environmental Conservation that requires it to install and maintain filtrations systems for both the Petersburg municipal supply wells as well as all of the private wells that are contaminated with PFOA in the class area. No other entity has been identified by the State as a source of the contamination other than Taconic. Accordingly, defendant has failed to raise a question of fact as to the source of the contamination.

Causation

Defendant argues that plaintiffs' medical monitoring case cannot survive because plaintiffs offer no admissible or reliable evidence to support the conclusion that PFOA is a disease-causing agent or that there is more than a 50% chance that plaintiffs' PFOA exposure will result in disease. Defendant again argues that there is no proof of actual injury, and therefore, medical monitoring is not warranted. Defendant contends that the mere presence of PFOA in the blood at or above 1.86 µg/L is not evidence of a cognizable injury, and that plaintiffs' proffered expert testimony on the epidemiology of PFOA is both inadmissible and insufficient to support any conclusion that PFOA causes disease. Defendant contends that there is no evidence that it is generally accepted in the medical and scientific community that PFOA is a disease-causing agent in humans. Rather, as plaintiffs admit, PFOA has only been "associated in the medical and scientific literature with increased incidence of cancerous and non-cancerous conditions in humans and animals," but that association is not causation.

Defendant argues that plaintiffs fail to proffer evidence that there is a "greater than 50% chance" that medical expenses will be incurred by plaintiffs due to plaintiffs' exposure to PFOA. Defendant contends that none of Plaintiffs' experts offer any scientifically reliable evidence that PFOA in the blood at or above 1.86 µg/L makes for a greater than 50% chance that the individual will develop kidney or testicular cancer, pregnancy complications, thyroid disease, liver disease, hyperlipidemia, uric acid abnormalities, higher risk of gout, or ulcerative colitis. Absent such evidence, defendant argues that plaintiffs fall far short of meeting the "rational basis" test.

In denying defendant's motion to preclude Dr. Savitz's testimony, this Court held as follows:

"[P]laintiffs are seeking medical monitoring as consequential damages to their ordinary negligence and property damage claims. Therefore, this Court's analysis shifts ... to Caronia v Philip Morris USA, Inc., 22 NY3d 439, 446 (2013), Abusio v Consolidated Edison Co. of N.Y., 238 AD2d 454, 454-55 (2d Dept 1997) and Askey v Occidental Chem. Corp., 102 AD2d 130, 135 (4th Dept. 1984), all of which concerned consequential rather than direct damages. In *Caronia*, the Court of Appeals determined that New York does not recognize an independent cause of action for medical monitoring and reaffirmed well established law that '[a] threat of future harm is insufficient to impose liability against a defendant in a tort context' and that 'the requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system.' Caronia v Philip Morris USA, Inc., *surpa* at 446. This Court has previously determined that the plaintiffs here have alleged the requisite injury via the accumulation of PFOA in their blood. However, the *Caronia* Court also recognized that there 'is a basis in law to sustain a claim for medical monitoring as an element of consequential damage.' Caronia v Philip Morris USA, Inc., *supra* at 447, quoting Askey v Occidental Chem. Corp., 102 AD2d 130, 135 (4th Dept. 1984). The *Askey* court concluded that the plaintiffs could recover 'reasonably anticipated consequential damages,' including medical monitoring, so long as the plaintiffs could 'establish with a reasonable degree of medical certainty that such expenditures [were] 'reasonably anticipated to be incurred by reason of their exposure.' Caronia v Philip Morris USA, Inc., *supra*, citing Askey, *supra* at 137. On the other hand, '[c]onsequences which are

contingent, speculative, or merely possible are not properly considered in ascertaining damages.' *Askey, supra* at 136-37.

In this case, Dr. Savitz's affirmation indicates a clear dose response gradient that increases with PFOA exposure with respect to thyroid disease, ulcerative colitis, and kidney cancer. He found an increase in the risk of testicular cancer and high levels of uric acid and ALT across the quartiles of exposure. With respect to hypercholesterolemia, Dr. Savitz finds a dose-response gradient with a rapid increase in total cholesterol in the lower range of PFOA exposure. *With respect to these specific diseases and conditions, the Court finds that Dr. Savitz has established that damages are reasonably anticipated to flow from the invasion of the body by PFOA at or above background.*" (Emphasis supplied).

The Court finds no basis to alter its prior decision on this issue. In the context of the present motion, the Court finds that plaintiffs have raised questions of fact sufficient to deny defendant's motion.

