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

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG **This Document relates to:** • **Donnelly v. 3M, et al., 20-cv-209** • **Speers v. 3M, et al., 21-cv-3181** • **Voelker v. 3M et al., 18-cv-3438** • **Bien v. 3M et al., 20-cv-257** • **Hartman v. 3M et al., 20-cv-302** • **Field v. 3M et al., 20-cv-00301**

PLAINTIFFS' REPLY BRIEF IN IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

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I. INTRODUCTION

Defendants' Opposition to Plaintiffs' Motion for Protective Order breezily casts aside the many improper questions they aggressively interrogated non-party witnesses about. Asking questions like that posed to non-party witness Mr. Russi ("What candidate do you talk about supporting?") or Plaintiff Kevin Voelker's son, Ryan Voelker, ("Roughly how much did you spend on [your] wedding?") are indefensible. So, Defendants call the indefensible mere "theatrics," contend they are blameless for having "merely followed up" on the witnesses' answers to their improper questions, and then they change the subject to whether discovery of "other potential sources of PFAS exposure" is permissible.[1] All the while, the Defendants acknowledge that Plaintiffs never disputed the relevance of exposure to other potential sources of PFAS exposure.[2] Where the disconnect lies is the manner in which Defendants fiercely questioned witnesses over impertinent matters and served interrogatories that are not designed to elicit relevant information. Because the Defendants crossed the line between the permissible scope of discovery involving relevant matters and the reprehensible – asking Mr. Voelker's son if his father used condoms, when that question was never asked of Mr. Voelker himself -- Plaintiffs are justified in seeking a protective order.

II. ARGUMENT

Defendants' principal argument is that their discovery of alternate sources of exposure is necessary to disprove Plaintiffs' evidence that Defendants' products were a "substantial factor" in proximately causing Plaintiffs' injuries. In Pennsylvania, "[p]roximate cause does not exist where

[1] Defendants' Opposition to Plaintiffs' Motion for a Protective Order [ECF No. 6536]("Opposition"), at 1, 14.
[2] *Id*. at 8.

the causal chain of events resulting in plaintiff's injury is so remote as to appear highly extraordinary that the conduct could have brought about the harm."[3] To defeat this "causal chain," Defendants intend to point out "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it," claiming that is a consideration for proximate cause under Pennsylvania law.[4] But their argument overstates the burden imposed on a plaintiff to prove "proximate cause"[5] and understates the evidentiary burden they themselves carry. Ever since the landmark decision of *Hamil v. Bashline*, it has long been the law in Pennsylvania that a "plaintiff *need not exclude every possible explanation* of the accident; it is enough that reasonable minds are able to conclude that the preponderance of the evidence shows defendant's conduct to have been a substantial cause of the harm to plaintiff." [6]

Here, the proximate cause ship has already sailed. Congress, as well as the EPA, have already determined that exposures to PFOS and PFOA are a substantial contributor to diseases

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[3] *Lux v. Gerald E. Ort Trucking, Inc*., 887 A.2d 1281, 1287 (Pa. Super. 2005).
[4] *Id.* at 2 (citing *Chetty Holdings Inc. v. NorthMarq Cap. LLC*, 556 Fed. Appx. 118, 122 (3d Cir. 2014)) (unpublished); *see also*, Restatement (Second) of Torts §433.
[5] Under Pennsylvania law, it is well established that two or more causes may contribute to and thus be the legal or proximate cause of an injury. Pennsylvania courts utilize the 'substantial factor' test from the Restatement (Second) of Torts §433 to ascertain proximate cause. *Heeter v. Honeywell International, Inc.*, 195 F. Supp.3d 753, 758 (E.D. Pa. 2016) (citing *Whitner v. Von Hintz*, 263 A.2d 889, 89–94 (Pa. 1970)). "Where a jury could reasonably believe that a defendant's actions were a substantial factor in bringing about the harm, the fact that there is a concurring cause does not relieve the defendant of liability." *Powell v. Drumheller*, 653 A.2d 619, 622 (Pa. 1995). The substantial factor need not be the only factor responsible for bringing about the alleged harm. *Id.* "Indeed, '[t]wo or more causes may contribute to and be the proximate cause of an injury." *Simmons v. Simpson House, Inc.*, 224 F. Supp. 3d 406, 420 (E.D. Pa. 2016) (citation omitted). The court may only decide proximate causation as a matter of law if it concludes that the jury could not reasonably differ as to the question of proximate cause. *Heeter*, 195 F. Supp. 3d, at 758 (citing *Chetty Holdings Inc.*, 556 Fed. Appx. at 121); *see also, Powell*, 653 A.2d, at 622 (The question of concurrent causation is normally one for a jury). In addition, where multiple chemical exposures lead together to an indivisible injury, all defendants share equally (as opposed to a percentage allocation by the jury) as all are "substantial contributing factors" to the harm. *See Roverano v. John Crane, Inc*., 226 A.3d 526 (Pa. 2020).
[6] *Hamil v. Bashline,* 392 A.2d 1280, 1285 (Pa. 1978) (emphasis added).

such as those presented in this MDL.[7] Plus, Plaintiffs have *already* proven as a matter of law that Defendants' products are capable of leaching into the groundwater, transporting themselves to public water drinking wells, being pumped through public water systems to plaintiffs' taps, and being ingested.[8] In due course through the personal injury bellwether process, Plaintiffs' experts will confirm the fate and transport of Defendants' products, as well as opine on Plaintiffs' lifetime exposures to Defendants' chemicals through their ingestion of drinking water at their homes, which caused their injuries.

What Defendants have done is understated their burden to demonstrate that Plaintiffs' background exposures to PFAS were the proximate cause of each Plaintiffs' diseases. Defendants introduce speculative evidence about postulated concurrent exposures to household items (*e.g.*, toilet paper, condoms) as the reason for Plaintiffs' injuries. These contentions are not well founded.[9] Litigation in this federal court is not an opportunity for the Defendants to simply throw spaghetti on a wall in hopes that something sticks. Defendants may not simply speculate that some

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[7] *See e.g.,* June 15, 2022 Letter of the United States [ECF No. 2405] (noting the EPA's issuance of lifetime drinking water health advisories for PFAS and Congress funding through the Bipartisan Infrastructure Law's Emerging Contaminants in Small or Disadvantaged Communities Grant Program efforts to address health concerns raised by certain PFAS); *see also*, EPA's website noting that EPA's Maximum Contaminant Levels will "reduce tens of thousands of PFAS-attributable illnesses or deaths…[f]ewer people will get cancer or liver disease, pregnant women will have reduced risks, and more and children and infants will be stronger and grow healthier." *available at*: https://www.epa.gov/system/files/documents/2024-04/pfas-npdwr_fact-sheet_general_4.9.24v1.pdf)

[8] *See, e.g., In re Aqueous Film-Forming Foams Prod. Liab. Litig*., No. 2:18-CV-3487-RMG, 2023 WL 3550505, at *2 (D.S.C. May 18, 2023) (denying DuPont's motion for summary judgment on causation where, "Plaintiff has put forth expert testimony to establish that Universal Gold AFFF was more likely than not a substantial contributing factor to linear PFOA contamination in Stuart.").

[9] Conspicuously absent from the myriad of 39 miscellaneous products and/or foods Defendants have inquired about as a potential alternative exposure is the one product that has been widely associated with PFAS contamination through dermal exposure and is the subject of this litigation more broadly: turnout gear.

other PFAS exposure was the proximate cause of a Plaintiffs' injuries; they must have competent, well-founded evidence that the postulated exposure was capable of transferring into the human body at levels sufficient to "independently" cause the same injury at issue.[10] This, they will not be able to do because they still deny that *any* "PFAS can cause Plaintiffs' alleged injuries."[11] More importantly, Defendants' non-specific discovery fails to even address this requirement properly. Searching for irrelevant evidence is ordinarily prohibited, and to the extent irrelevant discovery is requested, it poses a per se undue burden that is subject to restriction via a protective order.[12]

Defendants' discovery is not properly framed to elicit relevant information. Defendants appear to contend that "oral intake is the main route of PFAS exposure[.]"[13] But then they veer away from materials that Plaintiffs ingest. Instead, they inquire about *ownership* of household items and apparel (*e.g.*, raincoats, carpets), that will never be ingested. For example, Ryan Voelker was interrogated during his deposition about Mr. Voelker's use (not ingestion) of toilet paper, contact lenses, adhesive bandages, eye drops, parchment paper, and condoms.[14] And all along,

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[10] *See Jones v. Montefiore Hosp*. 431 A.2d 920, 923 (Pa. 1981) ("A plaintiff need not exclude every possible explanation, and 'the fact that some other cause concurs with the negligence of the defendant in producing an injury *does not relieve defendant from liability* ***unless he can show that such other cause would have produced the injury independently of his negligence***.'") (citing *Majors v. Brodhead Hotel*, 205 A.2d 873, 878 (Pa. 1965)) (emphasis added); *Rost v. Ford Motor Co*., 151 A.3d 1032, 1053 (Pa. 2016) (defendant must adduce competent medical testimony establishing substantial factor causation to challenge plaintiffs' proofs); *Johnson v. Devereux Found*., No. 01360, 2018 WL 11426857, at *14 (Pa. Com. Pl. Mar. 29, 2018) (trial court opinion supporting its order precluding Defendant from introducing evidence that lacked the "necessary predicate" of admissibility to challenge Plaintiff's life expectancy).

[11] Opposition, at 3.

[12] Any request that "seeks information irrelevant to the case is per se an undue burden." *Weckesser v. Knight Enterprises S.E., LLC*, No. 2:16-CV-2053-RMG, 2019 WL 2090098, at *3 (D.S.C. May 13, 2019) (Gergel, J.)(citing *Cook v. Howard*, 484 Fed. Appx. 805, 812 n.7 (4th Cir. 2012)).