Nuisance

Defendant notes that the elements of a private nuisance claim in New York are: (1) an interference that is substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. *Taggart v. Costabile*, 131 AD3d 243, 247 (2d Dept. 2015); *Zizzo v. Port Auth. of N.Y. & N.J.*, 31 Misc. 3d 1243(A), 2011 WL 2447995, at *3 (Sup. Ct. Queens Cnty. June 17, 2011), quoting *Aristedes v. Foster*, 73 AD3d 1105, 1106 (2d Dept. 2010). Defendant argues that plaintiffs' proof cannot support any of these elements,

Defendant contends that plaintiffs provide no reliable or admissible evidence that Taconic intended to cause an intrusion or interference with plaintiffs' properties. Further, that at all times, Taconic acted in accordance with government regulations and permits and industry guidance. Taconic notes that it stopped the permitted onsite disposal of waste water in 1999, long before: (1) the state of knowledge regarding PFOA-related groundwater contamination was such that Taconic would have known of the potential migration to plaintiffs' properties; and (2) PFOA was known as even a potential contaminant. Taconic argues that it had no reason to know or suspect that there could be any emission of PFOA via air. Taconic tested its environmental control devices in 1997 and again in 2016 for PFOA emissions and both sets of tests confirmed PFOA was non-detect. Defendant argues that there were at least three other facilities in the relevant geographic zone that used PFOA-containing materials, and that plaintiffs fail to provide any evidence that the PFOA in plaintiffs' blood or on their properties emanated from Taconic.

The Court finds that Dr. Cheremisinoff's affidavit raises questions of fact as to each element of the Nuisance cause of action. Additionally, as noted *supra*, the affidavits of Hyeong-Moo Shin, Ph.D. and Donald I. Siegel, Ph.D. allege that, based upon the testing data and other evidence, that Taconic is the source of all of the contamination in the class area. Defendant's expert Stephen Washburn only opined that there are "other" sources that "would have the potential to impact surface water and groundwater quality within the Little Hoosick [sic] Valley including areas within a 7-mile

radius of the Taconic Facility," but he did not state that any of these other potential sources actually contributed to the contamination found. Nor did he exclude Taconic as a source of the contamination.

Punitive Damages

Defendant argues that plaintiffs have failed to prove that Taconic's use and disposal of PFOA-containing materials were close to criminality or actuated by evil and reprehensible motives, such that an award of punitive damages is appropriate.

Plaintiffs respond that they have proffered evidence that for decades, Taconic chose to ignore its APFO emissions even when it was being warned not to do so by the DEC and by other chemical suppliers. It discharged liquid APFO waste into the ground around its facilities even though its MSDS advised it not to do so. When it learned that it had likely contaminated the Petersburg community in 2005 with PFOA, it did nothing. As a result of that inaction, the people of Petersburg were exposed to a cancer-causing chemical for at least 11 unnecessary years.

The purpose of punitive damages is to punish the defendant for wanton, reckless or malicious acts and discourage them and other companies from acting that way in the future. Ross v. Louise Wise Servs., Inc., 8 NY3d 478 (2007).

In this case, plaintiffs' submissions establish that Taconic tested its waste streams in September 2004. The results showed that APFO was present in Taconic's wastewater at levels of 88.8 ug/mL. This discovery, in turn, prompted Taconic to begin testing groundwater beneath its facility. In November 2004, Taconic took samples from its on-site production wells and sent them for testing to Exygen, the laboratory recommended by DuPont. These wells, which were estimated to be 300 feet deep, contained PFOA levels of 117 ng/mL (117,000 parts per trillion), 152 ng/mL (152,000 parts per trillion), and 2.3 ng/mL (2,300 parts per trillion).

In January 2005, Taconic sent more samples to Exygen for testing. Two samples were taken from the taps at residences owned by Taconic and that were adjacent to Taconic's property. Each residence obtained drinking water from private wells located on its property. These residences, at 147 Coon Brook Road and 6 Russell Road, were leased to Taconic employees. The tap water at 147 Coon Brook Road contained 4.2 ng/mL (4,200 parts per trillion) and the tap water at 6 Russell Road contained 2.28 ng/mL (2,280 parts per trillion). Taconic also sampled water from a surface pond located onsite, which contained 0.562 ng/mL (562 parts per trillion).

Plaintiffs allege that at this point, Taconic understood the groundwater beneath its facility was contaminated with PFOA, surface water on its property was contaminated, and that PFOA contamination had spread offsite to nearby residences. Taconic also learned in 2005 that the EPA Science Advisory Board labeled PFOA a "likely carcinogen." The EPA's draft Risk Assessment on the potential effects of PFOA also indicated that PFOA exposure posed a potential risk of developmental and other adverse effects, including immune deficiencies and increases in cholesterol levels. Shortly after publication of the risk assessment, DuPont agreed to fund a comprehensive

biomonitoring study of the communities adjacent to the Washington Works facility whose drinking water was contaminated with PFOA.

On July 7, 2005, Taconic created a "PFOA Summary and Assessment," which set forth its own "risk assessment" regarding PFOA exposure. The memo provided an overview of measures Taconic had taken to date to improve employee personal protective equipment; to answer customer inquiries "about the safety issues associated with PFOA and PTFE"; and its efforts to stay abreast of industry knowledge by maintaining contacts with the FPG. The document also identified "Potential Interested Parties," including Taconic's suppliers, employees, customers, the general public, and media. Despite acknowledging that the general public would wish to know what Taconic was finding in the groundwater in and around its site, no one at Taconic took any steps to share PFOA-related information with the greater community at this time.