[13] Opposition, at 4.

[14] Dep. Tr. of Ryan Voelker, dated Oct. 17, 2024, at 168:15-169:12, attached to Plaintiffs' Motion for a Protective Order and Incorporated Memorandum of Law in Support of their Motion for Protective Order as Exhibit 5 [ECF No. 6306-5].

Defendants concede they have *no idea* whether the subjects of their discovery even contain PFAS.[15] In particular, they rely heavily on a study authored by Glüge for support that PFAS is in the articles they inquired about. But the Glüge study did not focus on PFOA or PFOS; it addressed a myriad of over 1400 PFAS substances ranging from Ammonium perflfluorooctanoate to Ethylene tetrafluoroethylene copolymer (ETFE).[16] Likewise, the Fromme Study appended to their Opposition is replete with the same conjecture about exposures to "perfluorinated substances" from food packaging, where the author speculates, "food ***could*** become contaminated by this route[.]"[17] Therefore, the subject interrogatories and deposition questions cannot possibly lead to admissible evidence as the very scientific literature relied on by the defense as justification is itself speculative. Without specific reference to a particular brand product *known* to 1) have high levels of PFOA or PFOS and 2) that can be transferred into humans and is known to independently cause the same injury, the point of the discovery is irrelevant, which imposes a per se undue burden on Plaintiffs.[18]

Plaintiffs stand ready to answer properly framed deposition questions or interrogatories that are intended to discover relevant evidence. As asked, Defendants' questions and interrogatories fail this test. Had Defendants asked, "did your father use Colgate mint dental floss?" that may have been appropriate since the Glüge study referenced a source (Blom) that

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[15] *See* Opposition, at 2-3, 11 ("It is sometimes necessary to explore such questions in discovery . . . where personal products ***may*** contain the same chemical Plaintiffs allege caused their cancer" and "products that are ***believed*** to contain PFAS.") (emphasis added). Since the only chemicals at issue are PFOA and PFOS, Defendants' conjecture is unsupported. Their discovery, being focused on PFAS in general, and not the two at-issue chemicals, does not pertain to relevant matters.

[16] Juliane Glüge, et al., *An overview of the uses of per- and polyfluoroalkyl substances (PFAS*), 12 Env'tl Sci.: Processes & Impacts at 1 & Table 2 (2020), https://tinyurl.com/4cx6294d.

[17] Hermann Fromme, et al., *Perfluorinated compounds–Exposure assessment for the general population in western countries*, 212 Int J Hyg. Environ Health 239, 251 (May 2009) [ECF No. 6356-7].

[18] *See Weckesser*, 2019 WL 2090098, at *3.

sampled and found the presence of PFOA in that one product.[19] Of course, neither study discussed how the presence of PFOA in the sampled Colgate Mint dental floss that is sold in Norway bioaccumulates in humans who simply use that brand of dental floss but do not ingest it. So, asking the poorly framed question -- "does your father use dental floss?" -- seeks irrelevant information, the foundation for which by even their own account set forth in their opposing brief, is patently inadequate. There is no relevance to the question since it fails to elicit vital information regarding both the brand and timeframe of usage of a product known to have the capacity to cause harm. Defendants must be able to prove that exposure to the brand of dental floss Mr. Voelker used during the times he used it was formulated with enough PFOA or PFOS that could be ingested to cause him cancer. Absent this foundation, the questions presented by the Defendants in either format (deposition questioning or interrogatory) are misleading and unfair.[20]

Defendants' deposition questioning about household item usage and interrogatories on the subject seek irrelevant information. One would think that given the caliber of counsel for the defense that they should be able to frame their interrogatories and deposition questions in such a way that could lead to relevant evidence (or ask the appropriate questions of the appropriate witnesses in the first place.) The fact is they did not. The effect of which, in some instances, is chilling. As such, they pose a per se undue burden, and, in certain contexts, *e.g.,* condom usage,

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[19] Glüge, fn 70, citing C. Blom and L.Hanssen. *Analysis of Per- and Polyfluorinated Substances in Articles* (M-360), 2015, *available at*: https://www.miljodirektoratet.no/globalassets/publikasjoner/m360/m360.pdf. The author only tested two dental floss samples where PFOA was detected, Easyslide and Colgate mint, which were purchased in Norway.

[20] It is worth noting that Defendants revised proposed interrogatories fail to ask any brand information whatsoever. *See* Exhibit 19 to Plaintiffs' Motion for a Protective Order and Incorporated Memorandum of Law in Support of their Motion for a Protective Order [ECF No. 6306-19], at Appendix A.

are especially embarrassing, if not intimidating. Rule 26(c) authorizes this Court, in these circumstances, to limit Defendants' discovery by issuing a protective order.

III. CONCLUSION

For the reasons set forth above, as well as in our moving papers, Plaintiffs respectfully request that the motion for protective order be granted.

Dated: November 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 19th day of November, 2024 and was thus served electronically upon counsel of record.

/s/ Fred Thompson, III