In August 2005, more samples were sent to Exygen. Taconic sent four samples from shallow monitoring wells that were constructed as part of the 2000 consent order with DEC; one from a reservoir, and three samples from three additional residences owned by Taconic at 46, 66, and 85 Coon Brook Road. Taconic also took a sample from a campground that Taconic owned across Route 22 and from the effluent of one of its Fume Eliminators. Results from the shallow monitoring wells ranged from 8,820 ng/mL (8,820,000 parts per trillion) to 15.6 ng/mL (15,600 parts per trillion). The reservoir sample tested at 0.594 ng/mL (594 parts per trillion) and the campground contained 0.691 ng/mL (691 parts per trillion). The tap at 85 Coon Brook Road contained 0.349 ng/mL (349 parts per trillion), while the other two residences were non-detect. Effluent from the Fume Eliminator contained 172,000,000 ng/mL of PFOA. Taconic also sent a soil sample for testing, which showed that the soil on site contained 4.71 ng/g of PFOA (4.71 parts per billion). Plaintiff alleges that at this point, it was clear that the surface, subsurface, and deeper wells on Taconic's site were contaminated with PFOA and that PFOA had contaminated the drinking water wells of at least some nearby residences.

Taconic informed the individuals living in the leased properties on Coon Brook Road and Russell Road that PFOA was found in their drinking water, but did not share the actual test results or any of the information Taconic learned through its association with the FPG. Andy Kawczak, defendant's environmental manager, told one resident, Suzanne Seymour - who was also a Taconic employee - that she did not need to worry about the contamination because she was "an old hen." Kawczak intimated that PFOA only affected women young enough to have children, but he did not share any of the other information Taconic's management had accrued regarding potential health risks.

Kawczak created a number of maps depicting not only the Taconic properties, but residences in the vicinity of the Taconic property, and placed question marks next to several of the properties near the facility, indicating that he was not sure the extent of PFOA contamination at these residences. Kawczak testified that he created these maps to try and visually capture the PFOA air emissions coming from the plant. No one from Taconic informed the residents at the nearby properties identified by Kawczak's maps to test their wells to determine the extent of the PFOA contamination. As Kawczak explained, there was no discussion among management whether to test

these properties because Taconic CEO Andy Russell would not approve payment for testing if that testing was not required by law.

The Court finds that there are issues of fact as to whether defendant knew the potential health affects of PFOA, and that it had contaminated the wells and soil of some of its employees and tenants, but failed to take any steps to share PFOA-related information with the greater community. To the extent that plaintiffs argue that defendant placed profits and reputation above the health and safety of the surrounding community, the issue of punitive damages should be determined by the jury after submission of all evidence.

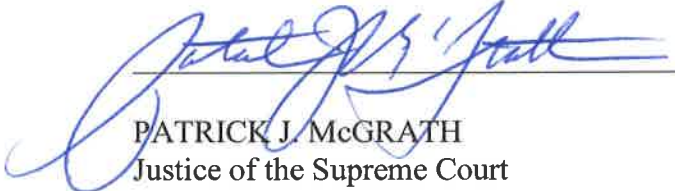
Therefore, in accordance with the foregoing, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing the plaintiff's Strict Liability claims is **GRANTED**; and it is further

ORDERED that the balance of defendant's motion for summary judgment is **DENIED**.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to Weitz & Luxenberg, P.C., co-lead counsel for the plaintiff. All original supporting documentation is being forwarded to the Rensselaer County Clerk's Office for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: January 24, 2020
Troy, New York



PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. Notice of Motion; Affidavit, Ann Marie Duffy, Esq., with annexed Exhibits 1-65; Affidavit, Joseph Rodricks, with annexed Exhibits; Affidavit, Stanley Feenstra; Affidavit, Paul Wm. Hare, dated March 29, 2018, with annexed Exhibits; Affidavit, Dawn Ramasco, dated March 27, 2018; Affidavit, Karen Toth; Affidavit, Larry Carroll, with annexed Exhibits A-K; Taconic's Memorandum of Law in Support of Motion for Summary Judgment.
2. Attorney's Affidavit, James J. Bilsborrow, with annexed Exhibits 1-65; Affidavit, Hyeong-Moo Shin; Affidavit, Donald I. Siegel; Affidavit, David A. Savitz; Affidavit, Alan Ducatman; Affidavit, Nicholas P. Cheremisinoff; Affidavit, Jeffrey E. Zabel; Plaintiff's Memorandum of Law in Opposition to Taconic's Motion for Summary Judgment.
3. Attorney's Affidavit of Jessica Kaplan in Reply to Taconic's Motion for Summary Judgment, with annexed Exhibits 1-4; Taconic's Reply in Support of its Motion for Summary Judgment.
4. Plaintiffs' Sur-Reply in Opposition to Defendant's Motion for Summary Judgment and Motions to Exclude Plaintiffs' Experts, with annexed Exhibit.